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.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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Queens County Clerk's Index No. 2949/14

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PRELIMINARY STATEMENT

The legal issue at the heart of this appeal is a simple one—does the recently enacted New York Water Resources Law give the New York State Department of Conservation (DEC) discretion in setting the terms and conditions for "initial" water withdrawal permits issued to existing users? If DEC has discretion in setting terms and conditions for such permits, the trial court erred in determining that issuance of an "initial" water withdrawal permit qualifies as a Type II action under SEQRA.

INTRODUCTION

Should DEC be allowed to subvert the first major legislation addressing the regulation of water withdrawals in this state in over 100 years, legislation designed to protect our state's water resources for the next century? This is the fundamental question before this court. Subversion will occur if the interpretation of the recently enacted New York Water Resources Law urged by Respondents and approved by the trial court is allowed to stand.

The law and the legislative history are absolutely clear that large existing users are to be subject to the new law. Users taking less than 100,000 gallons of water a day and a few specific types of existing users, such as agricultural users, are exempt from the law's permitting requirements. Now, after the law has been

enacted and the regulations promulgated, DEC and large users are attempting to turn the lack of exemption for large existing users into a benefit even greater than an exemption would provide. If their proposed interpretation is allowed to stand, a large existing user will have the best of all possible worlds—a permit that is a privilege to take water and may subsequently be interpreted to give permit holders priority water rights over unpermitted users, without any of the conditions the law requires in exchange for the grant of the permit.

DEC's new interpretation turns a law designed to protect our state's rich water resources into a give-away of those resources to the very persons targeted for permitting. The full ramifications of the give-away may take years to unfold, the fundamental issues of water resource protection and DEC authority presented by this interpretation are discernible today.

The harms that result from this interpretation are compounded because if DEC's claim it has no discretion to deny permits or set conditions on permits to existing users is affirmed, the issuance of such permits will be exempt from review under SEQRA and the coastal zone laws.

Pursuant to its radical new interpretation of the Water Resources Law, DEC issued a water withdrawal permit to TransCanada for its TC Ravenswood generating station in Queens to take more than 1.5 billion gallons of water a day from the East River without conducting a SEQRA review of the impacts of the

withdrawal. The TransCanada permit is the first permit issued by DEC under the new law and regulations. The decision in this case, therefore, will set the precedent for the implementation of this important law.

ARGUMENT

POINT I

INITIAL PERMITS ARE NOT EXEMPT FROM THE WATER RESOURCES LAW AND REGULATIONS

Respondents' key assertions in this proceeding are that DEC is mandated to issue initial water withdrawal permits to existing users pursuant to without making the determinations required in ECL § 15-1503.2(a)-(h) and 6 N.Y.C.R.R. § 601.11(c)(1)-(8) or setting conditions to implement those determinations, and that DEC has no discretion to deny an initial permit. For the reasons discussed in Petitioners' initial brief and below, Respondents misinterpret the provisions of the Water Resources Law ("WRL"), ECL Article 15, Title 15, §§ 1501 *et seq*., and its implementing regulations, 6 N.Y.C.R.R. Part 601.

A. Respondents Misinterpret the Significance of the Phrase "Shall Issue"

In support of its contentions regarding the mandatory nature of initial permits, DEC points to the phrase "shall issue" in Section 15-1501.9 of the WRL,

ECL § 15-1501.9. DEC Brief 19-20.[1] Section 15-1501 relates generally to the issuance of water withdrawal permits. Section 15-1501 has nine subsections. Subsection 9 authorizes the issuance of initial permits to existing water users. The wording of Subsection 9 is perfectly clear that initial permits are to be "subject to appropriate terms and conditions as required under this article." It is therefore obvious that the "shall issue" wording in Subsection 9 does not exclude initial permits from the other requirements of Section 15-1501, Section 15-1503.2(a)-(h) or the other provisions of the WRL.

Almost every subsection of Section 15-1501 uses the word "shall." Subsection 1 provides that "no person who is engaged in, or proposing to engage in, the operation of a water withdrawal system with a capacity of greater than or equal to the threshold volume, *shall have any power* [emphasis added]" to make a withdrawal from the waters of New York without a permit to do so. Subsection 2 provides that valid public water supply permits "*shall remain* [emphasis added]" in force and effect. Subsection 3 provides that nothing in the water withdrawal permitting requirements "*shall be deemed* [emphasis added]" to nullify the State Sanitary Code applicable to drinking water supplies. Subsection 4 provides that DEC "*shall promulgate* [emphasis added]" regulations to implement the water

[1] When discussing ECL § 15-1501.9 and 6 N.Y.C.R.R. § 601.7, Respondents also use the word "entitled" in quotes, although the word "entitled" does not appear in either the WRL or the water permitting regulations. The word does appear in the legislative history of the WRL and is discussed in that context below.

withdrawal permitting program, "which *shall establish*: (a) minimum standards for operation and new construction of water withdrawal systems; . . . . [emphasis added]." Subsection 5 provides that DEC is authorized to consolidate existing permits for public water supplies. Subsection 6 provides that each person who is required to obtain a permit "*shall annually, . . . , report* [emphasis added]" water usage and water conservation measures to the DEC. Subsection 7 exempts certain types of withdrawals from the permitting requirements. Subsection 8 provides that DEC "*shall establish* [emphasis added]." a water conservation and efficiency program. Subsection 9 provides in its entirety:

> 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 [emphasis added].

ECL § 15-1501.9. Given the explicit statement in Subsection 9 that an initial permit shall be "subject to appropriate terms and conditions as required under this article," there is no basis in the wording of this subsection to argue that initial permits are not subject to the terms and conditions that apply to water withdrawal permits generally.

As the Court of Appeals explained in the *Majewski* case, the starting point in interpreting a statute is the statutory text. "If the [words employed] have a definite

meaning which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning [citations omitted]." *Majewski v. Broadalbin-Perth Cent. School Dist.,* 91 N.Y.2d 577, 583 (1998). Accord *Balsam v. Fioriglio*, 123 A.D.3d 750 (2nd Dept. 2014), *State Division of Human Rights v. Berler*, 46 A.D.3d 32, 40 (2nd Dept. 2007). The case cited by TransCanada as purporting to show that a provision was "cast in mandatory terms as evidenced by the repeated use of the word 'shall,'" *NYPIRG v. Dinkins*, 83 N.Y.2d 377 (1994) is not authority for Respondents' assertion that a statutory mandate to issue certain types of permits encompasses an additional mandate not to include any requirements in those permits. Petitioners agree that DEC is mandated to issue initial permits to existing users, but Petitioners assert that mandate includes a mandate to include appropriate and conditions in the permits issued, and that the mandate allows denial of applications for initial permits in certain circumstances. Respondents read far more than is warranted into the use of the word "shall" and the case they cite does not provide justification for such overreaching.[2]

Just as Respondents' misinterpret the statutory requirements applicable to initial permits, they also misinterpret the applicable regulatory provisions. The

[2] In the *NYPIRG* case, Petitioners sought to compel the Mayor and City Council of New York to establish and fund the Independent Budget Office (IBO). The Court of Appeals found that "It is clear that the [City] Charter mandates the establishment of the IBO. The language of the Charter explicitly requires that the office be set up and funded." 83 N.Y.2d. at 385.

regulations implementing the WRL, 6 N.Y.C.R.R. Part 601, were promulgated November 28, 2012, effective April 1, 2013, R. 524-531, just four months before notice of the TransCanada permit application was published in DEC's Environmental Notice Bulletin on August 7, 2013. R. 88.

There are 23 sections in Part 601, including Section 601.6 captioned "Water withdrawal permits," Section 601.7 captioned "Initial permits," Section 601.9 captioned "Permit exemptions," Section 601.10 captioned "Application for a permit; Renewal of an Existing Permit," Section 601.11 captioned "Action on permit applications," Section 601.12 captioned "General provisions of a water withdrawal permit," Section 601.15 captioned "Modification of water withdrawal permits," and Section 601.16 captioned "Denial, suspension or revocation of permits." Respondent TransCanada argues that, because Section 601.7 is captioned "Initial Permits," no other section of the regulations applies to initial permits. TransCanada Brief, 22-26. However, the wording of Section 601.7 makes clear that the other sections of Part 601 also apply. Subsection (e) of Section 601.7 specifically provides that "An initial permit . . . *includes all terms and conditions of a water withdrawal permit, including environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies, and is subject to modification, suspension and revocation, pursuant to the requirements of this Part* [emphasis added.]" The wording of Subsection (e) leaves no room for

argument that all the terms and conditions required to be included in a water withdrawal permit pursuant to Part 601 are required to be included in an initial permit, including terms and conditions relating to environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies as required by ECL § 15-1503.2(a)-(h) and 6 N.Y.C.R.R. § 601.11(c)(1)-(8).

DEC says Petitioners' interpretation of the requirements applicable to initial permits would "eliminate the distinction between initial and new permits." DEC Brief, 22. But the distinction DEC urges is not found in the statute or the regulations.

Petitioners point out in their initial brief that DEC's interpretation of the "shall issue" wording in Section 15-1501.9 of the Water Resources Law is contrary to its interpretation of the "shall issue" wording in Section 23-0503.2 of the Oil, Gas and Solution Mining Law which DEC interprets as giving them sufficient discretion to provide a basis for review of oil, gas and solution mining permits under SEQRA. Petitioners' Brief at 52-53. Respondents argue that consideration of the permitting provisions applicable to gas wells not relevant because DEC has authority to deny a gas well permit and to require that drilling be conducted in a manner that prevents pollution of fresh water supplies. TransCanada Brief, 46-48, DEC Brief 32-33. However, as discussed in the next section, the clear wording of

the WRL and the water withdrawal regulations shows that DEC has authority to deny a water withdrawal permit to an existing user and to set conditions to prevent harm to water sources and other users. Thus DEC's interpretation of its discretion under the "shall issue" wording of a similar permitting statue is directly relevant to its interpretation of its discretion under the WRL. Respondents' baseless claim that this argument is not properly before this court demonstrates that they recognize the merit of the comparison. [3] TransCanada Brief, 15, 47, DEC, Brief 33.

For these reasons, the phrase "shall issue" in ECL § 15-1501.9 and 6 N.Y.C.R.R. § 601.7 does not give DEC authority to issue an initial water

[3] Respondents also argue that Petitioners' reference to the oil, gas and solution mining permitting law is not properly before this court on the ground that the argument was not raised in the court below. The reference is made, however, to illustrate Petitioners' fundamental argument in this proceeding, that DEC has not correctly interpreted the "shall issue" wording in ECL § 15-1501.9. Even if Petitioners' reference to the oil and gas permitting law were to be regarded as an entirely new argument, it would be proper to raise an issue of statutory construction for the first time in this court. *MTR of Richardson v. Fiedler*, 67 N.Y.2d 246, 250 (1986). ("[Appellants] contend in this court, for the first time, that a claimant is excluded from compensation benefits, as a matter of law, if he is engaged in an illegal activity at the time of the accident. . . . The argument raises solely a question of statutory interpretation, however, which we may address even though it was not presented below.")

The general rule concerning questions not raised at trial is stated by the Court of Appeals in *Telaro v. Telaro*, 25 N.Y.2d 433 (1969). "[T]he general rule concerning questions raised neither at the trial nor at previous stages of appeal is far less restrictive than some case language would indicate. Thus, it has been said: "if a conclusive question is presented on appeal, it does not matter that the question is a new one not previously suggested. No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court." [Citation omitted.] Of course, where new contentions could have been obviated or cured by factual showings or legal countersteps, they may not be raised on appeal. But contentions which could not have been so obviated or cured below may be raised on appeal for the first time. . . ." *Id*. at 439. Accord, *Block v. Magee*, 146 A.D.2d 730, 732-733, (2nd Dept. 1989), *Buywise Holding, LLC v. Harris*, 31 A.D.3d 681, 682 (2nd Dept. 2006) and *Williams v. Naylor*, 64 A.D.3d 588 (2nd Dept. 2009).

withdrawal permit without the conditions required by ECL § 15-1503.2(a)-(h) and 6 N.Y.C.R.R. § 601.11(c)(1)-(8).

B. Respondents Misinterpret DEC's Authority to Deny Initial Permits

Respondents seek to buttress their claims that DEC has no discretion in issuing permits to existing users by arguing that DEC has no authority to deny a permit to an existing user. TransCanada Brief, 32-35. DEC Brief, 26-27. This claim flies in the face of the clear wording of Section 15-1503 the WRL and Section 601.16(a) of the implementing regulations. Subsection 2 of ECL § 15-1503 states that "[i]n making its decision to grant *or deny* a permit or to grant a permit with conditions, the department shall determine . . . [emphasis added]." The wording of Subsection 2 does not exempt initial permits from being denied. In addition, Subsection 4 of ECL § 15-1503 states 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, or to bring into cooperation all persons that may be affected by the project, but it shall make a reasonable effort to meet the needs of the applicant, with due regard to the actual or prospective needs, interests and rights of others that may be affected by the project* [emphasis added]." Both Subsection 2 and Subsection 4 make absolutely

clear that DEC has the power to deny any water withdrawal permit application, including an application for an initial permit.

DEC says the eight factors listed in Subsection 2 of Section 15-1503 to be determined by the DEC in making a decision whether to granting or deny a water withdrawal "do not apply to initial permits because they expressly apply to 'proposed' or 'future' withdrawals." DEC Brief, 21. Accord TransCanada Brie, 23-26. However, the word "future" does not appear in Subsection 2 or in any other section of the WRL or the regulations. It is not logical to interpret the phrase "proposed withdrawal" in Subsection 2 as excluding applications for existing withdrawals from the purview of that section. A more logical explanation is that "proposed" means "withdrawal proposed for permitting." Existing withdrawals are subject to permitting under the WRL, as well as new withdrawals. Before an existing withdrawal is permitted, it is "proposed" for permitting. Because an initial permit may be denied, an existing withdrawal that has not yet been permitted is "proposed" until it has been permitted. Because Section 15-1501.9 states that "applicable terms and conditions," are to be included in it is clear that the phrase "proposed withdrawal" does not constitute an exemption from the requirements of Section 15-1503(2) for initial permits.

In any event, the use of the word "proposed" in Subsection 2 of Section 15-1503 is an extremely flimsy thread upon which to hang all the conclusions DEC

and TransCanada wish to draw about DEC having no discretion but to issue initial permits.

Section 601.16(a) of the water permitting regulations lists the circumstances in which that DEC may deny an application for a water withdrawal permit. Six circumstances are listed. Three of the listed circumstances are circumstances that relate to characteristics of the withdrawal:

> (1) the water withdrawal will result in contravention of water quality standards or guidance values;
>
> (2) the water withdrawal will exceed or cause to be exceeded the safe yield or sustainable supply of the water source;
>
> (3) the water withdrawal will cause a new or increased interbasin diversion that results in a significant adverse impact on the water quantity of the source New York major drainage basin;

Two of the circumstances related to characteristics of the applicant:

> (4) the permittee or applicant has been convicted of a crime related to the permitted activity under any federal or state law;
>
> (5) the permittee or applicant has been determined in an administrative, civil or criminal proceeding to have violated any provision of the ECL, any related order or determination of the Commissioner, any regulation of the Department, any condition or term of any permit issued by the Department, or any similar statute, regulation, order or permit condition of the federal or other state government, or agency, on one or more occasions and in the opinion of the Department, the violation that was the basis for the action posed a significant potential threat to the environment or human health, or is part of a pattern of non-compliance;

And the final circumstance relates to approval by an applicable compact basin commission:

(6) the water withdrawal has not been approved by the applicable compact basin commission.

Nothing in the wording of Section 601.16(a) exempts initial permit applications from this provision. Not only is it inconsistent with Section 601.16(a) for DEC to argue that it does not have authority to refuse to issue an initial permit in circumstances where the water withdrawal would exceed the safe yield or sustainable supply of the water source, it is inconsistent with the purposes of the Water Resources Law and the general authority granted to DEC under the WRL as set forth in Title 1 of ECL Article 15. Clearly DEC has authority to deny an initial permit to prevent damage to a water source or to other users.

For these reasons, DEC's authority to deny a water withdrawal permit application is not removed in the case of initial permits.

C. Respondents Distort the Legislative History of the Water Resources Law

Because the statutory wording of the 2011 amendments to the Water Resources Law is clear, it is not necessary to look at the legislative history to interpret the law. Nevertheless, the legislative history supports the clear wording of the statute and does not support the interpretation given to that history by TransCanada and DEC. In particular, Respondents point to the use of the word "entitled" in reference to existing users in the bill jacket for the 2011 amendments. TransCanada Brief 17, 20, 48, DEC Brief, 22-23, 31.

Just as Respondents try to read far too much into the phrases "shall issue" and "proposed withdrawal," in the WRL and the regulations, they also try to read far too much into the use of the word "entitled" in the legislative history. In most permitting statutes, an applicant is entitled to a permit if they meet certain statutory or regulatory standards. To say that an applicant is "entitled" to a permit does not mean that the permit must be issued without conditions or that the permit cannot be denied.

The legislative history of the WRL makes absolutely clear that large existing users are to be subject to the new law. Only users taking less than 100,000 gallons of water a day and a few specific types of existing users, such as agricultural users, are exempt from the law's permitting requirements. Respondents' interpretation of the law puts agricultural users and all small water users at a huge disadvantage. Not only do they not have permits, their water rights are subordinate to the rights of permit holders, who may claim rights to all the water in the water source. Respondents make the absurd claim that DEC has no power to prevent this result by denying an initial permit.

Respondents' argument that it was understood at the time the bill was being considered by the legislature that no conditions would apply to permits issued to existing users is belied by the exemption contained in the statute for "existing

withdrawals for agricultural purposes."[4] If the agricultural industry had understood the law to mean what DEC now says it means—a give away of a permit for a user's maximum withdrawal capacity with no strings attached—surely the agriculture industry would not have sought an exemption that precludes them from obtaining a permit, but would have sought to be included the permit give-away.

For these reasons, Respondents are incorrect that the legislative history of the Water Resources Law supports their claim that the terms and conditions specified in the WRL do not apply to initial permits issued to existing users.

POINT II

ISSUANCE OF AN INITIAL PERMIT IS NOT EXEMPT FROM SEQRA

The issue of whether issuance of an initial permit can properly be determined to be a ministerial action under SEQRA is addressed in Petitioners' initial brief. *Id*., 39-59. In their briefs in response, Respondents seek to avoid application of the relevant case law on the scope of the ministerial action exemption under SEQRA by arguing that DEC cannot deny an application for an

[4] ECL § 15-1501 subsection 7 provides "The following water withdrawals are exempt from the permit requirements established by this section: . . . (e) existing withdrawals for agricultural purposes provided the withdrawal has been registered with the department pursuant to the requirements of title sixteen of this article or reported to the department pursuant to the requirements of title thirty-three of this article on or before February fifteenth, two thousand twelve."

initial water withdrawal permit. As discussed above, it is clear that DEC does have the power to deny an initial water withdrawal permit application. Furthermore, it is clear that the circumstances in which a permit may be denied as set forth in 6 N.Y.C.R.R. § 601.16(a), circumstances where the water withdrawal would exceed the safe yield or sustainable supply of the water source, are circumstances that would be informed by an EIS. Consequently, the case law upon which Respondents and the trial court rely does not support a 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.[5]

POINT III

DEFERENCE TO DEC'S INTERPRETATION OF THE WATER RESOURCES LAW IS NOT APPROPRIATE

The issue of deference to DEC's interpretation of the Water Resources Law is addressed at some length in Petitioners' initial brief. Id., 53-58. Petitioners cite

[5] Petitioners' argument that DEC exercised discretion in issuing the TransCanada permit when it adjusted the maximum reported capacity of the permit may be raised for the first time on appeal because the permit and the revised permit are part of the record in this proceeding. R. 104, 191. *Rentways, Inc. v. O'Neill Milk & Cream Co*., 308 N.Y. 342, 349 (1955) ("It is quite true that an appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had they been presented at the trial. [Citations omitted]. But, quite obviously, the present is not such a case. Here, the issue involved the meaning of the written contract between the parties. The writing was in the record; each party had full opportunity to adduce all pertinent evidence bearing on its construction; and there is no claim or suggestion that either party would or could have offered any further evidence.")

A third argument that TransCanada says Petitioners did not raise below, the argument that DEC's BTA policy requiring closed-cycle cooling is not implemented in TransCanada's SPDES permit, was in fact raised in Petitioners' reply memorandum of law below. R. 568.

a number of cases which establish that judicial deference to DEC's interpretation is not appropriate in matters of statutory interpretation. *Raritan Development Corp. v. Silva,* 91 N.Y.2d 98 (1997)m *Matter of Brown v. NYS Racing and Wagering Board*, 60 A.D.3d 107 (2nd Dept. 2009), *HLP Properties, LLC, v. NYS DEC*, 21 Misc.3d 658 (NY County 2008). Respondents' fail to address these cases in their briefs, instead citing cases that Petitioners distinguish in their initial brief.

For the reasons discussed in Petitioners' initial brief, 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, and the cases cited by Respondents do not modify this conclusion. There is no basis in these cases for deferring to DEC's interpretation of its discretion under SEQRA, and the trial court erred in so ruling.

POINT IV

DEC MUST COMPLY WITH ITS PUBLIC TRUST OBLIGATIONS IN CARRYING OUT ITS DUTIES UNDER THE WATER RESOURCES LAW AND SEQRA

DEC states in its brief that it "has complied with the WRL and SEQRA in issuing the TransCanada permit" and that "Petitioners cite no provision of law that imposes a separate set of 'public trust objections' on DEC on top of existing laws." DEC Brief, 35. In fact, Petitioners cite numerous constitutional and statutory provisions and common law principles that impose "public trust obligations" on

DEC in carrying out its duties under the ECL. Petitioners Initial Brief, 63-67. DEC's failure to give effect to the requirements of the Water Resources Law and SEQRA is a violation not just of the Water Resources Law and SEQRA, but of these other laws as well.

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
January 12, 2016

Respectfully submitted,

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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.

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Dated: Buffalo, New York
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