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.

BRIEF FOR PETITIONERS-APPELLANTS

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

Queens County Clerk's Index No. 2402/19

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Federal Statutes

State Statutes

State Regulations

QUESTIONS PRESENTED

1. Did the New York State Department of Environmental Conservation ("DEC") comply with the requirements of the Water Resources Protection Act of 2011, ECL Article 15, Title 15 ("WRPA"), when it issued a permit to Helix Ravenswood LLC ("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 (the "2019 Ravenswood WW Permit") without considering existing impacts and current circumstances?

Answer: DEC violated WRPA when issued the 2019 Ravenswood WW Permit without considering existing impacts or examining current circumstances, as required by ECL 15-1503.2 but instead relied improperly upon determinations made thirteen years previously for the Ravenswood's State Pollution Discharge Elimination System ("SPDES") permit. The trial court erred in ruling that DEC complied with WRPA.

2. Did DEC comply with the requirements of the State Environmental Quality Review Act, ECL Article 8, ("SEQRA") when it excluded existing impacts from its review of the adverse impacts of 2019 Ravenswood WW Permit and failed to examine current circumstances before issuing a determination of no significant impact for the withdrawals covered by the 2019 Ravenswood WW Permit?

Answer: DEC violated SEQRA when it issued its determination of no significant impact for the withdrawals covered by the 2019 Ravenswood WW Permit without considering existing impacts or examining current circumstances. The trial court erred in ruling that DEC complied with SEQRA.

STATEMENT OF FACTS

I. Issuance of the 2019 Ravenswood Permit

In anticipation of the pending transfer of Ravenswood Generating Station from TransCanada to an affiliate of Helix, A. 289, Helix submitted an application to DEC to transfer the water withdrawal permit DEC issued in 2013 for operation of Ravenswood Station (the "2013 Ravenswood WW Permit") to Helix on April 12, 2017. A. 241-287. On September 29, 2017, DEC transferred the permit to Helix. A. 367. After this court invalidated the 2013 Ravenswood WW Permit in *Sierra Club v. Martens*, 158 A.D.3d 169 (2nd Dep't 2018) and remitted the proceeding on the 2013 permit to DEC, DEC notified Helix on April 13, 2018, that "[d]ue to the outcome of recent litigation, the water withdrawal permit issued for the Ravenswood Generating Station on November 15, 2013 has been annulled and remitted back to the department for further action on the application in accordance with SEQR[A]." A. 372. DEC's letter of April 13, 2018, stated that "[t]he Department is using information presented in the initial water withdrawal permit application dated May 31, 2013 as well as the information presented in the

permit renewal application dated August 2, 2017 as the basis for our review. Because the facility has the capacity to withdraw 1,527.84 million gallons per day of water, the project must be considered a Type I action under the State Environmental Quality Review Act." *Id.* The only additional information DEC asked Helix to submit was a completed and signed Part 1 of a Full Environmental Assessment Form (FEAF"), in place of the short form Environmental Assessment Form submitted with the transfer application, together with a letter signed by the owner's representative indicating what, if any, changes to the water withdrawal system have been made since August 2, 2017, the date of Helix's transfer application. *Id*. Helix submitted Part 1 of the FEAF about May 4, 2018 and advised DEC that no changes had been made to Helix's water withdrawal system (the "Helix Amended WW Application"). A. 374-392.

On September 25, 2018, DEC accepted Helix's transfer application as sufficient and completed Parts 2 and 3 of FEAF, determining that issuance of a water withdrawal permit to Helix to withdraw up to 1,527,840,000 gallons per day from the East River for the operation of Ravenswood Station "will result in no significant adverse impacts on the environment, and, therefore, an environmental impact statement need not be prepared" (the "2018 Initial WW Negative Declaration"). A. 397-427. The 2018 Initial WW Negative Declaration was composed of paragraphs taken verbatim from the negative

declaration DEC issued for the Ravenswood SPDES permit in 2006. Compare A. 426 to A. 105-108.

DEC published notice of the Helix water withdrawal permit application in DEC's Environmental Notice Bulletin on October 3, 2018 and announced that it was accepting written comments on the application. A. 431-432. When asked by an attorney for Petitioners for a copy of the proposed draft permit, DEC informed her that "the Department is not proposing changes to the previously issued permit." A. 433. When asked by the attorney for a copy of the WRPA determinations made pursuant to ECL 15-1503.2, A. 1128, DEC provided an undated and unsigned checklist, A. 1133. A DEC engineer later said that this checklist did not constitute the determinations. A. 823-824. DEC received thousands of comments strongly objecting to its plan to reissue the same permit that had been invalidated in *Sierra Club v. Martens*, to DEC's failure to prepare WRPA determinations and to DEC's SEQRA determination that there would be no significant impact from the issuance of a water withdrawal permit that would allow the withdrawal of up to 1,527,840,000 gallons per day from the New York harbor estuary. See selected comments at A. 714-770.[1]

[1] In order to reduce the size of the record on appeal, most of the public comments included in the administrative record below are not included in the appendix. The comments are included in the full transcript of the proceeding below from the Queens County Clerk's Office.

On February 14, 2019, DEC amended its negative declaration (the "2019 Amended WW Negative Declaration"). A. 556-557. The 2019 Amended WW Negative Declaration amended the reasoning contained in the 2018 WW Negative Declaration and added this explanation: "In evaluating magnitude, [DEC] begins with the concept of baseline or to what extent would the permit bring about a change in baseline or existing conditions. Under SEQR[A], the magnitude of the impact is measured by the difference between existing conditions and that proposed change that would be brought about by a proposed permit." A. 556.

On February 20, 2019, DEC issued the 2019 Ravenswood WW Permit to Helix and issued its response to public comments on the permit ("Response to Public Comments"). A. 559-566. The terms and conditions of the reissued permit were virtually identical to the terms and conditions of the 2013 Ravenswood Permit. Compare A. 570-573 to A. 198-201. The four-page permit contained ten permit conditions applicable to all non-public permittees. A. 571-572. The only condition specifically tailored to Ravenswood was a condition incorporating the Biological Monitoring section of the Ravenswood SPDES permit. A. 571. The Response to Public Comments explained DEC's position that existing withdrawals are exempt from review under WRPA and SEQRA. The response stated: "The baseline against which to evaluate changes for the purposes of determining environmental impact is the current operations as authorized by the existing

environmental controls of the facility. There is no change from the previously authorized operations. The water withdrawal permit allows Helix to withdraw the same volume of water it has historically been withdrawing and incorporates operational controls and technologies previously determined by [DEC] to be protective of the environment." A. 561. The response also stated that, "The impacts from the continued water withdrawals of the Ravenswood Generating Station have previously been fully reviewed under SEQR[A] during the 2006 SPDES permit renewal and were determined to not have a significant negative impact on the environment. There is no new factual change or basis for now considering those same impacts to be significant either individually or cumulatively in the current application for Helix's initial water withdrawal permit." *Id*. The response also stated that DEC was not required to evaluate closed-cycle cooling under WRPA because it had already evaluated closed-cycle cooling in 2006 in developing the best technology available ("BTA") for the facility's 2006 SPDES permit, stating that "[t]he factors that led to the SPDES permit BTA determination remain unchanged and that determination has been reaffirmed. Based upon the same information and reasons cited for its BTA selection, closed cycle cooling is not an economically feasible and environmentally sound water conservation measure for the Ravenswood Generating Station." A. 562.

II. Procedural History of the Case

The verified petition of Sierra Club and Hudson River Fishermen's Association was filed April 18, 2019. A. 15. The petition alleged two causes of actions with respect to DEC's issuance of the 2019 Ravenswood Permit, first that DEC violated WRPA by its actions in issuing the 2019 Ravenswood WW Permit and second that DEC failed to comply with SEQRA in issuing the permit. A. 25-31. The parties served their papers in accordance with a stipulated schedule and filed their papers with the trial court on September 11, 2019. On October 31, 2019, the trial court issued its decision and order denying the petition. A. 12. On January 7, 2020 Petitioners filed notice of entry of the judgment, A. 5. Petitioners filed and served their notice of appeal dated January 30, 2020 on February 5, 2020. A. 3.

ARGUMENT

DEC's actions in issuing the 2019 Ravenswood WW Permit violate fundamental requirements of WRPA and SEQRA. Both laws require that DEC make determinations about adverse environmental impacts before issuing a water withdrawal permit. DEC asserts that existing withdrawals are exempt from the determinations and that DEC is entitled to rely on determinations it made thirteen years previously for the issuance of Ravenswood SPDES permit in 2006. The trial court erred in giving deference to DEC's interpretations of WRPA and SEQRA.

The clear wording of WRPA and the SEQRA regulations shows that existing withdrawals are not exempt from adverse impact determinations and that the determinations must take current circumstances into account.

Because almost all persons subject to the water withdrawal permitting requirements imposed by WRPA are existing users and already hold SPDES discharge permits, DEC's refusal to apply WRPA's new standards to existing uses nullifies the additional protections WRPA is designed to provide to New York's water resources. DEC's refusal to apply WRPA's requirements to existing withdrawals turns WRPA's lack of an exemption for existing users into a benefit greater than an exemption would provide. DEC is giving permits to large existing users that provide an enforceable privilege to take water in large amounts and may subsequently be interpreted to give permit holders priority water rights over water users without permits, such as water users that do not meet WRPA's permitting threshold of 100,000 gallons a day or water users that are exempt from permitting, such as agricultural users. DEC is giving these permits without imposing the scrutiny or mandating the conditions that WRPA requires for the privilege of obtaining a permit. The harms that result from DEC's interpretation of WRPA are compounded because DEC claims that existing withdrawals are also exempt from review under SEQRA.

This is not the first time DEC has claimed that WRPA and SEQRA do not apply to existing uses. The 2019 Ravenswood WW Permit, the permit at issue in this case, was issued by DEC after this court invalidated the 2013 Ravenswood WW Permit in *Sierra Club v. Martens*, *supra*. In the *Martens* case, DEC justified its refusal to conduct a review of adverse impacts of the 2013 permit under WRPA on the ground that water withdrawal permits issued to existing users were exempt from the adverse impact reviews under WRPA. Because DEC claimed it had no discretion in issuing a water withdrawal permit to an existing user under WRPA, DEC claimed that water withdrawal permits issued to existing users were also exempt from review under SEQRA. This court reviewed the provisions of WRPA and rejected DEC's arguments. The court determined that DEC does have discretion under WRPA in setting the terms and conditions of water withdrawal permits issued to existing users. The Court stated that "whether 'the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures' will almost certainly vary from operator to operator, or from water source to water source. . . . Whether a condition is 'appropriate' for a given operator is a matter that falls within the DEC's expertise and involves the exercise of judgment, and, therefore, implicates matters of discretion." *Id.* at 177. The court held therefore that issuance of the 2013 Ravenswood WW Permit was not exempt from review

under SEQRA and invalidated the 2013 permit because no SEQRA review had been conducted.

Now, after the *Sierra Club v. Martens* decision, DEC has slightly modified its arguments. Instead of asserting that permits issued to existing *users* are not subject to review under WRPA or SEQRA, DEC now asserts that existing *withdrawals* are not subject to review under either WRPA or SEQRA. Thus, DEC claims that it has made the required determinations under WRPA for the 2019 Ravenswood WW Permit because the withdrawals to be permitted are existing withdrawals and have already been reviewed by DEC under the Ravenswood SPDES permit. Although DEC classified its issuance of the 2019 Ravenswood WW Permit as a Type I action under SEQRA, DEC asserts that existing withdrawals are exempt from review under SEQRA and that DEC is entitled to rely its thirteen-year old Best Technology Available ("BTA") determination for the Ravenswood SPDES permit for its SEQRA determination without reviewing current impacts of the Ravenswood withdrawals. For the reasons discussed below, these assertions are just as incorrect as DEC's earlier assertions about exemptions for existing users.

I. DEC Violated WRPA in Issuing the 2019 Ravenswood WW Permit without Making the Required Determinations about Adverse Impacts

Just as the heart of SEQRA lies in its provisions requiring an Environmental Impact Statement, e.g., *Jackson v. New York Urban Dev. Corp.*, 67 N.Y.2d 400, 415 (1986); the heart of WRPA lies in its provision requiring that a series of determinations be made by DEC before issuing a water withdrawal permit.[2] ECL 15-1503.2(a)-(h). The legislature enacted WRPA in 2011 to establish new, more stringent standards for water withdrawals to better protect New York's water resources than existing laws. This court reviewed the legislature's purposes in

[2] ECL 15-1503.2 provides that, "In 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.

enacting WRPA in *Sierra Club v. Martens*. The court noted that the "consumptive uses of water for agricultural, commercial, and industrial purposes remain[ed] largely unregulated" under New York's State Pollution Discharge Elimination System ("SPDES") program, ECL 17–0801 et seq., which regulates the discharge of pollutants from point sources and which DEC administers under the Federal Clean Water Act, 33 USC 1251 et seq., and the previous water withdrawal permitting law, which only applied to public water suppliers. 158 A.D.3d at 172. Thus, in order to provide greater protections than were provided by the SPDES program and the Clean Water Act requirements, the legislature enacted WRPA in 2011. The court in *Sierra Club v. Martens* noted that the new law brought New York into line with neighboring states, including Connecticut, New Jersey, Rhode Island, and Massachusetts, which all had programs that regulated "industrial, commercial and agricultural water withdrawals." *Id.*

The decision-making standards in WRPA are specific and provide a detailed road map of the impacts that need to be considered and the determinations that need to be made and used in setting appropriate permit terms and conditions. Among the determinations required are (1) whether "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," ECL 15-1503.2(c); (2) 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," ECL 15-1503.2(d); (3) whether "the proposed water withdrawal is limited to quantities that are considered reasonable for the purposes for which the water use is proposed," ECL 15-1503.2(e); (4) 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," ECL 15-1503.2(f); and (5) whether "the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures," ECL 15-1503.2(g). The purpose of these decision-making standards is to use them in setting permit conditions that will protect New York's water resources. ECL 15-1503.4 requires that the determinations required by ECL 15-1503.2 be used in setting appropriate terms and conditions in the water withdrawal permit. The water withdrawal regulations require that the information necessary to make the determinations be included in the application materials for a water withdrawal permit. 6 NYCRR 601.10(k). ECL 15–1503.1(f) requires that applicants for water withdrawal permits submit a "proposed near term and long range water conservation program that incorporates environmentally sound and economically feasible water conservation measures."

A. Existing Withdrawals Are Subject to Review under WRPA

DEC is incorrect in its interpretation of the legal scope of ECL 15-1503.2. DEC made two assertions regarding the scope of ECL 15-1503.2 in response to public comments that it did not make the determinations required by WRPA. The first assertion is that the determinations required by ECL 15-1503.2 do not need to be made for existing withdrawals; the second assertion is that DEC made whatever determinations need to be made under WRPA when it made its BTA determinations for the Ravenswood SPDES permit. The assertions DEC makes about existing withdrawals being exempt from review under WRPA are set forth in its response to public comments on the 2019 Ravenswood WW Permit. In response to comments objecting to DEC's failure to make the WRPA determination about cumulative adverse impacts, DEC states that "[u]nder ECL § 15-1503.2(f), NYSDEC has determined that there are no significant cumulative adverse effects from issuance of the initial water withdrawal permit to Helix for its continued, unchanged operation. The baseline against which to evaluate changes for the purposes of determining environmental impact is the current operations as authorized by the existing environmental controls of the facility. There is no change from the previously authorized operations. The water withdrawal permit allows Helix to withdraw the same volume of water it has historically been withdrawing and incorporates operational controls and technologies previously

determined by NYSDEC to be protective of the environment." A. 561. This assertion that current operations as authorized by the existing environmental controls of the facility are the baseline against which to evaluate environmental impacts under WRPA is a minor variation of the claim repudiated by this court in *Sierra Club v. Martens* that the WRPA determinations are not required for existing users. There is not a substantive distinction between grandfathering existing *uses*, and grandfathering existing *users*. As noted above, almost all water withdrawals subject to permitting under WRPA are existing uses. If the legislature had intended existing uses to be exempt from the requirements of WRPA, they would have added an exemption for existing uses, and they did not. WRPA does not authorize DEC to exclude existing uses in evaluating cumulative adverse impacts, and it was a violation of WRPA for DEC to have done so.

B. SPDES Determinations Do Not Substitute for Review under WRPA

In addition to its assertions about existing impacts, DEC asserts that it does not need to make determinations under WRPA because it already has made certain determinations pursuant to the Ravenswood SPDES permit. In response to public comments objecting to DEC's failure to make a determination under WRPA about cumulative impacts, DEC stated that, "The impacts from the continued water withdrawals of the Ravenswood Generating Station have previously been fully reviewed under SEQR[A] during the 2006 SPDES permit renewal and were

determined to not have a significant negative impact on the environment. There is no new factual change or basis for now considering those same impacts to be significant either individually or cumulatively in the current application for Helix's initial water withdrawal permit." A. 561. Similarly, in response to public comments that DEC should have evaluated closed-cycle cooling as a water conservation measure in making its determinations under WRPA, DEC responded that it was not required to evaluate closed-cycle cooling under WRPA because it had already evaluated closed-cycle cooling in 2006 "in developing the best technology available (BTA) for the facility's 2006 SPDES permit." A. 562. DEC asserted that "[t]he factors that led to the SPDES permit BTA determination remain unchanged and that determination has been reaffirmed. Based upon the same information and reasons cited for its BTA selection, closed cycle cooling is not an economically feasible and environmentally sound water conservation measure for the Ravenswood Generating Station." *Id*.

These assertion regarding reliance on the SPDES determinations for compliance with WRPA are related to the assertion DEC makes in the 2019 Amended WW Negative Declaration, that "[t]here is no difference between the amount of water withdrawn under the SPDES permit and the amount that may be withdrawn under the water withdrawal permit," A. 556, an assertion that is simply not true. The size of water withdrawals by non-public users were not regulated in

New York until the enactment of WRPA. While it is true that power plant cooling water intake structures are subject to special rules under the Clean Water Act ("CWA") and the SPDES program for minimizing adverse environmental impact. 33 U.S.C. 1316(b), 6 NYCRR 704.5, the size of water withdrawals is not regulated under the CWA or the SPDES program.

Because WRPA has different standards than the CWA and the SPDES law, compliance with WRPA requires that information collected for evaluations made pursuant to a SPDES permit must be re-evaluated and the public given an opportunity to comment on the new determinations before a water withdrawal permit is issued. It is not sufficient to rely on BTA determinations made for the Ravenswood SPDES Permit as a substitute for making the determinations required by WRPA. As described above, the New York legislature enacted WRPA in 2011 because it perceived that DEC did not have adequate authority to regulate water withdrawals under existing laws, such as the SPDES law. The SPDES Law was enacted to protect New York waters from discharges of pollution. ECL 17-0103. Water conservation is not one of the purposes of the SPDES law. If water withdrawals and water conservation could be adequately regulated under the SPDES program, the legislature would not have seen a need for a new permitting program imposing significant water conservation requirements and environmental impact review. WRPA and the SPDES Law have different objectives and different

requirements. The standards to be applied in issuing a SPDES permit are not the same as the standards that apply under WRPA. Whatever determinations DEC has made under the SPDES law and regulations does not substitute for the necessity of making current determinations under WRPA. Every major water user in the state already has a SPDES permit. The fact that DEC made a determination about closed-cycle cooling thirteen years before pursuant to statutes and regulations that do not apply to the issuance of water withdrawal permits under WRPA is not a substitute for making a new determination regarding closed-cycle cooling pursuant to the water conservation requirement of WRPA in light of new technologies, new insights into the impacts of once-through cooling on the New York Harbor estuary, WRPA's new regulatory requirements and new circumstances at Ravenswood Station.

Furthermore, DEC has not properly applied its BTA policy to the Ravenswood SPDES permit. The BTA requirements contained in the Ravenswood SPDES Permit are not in compliance with DEC's BTA policies. DEC's most recent guidance on BTA for cooling water intake structures was issued in 2011. A. 706-713. The guidance states that cooling water intake structures will be subject to one of four "performance goals" when selecting BTA. Each of the four goals requires "closed-cycle cooling." A. 706-707. 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." A. 711. Under the guidance document, the policy requiring closed-cycle cooling should have been implemented when Ravenswood's SPDES permit was renewed in 2012, but it was not.

In *Sierra Club v. Martens*, this court provided extensive background on the SPDES permitting system and noted that Ravenswood Station has been regulated under the SPDES program since the 1970s. The court reviewed the Clean Water Act effluent standards for discharges and noted that those standards address cooling water intake structures. The court cited the requirement in 33 U.S.C. 1326(b) "that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 158 A.D.3d at 171. The court explained that "'Best technology available,' or 'BTA,' is a standard of performance established through detailed regulations promulgated by the United States Environmental Protection Agency," *Id*. at 172. The court noted that "[t]he Clean Water Act expressly provides that states may adopt and enforce more stringent effluent limitations or standards of performance than required by federal law, 158 A.D.3d at 172. As the

court's opinion makes clear, WRPA does not mirror the requirements of the SPDES Law, but supplements and expands upon them.

For these reasons, WRPA does not authorize DEC to rely on earlier determinations made for a SPDES permit in making the determinations required under WRPA, and it was a violation of WRPA for DEC to have done so.

C. WRPA Determinations Must Be Made before the Permit Terms and Conditions Are Announced

Making the WRPA determinations cannot be not a perfunctory exercise. To give substance to these requirements, DEC must be required comply with these decision-making standards both substantively and procedurally. As the court said in *Matter of Jackson*, *supra*, "In a statutory scheme whose purpose is that the agency decision-makers focus attention on environmental concerns, it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied [the statute], procedurally and substantively." 67 N.Y.2d at 417. Courts in New York require that administrative agencies strictly comply with the procedural mandates of SEQRA, *e.g.*, *Matter of King v. Saratoga County Bd. of Supervisors*, 89 N.Y.2d 341 (1996); so too DEC must strictly comply with WRPA's procedural mandates. As the Court of Appeals stated in *Matter of King v. Saratoga County*, "[t]he mandate that agencies implement SEQRA's procedural mechanisms to the 'fullest extent possible' reflects the Legislature's view that the substance of SEQRA

cannot be achieved without its procedure, and that departures from SEQRA's procedural mechanisms thwart the purposes of the statute. Thus it is clear that strict, not substantial, compliance is required." *Id.*, at 347, 348. Accord *Matter of Coalition to End Lead Poisoning v. Vallone*, 100 N.Y.2d 337 (2003) ("Strict compliance with SEQRA guarantees that environmental concerns are confronted and resolved prior to agency action and insulates rational agency determinations from judicial second-guessing"), *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) ("[I]t would be unwise to permit local agencies to substitute substantial compliance with the SEQRA for literal compliance therewith, thereby inevitably giving rise to numerous lawsuits challenging the sufficiency of the agencies' environment-safeguarding procedures. Uniform and literal enforcement of the provisions of SEQRA would render environmental review more objective, standardized, and consistent, and would be more certain to promote the policies of the Legislature with respect to this fundamental concern of society."). For the same reasons, strict compliance with the procedural aspects of WRPA's mandates for environmental impact determinations must be required.

Among the procedural requirements that must be applied under WRPA is to require that determinations be made before the terms and conditions of the proposed permit are announced. It is well-established in the SEQRA context that

documents containing the lead agency's reasoning and rationale, but prepared subsequent to the issuance of a negative declaration, do not fulfill the mandate for a reasoned elaboration. See e.g., *Matter of Dawley v. Whitetail 414, LLC*, 130 A.D.3d 1570, 1571 (4th Dep't 2015), *Matter of Rochester Eastside Residents for Appropriate Dev., Inc. v. City of Rochester*, 150 A.D.3d 1678, 1680 (4th Dep't 2017). Similarly, the determinations required by WRPA must be made before the terms and conditions of a water withdrawal permit are announced. As the Court of Appeals said in *Chinese Staff v. City of New York*, 68 N.Y.2d 359 (1986), "a disposition which would eliminate consideration of the required environmental effects by the town board at the time the action is initially authorized would relegate SEQRA's mandates for environmental protection to an afterthought in contravention of the express legislative purposes." *Id*. at 369. This procedural requirement was not met for the 2019 Ravenswood WW Permit. The assertions DEC made in its Response to Public Comments that "[it] subsequently made the determinations that appear in ECL § 15-1503.2," A. 560, without stating when or by whom the determinations were made or pointing to a document in the administrative record that evidences the determinations is insufficient to constitute compliance with WRPA's procedural requirements. The setting forth of determinations in the affidavit of a DEC engineer on August 12, 2019 almost six months after the permit was issued was procedurally too late. A. 813-825. The

trial court erred in relying on the engineer's determinations and summarizing them with approval in its opinion. A. 12-14.

A strong indication that DEC did not make the required determinations before setting the terms and conditions of the 2019 Ravenswood WW Permit is the fact that the terms and conditions of the 2019 permit are virtually the same as the terms and conditions of the 2013 Ravenswood WW Permit. The terms and conditions of the 2013 Ravenswood Permit were set by DEC at a time when it claimed that it did not have the authority to make the determinations required by ECL 15-1503.2 for permits issued to existing users and could only set generic conditions for such permits. As described above, the court in *Sierra Club v. Martens* ruled against this argument. That court ruled that DEC does have discretion under WRPA in setting the terms and conditions of water withdrawal permits issued to existing users, and stated that whether 'the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures' will almost certainly vary from operator to operator, or from water source to water source." *Id.* at 177. DEC cannot use the same generic conditions contained in the 2013 permit and claim that it made WRPA determinations tailored to Ravenswood. Had DEC made tailored WRPA determinations for Ravenswood, it should have used those determinations to set appropriate terms and conditions tailored to operations at

Ravenswood in the 2019 permit. The fact that it did not do so is another indication that it did not make the required determinations.

In this regard, a Yates County case that upheld generic permit conditions in a water withdrawal permit as evidence of compliance with WRPA was wrongly decided. *Sierra Club v. New York State Dept. of Environ. Cons.*, Yates County Supreme Court, Index No. 2017-0232 (November 8, 2018), A. 792-812, addressed the validity of the water withdrawal permit issued for Greenidge Generating Station on Seneca Lake. Although the Yates County court followed this court's decision *Sierra Club v. Martens* and held that "DEC was required to consider the factors set forth in ECL 15-1503," the court concluded that, "it is clear from the record that the DEC did consider the factors set forth in ECL 15-1503 when it placed permit conditions 'including environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies' . . . . The conditions placed on the Water Withdrawal Permit, including the installation of meters, water auditing, and reporting of audits and leaks as well as the 'Incorporation of the Cooling Water SPDES Water Conservation and Fisheries Protection Measures,' satisfied the requirements of both ECL 15-1503 and 6 NYCRR 601.7." *Id.*, A. 797-798. The conditions referenced in the Yates County case, however, are not evidence that the determinations required by ECL 15–1503.2 were made. The conditions in the Greenidge permit are the same generic

conditions contained in the 2013 Ravenswood WW Permit invalidated in *Sierra Club v. Martens*, and were set by DEC before the *Sierra Club v. Martens* decision was issued at a time when DEC took the position that it had no discretion in setting the terms and conditions of a permit issued to an existing user. It is not in accordance with the procedural requirements of WRPA to find that generic conditions that are not tailored to the particular water use and water source can be used as evidence that the WRPA determinations were made.

D. Deference to DEC's Interpretation of the Clear Wording of WRPA Is Not Appropriate

This court declined to defer to DEC's interpretation of the statutory wording of WRPA in *Sierra Club v. Martens*, and the trial court erred in granting deference to DEC's interpretation in the proceeding below. Judicial deference to DEC's assertions that it complied with the substantive and procedural requirements of WRPA 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. [Citations omitted.] Even in those situations, however, a determination by the agency that "runs counter to the clear wording of a statutory provision" is given little weight. [Citations omitted.]

Id. at 102-103. 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, "[t]he statutory language could not be clearer. . . . BSA's interpretation conflicts with the plain statutory language and may not be sustained." *Id*. at 103. Accord *Matter of New York State Superfund Coalition v. New York State Dept. of Envtl. Cons.*, 18 N.Y.3d 289, 296 (2011) (where "the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight. And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight"); *Lighthouse Pointe v. New York State Dept. of Envtl. Cons.*, 14 N.Y.3d 161 (2010) (holding that DEC's interpretation of the phrase "brownfield site" was contrary to the clear wording of New York's Brownfield Cleanup Program (BCP) and ruling that the petitioner was eligible for acceptance into the BCP as a matter of law), *Matter of Brown v. New York State Racing and Wagering Board*, 60 A.D.3d 107, 116 (2nd Dep't 2009) ("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"), *HLP Properties v. New York State Dept. of Environ. Cons.*, 21 Misc.3d 658, 669 (NY County 2008) ("while 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").

The case relied upon by the trial court for its decision to give deference to DEC's interpretation of WRPA is not pertinent. The trial court quotes *Carver v. State of New York*, 87 A.D.3d 25 (2nd Dep't 2011) for the proposition that "[a]n agency's interpretation of a statute or regulation should be granted substantial deference if that agency is responsible for administering the statutory program and its decision is rationally based," A. 14, but Petitioners do not find the quoted language in the reported decision. The general principle is correct, but not in the circumstances of the present case where the statutory wording is clear, as discussed above.

Because DEC's interpretation of the legal scope of ECL 15-1503.2 runs counter to the clear wording of the statute, deference to DEC's interpretation is not appropriate.

II. DEC Violated SEQRA In Issuing the 2019 Ravenswood WW Permit without Taking a Hard Look at Adverse Impacts

DEC's action in issuing a determination of no significant adverse impacts for the 2019 Ravenswood WW Permit was a violation of SEQRA. SEQRA provides that no state or local governmental agency may undertake, fund or approve an action unless and until that agency has performed an adequate environmental review consisting of an evaluation of the nature, type, size and scope of the action and an assessment of whether the action has the potential to have a significant environmental impact. ECL 8-0109, et. seq. The purpose of SEQRA is to require agencies to incorporate environmental considerations directly to their decision making and, where necessary, to modify that action to mitigate adverse environmental effects. "SEQRA's fundamental policy is to inject environmental considerations directly into governmental decision making." *Matter of Coca-Cola Bottling Co. v. Board of Estimate*, 72 N.Y.2d 674, 679 (1988). This policy is effectuated, in part, through strict compliance with the review procedures outlined in the environmental laws and regulations. See *Matter of King v. Saratoga County Bd. of Supervisors*, supra, 89 N.Y.2d 341, 347-348 (1996). The heart of SEQRA lies is the Environmental Impact Statement (EIS) process. E.g. *Jackson v. New York Urban Dev. Corp., supra*, 67 N.Y.2d 400, 415 (1986); *Town of Henrietta v. New York State Dept. of Envtl. Cons.*, 76 A.D.2d 215 (4th Dep't 1980). Under SEQRA, an EIS must be prepared regarding any action that "may

have a significant effect on the environment" (ECL 8-0109 [2]). In order to determine whether an EIS is required for a particular permitting action, the decision-making body having primary responsibility for carrying out or approving a project or activity (termed the "lead agency"), in this case DEC, is charged with determining whether the project under consideration *may* have significant adverse environmental effects. ECL 8-0109(2). An EIS 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) [emphasis added]. 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 SEQRA regulations specify the steps the lead agency is to use in determining whether an EIS needs to be prepared. 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. . . . [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. Unlisted actions are those actions that are neither Type I nor Type II. 6 NYCRR § 617.2(ak). In making its determination of significance, the lead agency must:

> (i) consider the action as defined in sections 617.2(b) and 617.3(g) of [the SEQRA regulations];
>
> (ii) review the EAF, the criteria contained in subdivision (c) of this section and any other supporting information to identify the relevant areas of environmental concern;
>
> (iii) thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant effect on the environment; and
>
> (iv) set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation.

6 NYCRR 617.7(b). Thus, the lead agency must identify "the relevant areas of environmental concern" and take a "hard look' at them." E.g. *Merson v. McNally*, 90 N.Y.2d 742, 609 (1997); *Kahn v. Pasnik*, 90 N.Y.2d 569 (1997). Where a significant adverse impact has been identified, it cannot be ignored; an EIS must be prepared. [citations]. When a Type I action is involved, the threshold for an EIS is especially low, since Type I actions "are more likely to require the preparation of

an EIS" than other actions. 6 NYCRR 617.4(a); see also *Shawangunk Mountain Environ. Assn. v. Town of Gardiner*, 157 A.D.2d 273 (3d Dep't 1990). Thus, for a "type I action an EIS is presumptively required." *Town of Dickinson v. County of Broome*, 183 A.D.2d 1013, 1014, (3d Dep't 1992).

DEC classified its action in issuing the 2019 Ravenswood WW Permit as a Type I action under SEQRA. A. 426. This classification was mandated by the SEQRA regulations which provide that "a project or action that would use ground or surface water in excess of 2,000,000 gallons per day," is to be categorized as a Type I action that, because of its size, is likely to have a significant adverse impact. 6 NYCRR 617.4(b)(6)(ii). The 2019 Ravenswood Permit, which authorizes the withdrawal of up to 1,527,840,000 gallons per day is 764 times the Type I threshold of 2,000,000 gallons per day provided in Section 617.4(b)(6)(ii). The SEQRA regulations state, "the 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." *Id.* In addition to being 764 times as large as a type of action included on the list of Type I actions, the Ravenswood withdrawals meet the criteria set forth in 6 NYCRR 617.7(c)(1) for determining whether Type I and unlisted actions have a significant adverse impact on the environment. These criteria include "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)(1)(ii).

The removal or destruction of large quantities of fish by the Ravenswood Generating Station was recognized by the Second Department in the *Sierra Club v. Martens* case. The court gave a detailed description of the once-through cooling water intake system at Ravenswood Station and the impacts this system has on fish in the East River. The court noted that:

> When operating at full load, the station has a maximum withdrawal capacity of 1.5 billion gallons of water per day, although the actual amount of water used to operate the station is typically less, and varies depending upon the station's operating needs. This sizable water withdrawal has environmental consequences, most notably to fish and other local aquatic life. When the cooling water is drawn in, larger fish are killed when they become 'impinged' on the screens that cover the intake structures to prevent debris in the water from entering. Juvenile fish, larvae, and eggs that are small enough to pass through the intake screens are killed when they become 'entrained' in the cooling system. Additionally, the discharge of heated water back into the East River also has an impact on the aquatic environment.

158 A.D.3d at 170-171. Under the standards set forth in 6 NYCRR 617.7(c)(1)(ii) it is clear that the destruction of aquatic life by the once-through cooling water intake structures of the Ravenswood plant has a significant adverse impact on natural resources and thus requires an EIS.

Notwithstanding the significant impacts of the Ravenswood water withdrawals, and the presumption that an EIS is to be conducted for a Type I action, DEC determined that there would be no significant impacts from issuance of the 2019 Ravenswood WW Permit and issued the 2018 Initial WW Negative Declaration and the 2019 Amended WW Negative Declaration. A.426-427 and A. 556-557. These determinations violated SEQRA. DEC made its determination of no significant impact on the basis of made two assertions regarding the scope of SEQRA. First that existing withdrawals are exempt from review under SEQRA and second that DEC is entitled to rely on its BTA determinations for the Ravenswood SPDES permit. As will be seen in the discussion below, neither of these assertions is correct.

A. Existing Impacts are Subject to Review under SEQRA

SEQRA does not exclude consideration of existing impacts to natural resources in evaluating the potential future impacts of an action under review. DEC is incorrect in its assertion in the 2019 Amended WW Negative Declaration that "[i]n evaluating magnitude, the Department begins with the concept of baseline or to what extent would the permit bring about a change in baseline or existing conditions. Under SEQR, the magnitude of the impact is measured by the difference between existing conditions and that proposed change that would be brought about by a proposed permit," A. 556. The clear wording of the SEQRA

regulations does not support this assertion. Consideration of changes from existing conditions is not an element of 6 NYCRR 617.7(c)(1)(ii) of the SEQRA regulations, the provision applicable to evaluating impacts on natural resources. This subsection is cited in both negative declarations, A. 426 and A. 556, but is incorrectly applied by them. Section 617.7(c)(1)(ii) requires consideration of "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." This provision does not limit DEC's consideration to *changes* in the "removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish" be considered. The clear wording of this provision requires that *any* "removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish" must be considered in making a determination of significance for a Type I action. The use of the word "changes" in three other subsections of Section 617.7(c)(1) leaves no doubt that the term was deliberately left out of subsection 617.7(c)(1)(ii). There is no support in the wording of this provision for DEC's

interpretation that existing impacts to natural resources are exempt from review under SEQRA.

Petitioners have not discovered any cases addressing the interpretation of Section 617.7(c)(1)(ii). The trial court cited only two cases in support of its ruling in favor of DEC's baseline arguments, a New York trial court decision and a federal Ninth Circuit decision interpreting the Federal Power Act ("FPA"). Neither of these decisions support DEC's argument that existing impacts should be excluded in calculating impacts on natural resources. The issue addressed in *Lazard Realty, Inc. v. New York State Urban Dev. Corp.*, 142 Misc.2d 463 (NY County 1989) was whether a modification of a project requires an entirely new EIS or a supplemental EIS. The court looked at a site plan involving a partial change in the use of one site that was an integral part of a larger project involving 12 sites, determined that the change was "simply a later step in implementing the Project" (*id.*, at 471) and, therefore, was only subject to a possible supplemental EIS, but did not constitute a new action requiring a new EIS. The court in *Lazard Realty* was interpreting 6 NYCRR 617.3(k)(2), which took effect in 1987 and was repealed in 1995. Section 617.3(k)(2) addressed the issue of when a supplemental EIS is required. It provided that "[a]ctions commonly consist of a set of activities or steps (e.g., for capital projects the activities may include planning, design, contracting, demolition, construction and operation)," that "[t]he entire set of

activities or steps shall be considered the action," that "only one draft and one final EIS need be prepared on the action if the statement addresses each part of the action at a level of detail sufficient for an adequate analysis of environmental effects" and that a supplemental EIS "will only be required in the circumstances prescribed in section 617.8 (g) of this Part." *Lazard Realty* at 471, quoting 6 NYCRR 617.3(k)(2). The *Lazard Realty* ruling is not applicable to the facts of this case, however, because this case does not involve the question of when to supplement an existing EIS. As best Petitioners can determine, an EIS has never been prepared evaluating the operations of Ravenswood Generating Station. The issue in the present proceeding is whether existing impacts on natural resources can be excluded from review when an EIS has never been prepared.

American Rivers v. FERC, 201 F.3d 1186 (9th Cir. 1999), the other case cited by the trial court, did not involve baseline issues under SEQRA or under the federal equivalent of SEQRA, the National Environmental Policy Act. The issue in *American Rivers* was what baseline should be used under the Federal Power Act ("FPA") to compare predictions of the effects of a proposed relicensing project to reasonable alternatives in a relicensing proceeding. Having determined that FPA "was silent on the salient question," *id*. at 1197, the Ninth Circuit applied the principles of construction set forth in *United States ex rel. Fine v. Chevron, U.S.A.*, 72 F.3d 740 (9th Cir.1995) (en banc) and determined that the agency's "decision to

employ an existing project baseline fills the interstices of the FPA in a permissible fashion." *Id.* In contrast to the provisions of FPA, 6 NYCRR 617.7(c)(1)(ii) is clear that existing impacts are not excluded in evaluating impacts on natural resources.

Another type of baseline was at issue in *Matter of Riverkeeper, Inc. v. Johnson*, 52 A.D.3d 1072 (3rd Dep't 2008). *Riverkeeper* involved a challenge to the SEQRA review conducted when the Danskammer Generating Station was repowered. The petitioners in the *Riverkeeper* case contended "that DEC acted arbitrarily and capriciously in calculating the reduction in the amount of cooling water flow at the Danskammer plant based upon its full-flow capacity and in crediting the plant with the alleged survival of a percentage of the river organisms entrained in the existing system." *Id.* at 1074. The petitioners in that case contended that "since the Danskammer plant's cooling system has historically used much less than the maximum quantity of water it is capable of withdrawing from the Hudson River, the target flow level set by DEC based upon its full-flow potential allows the plant to meet the goal without actually reducing the amount of water withdrawn or its associated environmental impacts." Petitioners in the present proceeding have not challenged DEC's full flow calculations for Ravenswood Station. Petitioners herein challenge the separate issue of DEC's claim that existing impacts on natural resources are not subject to review under

SEQRA. A significant difference between the two arguments is that Petitioners' argument is a legal argument regarding DEC's obligations under the SEQRA regulations based on the clear wording of 6 NYCRR 617.7(c)(1)(ii), whereas the argument raised by the petitioners in *Riverkeeper* was a factual argument that was not based on a regulatory provision. On the basis of the factual arguments, the court in *Riverkeeper* deferred to DEC's interpretation, stating "[i]nasmuch as the record contains substantial evidence supporting DEC's determinations as to both the calculation of required flow reductions and allowance of an entrainment credit, we defer to those determinations even though the evidence presented by petitioners could lead to a contrary conclusion." *Id*. at 1075. In the instant case deference to DEC's interpretation 6 NYCRR 617.7(c)(1)(ii) is not due because the wording of the regulation is clear.

Because DEC is incorrect in its interpretation of the requirements of 6 NYCRR 617.7(b), 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. The "Hard Look" Standard Requires a Current Impact Review

DEC's 2019 Amended WW Negative Declaration makes clear that DEC did not make a review of the current impacts of Ravenswood Station at the time in connection with its evaluation of the potential adverse impacts of the 2019 Ravenswood WW Permit. The negative declaration explicitly relies on the BTA measures contained in the 2006 Ravenswood SPDES permit and continued in the 2012 Ravenswood SPDES permit for its determination that "that there are no significant cumulative adverse effects from issuance of the [2019 Ravenswood WW Permit]." A. 556. The negative declaration does not update 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, or 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 these 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. Therefore, DEC's SEQRA review must be invalidated. *Kahn v. Pasnik*, 90 N.Y.2d 569 (1997); *Matter of Riverso v. Rockland County Solid Waste Mgt. Auth.*, 96 A.D.3d 764 (2nd Dep't 2012) ("the passage of

more than 10 years since that investigation has been conducted necessitates further review under SEQRA to ensure that no new environmental concerns exist"); *Matter of Doremus v. Town of Oyster Bay*, 274 A.D.2d 390 (2nd Dep't 2000); and *Matter of Golten Marine Co. v. New York State Dept. of Envtl. Conservation*, 193 A.D.2d 742 (2nd Dep't 1993). This is particularly true because DEC's BTA determinations for Ravenswood Station are not in compliance with its BTA policy. As noted above, DEC's guidance on BTA for cooling water intake structures states that the performance goal of closed-cycle cooling "will be implemented when: . . . (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." A. 711. Under the BTA guidance document, DEC's policy requiring closed-cycle cooling should have been implemented when Ravenswood's SPDES permit was renewed in 2012, but it was not.

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

For the same reasons that judicial deference is not due to DEC's interpretation of the clear wording of WRPA, deference is not due to DEC's interpretation of the clear wording of 6 NYCRR 617.7(c)(1)(ii), the applicable regulation for determining significant adverse impacts to natural resources, including 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. 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. Deference to DEC's interpretation of the scope of Section 617.7(c)(1)(ii) is therefore not appropriate and the trial court erred in granting deference.

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
October 12, 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

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
Point size:	14
Line spacing:	Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 9,708.

Dated: October 12, 2020

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—Second Department

In the Matter of the Application of

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.

---

1. The index number of the case in the court below is 2402/19.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The proceeding was commenced in Supreme Court, Queens County.

4. The proceeding was commenced on or about April 18, 2019 by filing of a Verified Petition. Issue was joined on or about August 12, 2019 by service of a Verified Answer.

5. The nature and object of the proceeding is for a Judgment and Order vacating and annulling the 2019 Ravenswood Permit, and the 2018 Negative Declaration.

6. This appeal is from the Decision and Order of the Honorable Ulysses B. Leverett, dated October 31, 2019 which denied the Petition seeking a Judgment and Order vacating and annulling the 2019 Ravenswood Permit, and the 2018 Negative Declaration.

7. This appeal is on the Appendix Method.

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

AFFIDAVIT OF SERVICE BY MAIL

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 October 13, 2020

deponent served the within: **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

the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, in a postpaid properly addressed wrapper in a Post Office Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

Sworn to before me on October 13, 2020

MARIA MAISONET
Notary Public State of New York
No. 01MA6204360
Qualified in Queens County
Commission Expires Apr. 20, 2021

Job# 296704

EXHIBIT 1 — SLIP OPINION IN SIERRA CLUB, ET AL. V. DEC, ET AL., STATE OF NEW YORK SUPREME COURT, COUNTY OF YATES, INDEX NO. 2017-0232 (NOVEMBER 8, 2018) [A- 792 - A- 812]

STATE OF NEW YORK
SUPREME COURT COUNTY OF YATES

In the Matter of the Application of

SIERRA CLUB, COMMITTEE TO PRESERVE THE FINGER LAKES by and in the name of PETER GAMBA, its President; COALITION TO PROTECT NEW YORK by and in the name of KATHRYN BARTHOLOMEW, its Treasurer; and SENECA LAKE GUARDIAN, A WATERKEEPER AFFILIATE by and in the name of YVONNE TAYLOR, its Vice President,

Petitioners,

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

DECISION
Index No. 2017-0232

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, BASIL SECCOS, COMMISSIONER, GREENIDGE GENERATION, LLC, and LOCKWOOD HILLS, LLC,

Respondents.

Petitioners brought this application by way of a Notice of Petition and Verified Petition challenging the issuance of two permits to Respondent Greenidge Generation ("GGLLC") on September 11, 2017. The challenges for each permit focus on both the alleged violations of the Environmental Conservation Law and respondent New York State Department of Environmental Conservation's ("DEC") State Environmental Quality Review Act ("SEQRA") determinations. Both GGLLC and the DEC have answered the Petition[1].

1 The issue of standing has been resolved by the parties and will not be addressed.

As a preliminary matter, this Court previously issued a Decision regarding the challenge to the SEQRA review in conjunction with the claim that the issuance of air permits to GGLLC was in error (the Greenidge I action). Following the determination that the air permits were, in all respects properly issued, the present Petitioners filed this action challenging the issuance of the Water Withdrawal Permit and the SPDES permit.

Following oral argument of the case on May 22, 2018, Respondent GGLLC submitted a number of documents related to Petitioners' motion practice at the Appellate Division, Fourth Department in Petitioners' appeal from this Court's order in the Greenidge I action. Petitioners objected to the submission on the ground that they were improper and untimely.

FINDINGS OF FACT

The Greenidge Station ("the Facility") is an electric generating facility located in the Town of Torrey, Yates County, New York. It currently consists of one 107 megawatt generating unit, known as Unit 4, which historically operated as a coal-fired power plant. The Facility was initially constructed in the 1930s. The plant was built to use once-through condenser cooling, taking water withdrawn from Seneca Lake to cool the turbines and then discharge the water into the Keuka Outlet, upstream from Seneca Lake. Unit 4 was installed in 1953. In 1999, the facility and the Lockwood Ash Disposal Site ("LADS"), located across NYS Route 14 from the Facility, were acquired by AES AEE2, LLC.

On January 29, 2010, the DEC renewed the SPDES permit for the Facility effective February 1, 2010. The permit required various reports in compliance with 6 NYCRR 704.5. Following an Impingement and Entrainment Characterization Study, the DEC issued a modification to the SPDES permit.

In September 2010, AES AEE2, LLC, notified the New York State Public Service Commission that the Greenidge Unit 4 would be placed in protective lay-up status in March 2011. In May 2011, a lay-up plan for LADS was submitted to the DEC.

In December 2011, AES AEE2, LLC and its parent company, AES Eastern, filed for Chapter 11 bankruptcy. Petitioners allege that in September 2012, AES AEE2, LLC indicated in bankruptcy papers that the Facility would be permanently retired and transferred to a salvage company to dismantle. Thereafter, AES AEE2, LLC sought permission to sell the Facility to GMMM Holdings I, LLC. In October 2012 the sale was approved by the bankruptcy court. On January 15, 2013, the SPDES permit for the Facility, then held by AES Eastern, was transferred to GMMM Greenidge LLC, a subsidiary of GMMM Holdings. In March of 2013, AES AEE2, LLC deeded certain property to GMMM Greenidge and additional adjoining property to GMMM Lockwood LLC, also a subsidiary of GMMM Holdings. In May 2013, GMMM Greenidge applied to the DEC for a water withdrawal permit for the Facility.

In February and March of 2014, GMMM Greenidge was sold to Atlas Holdings and renamed Greenidge Generation, LLC (GGLLC). At the same time, GMMM Lockwood, LLC was sold and renamed Lockwood Hills, LLC.

On May 16, 2014, GGLLC submitted an air permit application for the Facility. Thereafter, in August 2014, GGLLC applied to renew the SPDES permit for the Facility. One year later, in August 2015, the DEC published notices that GGLLC had applied for air permits, water withdrawal permits and a renewal of the permit. The notice for the renewal of the SPDES permit indicated that the DEC was proposing a department-initiated modification to the SPDES

permit. The notice further indicated that the DEC, as lead agency, had determined that the entire project was a Type I action and would not have a significant impact on the environment.

In September 2015, petitioner Committee to Preserve the Finger Lakes filed comments with the DEC opposing all three permits. Specifically, Petitioners objected to the permits contending that had the applications been treated as applications for new permits, additional permit conditions would have been imposed. Petitioners further opposed the issuance of the petitions on the basis that the DEC failed to take a hard look at the environmental impacts of resuming operation at the Facility.

On June 29, 2016, the DEC issued an Amended Negative Declaration covering the SPDES permit. On September 11, 2017, the DEC issued the water withdrawal permit and SPDES permit to GGLLC. The water withdrawal permit authorizes the withdrawal of 139,248,000 gallons of water per day from Seneca Lake. The SPDES permit authorizes the discharge of 134,000,000 gallons of water per day into the Keuka Outlet. The permit requires the installation of wedge-wire screens and variable speed drives.

CONCLUSIONS OF LAW

Petitioners commenced this proceeding challenging certain actions of the Respondent DEC. The "review of an agency determination that was not made after a quasi-judicial hearing is limited to consideration of whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion" (*Matter of Harpur v Cassano*, 129 AD3d 964, 965, *lv denied* 26 NY3d 916; *see also Town of Marilla v Travis*, 151 AD3d 1588, 1589).

PETITIONERS' FIRST CAUSE OF ACTION

As a first cause of action, Petitioners contend that the Water Withdrawal Permit dated September 11, 2017 was issued in error. Specifically, Petitioners contend that the DEC should have considered the Water Withdrawal Permit application as an application for a new withdrawal rather than treating GGLLC as an existing user. Petitioners also contend that the DEC failed to consider the environmental impacts of the permit and failed to set appropriate conditions in issuing the permit.

As noted above, the Facility operated as a coal burning electric generating station since the 1930s. Although the Facility was placed in protective lay-up in March of 2011, on January 16, 2012, the Facility's water withdrawals were reported to the DEC pursuant to ECL 15-1501(9) which provides,

> 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.

Therefore, the DEC issued the initial permit to GGLLC as an existing user.

The DEC's interpretation of ECL 15-1501(9) as mandating the issuance of an initial permit to any person who reported the maximum water withdrawal capacity before February 15, 2012 was not irrational or unreasonable. "Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld" (*Kurcsics v Merchants Mut. Ins.*

Co., 49 NY2d 451, 459). Here, the requirement of ECL 1501(9) was for reporting of water withdrawal capacity. Had the legislature intended to consider only facilities that were operating as of February 15, 2012, the reporting requirement would have been for actual gallons withdrawn, and not for capacity.

Petitioners further contend that even had the DEC properly determined that GGLLC was an existing water user, the DEC erred in failing to impose adequate conditions on the Water Withdrawal Permit. The DEC does not dispute that it was entitled to place appropriate terms and conditions on the permit but does dispute that it was required to satisfy the requirements of ECL 15-1503. ECL 15-1503 requires the DEC to consider several factors when deciding whether to grant a permit, deny a permit or grant a permit with conditions. Those factors include 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," and whether "the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures" (ECL 15-1503 [2] [f], [g]).

In *Sierra Club v Martens* (158 AD3d 169 [2d Dept 2018]), the Second Department cited the consideration and application of the factors set forth in ECL 15-1503(2) as a reason why the issuance of an initial water withdrawal permit is a Type II action under SEQRA. The Court noted that the DEC is required to consider the factors set forth in ECL 15-1503.

This Court finds that the DEC was required to consider the factors set forth in ECL 15-1503. However, it is clear from the record that the DEC did consider the factors set forth in ECL 15-1503 when it placed permit conditions "including environmentally sound and economically

feasible water conservation measures to promote the efficient use of supplies" (6 NYCRR 601.7). The conditions placed on the Water Withdrawal Permit, including the installation of meters, water auditing, and reporting of audits and leaks as well as the "Incorporation of the Cooling Water SPDES Water Conservation and Fisheries Protection Measures," satisfied the requirements of both ECL 15-1503 and 6 NYCRR 601.7.

Petitioners' contention that the DEC's failure to consider wet closed-cycle cooling as a viable alternative in the issuance of the water withdrawal permit violates the Water Supply Law is without merit. As discussed below, the closed-cycle cooling system is only an absolute requirement for new facilities. Furthermore, and again, as discussed below, the alternative conditions placed on the SPDES permit present equivalent results to closed-cycle cooling. Petitioners' attempt to compare the permits and conditions of an unrelated project to the permits issued in relation to the Facility are unpersuasive. The DEC considers the Best Technology Available on a "site specific, case by case basis" (Commissioner's Policy on Best Technology Available [sp-52], Record, 729).

The issuance of the Water Withdrawal Permit was not arbitrary and capricious, or an abuse of discretion and the Petitioners' first cause of action is dismissed.

PETITIONERS' SECOND CAUSE OF ACTION

Petitioners contend that the DEC failed to comply with SEQRA when it determined that the Water Withdrawal Permit constituted a Type II action. The DEC contends that even though the issuance of the Water Withdrawal permit was considered a Type II action, the entire project was reviewed as a Type I action and a negative declaration was properly issued.

As a preliminary matter, "[a] four-month statute of limitations is applicable to allegations of SEQRA violations" (*Matter of Eadie v Town Bd. of Town of N. Greenbush*, 22 AD3d 1025, 1027, *affd.* 7 NY3d 306). The question is whether the fourth-month statute of limitations commenced when the negative declaration was issued as respondent Greenidge contends or whether it commenced when the DEC issued the Water Withdrawal Permit and SPDES Permit as Petitioners contend.

In *Eadie v Town Bd. of Town of N. Greenbush* (7 NY3d 306, 317), relied upon by the Petitioners, the Court of Appeals cited two factors in determining when the statute of limitations begins to run. The Court noted that in cases involving the enactment of legislation, the four-month period commences with the date of enactment of the legislation, and not the issuance of the SEQRA findings. The Court also found that where "the completion of the SEQRA process was the last action taken by the agency whose determination petitioners challenged," the running of the four months begins upon the issuance of the SEQRA findings. The *Eadie* case does not directly answer the question presented here, that is, when does the statute of limitations begin to run where there is no legislation to be enacted and where the SEQRA determination is not the "last action taken by the agency." This Court is persuaded by the fact that the DEC was required to issue several permits following the negative declaration before the petitioners suffered harm and therefore, the statute of limitation did not begin to run until the DEC issued the permits (*see, Town of Marilla v Travis*, 49 Misc3d 1203(A), *affd*, 151 AD3d 1588) and Petitioners' SEQRA claims are not time barred.

Furthermore, Respondent GGLLC contends that Petitioners' SEQRA claims are barred by the doctrine of *res judicata*. In the previous Greenidge Decision, this Court stated,

"Petitioners' request to annul Respondent DEC's SEQRA finding and June 28, 2016 negative declaration is also denied. A review of the findings contained in this decision finds that Respondent DEC followed the law and its decision was not arbitrary, capricious or an abuse of discretion."

Petitioners contend that the doctrine of *res judicata* cannot be applied because there is an additional party in the present proceeding and because the claims in the previous proceeding involved permits that are different from the permits being challenged in the present action. Petitioners' claims in the second and fourth causes of action challenge not the issuance of the permits but the way the SEQRA review was conducted and the conclusions reached from the SEQRA review. The fact that the issuance of the permits was the manifestation of the "harm" suffered by the Petitioners does not change the fact that the SEQRA review challenged in Greenidge I is the same as that challenged in the present action. Therefore, with respect to the Petitioners involved in that case, the challenge to the SEQRA review is barred by the doctrine of *res judicata.* Due to the fact that the present action involves a Petitioner that was not a party to the prior action, this Court will discuss the merits of Petitioners' claims as if there was no *res judicata* preclusion.

Under SEQRA, actions are classified a Type I, Type II or Unlisted (*see* 6 NYCRR 617.2[ai], [aj], [ak]). Type I actions are those actions that "may have a significant adverse impact on the environment and require the preparation of an EIS" (6 NYCRR 617.4[a][1]). Type II actions are activities that "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" (6 NYCRR 617.5[a]). Unlisted actions are "all actions not

identified as a Type I or Type II action in this Part" (6 NYCRR 617.2[ak]). All Type I and unlisted actions initially require the preparation of an Environmental Assessment Form (EAF), whose purpose is to aid an agency "in determining the environmental significance or non-significance of actions" (6 NYCRR 617.6[a][2], [3]; 6 NYCRR 617.2[m]). If an action is determined to be Type II, no further action is required (6 NYCRR 617.6[a][1][i]).

After reviewing the EAF, if the lead agency determines the significance of a Type I or Unlisted action. If "the action may include the potential for at least one significant adverse environmental impact," an Environmental Impact Statement (EIS) is required (6 NYCRR 617.7[a][1]). If the lead agency determines "that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant" no EIS is required (a negative declaration) (6 NYCRR 617.7[a][2]).

Importantly for the determination of this case, Type II actions include "official acts of a ministerial nature involving no exercise of discretion" (6 NYCRR 617.5[c][19]). This was the DEC's basis for determining that the issuance of the Water Withdrawal Permit was a Type II action. This Court is persuaded by the holding in *Sierra Club v Martens* (158 AD3d 169, *supra*, at 177) that the issuance of the initial Water Withdrawal Permit was not a ministerial act. The *Martens* court stated,

> Here, while ECL 15-1501 (9) states that the DEC "shall issue" an initial permit to an existing operator for its self-reported maximum water withdrawal capacity, the statute provides that such initial permit is "subject to appropriate terms and conditions as required under this article." Notably, the WRPA specifically provides the DEC with the power "to grant or deny a permit or to grant a permit *with conditions*" (ECL 15-1503 [2] [emphasis added]). The statutory factors that the DEC is required to consider when reviewing an application and imposing conditions on the permittee do not lend themselves to mechanical application. For instance,

> whether "the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures" (ECL 15-1503 [2] [g]) will almost certainly vary from operator to operator, or from water source to water source. The DEC's own regulations state that an "initial permit" must include "environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies" (6 NYCRR 601.7 [e]). Whether a condition is "appropriate" for a given operator is a matter that falls within the DEC's expertise and involves the exercise of judgment, and, therefore, implicates matters of discretion (*see New York Civ. Liberties Union v State of New York*, 4 NY3d at 184; *Tango v Tulevech*, 61 NY2d at 41; *see also Tarter v State of New York*, 68 NY2d at 518-519).

As Petitioners contend, the issuance of the Water Withdrawal Permit constitutes a Type I action (6 NYCRR 617.4[b][6][ii]).

Although the DEC may have incorrectly considered the issuance of the Water Withdrawal Permit as a Type II action, it is clear from the record that the DEC properly conducted a consolidated SEQRA review and considered the entire project a Type I action. The SEQR full EAF lists the title of the action as "Greenidge Station Reactivation" and specifically discusses "an initial permit for the withdrawal of water pursuant to 6 NYCRR Part 601" (Record, 1054-1055). Furthermore, the EAF specifically notes, "Although the Department has classified the issuance of an initial permit under 6 NYCRR Part 601 as a Type II action under SEQR (6 NYCRR 617.5[c][19]) and, therefore not subject to SEQR, substantively, in this instance – because the initial water withdrawal permit is proposed to be issued along with permits that are subject to SEQR – the impact or impact of any change in withdrawal has been considered alongside the impacts of the air and SPDES permits" (Record, 1055).

Here, after preparing a full EAF, the DEC, as the lead agency, issued a negative declaration. The Record establishes that the DEC "identified the relevant areas of environmental

concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417). The DEC "complied with the requirements of SEQRA in issuing the negative declaration and, ...the 'designation as a type I action does not, per se, necessitate the filing of an environmental impact statement ..., nor was one required here'" (*Wooster v Queen City Landing, LLC,* 150 AD3d 1689, 1692, *rearg denied*, 151 AD3d 1970, *quoting Matter of Mombaccus Excavating, Inc. v Town of Rochester, N.Y.*, 89 AD3d 1209, *lv. denied* 18 NY3d 808; *see also*, *Fichera v New York State Dept. of Envtl. Conservation*, 159 AD3d 1493, 1497).

Petitioners' second cause of action for a violation of SEQRA in the issuance of the Water Withdrawal Permit is dismissed.

PETITIONERS' THIRD CAUSE OF ACTION

Petitioners contend that the DEC violated the Water Pollution Control Law in issuing a State Pollution Discharge Elimination System (SPDES) permit without conducting a full technical review and without imposing adequate terms and conditions[2]. Respondent DEC states that a full technical review of the application was conducted before the SPDES permit was renewed and that appropriate and adequate conditions were imposed.

"[T]hermal discharge—which deleteriously impacts fish populations—falls within the definition of water pollution regulated by the Clean Water Act (*see* 33 USC § 1326[b]; § 1362[6]). New York, mirroring federal regulations, requires power plants that employ water intake and thermal discharge systems [ ] to obtain a permit from respondent Department of

2 To the extent that petitioners challenge the 2013 transfer of the Greenidge SPDES permit, the challenge to that action is barred by the four-month statute of limitations.

Environmental Conservation (hereinafter DEC) under the State Pollutant Discharge Elimination System (*see* ECL 17–0701, 17–0801—17–0831)" (*Riverkeeper, Inc. v Crotty*, 28 AD3d 957, 957).

Petitioners contend that the DEC was required to treat the SPDES renewal application as a new application because the Facility "has not operated" during the term of the prior permit pursuant to 6 NYCRR 621.11(b)(3). Respondent DEC contends that a renewed SPDES permit must be treated as a new permit application pursuant to 6 NYCRR 621.11(i). "In 1994 the Legislature amended the procedure for the renewal and review of SPDES permits * * * by providing that all SPDES permits may be 'administratively renewed,' but that the DEC would conduct a 'full technical review' of SPDES permits according to a 'priority ranking system' (ECL 17–0817 [2], [4])" (*Nat. Resources Defense Council, Inc. v New York State Dept. of Envtl. Conservation*, 54 AD3d 866, 866). Full technical review is defined as "the complete evaluation of all elements of the permit associated with the ranking system's priority ranking factors, together with substantive issues identified in comments submitted during the public comment period, and the verification of the accuracy and appropriateness of all other information contained in the permit" (ECL 17-0817[4]).

From a review of the record, and contrary to Petitioners' allegations, it is clear that the permit application underwent a full technical review resulting in a renewal of the permit with additional conditions imposed. The documents reviewed as part of the full technical review are included in the record at pages 464-709. The full technical review is further evidenced by the conditions attached to the SPDES permit.

The Petitioners also contend that the DEC erred in failing to require the installation of closed-cycle cooling. The DEC's regulations require the use of the "best technology available" in the construction of cooling water intake structures (6 NYCRR 704.5). The DEC Policy sheet on Best Technology Available issued on July 10, 2011 states that it applies to "all existing and proposed industrial facilities designed to withdraw twenty (20) million gallons per day." The documents make clear that wet closed-cycle cooling is not the sole means of obtaining the performance goal. "The performance goal for existing industrial facilities in New York is closed-cycle cooling or the equivalent. Department staff believe that the majority of facilities that install and properly operate and maintain approved closed-cycle-equivalent technologies should be capable of meeting the performance goals established in this policy" (Record, 730). The policy sheet also states that staff will impose permit conditions on "a site specific, case by case basis." The document makes clear that wet closed-cycle cooling is the performance goal for all new facilities and wet closed cycle cooling *or its equivalent* is the goal for all existing industrial facilities. Equivalent is defined as "reductions in impingement mortality and entrainment from calculation baseline that are 90 percent or greater of that which would be achieved by a wet closed-cycle cooling system" (Record, 726).

Despite Petitioners' arguments to the contrary, wet closed-cycle cooling was not the only option for the SPDES permit for the Facility. The DEC was authorized to consider other options for the Facility as it was in existence at the time the SPDES permit was issued. The DEC imposed cylindrical wedge screens and variable speed pumps as the equivalent of closed-cycle cooling. Petitioners have failed to submit any statements to contradict the DEC's opinion that the conditions imposed will reduce impingement mortality by 95% and entrainment mortality by

85%. In fact, Petitioners' argument is not that the wedge screens and variable speed pumps are inequivalent to wet closed-cycle cooling but rather that the DEC lacked the ability to impose anything but wet closed-cycle cooling. As discussed above that argument fails as a reading of the 2011 policy statement indicates.

The DEC's issuance of the SPDES permit, with the imposed requirements, was not arbitrary and capricious nor was it an abuse of discretion and Petitioners' third cause of action is dismissed.

PETITIONERS' FOURTH CAUSE OF ACTION

Petitioners contend that the DEC erred in finding that there were no significant adverse impacts with the renewal of the SPDES permit. Petitioners also contend that the DEC erred in issuing a negative declaration because it constitutes a "conditioned negative declaration" which is impermissible for Type I actions. Petitioner further contends that the DEC improperly segmented the SEQRA review of the Facility from the review of the LADS and applied an incorrect baseline.

"Judicial review of SEQRA findings 'is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination "was affected by an error of law or was arbitrary and capricious or an abuse of discretion"' (*Akpan v Koch*, 75 NY2d 561, 570, *quoting* CPLR 7803[3]). This review is deferential for 'it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively' (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 416)" (*Friends of P.S. 163, Inc. v Jewish Home*

Lifecare, 30 NY3d 416, 430, *rearg denied sub nom. Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 31 NY3d 929).

A review of the EAF prepared by the DEC revels that the DEC fully considered all of the potential environmental impacts of the renewed SPDES permit, including those to surface waters (Record, 1043). Furthermore, as the 2017 SPDES permit contained more stringent conditions than had existed previously, it would have been arbitrary and capricious should the DEC have determined that there was a significant adverse environmental impact. The DEC was reviewing an application for a renewed SPDES application on an existing facility. To have compared the environmental impacts of the renewed SPDES permit to a fictional nonexistent facility would have been an abuse of discretion.

Petitioners contend that the negative declaration fails to evaluate the thermal impacts on the area of the lake surrounding the Keuka Outlet.

> [T]here is nothing inherently improper in "allow[ing] for ambient [temperature] above the criteria in small areas near outfalls" (EPA, Water Quality Standards Handbook: Second Edition at 5–1 [Aug.1994], available at https://www.epa.gov/sites/production/files/2016–06/documents/wqs–handbook–1994.pdf [accessed July 13, 2017]). New York has adopted such a "mixing zone" policy (*see* 6 NYCRR 704.1[b]; 704.3; *see also* 40 CFR 131.13), and such a zone will pass muster so long as it is defined in scope, does "not interfere with spawning areas, nursery areas and fish migration routes" (6 NYCRR 704.3[c]) and avoids lethality "in contravention of water quality standards to aquatic biota which may enter" it (6 NYCRR 704.3[b]). Lethality, for purposes of mixing zones, focuses upon the impacts of a mixing zone upon an entire population, not whether the water temperature in the zone will prove deadly to an individual organism (see 6 NYCRR 704.1[a]; EPA, Water Quality Standards Handbook: Second Edition at 5–6 [Aug.1994], available at https://www.epa.gov/sites/production/files/2016–06/documents/wqs–handbook–1994.pdf [accessed July 13, 2017]).

(*Riverkeeper, Inc. v New York State Dept. of Envtl. Conservation*, 152 AD3d 1016, 1019).

This Court has reviewed the Discharge Monitoring Report Summaries for Greenridge Station (Record, 710-723) for the year prior to the lay-up. The report indicates that the maximum temperature of the water being discharged from the Facility in the summer was 102° and the maximum temperature of the water being discharged from the Facility in the winter was 85°. Both the current and prior SPDES Permit require a maximum discharge temperature of 108° in the summer and 86° in the winter, with a differential of 26° in the summer and 31° in the winter. Furthermore, the current SPDES Permit requires GGLLC to submit an updated schedule to the Thermal Discharge Study Plan that was submitted on January 27, 2011 within three months of the reactivation date. The existing Thermal Discharge Study Plan (Record 690-707) fully detailed the manner in which the study and monitoring of the thermal discharge is to be conducted. The foregoing constitutes a rational basis from which the respondent DEC could conclude that issuance of SPDES Permit would result in no significant adverse environmental impact.

Petitioners contend that the DEC utilized the wrong baseline in determining that the recommencement of operations at the Greenidge Facility would not result in any significant adverse environmental impacts. Specifically, the Petitioners contend that the baseline should have been "no operations" rather than pre-layup operations. Petitioners are unable to cite any authority for their position that the Facility's lay-up status required using a baseline as if there was no existing facility. The determination to use a pre-layup baseline was not arbitrary or capricious.

Petitioners are correct that a conditioned negative declaration cannot be issued for a Type I Action (*Ferrari v Town of Penfield Planning Bd.*, 181 AD2d 149, 151). Although the SPDES permit contains sections titled "Additional Requirements" and "Biological Monitoring Requirements" (Record, 1427-1429), this does not make the negative declaration a conditioned negative declaration. The amended negative declaration was for a project that involved a SPDES permit with requirements. Notably, Part 3 of the EAF states. "The project will ultimately involve a modification of the cooling water intake structure (CIWS) at the facility. The modification will include the installation of 'Best Technology Available' (BTA) measures *in accordance with Commissioner's Policy CP-52* to reduce fish entrainment and impingement" (Record, 1054). Therefore, the inclusion of the BTA requirements in the SPDES Permit only clarified that GGLLC was required to do to be in compliance with the Commissioner's Policy CP-52 and other regulations. They should not be considered conditions any more than other requirements that the permittee comply with the law are requirements.

A conditioned negative declaration is defined as "a negative declaration issued by a lead agency for an Unlisted action, involving an applicant, in which the action as initially proposed may result in one or more significant adverse environmental impacts; however, mitigation measures identified and required by the lead agency, pursuant to the procedures in section 617.7(d) of this Part, will modify the proposed action so that no significant adverse environmental impacts will result" (6 NYCRR 617.2[h]). The Court of Appeals has discussed the issuance of conditioned negative declaration in *Merson v McNally* (90 NY2d 742). The Court stated that determining whether a conditioned negative declaration has been impermissibly issued involves a two-part analysis. "(1) whether the project, as initially proposed, might result in

the identification of one or more 'significant adverse environmental effects'; and (2) whether the proposed mitigating measures incorporated into part 3 of the EAF were 'identified and required by the lead agency' as a condition precedent to the issuance of the negative declaration" (*Merson v McNally* at 752-53). This analysis "allows for consideration of the legitimate maturation of a development project in accordance with the goals of environmental regulation" (*Merson v McNally*, 90 NY2d 742, 750).

Inasmuch as Petitioners contend that it is the conditions placed on the SPDES permit that created the conditioned negative declaration, this Court will consider whether the environmental impacts of a SPDES permit without the conditions may have resulted in a significant adverse environmental impact. This Court concludes that it would have. To determine otherwise would be to ignore the importance of minimizing or eliminating entrainment and impingement. Therefore, because the first prong of the test established by the Court of Appeals has been satisfied, the Court will go on to consider the second prong, whether the mitigating measures were required by the lead agency as a condition precedent to issuing the negative declaration. The Court determines that they were not.

Here, the "mitigating measures" were not truly conditions as they were a statement of the policy and regulations required to be imposed upon the issuance of a permit. The "revisions" were a natural part of the permitting process, to specify the conditions the permittee must meet to follow the law. The provisions were submitted and publicly evaluated prior to the issuance of the negative declaration (*Merson v McNally*, 90 NY2d at 755).

"Where mitigating measures are part of the 'give and take' of the application process, rather than a condition of approval, a negative declaration may be valid (see, *Matter of Merson v McNally, supra,* at 753)" (*Hoffman v Town Bd. of Town of Queensbury*, 255 AD2d 752, 754).

Petitioners further contend that the DEC improperly segmented its review of the environmental impacts of the operations of the Greenidge Station from its review of the operations of Lockwood Ash Disposal Site, Petitioners contend that the impact of depositing the waste from the Greenidge Station should have been included in the EAF. The DEC contends that the consideration of the Facility as separate from the landfill was appropriate.

Segmentation is defined as "the division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance" (6 NYCRR 617.2[ag]). Although the SPDES permit associated with the Landfill was not formally part of the negative declaration issued as part of the re-activation of the Facility, the DEC did consider the environmental impact of the waste from the Facility. The DEC specifically stated, in a section titled "Solid Waste Management" that there would be no impacts related to solid waste management. "By eliminating the use of coal as a fuel source, the generation of solid waste from the facility will be significantly reduced compared to prior operations" (Record, 1057). This Court finds that the DEC did not improperly segment the review of the environmental impacts of operating the Facility from the environmental impacts of operating the landfill.

Petitioners' fourth cause of action for a violation of SEQRA in the issuance of the Water Withdrawal Permit is dismissed.

RESPONDENT GGLLC'S ADDITIONAL SUBMISSIONS

Finally, following the argument of this case, Respondent GGLLC submitted to this Court a number of documents that had been submitted to the Appellate Division, Fourth Department by the Petitioners. As a preliminary matter, this Cases makes no determination on whether the papers submitted to this Court by Respondent GGLLC are properly before the Appellate Division.

This Court does disagree with Respondent GGLLC that the recent motion practice at the Appellate Division renders the present Greenridge action moot. This Court finds that this Greenidge action is not moot and is properly before this Court.

The Petition is dismissed in its entirety. This constitutes the Decision of the Court. Respondent DEC to submit an order, on notice to the Petitioners and Respondent GGLLC on or before December 3, 2018.

Dated: 11/8/WFK
Penn Yan, New York.

Hon. William F. Kocher
Acting Supreme Court Justice