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

New York Supreme Court

Appellate Division—Second Department

Docket No.: 2015-02317

In the Matter of the Application of

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

Petitioners-Appellants,

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

– against –

JOSEPH MARTENS, Commissioner, New York State Department of Environmental Conservation,

Respondents-Respondents,

– and –

TRANS CANADA RAVENSWOOD LLC,

Non-Party Respondent.

BRIEF FOR PETITIONERS-APPELLANTS

GARY ABRAHAM, ESQ.
170 North Second Street
Allegany, New York 14706
(716) 372-1913

– and –

JONATHAN L. GEBALLE, ESQ.
11 Broadway, Suite 615
New York, New York 10004
(212) 732-0800

RICHARD J. LIPPES, ESQ.
LIPPES & LIPPES
1109 Delaware Avenue
Buffalo, New York 14209
(716) 884-4800

– and –

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

Attorneys for Petitioners-Appellants

Queens County Clerk's Index No. 2949/14

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—Second Department

In the Matter of the Application of

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

Petitioners-Appellants,

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

– against –

JOSEPH MARTENS, Commissioner, New York State Department of Environmental Conservation,

Respondents-Respondents,

– and –

TRANS CANADA RAVENSWOOD LLC,

Non-Party Respondent.

---

1. The index number of the case in the court below is 2949/14.

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

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

4. The action was commenced on or about February 18, 2014 by filing of a Notice of Petition and Verified Petition. Issue was joined on or about April 24, 2014 by service of a Verified Answer.

5. The nature and object of the action involves an Article 78 Proceeding.

6. This appeal is from a Judgment of the Honorable Robert J. McDonald, dated November 25, 2014, which denied the Verified Petition and Dismissed the Proceeding.

7. This appeal is on the full reproduced record.

TABLE OF CONTENTS

QUESTIONS PRESENTED

1. Did the trial court err in failing to address the claim of Petitioners-Appellants that the actions of Respondent Martens, Commissioner of the New York State Department of Environmental Conservation ("DEC") in issuing an "initial" water withdrawal permit to TransCanada Ravenswood LLC ("TransCanada") for its Ravenswood Generating Station violated the Water Resources Law, ECL § 15-1501 *et seq.*?

Answer: The trial court erred in failing to address Petitioners' claim that DEC's actions violated the Water Resources Law. DEC failed to make the determinations required by ECL § 15-15013.2 regarding the TransCanada water withdrawals to be permitted and failed to include adequate conditions in the permit.

2. Did the trial court err in finding that issuance of TransCanada's "initial" water withdrawal permit is a nondiscretionary action by the DEC and therefore qualifies as a Type II action under SEQRA?

Answer: The trial court erred in finding that DEC's issuance of an "initial" water withdrawal permit to TransCanada was a nondiscretionary action. The plain wording of the Water Resources Law gives substantial

discretion to DEC in setting the terms and conditions of an "initial" water withdrawal permit and the information provided in an EIS would have assisted DEC in making the determinations required by the Water Resources Law. Furthermore, DEC exercised discretion in setting the terms and conditions of the permit. Therefore, issuance of an "initial" water withdrawal permit does not qualify as a Type II action under SEQRA.

3. Did the trial court's erroneous finding that DEC's issuance of an "initial" water withdrawal permit to TransCanada constituted a Type II action under SEQRA lead it to err in concluding that the action was exempt from review under the New York State Coastal Management Program and the New York City Waterfront Revitalization Program?

Answer: Because the trial court erred in finding that DEC's issuance of an "initial" water withdrawal permit is a Type II action under SEQRA, it erred in determining that DEC's issuance of the TransCanada permit was therefore exempt from the requirements of the New York State Coastal Management Program and the New York City Waterfront Revitalization Program.

4. Did the trial court err in failing to address Petitioners' claim that DEC violated its public trust obligations in issuing a water withdrawal

permit to TransCanada to take over 1.5 billion gallons of water per day from the East River?

Answer: The trial court erred in failing to address Petitioners' claim that DEC violated its public trust obligations when it issued a water withdrawal permit to TransCanada to take 1.52784 billion gallons of water a day from the East River without adequately protecting fish and wildlife in the river and the Hudson River estuary of which the river is a part.

PRELIMINARY STATEMENT

This appeal involves the interpretation of the water withdrawal permitting requirements of the New York Water Resources Law ("WRL"), ECL Article 15, Title 15, § 15-1501 *et seq.*, as amended by the Water Resources Protection Act of 2011 (Chapters 400-402, Laws of 2011) as those provisions apply to of the first water withdrawal permit issued by Respondent DEC under the 2011 amendments, the permit issued to Respondent TransCanada for its Ravenswood Generating Station. The appeal also involves the interpretation of the requirements of the New York State Environmental Quality Review Act, ECL Article 8, ("SEQRA"), the New York State Waterfront Revitalization of Coastal Areas and Inland Waterway Act, the New York City Waterfront Revitalization Program, the

New York State Constitution and common law public trust principles to the water withdrawal permitting process for existing users.

The fundamental issue presented by this case is whether DEC's decision to effectively exempt existing water users from the requirements of New York's new water permitting law is consistent with the provisions of the law and the legislature's intent in enacting a new water permitting program. The vast majority of persons subject to the new law are existing users, so if DEC's refusal to apply the requirements of the law to existing users is allowed to stand, the entire program will have been effectively nullified. The harm is compounded by DEC's claim that issuance of a water withdrawal permit to an existing user is exempt from review as a Type II action under SEQRA, and that because it is exempt from review under SEQRA, it is also exempt from review under the coastal zone laws. The permit issued to TransCanada is the first permit issued by DEC under the new program and DEC's actions in issuing this permit have set a troubling precedent for the administration of the new law.

SUMMARY OF ARGUMENT

The trial court erred in failing to address Petitioners' claims that DEC's actions in issuing a water withdrawal permit to TransCanada for its

Ravenswood Generating Station in Long Island City violated the Water Resources Law and DEC's public trust obligations. The trial court erred further in dismissing Petitioners' claims that DEC's actions in issuing a water withdrawal permit to TransCanada to take over 1.5 billion gallons of water per day from the East River without determining whether the action would have a significant adverse effect on the environment violated SEQRA and the coastal zone laws. For the reasons set forth below, the trial court's decision must be reversed and the permit annulled.

STATEMENT OF FACTS

A. TransCanada's Permit to Withdraw Water from the East River

On November 15, 2013 Respondent DEC issued an "initial" water withdrawal permit to TransCanada Ravenswood LLC ("TransCanada") to withdraw up to 1.39 billion gallons of water per day ("GPD") from the East River in the Hudson River estuary for cooling operations at its Ravenswood Generating Station in Long Island City. Record on Appeal ("R") 102-107. The permit is the first water withdrawal permit issued by DEC under New York's new water permitting law enacted in 2011 (Chapters 400-402, Laws of 2011), and DEC's new water withdrawal permitting regulations, which became effective April 1, 2013 (6 NYCRR Part 601). The permit was

revised March 7, 2014 to increase the maximum permitted amount to 1.52784 billion GPD (R. 205-209).

TransCanada submitted its application for a water withdrawal permit on May 31, 2013 (R. 52-86). The project justification section of the application explains the operation of the Ravenswood once-through cooling system and the efforts that have been made at the plant to use variable speed pumps and moveable screens to reduce the amounts of water withdrawn from the East River in order to reduce fish impingement and entrainment by the plant's water intake system (R. 54). [1] There is no information included in the application regarding impingement and entrainment numbers before and after the new technology was installed and no alternative technologies are evaluated. Nor is there an evaluation of the effects of impingement and entrainment by the plant on the Hudson River estuary or of the cumulative effects of impingement and entrainment by all the plants taking water from the East River on the estuary.

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

A key section of TransCanada's water withdrawal permit application is its Water Conservation Program Form ("WCPF") (R. 64-69). The WCPF surveys an applicant's water management practices and describes best management practices. TransCanada's responses on its WCPF show that it does not have in place the basic water conservation measures surveyed on the form. Section III of the WCPF captioned "Water Sources and Metering" states that "Best Management Practices" are: "100% metering of all sources of water supply," and "Sources and secondary meters must be tested and calibrated annually" (R. 65). In response to the question, "Are all sources of supply including major interconnections equipped with master meters?" TransCanada responded "No," *id*. In response to the question, "How often are they calibrated?" TransCanada responded "Meters are not calibrated at this time," *id.* Section IV of the WCPF captioned "Water Auditing" states that "Best Management Practices" are: "At least once each year, a system water audit must be conducted using metered water production and consumption data to determine unaccounted-for water," "Keep accurate estimates of unmetered water use," and "Quantify all authorized water uses by consumption categories" (R. 66). In response to the question, "Do you conduct a water audit at least once each year?"

TransCanada responded "No," *id.* Section V of the WCPF captioned "Leak Detection and Repair" states that "Best Management Practices" are: "Check any underground water distribution systems for leaks each year," "Fix every detectable leak as soon as possible," and "Have an on-going system rehabilitation program" (R. 67). In response to the question, "Do you regularly survey your facility for leakage?" TransCanada responded "No," *id.* In response to the question, "Do you regularly survey underground piping for water leakage?" TransCanada responded "No," *id.* Section VI of the WCPF captioned "Water Reuse, Recycling and Drought Planning" states that "Best Management Practices" are: "Reuse or recycle water whenever possible," "Employ efficient irrigation techniques," and "Develop a plan to reduce water use during times of drought" (R. 68). In response to the question, "Does your facility reuse or recycle primary use water?" TransCanada responded "No," *id.* In response to the question, "Does your facility use reclaimed rainwater, storm water runoff or wastewater?" TransCanada responded "No," *id.*

DEC determined that the TransCanada application was complete on August 1, 2013 (R. 87). Notice of TransCanada's application was published in DEC's Environmental Notice Bulletin ("ENB") on August 7, 2013 (R. 88-

93). The notice states under the caption "State Environmental Quality Review (SEQR) Determination" that "Project is not subject to SEQR because it is a Type II action" (R. 93). The August 7, 2013 ENB notice also states that "[t]his project is not located in a Coastal Management area and is not subject to the Waterfront Revitalization and Coastal Resources Act," *id.* This statement is corrected in the revised ENB notice issued August 28, 2013, which states that "[t]his project is located in a Coastal Management area and is subject to the Waterfront Revitalization and Coastal Resources Act" (R. 99). The project description in the revised notice states that, "The Department has determined that permit renewals, and the issuance of 'initial permits' under ECL section 15-1501.9 as implemented by 6 NYCRR 601.7, are Type II actions, and not subject to SEQR." *Id.*

DEC responded to public comments on the TransCanada application on November 15, 2013 (R. 108-112). In response to comments that the TransCanada permit application failed to provide information on upstream water withdrawals, safe yield analyses, and passby flow calculations in accordance with the requirements of the WRL, DEC responded that "Information on rainfall, safe yield, river flow, contributing watershed size, passby analysis or other upstream water withdrawals, is not germane to the

Ravenswood Project as the East River is not, in fact, a river but rather a strait between Long Island Sound and Lower New York Harbor" (R. 108). In response to comments that the plant's water conservation measures are inadequate, DEC asserted that "A comprehensive water conservation plan suitable for this facility was developed pursuant to the facility's SPDES permit" (R. 110). In response to comments about excessive fish kills caused by the plant's once-through cooling system, DEC described various conditions required under TransCanada's SPDES permit to reduce "fish impingement and entrainment" and reduce water intake by the Ravenswood plant (R. 111). In response to objections to DEC's Type II designation for the project, DEC asserted that "the Department has no discretion but to issue 'initial permits' [to existing users]," and that "[u]nder these circumstances, the issuance of the water withdrawal permit here is covered by the Type II category for ministerial actions set out in section 617.5(c)(19) of the Department's SEQR regulations" (R. 109). In response to comments about DEC's failure to conduct a coastal consistency review, DEC asserted that "Type II actions do not require a Coastal Consistency Certification. As a consequence, no coordination with the Department of State is required," *id*.

Notwithstanding the issues raised in the public comments, DEC issued a water withdrawal permit to TransCanada for its Ravenswood Generating Facility on November 15, 2013 (R. 102-107). The permit authorized TransCanada to withdraw up to 1.39 billion gallons per day (GPD) from the East River, *id*. On December 18, 2013, TransCanada's attorney wrote to DEC stating that the actual total maximum capacity of all its water withdrawal pumps was 1,527.84 million gallons per day ("MGD"), and submitting revised Annual Water Withdrawal Reports for the years 2009-2011 (R. 188-202). On February 19, 2014, DEC notified TransCanada that DEC had determined that it was necessary to modify the TransCanada water withdrawal permit to correct the maximum permitted withdrawal amount to 1,527.84 MGD, R. 203-204, and on March 7, 2014, DEC issued a revised permit to TransCanada increasing the permitted amount from 1,390 MGD to 1,527.84 MGD (R. 205-209). The revised permit was issued for a period of four years, expiring on October 31, 2017 (R. 206).

Three conditions related to water conservation requirements are contained in the permit, conditions 5, 7 and 8 (R. 207). Condition 5 states that "[r]equired measures for water conservation and the reduction of impacts to the fisheries resource contained in the Biological Monitoring

Requirement Section of the facilities [sic] SPDES permit #NY0005 193 are hereby incorporated by reference into this permit," *id*. Conditions 7 and 8 require that all sources of supply be metered and that all meters be calibrated at least once a year, *id*. A number of practices identified as "Best Management Practices" in the WWCF are not required in the TransCanada permit, such as annual water audits, regular surveys for leakage, regular surveys of underground piping for water leakage, the recycling of water (such as a closed-cycle cooling system) or the use of reclaimed water. Thus, the conditions in the permit address only two of TransCanada's negative responses to the questions on the WCPF in its permit application.

B. Other Permits to Withdraw Water from the East River

To date, a total of four water withdrawal permits have been issued to facilities taking water from the East River.[2] In addition to the TransCanada permit, a water withdrawal permit was issued to US Power for its Astoria Generating Station in Queens to take up to 1.454 billion GPD from the East River on September 24, 2014, a permit was issued to Consolidated Edison for its East River Generating Station to take up to 323.6 MGD on November

[2] DEC Permit Applications Database, http://www.dec.ny.gov/cfmx/extapps/envapps/ [accessed 6/15/15].

21, 2014, and a permit was issued to Brooklyn Navy Yard Cogeneration Partners for its facility at the Brooklyn Navy Yard to take up to 72 MGD from the East River on February 27, 2015. [3] Each of these facilities is a thermo-electric power plant.

The combined maximum withdrawal from the river authorized by these four permits is a staggering 3.4 billion GPD. This is 340% of the one billion GPD used by the entire New York City water supply system, which provides nearly half the population of all New York State with drinking water.[4] It is almost 600% of the 650 million GPD used by all the coal and gas power plants in the states of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.[5]

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

---

[3] *Id*.

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

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

electric generating units. A once-through cooling system withdraws water from the source water body, runs it through the condenser system, and then discharges it without recirculation. In contrast, closed-cycle cooling systems recirculate and reuse cooling water. A 2010 report on the impact of once-through cooling systems in New York power plants concludes, "Closed-cycle cooling is a proven technology that reduces power plant water intake by up to 98 percent, thereby reducing the damage to aquatic life by up to 98 percent."[6]

Each of the ENB notices for the power plants withdrawing from the East River states that the DEC has determined that the project is a Type II action and is not subject to review under SEQRA.[7] Each of the ENB notices, except the amended Ravenswood notice, also states that the plant is not located in a coastal zone, *id*. In fact, each of the plants is located in the New York City coastal zone.[8]

---

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

[7] R. 93.99, http://www.dec.ny.gov/enb/20140226_not2.html, http://www.dec.ny.gov/enb/20140611_reg2.html#262060001200004, http://www.dec.ny.gov/enb/20141022_reg2.html#261010018500019.

[8] See NYC Coastal Zone maps at http://www.nyc.gov/html/dcp/html/wrp/wrpcoastalmaps.shtml [accessed July 24, 2015].

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

The East River, from which each of these four power plants draws water for its once-through cooling system, is an integral part of the Hudson River estuary and plays a critical role in the estuary. Gilbert Hawkins, president of Petitioner Hudson River Fishermen's Association ("HRFA"), points out in his affidavit that the East River is one of the main fish migration routes between the Atlantic Ocean and both the Hudson River and Long Island Sound (R. 271). He says, "Because the East River is constantly filled with moving water, it is a very attractive location for fish. There are two tides a day in the East River, which means that there are strong currents in the river four time a day—the incoming and outcoming flows for each tide. Millions of fish are riding on these flows in the migratory seasons," *id*. The biological richness of the Hudson River estuary is described in a 2011 Sierra Club report:[9]

> The lower Hudson's unique configuration as a narrow, 154-mile-long estuary creates a huge, diverse nursery that supports a mix of freshwater and saltwater fish. The river's marshes and tidal flats contribute essential minerals and nutrients to the food chain, allowing its quiet backwaters to become an essential nursery habitat for many types

[9] *Giant Fish Blenders: How Power Plants Kill Fish & Damage Our Waterways,* Sierra Club, July 2011, R. 252-268.

> of wildlife. In fact, the Hudson is one of the two principal spawning grounds for aquatic life in the East Coast.
>
> More than two hundred species of fish are found in the Hudson and its tributaries, which make up one of the most biodiverse temperate estuaries on the planet. The river is a refuge for rare and endangered species such as the shortnose sturgeon and heartleaf plantain. The Hudson is also part of the great Atlantic flyway for migratory birds; and ducks, geese and osprey, among others, stop to feed in its shallows.
>
> The ecological influence of the Hudson estuary extends fR. into the Atlantic Ocean and along the coast. For vast schools of migratory sturgeon, herring, blue crab, mackerel and striped bass, the Hudson is a nearly unimpeded corridor from the Atlantic to their ancestral spawning grounds. These fish support a 350-year-old recreational and commercial fishery along the Atlantic coast that's worth hundreds of millions of dollars. . . . [10]

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

[10] R. 260-262.

commercially important fish species. [11] The report emphasizes the importance of looking at the cumulative impact of the plants withdrawals on the Hudson River:

> [P]ower plants using once-through cooling on the Hudson have a huge, detrimental impact on the ecology of the estuary—and this impact goes well beyond the loss of large numbers of individual fish. In a 2007 report, New York State found that the cumulative impact of multiple facilities on the river substantially reduces the population of young fish in the entire river. In certain years those plants have entrained between 33 and 79 percent of the eggs and larvae spawned by striped bass, American shad, Atlantic tomcod and five other important species. Over the time the plants have been operating, the ecology of the Hudson River has been altered, with many fish species in decline and populations becoming less stable. Of the 13 key species subject to intensive study, ten have declined in abundance, some greatly. Power plants have played a considerable role in that decline.[12]

The following table of impingement and entrainment by the five power plants in New York harbor shows total impingement and entrainment of almost five billion fish, larvae and eggs per year.

[11] *Id.* at 18.

[12] *Id.* at 17.

Table 1. Impingement and Entrainment by New York Harbor Power Plants[13]

Generating Station	*Entrainment (annual)*	*Impingement (annual)*
Arthur Kill Generating Station	1,548,314,607	4,406,742
Astoria Generating Station	629,832,154	2,916,328
Brooklyn Navy Yard	38,998,201	0
East River Generating Station	1,342,191,677	1,500,873
Ravenswood Generating Station	199,000,000	82,303
Total	3,758,336,639	8,906,246

Notwithstanding these massive numbers, neither TransCanada nor DEC addressed cumulative impacts on the Hudson River estuary related to impingement and entrainment by all the power plants in the harbor in conjunction with TransCanada's water withdrawal permit application.

In 2010, DEC refused to issue a Clean Water Act section 401 water quality certificate to Entergy's Indian Point nuclear power plant on the ground that the taking of short-nose sturgeon by the operation of Indian

[13] Data from GRACE Communication Foundation, http://www.gracelinks.org/maps/homepage/post/422 [accessed 7/24/15].

Point's once-through cooling system is unlawful and impairs the best usage of the waters of the Hudson River for propagation and survival of sturgeon.[14]

In April of this year, DEC released its Draft Hudson River Estuary Action Agenda 2015-2020.[15] Target 4 for Benefit 3 "Vital Estuary Ecosystem Vision" of the Agenda calls for the reduction of fish kills in the estuary by taking steps to "[r]educe or have schedules to reduce fish kills at the four remaining steam electric power plants that use once-through cooling systems by imposing the "best technology available" standard pursuant to 6 NYCRR§704.5 and §316(b) of the Clean Water Act, which both call for minimizing adverse environmental impacts." Draft Action Agenda at 30.

D. TransCanada's Permit to Discharge Water into the East River

The impingement and entrainment of fish and other aquatic organisms by the TransCanada Ravenswood plant has been documented over the years in studies conducted by the facility pursuant to its SPDES permit. The 2005-2006 studies are summarized in the Biological Fact Sheet issued in conjunction with TransCanada's 2012 SPDES permit:

---

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

[15] http://www.dec.ny.gov/docs/remediation_hudson_pdf/dhreaa15.pdf [accessed 7/24/15].

> The most recent Impingement and Entrainment studies were conducted from March 2005 to February 2006. About 25,850 fish were impinged over the year, ... Approximately 149.7 million eggs, larvae and juveniles were entrained through the station. . . . . Post-yolk-sac larvae (51.2%) and eggs (47.0%) were the main life stages found in the entrainment collections.

R. 155.

As noted above, condition 5 of TransCanada's water withdrawal permit incorporates the biological monitoring conditions contained in its SPDES permit. There are six biological monitoring conditions in TransCanada's 2012 SPDES permit (R. 176-178). The first condition requires "Best Available Technology" and lists various measures such as variable speed pumps, improvements to intake screens, planned outage scheduling and low stress fish return lines (R. 176). Closed-cycle cooling is not listed. The second condition requires "Performance Standards" and states that the plant must achieve a reduction in impingement mortality of 90% for all fish species combined and 90% for winter flounder alone from the calculation baseline" (R. 177). The third condition requires submission of a "Supplemental Technology and Operation Review/Plan" *id*. The fourth condition requires a "Verification Monitoring Plan" to confirm that the

performance standards are being achieved (R. 177-178). The fifth condition requires that data be maintained and status reports issued in 2014 and 2017 (R. 178). The sixth and final condition provides that no changes to the cooling intake system may be made without DEC approval, *id*. None of the water conservation measures listed in the WCPF are required under TransCanada's SPDES permit.

PROCEDURAL HISTORY

The verified petition of Sierra Club and Hudson River Fishermen's Association was filed February 18, 2014 (R. 22-47). The petition alleged four causes of actions: violations of SEQRA, violations of the Water Resources Law, violations of the coastal zone laws and violations of the public trust. Respondent DEC served its Verified Answer and supporting affidavits on April 24, 2014 (R. 395). Necessary Party TransCanada filed a motion to dismiss and supporting affidavits, also on April 24, 2014 (R. 464). No hearing was held in the case. On October 2, 2014, the trial court issued a decision and order finding that Petitioners had standing and granting TransCanada's motion for summary judgment (R. 10). The trial court issued its judgment on November 25, 2014 (R. 5). Petitioners served their notice of appeal of the judgment on January 7, 2015 (R. 3).

ARGUMENT

POINT I

DEC VIOLATED THE WATER RESOURCES LAW IN ISSUING AN "INITIAL"WATER WITHDRAWAL PERMIT TO TRANSCANADA WITHOUT MAKING THE REQUIRED DETERMINATIONS OR INCLUDING ADEQUATE CONDITIONS

It was reversible error for the trial court to dismiss the petition without addressing Petitioners' claims that DEC violated the Water Resources Law ("WRL"), ECL Article 15, Title 15, §§ 1501 *et seq*., and its implementing regulations, 6 NYCRR Part 601, when it issued the TransCanada permit without making the eight determinations required by the WRL, and when it failed to include conditions in the permit sufficient to avoid such impacts.

A. 2011 Amendments to the Water Resources Law

The Water Resources Protection Act of 2011 ("WRPA"), Chapters 400-402, Laws of 2011, was signed into law by Governor Cuomo on August 15, 2011, with the support of many of New York's largest environmental and conservation organizations, including Petitioner Sierra Club. WRPA amended the WRL to require that any person taking 100,000 gallons or more per day from any of the state's waters obtain a water withdrawal permit (with certain exemptions not relevant here). ECL § 15-1501. The new law

is the first statutory provision in New York law to require that users other than public water supply systems obtain water withdrawal permits (R. 334). Water withdrawal permits have been required for public water supply systems since 1905. The purpose of the legislation as outlined in the Assembly sponsor's memorandum in support of the bill was to update New York's water withdrawal laws in light of increased demands on the state's water resources and DEC's limited ability to regulate water withdrawals under the existing statutes (R. 338-339). A major impetus for passage of the legislation was to implement the requirements of the Great Lakes-St. Lawrence River Basin Water Resources Compact (the "Compact"), ECL § 21-1001 (R. 339). The legislation applied key elements of the decision-making standards required by the Compact to water withdrawal permits issued throughout the state; including the Compact requirements that water withdrawals must "incorporate environmentally sound and economically feasible water conservation measures" and "result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources and the applicable Source Watershed." ECL § 21-1001, Section 4.11.2.

The new law provides that existing users who have registered their use with the DEC as of February 2012 are eligible to receive a permit for their maximum reported use. ECL § 15-1501. Almost 1,600 existing users registered with DEC in 2012 and 2013 (R. 308-329). Approximately 1000 of these users are private users not previously permitted by DEC. *Id*.

DEC promulgated new regulations implementing the 2011 amendments in 2012 (R. 519-523). These regulations became effective April 1, 2013 (R. 524), 6 NYCRR Part 601. The regulations provide an expedited permitting process for existing water users, and provide that existing users will be permitted on a staggered schedule over a four-year period, with the largest users being permitted first. 6 NYCRR § 601.7.

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

DEC violated the WRL and its implementing regulations when it issued the TransCanada water withdrawal permit without requiring the necessary data and analysis in the application materials to make the determinations required in the law and the regulations. ECL § 15-1503.2(a)-(h) provides that "[i]n making its decision to grant or deny a permit or to

grant a permit with conditions," DEC shall make eight determinations.

These are:

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

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

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

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

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

(f) the proposed water withdrawal will be implemented in a manner to ensure it will result in no significant individual or cumulative adverse impacts on the quantity or quality of the water source and water dependent natural resources;

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

(h) the proposed water withdrawal will be

> implemented in a manner that is consistent with applicable municipal, state and federal laws as well as regional interstate and international agreements.

The same eight determinations are required by Section 601.11(c)(1)-(8) of the regulations. These mandates are reinforced by requirements in the regulations that the information necessary to make these determinations be included in the application materials for a water withdrawal permit.

6 NYCRR § 601.10(k). Subsection (k) requires a "Project Justification," which is required to show:

> (1) why the proposed project was selected from the evaluated alternatives;
>
> (2) why increased water conservation or efficiency measures cannot negate or reduce the need for the proposed water withdrawals;
>
> (3) why the proposed water withdrawal quantity is reasonable for the proposed use;
>
> (4) why the proposed water conservation measures are environmentally sound and economically feasible;
>
> (5) whether the proposed water supply is adequate;
>
> (6) whether the proposed project is just and equitable to other municipalities and their inhabitants in regards to present and future needs for sources of potable water;

(7) whether the proposed withdrawal will result in no significant individual or cumulative adverse environmental impacts; and

(8) whether the proposed withdrawal will be consistent with all applicable municipal, state and federal laws as well as regional interstate and international agreements.

The WRL explicitly applies to existing water withdrawals. ECL § 15-1501.1 provides that, "[e]xcept as otherwise provided in this title, no *person who is engaged in, . . . , the operation of a water withdrawal system* with a capacity of greater than or equal to the threshold volume, shall have any power to do the following until such person has first obtained a permit or permit modification from the department pursuant to this title: a. To make a water withdrawal *from an existing . . . source*." *Id*., emphasis added. ECL § 15-1501.9, which provides for the issuance of "initial" permits to existing users who have reported their water usage as of February 2012, states that " initial" permits are "subject to appropriate terms and conditions as required under this article." Thus the requirements of ECL § 15-1503.2 are incorporated into ECL § 15-1501.9. There is no basis in the wording of ECL § 15-1501.9 for concluding, as the trial court did, that the provisions of ECL § 15-1501.9 are inconsistent with the requirements of ECL § 15-1503.2 (R. 20). Furthermore, "initial" permits are not exempted from the conditions

set forth in 6 NYCRR § 601.11(c)(1)-(8). Consequently, it is apparent that the plain wording of the WRL and the regulations does not exempt DEC from making the determinations required in ECL § 15-1503.2 for "initial" permits. DEC's failure to make these determinations for the TransCanada permit application was thus a violation of ECL § 15-1503.2 and § 601.11(c)(1)-(8). In particular, DEC is obligated under ECL § 15-1503.2(g) to determine whether closed-cycle cooling represents an "environmentally sound and economically feasible water conservation measure" for the TransCanada plant and, if so, to impose a permit condition requiring closed cycle cooling. DEC's failure to determine whether closed-cycle cooling for the TransCanada power plant is an "environmentally sound and economically feasible water conservation measure" under the WRL is thus a violation of the requirements of the WRL.

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

Not only did DEC violate the WRL and its implementing regulations when it failed to make the determinations required by ECL § 15-1503.2 and 6 NYCRR § 601.11(c) regarding TransCanada's East River power plant withdrawals, it also violated the WRL when it failed to include appropriate

water conservation conditions in the permit. ECL § 15-1503.4 provides that DEC "may grant or deny a permit or grant a permit with such conditions as may be necessary to provide satisfactory compliance by the applicant with the matters subject to department determination pursuant to subdivision 2 of this section." ECL § 15-1501.8 requires that the DEC establish a water conservation and efficiency program. Section 601.10(f) of the water withdrawal regulations implements the requirement of Section 15-1501.8 and provides that an application for a water withdrawal permit *shall include* a "Water conservation program. A completed form as made available by the Department or, if acceptable to the Department, a detailed plan, *that demonstrates the applicant's water conservation and efficiency measures that are environmentally sound and economically feasible and that minimize inefficiencies and water losses*. Such measures *must include but are not limited to: source and customer metering; frequent system water auditing; system leak detection and repair; recycling and reuse; and ability to enforce water restrictions during drought*." 6 NYCRR § 601.10(f), emphasis added.

Because the determinations required by Section 15-1503.2 were not made, DEC did not undertake to set conditions to address the problems it would have identified had it made the determinations. It also failed to set

required water conservation conditions. As outlined above, the WCPF contained in the TransCanada water withdrawal application demonstrates that the plant does not have a compliant water conservation program (R. 64-69), yet DEC determined that the application was complete and issued the permit without including conditions requiring most of the conservation measures listed as minimal requirements in 6 NYCRR § 601.10(f). The only explicit water conservation measures contained in the water withdrawal permit are the requirements contained in conditions 7 and 8 that all sources of supply be metered and that all meters be calibrated (R. 156). Other practices required by Section 601.10(f), such as frequent system water auditing, system leak detection and repair, recycling and reuse (such as a closed-cycle cooling system), and the ability to enforce water restrictions during drought are not required in the TransCanada permit.

The failure of the DEC to require appropriate terms and conditions in the TransCanada water withdrawal permit violates the requirements of the WRL for issuance of "initial" permits. As noted above, "initial" permits are "subject to appropriate terms and conditions as required under this article." ECL § 15-1501.9. In issuing the TransCanada permit without appropriate

conditions, DEC ignored the requirements of ECL § 15-1503.4 and 6 NYCRR § 601.10(f).

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

DEC's inclusion of a condition in TransCanada's water withdrawal permit incorporating the biological monitoring requirements of TransCanada's SPDES permit is not a substitute for making the determinations required by ECL § 15-1503.2 and 6 NYCRR § 601.11(c) or incorporating the water conservation conditions required by 6 NYCRR 601.10(f). Whatever determinations DEC has made regarding the adequacy of TransCanada's once-through cooling system under the SPDES law and regulations, ECL Article 17, §§ 17-0101 et seq. and 6 NYCRR Part 750, does not substitute for the necessity of determining whether closed-cycle cooling represents an "environmentally sound and economically feasible water conservation measure" under the WRL. Although TransCanada's SPDES permit contains a condition requiring "Best Available Technology" and lists various measures such as variable pumps, improvements to intake screens, planned outage scheduling and low stress fish return lines, R. 176, Petitioners note that TransCanada's water intake structures are not in

conformance with DEC's 2011 guidance on Best Available Technology ("BTA") for Cooling Water Intake Structures.[16] The BTA guidance requires closed cycle cooling. The guidance states that cooling water intake structures will be subject to one of four "performance goals" when selecting BTA—all four require "closed-cycle cooling." *Id*. The guidance also states, "This policy will be implemented when: (i) an applicant seeks a new SPDES permit; (ii) a permittee seeks to renew an existing SPDES permit; or (iii) a SPDES permit is modified either by the Department or by the permittee, for a facility that operates a CWIS in connection with a point source thermal discharge." *Id*. The BTA policy requiring closed-cycle cooling should have been implemented when TransCanada's SPDES permit was renewed in 2012. Because it was not, it is not appropriate to claim that TransCanada's SPDES permit requires BTA.

As pointed out above, the biological monitoring conditions contained in TransCanada's SPDES permit do not include requirements for frequent system water auditing, system leak detection and repair, recycling and reuse,

[16]"BTA for Cooling Water Intake Structures," July 10, 2011, http://www.dec.ny.gov/docs/fish_marine_pdf/btapolicyfinal.pdf [accessed July 5, 2015].

and the ability to enforce water restrictions during drought as required by 6 NYCRR § 601.10(f), and therefore do not substitute for those requirements.

There is no basis, therefore, for DEC's failure to make the determinations required by the WRL and to include adequate conditions in the TransCanada water withdrawal permit. The trial court's decision not to rule on Petitioner's claims of violations of the WRL was reversible error.

POINT II

DEC VIOLATED SEQRA IN ISSUING AN "INITIAL" WATER WITHDRAWAL PERMIT TO TRANSCANADA WITHOUT DETERMINING WHETHER THE ACTION WOULD HAVE A SIGNIFICANT ADVERSE EFFECT ON THE ENVIRONMENT

DEC violated SEQRA when it issued an "initial" water withdrawal permit to TransCanada to withdraw 1.52784 billion GPD from the East River and failed to make a determination whether the action would have a significant adverse effect on the environment under the New York State Environmental Quality Review Act (SEQRA), ECL Article 8, §§ 8-0101 *et seq*., and the SEQRA regulations, 6 NYCRR Part 617, and the trial court erred in holding that it did not.

A. The Statutory Scheme of SEQRA

SEQRA was enacted by the New York State Legislature in 1976. Although SEQRA was patterned after its Federal counterpart, the National Environmental Policy Act ("NEPA"), 42 USCA 4332 *et seq*., the Legislature wished to provide greater protection to the environment, and therefore, made significant changes from NEPA, requiring that environmental impact statements be prepared in a much broader category of actions, and imposing substantive duties on the deciding governmental body to assure that environmental consequences are avoided or mitigated. See *City of Buffalo v. NYS Dep't of Environmental Conservation*, 184 Misc.2d 243 (Erie County 2000).

As many courts have noted, the heart of SEQRA lies in its provision regarding environmental impact statements. See e.g. *Jackson v. NY Urban Dev. Corp*., 67 N.Y.2d 400 (1986), *Town of Henrietta v. DEC,* 76 A.D.2d 215 (4th Dep't 1980). 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 the responsibility of 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). Conversely, to determine that an EIS will not be required for an action, "the lead agency must determine either that there will be no adverse environmental impacts or the identified adverse environmental impacts will not be significant." 6 NYCRR § 617.7(a)(2).

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

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

6 NYCRR § 617.4(a). In contrast, Type II actions do not require environmental review under SEQRA. Type II actions are identified in Section 617.5 of the regulations. They have already been determined not to have an adverse effect on the environment, and therefore no further SEQRA review is required. Unlisted actions are those actions that are neither Type I nor Type II. 6 NYCRR § 617.2(ak).

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

B. Issuance of the TransCanada Water Withdrawal Permit is a Type I Action under SEQRA

Section 617.4(a)(1) of the SEQRA regulations identifies as Type I actions "those actions that an agency determines may have a significant adverse impact on the environment and require the preparation of an EIS." 6 NYCRR § 617.4(a)(1). The criteria for determining whether an action has a significant adverse impact on the environment are set forth in Section 617.7(c). These criteria include:

> (ii) the removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat

> area; substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse impacts to natural resources; . . . .

6 NYCRR § 617.7(c)(ii). Under this standard, the destruction of aquatic life by the cooling water intake structures of the TransCanada East River power plant outlined above clearly has a significant adverse impact. As documented in the plant's own impingement and entrainment studies, the plant's massive water withdrawals through its cooling water intake structures remove and destroy large quantities of fish and other aquatic life from the East River. These massive withdrawals substantially interfere with the movement of resident and migratory fish in the Hudson River estuary. Among the many species impacted, the withdrawals have substantial adverse impacts on Atlantic sturgeon, which are an endangered species,[17] and on their habitat in the East River and the Hudson River estuary. To determine that an EIS will not be required for an action, "the lead agency must determine either that there will be no adverse environmental impacts or the identified adverse environmental impacts will not be significant." 6

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

NYCRR 617.7(a)(2). To make such a determination for the TransCanada water withdrawals would be arbitrary and capricious.

Issuance of the TransCanada permit clearly meets the basic test for a Type I action and thus requires preparation of an EIS. In addition, the TransCanada withdrawals fall within one of the categories of actions listed as Type I actions in the SEQRA regulations. Projects or actions that "use ground or surface water in excess of 2,000,000 gallons per day," are listed as Type I actions in 6 NYCRR § 617.4(b)(6)(ii). As noted above, such a listing "carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS." 6 NYCRR § 617.4(a). The water withdrawal permit issued to TransCanada to take up to of 1.52784 billion GPD, involves withdrawals that are *764 times* the Type I threshold provided in Section 617.4(b)(6)(ii).

In view of the significant adverse environmental impacts of the TransCanada water withdrawals and the explicit categorization of water withdrawals over 2,000,000 GPD as Type I actions in the SEQRA regulations, the decision of DEC to categorize the TransCanada permitting process as a Type II action was arbitrary and capricious and an abuse of

discretion, and the trial court's decision to uphold that determination was reversible error.

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

An action categorized as a Type I action, cannot be a Type II action. To be categorized as a Type II action, Section 617.5(b) of the SEQRA regulations provides that "Each of the actions on an agency Type II list must: (1) *in no case, have a significant adverse impact on the environment based on the criteria contained in subdivision 617.7(c)* of this Part; and (2) *not be a Type I action as defined in section 617.4* of this Part (emphasis added)." An action cannot be a Type II action if it meets either criterion. The TransCanada water withdrawal project meets both criteria. It is a Type I action as defined in Section 617.4(b)(6)(ii) of the SEQRA regulations because it is for more than 2,000,000 GPD. In addition, it has a significant adverse impact on the environment based on the criteria in Section 617.7(c). For these reasons, it is apparent that issuance of the TransCanada water withdrawal permit cannot be a Type II action.

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

Even if the TransCanada East River water withdrawals did not meet the criteria for a "significant adverse impact on the environment" contained in Section 617.7(c)(ii) and were not categorized as a Type I action under Section 617.4(b)(6)(ii), the trial court erred in approving DEC's claim that its actions is issuing an "initial" water withdrawal permit to TransCanada is a Type II action under section 617.5(c)(19) of the SEQRA regulations because issuance of an "initial" water withdrawal permit is not a purely ministerial action.

Section 617.5(c)(19) of the SEQRA regulations provides that: "(c) The following actions are not subject to review under this Part: . . . (19) official acts of a ministerial nature involving no exercise of discretion, including building permits and historic preservation permits where issuance is predicated solely on the applicant's compliance or noncompliance with the relevant local building or preservation code(s)." A "ministerial act" is defined in the regulations to mean "an action performed upon a given state of facts in a prescribed manner imposed by law without the exercise of any judgment or discretion as to the propriety of the act, such as the granting of a hunting or fishing license." 6 NYCRR § 617.2(w). The *SEQRA Handbook*

states that "non-discretionary" decisions "are *based entirely* upon a given set of facts, as prescribed by law or regulation, without use of judgment or individual choice on the part of the person or agency making the decision." *SEQRA Handbook*, 3d Ed. 2010, p. 13, emphasis added.

In the present case, it is clear that numerous aspects of the issuance of a water withdrawal permit require the exercise of discretion by the DEC. As noted above, ECL § 15-1501.9, which authorizes the issuance of "initial" permits to existing users, states that "initial" permits are to be subject to "appropriate terms and conditions." The determination of what terms and conditions are "appropriate" for a given permit is discretionary. The legislature's intent that DEC exercise broad discretion in specifying the terms and conditions of all water withdrawal permits, including "initial" permits, is obvious from the wording of the eight determinations required by ECL § 15-1503.2. Making each of these determinations and implementing them with appropriate conditions during the application process requires the exercise of significant amounts of discretion by DEC.

Only one aspect of "initial" permitting is non-discretionary under ECL § 15-1501.9, and that is the size of the maximum permitted amount. Section 15-1501.9 provides that "initial" permits shall be issued to existing

users for the maximum water withdrawal capacity reported to DEC on or before February 15, 2012. Being constrained in the size of the maximum capacity to be permitted does not limit DEC as to what conditions may be provided in the permit. There is no contradiction between issuing a permit for a specified amount—whatever that amount might be—and also setting conditions requiring that various types of water conservation measures be used. Allowing a maximum volume is perfectly consistent with examining the environmental impacts of that volume and requiring measures to reduce that volume if possible.

Based on the clear wording of the statute, the trial court's ruling that DEC did not have discretion in issuing an "initial" water withdrawal permit is erroneous. The trial court stated that "The DEC had to issue the initial permit to TC Ravenswood on the basis of statutory specifications regardless of environmental concerns." R. 20. This statement overlooks the fact that the water permitting statute requires that environmental concerns be addressed when issuing initial permits. The court said "The statute *even* denied DEC the discretion to change the 'maximum water withdrawal capacity.'" *Id*., emphasis added. The facts of this case show that even this discretion was not denied, since DEC exercised discretion to change the

maximum reported withdrawal capacity in the TransCanada permit from 1.39 billion GPD in the permit issued November 15, 2013, to 1.52784 billion GPD in the revised permit issued March 7, 2014. R.104, 206.

The trial court stated that "ECL § 15-1501(9) is the more specific and applicable statute, and it is a rule of statutory construction that a general provision yields to a specific provision," R. 20. However, the trial court did not explain in what way section 15-1501.9 is more specific than or contrary to section 15-1503.2. The exact wording of Section 15-1501.9 is: "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." 6 NYCRR § 15-1501.9. As can be seen from its wording, section 15-1501.9 *incorporates* the requirements of section 15-1503.2, so the trial court's reasoning is difficult to understand. There is no conflict between the two sections. If there was a conflict, it is a well-established canon of statutory construction that facially conflicting statutes must be applied "in the manner that will harmonize and further their purposes."

Whalen v. Kawasaki Motors Corp., 92 N.Y.2d 288 (1998), *Foley v. Bratton*, 92 N.Y.2d 781 (1999). As the Court of Appeals stated in *Foley*, "[i]t is not the function of the court, however, to declare one statute the victor over another if the statutes may be read together, without misdirecting the one, or breaking the spirit of the other." *Id*. at 787.

The trial court noted that the Ravenswood facility has taken water from the East River for about fifty years (R. 13), but for purposes of determining the application of SEQRA to the issuance of a water withdrawal permit, it is not relevant that the plant's operations are long-standing, as the new regulatory program falls on new and old facilities alike. The WRL and the water withdrawal permitting regulations do not grandfather existing facilities or otherwise exempt them from the reach of the new permitting requirements. This is not unusual when new permitting programs are adopted. For example, the landfill permitting and operation regulations adopted by New York in the 1970s imposed substantial new costs on existing landfills. As a result, the number of municipal solid waste landfills in New York dropped from more than 200 before the regulations were adopted to 27 today.[18]

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

In reaching its determination that issuance of the TransCanada permit was a Type II action under the exemption for ministerial actions contained in 6 NYCRR § 617.5(c)(19), the trial court relied on several cases interpreting the scope of the exemption. The trial court noted that, in determining whether an act is merely ministerial in nature, "the pivotal inquiry . . . is whether the information contained in an EIS may form the basis for a decision whether or not to undertake or approve such action . . . ." citing *Village of Atlantic Beach v. Gavalas*, 81 N.Y.2d 322 (1993); *Filmways Communications v. Douglas*, 106 A.D.2d 185 (4th Dep't 1985), *aff'd*, 65 N.Y.2d 878; *Island Park, LLC v. New York State Dep't of Transp*., 61 A.D.3d 1023 (3rd Dep't 2009), and *Ziemba v. City of Troy*, 37 A.D.3d 68 (3rd Dep't 2006) *lv. app. den.*, 8 N.Y.3d 806 (2007). However, these cases do not support the trial court's ruling. None of the cases cited by the trial court presented circumstances comparable to issuance of a water withdrawal permit. In *Gavalas*, the Court of Appeals determined that issuance of a building permit did not constitute an agency "action" within the purview of SEQRA. The court said that that the village ordinance did not give the village building inspector the type of discretion that would allow a permit grant or denial to be based on the environmental concerns detailed in an EIS.

In *Filmways*, the Court of Appeals held that in applying for the building permit, petitioner was not required to comply with SEQRA. The court said, "the act of the building inspector in granting or denying the building permit is ministerial; it does not involve exercise of discretion. There is no provision in the building code that gives the building inspector a latitude of choice. In determining whether to grant or deny a building permit, he must adhere to the definite standards of the code and if the applicant meets these standards, he must issue the permit." 106 A.D.2d at 186. . In *Island Park*, the Third Department found that the safety issues presented by a particular railroad crossing were "unrelated to the environmental concerns that may be raised in an environmental impact statement." 61 A.D.3d at 1028. In *Ziemba*, the Third Department held that the discretion to be exercised in issuing a demolition permit "is limited to a narrow set of criteria that is unrelated to the environmental concerns that would be raised in an EIS." 37 A.D.3d at 74

The permitting decision made by DEC in the present case, in contrast, is explicitly mandated by the water withdrawal permitting statute to address the environmental concerns that may be raised in an EIS, and thus, under the rule of the above cases, DEC's issuance of an "initial" water withdrawal

permit does not fall within the ministerial exemption under SEQRA. DEC's evaluation of the determinations required by ECL § 15-1503.2 clearly would be informed by an EIS. For example, Section 15-1503.2(g) requires that DEC "shall determine whether . . . the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures." This determination would be informed by an EIS. Section 15-1503.2(d) mandates that, before issuing a water withdrawal permit, DEC determine whether "the need for all or part of the proposed water withdrawal cannot be reasonably avoided through the efficient use and conservation of existing water supplies." Again, this determination would be informed by an EIS. The trial court stated, "Whatever information DEC could have obtained from conducting an environmental review could not have affected its decision to issue or deny an initial permit to TC Ravenswood," R. 20, but this is not correct. Because the information contained in an EIS is exactly the type of information that would inform the determinations required to be made in issuing the TransCanada water withdrawal permit and in determining the conditions to include in the permit issuance of the TransCanada permit is not properly categorized as a Type II action, and the trial court's holding to the contrary

was erroneous. Contrary to the trial court's statement, DEC *does* have authority to deny an application for an "initial" water withdrawal permit if adequate conditions cannot be placed in the permit. The authority given in ECL §§ 15-1503 subsections (2) and (4) for DEC to deny a permit application, applies to all applications. There is no exemption for "initial" permit applications from the authority of DEC to deny a permit.

2. DEC's Current Interpretation of Its Discretionary Powers in Issuing an "Initial" Water Withdrawal Permit is Contrary to the Position It Took in Its Comments on the Proposed Regulations

The interpretation of its powers to set conditions in "initial" water withdrawal permits put forth by DEC in connection with the TransCanada permit is contrary to the position taken by DEC during consideration of the proposed water withdrawal regulations in 2012. In its responses to several penetrating questions regarding the scope of DEC's powers in issuing "initial" permits to existing water users during the 2012 comment process by Entergy Nuclear Operations, Inc., the owner of the Indian Point power plant, DEC clearly asserted that that it has discretion in setting the terms and conditions of "initial" permits (R. 588-590, #148, #149). In Question #148 Entergy observed, "There appears to be . . . no provision in the Proposed Regulations prohibiting substantive review of initial permits, and therefore

no reason to believe NYSDEC will refrain from substantively reviewing initial permits for existing facilities or requiring that new substantive provisions be included in initial permits" (R. 589 # 148). DEC responded:

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

Id., emphasis added. In Question #149, Entergy commented:

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

R 590 #149, emphasis added. DEC responded:

> ECL §15-1503 establishes permit application requirements and standards for permit issuance. This Section applies to all permits. *The statute does not authorize the Department to apply different standards for the issuance of initial permits.* It requires only that the applicant obtain a permit for the maximum withdrawal capacity reported to the Department.

Id., emphasis added.

From these responses, it can be seen that the position taken by DEC regarding its powers in issuing "initial" permits during the drafting of the proposed water withdrawal regulations in 2012 is contrary to the position it has taken in this proceeding. This fact weighs against giving deference to DEC's current interpretation.

3. DEC Exercised Discretion in Issuing the TransCanada Permit

In approving the TransCanada permit application and granting the TransCanada permit, DEC exercised discretion in many ways. First and foremost, DEC exercised discretion is setting the conditions in the TransCanada permit, when it decided not to require permit conditions to address the environmental and conservation factors determinations required in ECL § 15-1503.2(a)-(h) and 6 NYCRR § 601.11(c)(1)-(8). DEC

exercised discretion in determining that TransCanada's application was complete without requiring all the information necessary to make the determinations required in those provisions. It exercised discretion when it issued the permit without requiring many of the conservation measures listed as minimal requirements in 6 NYCRR § 601.1, and when it decided to incorporate conditions from TransCanada's SPDES permit in its water withdrawal permit. As noted above, DEC exercised discretion when it acted on TransCanada's adjustment of its maximum reported capacity after the February 2012 deadline for registering maximum capacity had passed and after the TransCanada water withdrawal permit had been issued on November 15, 2013, to upwardly revised the maximum water withdrawal amount allowed under the permit. DEC exercised discretion in setting the term for which the permit was issued. Section 601.7(e) of the regulations allows "initial" permits to be issued for terms up to 10 years. DEC exercised discretion in issuing the TransCanada permit for a term of four years. It exercised its discretion in setting different terms for other permits. DEC chose a five year term for the permit issued to Consolidated Edison's East River power plant and a 10 year term for US Power's permit for its Astoria

plant.[19] Finally, as noted above, the WRL and the water permitting regulations give DEC discretion to deny a permit application, even an application for an initial permit. ECL § 15-1503.2 and 6 NYCRR §601.11(a). DEC exercised discretion in granting the TransCanada permit.

For these reasons, DEC's claim that it has no discretion in setting the terms and conditions contained in an "initial" permit is contradicted by its actions in setting the terms and conditions of the TransCanada permit.

4. DEC Does Not Claim It Has Discretion under Other Statutory Permitting Provisions with Similar Wording

DEC's claim that it has no discretion in issuing initial water withdrawal permits based on the prescription in ECL § 15-1501(9) that it "*shall issue* an initial permit, subject to appropriate terms and conditions as required under this article, to any person not exempt from the permitting requirements of this section, for the maximum water withdrawal capacity reported. . . . [emphasis added]," is inconsistent with DEC's longstanding interpretation of the oil and gas well permitting statute, which contains similar phrasing. The statutory mandate contained in ECL § 23-0503.2 governing the permitting of oil and gas wells provides that DEC "*shall issue* a permit to drill, deepen, plug back or convert a well, if the proposed spacing

[19] See DEC Permit Application Database, cited in note 2.

unit submitted to the department pursuant to paragraph a of subdivision 2 of section 23-0501 of this title conforms to statewide spacing . . . [emphasis added]." Far from claiming that issuance of an oil or gas well drilling permit is a Type II action under SEQRA, DEC prepared an extensive generic EIS for oil and gas drilling permits in 1992, [20] and just completed a final supplemental generic EIS for hydrofracking, a technique not covered in the original GEIS.[21] DEC also requires that each applicant for a gas or oil well drilling permit provide an Environmental Assessment Form (EAF) for each well permit sought.[22] DEC's position with respect to interpretation of the water withdrawal permitting statute is in surprising contrast to its interpretation of very similar language in the oil and gas well permitting statute. This is another reason why deference should not be given to DEC's claim of a SEQRA exemption for "initial" water withdrawal permitting.

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

Because DEC's interpretation of its discretion in issuing "initial" water withdrawal permits runs counter to the clear wording of ECL § 15-

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

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

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

1501.9, which states that "initial" permits are to be subject to "appropriate terms and conditions," judicial deference to DEC's interpretation is not appropriate. The rules for when a court should defer to an agency interpretation of a statute are set forth in *Raritan Development Corp. v. Silva,* 91 N.Y.2d 98 (1997):

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

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

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

> conflicts with the plain statutory language and may not be sustained.

Id. at 103.

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

> [W]hile the implementation of a statute may place an agency in a position where they are forced to deal with competing

> interests, striking a balance between those interests is exclusively a legislative function. . . . Stated differently, an agency, by law, is not allowed to "legislate" by adding "guidance requirements" not expressly authorized by statute. . . .

Id. at 669, citations omitted.

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

In addition, it is "a well-settled principle of statutory construction that a statute or ordinance must be construed as a whole and that its various

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

Here, the purpose of Article 15 of the ECL is expansive, including numerous policies to protect, conserve and develop New York's water resources, including a strong policy promoting regulation of activities that adversely affect those resources. ECL § 15-0103. As noted above, a major impetus for passage of the 2011 amendments to the WRL was to implement the requirements of the Great Lakes-St. Lawrence River Basin Water Resources Compact (ECL § 21-1001). See Assembly Sponsor's Memorandum in Support (R. 339). The legislation applied key elements of the Compact's decision-making standards to water withdrawal permits issued throughout the state; including the Compact requirements that withdrawals must "incorporate environmentally sounds and economically

feasible water conservation measures" and "result in no significant individual or cumulative adverse impacts to the quantity or quality of "the waters and water-dependent resources in the source watershed." ECL § 21-1001, Section 4.

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

For these reasons, deference to DEC's interpretation that existing users are not subject to the substantive provisions of the new water permitting law and that it has no discretion in issuing "initial" permits to existing users is not appropriate. There is no basis therefore for finding that

DEC's issuance of the TransCanada water withdrawal permit is a Type II action under SEQRA, and the trial court erred in so ruling.

POINT III

DEC VIOLATED STATE AND CITY COASTAL ZONE LAWS WHEN IT FAILED TO PREPARE AN EIS OR CERTIFY IMPACTS OF TRANSCANADA'S WATER WITHDRAWAL APPLICATION

Because the trial court erred in holding that issuance of an "initial" water withdrawal permit to TransCanada was a Type II action under SEQRA, the trial court also erred in holding that the permit application was exempt from review under the New York State's Waterfront Revitalization of Coastal Areas and Inland Waterway Act and related acts on the ground that it was a Type II action. As shown above, the issuance of the permit is not properly categorized as a Type II action under SEQRA. Because it is not a Type II action, the permit application is subject to review under the state and city coastal zone laws, and DEC's failure to conduct an EIS or certify impacts of the permit application violated those laws.

New York developed a Coastal Management Program ("CMP") in 1981 to implement the federal Coastal Zone Management Act ("CZMA"), 16 USCA § 1451 et seq. The statutory authority for New York's CMP is the

Waterfront Revitalization of Coastal Areas and Inland Waterway Act ("WRA"), Executive Law, Article 42. The law is implemented by 19 NYCRR Part 600. WRA requires that "actions undertaken by State agencies within the coastal area ... shall be consistent with the coastal area policies of this Article," Executive Law §919(1). WRA allows for the creation of optional local government waterfront revitalization programs ("LWRPs"). Once a local waterfront revitalization program is approved by the State as consistent with the state's coastal policies, the local coastal area management policies contained in an approved LWRP become incorporated into the state's CMP. Accordingly, pursuant to WRA and the regulations adopted pursuant to WRA, state agency actions which are likely to affect the achievement of an LWRP must be reviewed for consistency with the local coastal area management policies. Executive Law § 916.1(b), 19 NYCRR §§ 600.3(c), 600.4.

In response to CZMA and WRA, New York City developed an LWRP. The City's original Waterfront Revitalization Program ("NYC WRP") was adopted by the City in 1982. It was approved by New York State for inclusion in the state CMP and then approved by the U. S. Secretary of Commerce on September 30, 1982. As a result of these

approvals, federal and state program actions identified by DOS are required to be undertaken in a manner consistent "to the maximum extent practicable" with the NYC WRP. Executive Law § 916.1(b), 19 NYCRR §§ 600.3(c), 600.4.

Under WRA, consistency determinations of state program actions are coordinated with the SEQRA process. Section 600.4 of the implementing regulations provides that, "[a]s early as possible in a State agency's formulation of an action it proposes to undertake, or as soon as a State agency receives an application for a funding or approval action, it shall determine whether the action is located within the coastal area." 19 NYCRR § 600.4. The coastal zone regulations require that, *after* having made a determination of significance pursuant to SEQRA, "[w]here a determination is made pursuant to 6 NYCRR Part 617 that an action may have a significant effect on the environment, the agency shall comply with the requirements of 6 NYCRR 617.9(b)(5)(vi) and 617.11(e). Fulfilling such requirements constitutes a determination of consistency as required by Executive Law article 42." 19 NYCRR § 600.4(a). Where "a determination is made pursuant to 6 NYCRR Part 617 that an action will not have a significant effect on the environment, and where the action is in the coastal area within

the boundaries of an approved local Waterfront Revitalization Program area, and the action is one identified by the Secretary pursuant to section 916(1)(a) of the Executive Law," the regulations require that "a State agency shall submit, through appropriate existing clearing house procedures, information on the proposed action to the local government and, at the time of making its decision on the action, file with the Secretary a certification that the action will not substantially hinder the achievement of any of the policies and purposes of the applicable approved local Waterfront Revitalization Program and whenever practicable will advance one or more of such policies." 19 NYCRR § 600.4(c).

Section 600.2(b) of the regulations defines "actions" to mean "either type I or unlisted actions as defined in SEQR (6 NYCRR 617.2), which are undertaken by State agencies; the term shall not include excluded actions as defined in SEQR (6 NYCRR 617.2) or actions not subject to SEQR pursuant to other provisions of law." Type II actions under SEQRA are therefore excluded from the requirements of the CMP. For the reasons described above, issuance of a water withdrawal permit to TransCanada is not Type II action under SEQRA.

This conclusion is fortified by the fact that the current list of state agency actions that are to be undertaken in a manner consistent with the NYC WRP lists permits issued pursuant to Article 15 of the ECL, the water withdrawal permitting sections. [23]

For these reasons, the trial court erred in holding that the issuance of an initial water withdrawal permit to TransCanada did not violate New York State's Waterfront Revitalization of Coastal Areas and Inland Waterway Act ("WRA") and related acts.

POINT IV

DEC FAILED TO EXERCISE ITS PUBLIC TRUST RESPONSIBILITIES IN ISSUING A WATER WITHDRAWAL PERMIT TO TRANSCANADA TO TAKE 1.5 BILLION GPD FROM THE EAST RIVER WITHOUT ADEQUATELY PROTECTING FISH AND WILDLIFE IN THE RIVER AND THE HUDSON RIVER ESTUARY

The trial court committed reversible error when it failed to address Petitioners' claim that DEC's actions in issuing a water withdrawal permit allowing TransCanada to destroy billions of fish and other aquatic organisms in the East River without considering the impacts of the withdrawals or

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

imposing adequate water conservation measures violate its public trust duties under the New York State Constitution, numerous state environmental statutes and the common law.

The public trust doctrine refers to the duty of the state government to hold and preserve certain natural resources, including water and fish, for the benefit of its citizens. The common law public trust doctrine has long been recognized in New York and has been incorporated in the State Constitution, Article XIV, and in our state environmental statutes, including Articles 8, 11 and 15 of the ECL and Article 42 of the Executive Law.

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

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

Accord *In re Del. River at Stilesville*, 115 N.Y.S. 745 (App. Div. 1909), holding that, "[t]he state, the representative of the people, the common owner of all things *feræ naturæ*, not only has the right, but is under a duty, to preserve and increase such common property." *Id*. at 753. In *Stilesville*, the court rejected a dam owner's challenge to a requirement that it construct a fish ladder around the dam. The court observed that "[t]he people of the state have . . . as an easement in this stream the right to have fish inhabit its waters and freely pass to their spawning beds and multiply . . . and no riparian proprietor upon the stream has the right to obstruct the free passage of the fish up the stream to the detriment of other riparian proprietors or of the public." *Id.* at 754.

Common law public trust principles were applied in *W.J.F. Realty Corp. v. New York*, 176 Misc.2d 763 (Suffolk County 1998), *aff'd* 267 A.D.2d 233 (2nd Dep't 1999) (applying the public trust doctrine to uphold the Long Island Pine Barrens Act, which protects the Long Island aquifer, against a takings challenge), and *Smithtown v. Poveromo*, 71 Misc.2d 524 (Suffolk County 1972), *rev'd on other grounds*, 79 Misc.2d 42 (App.Term Suffolk County 1973) ("The control and regulation of navigable waters and tideways was a matter of deep concern to sovereign governments dating

back to the Romans . . . . The entire ecological system supporting the waterways is an integral part of them (the waterways) and must necessarily be included within the purview of the trust.").

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

The state legislature has incorporated public trust principles in a number of sections of the ECL, including Article 8, SEQRA, Article 11, the Fish and Wildlife Law and Article 15, the WRL, as well Article 42 of the Executive Law, the as the WRA. The legislative declarations contained in these laws make these public trust purposes clear. See e.g., ECL § 8-0103, ECL § 11-0105, ECL § 15-0105, Executive Law § 910. As noted above, the Water Resources Protection Act was passed in 2011 to strengthen the protections contained in Article 15. In 1987, the legislature established the Hudson River estuary management program "to protect, preserve and, where possible, restore and enhance the Hudson River estuarine district." ECL §

11-0306. Also as noted above, the most recent draft Hudson River Estuary Action Agenda adopted pursuant to Section 11-0306 calls for the installation of closed cycle cooling at the power stations in the estuary, *supra*, note 15.

Public trust interests are explicitly referenced in Policy 8.5 of the NYC WRP:

> 8.5 Preserve the public interest in and use of lands and waters held in public trust by the state and city. . . .
>
> G. Re-establish public trust interests where appropriate in existing grants not used in accordance with the terms of the grant or the public trust doctrine.
>
> H. Minimize interference with public trust rights to the extent practicable, when exercising riparian interests. Provide mitigation to the extent appropriate where public access would be substantially impeded by the proposed activity. [24]

Whether an environmental review is required or not under SEQRA, DEC is required to comply with its public trust obligations in issuing the TransCanada water withdrawal permit. In issuing a permit to take more than 1.5 billion gallons of water per day from the East River without adequately protecting the fish and wildlife in the river and the Hudson River Estuary of which the river is a part, DEC violated those obligations. The trial court's

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

decision not to rule on Petitioner's claims of violations of DEC's public trust obligations.

CONCLUSION

For the foregoing reasons, Sierra Club and Hudson River Fishermen's Association respectfully submit that the judgment of the trial court should be reversed and the water withdrawal permit issued by DEC to TransCanada for its Ravenswood Generating Station should be annulled.

DATED: Buffalo, New York
July 27, 2015

Respectfully submitted,

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

GARY ABRAHAM, ESQ.
170 N. Second St.
Allegany, NY 14706
Telephone: (716) 372-1913

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

JONATHAN GEBALLE, ESQ.
11 Broadway, Suite 615
New York, NY 10004
Telephone: 212-732-0800

Attorneys for Petitioners-Appellants

APPELLATE DIVISION – SECOND DEPARTMENT
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 670.10.3(f) 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
Footnote Point Size:	12
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, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 13,951.

DATED: Buffalo, New York
July 27, 2015

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