To be Argued by:
YVONNE E. HENNESSEY
(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 NON-PARTY RESPONDENT

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Queens County Clerk's Index No. 2949/14

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the lower court's decision correctly hold that the New York State Department of Environmental Conservation ("NYSDEC") complied with the 2011 Water Resources Protection Act ("2011 WRPA"), ECL Section 15-1501 *et seq*, when it issued an "Initial" water withdrawal permit ("Initial Permit") to Respondent TC Ravenswood, LLC[1] ("TC Ravenswood")?

ANSWER: Yes, because the lower court found that the 2011 amendments to the WRPA and the implementing regulations required NYSDEC to issue the Initial Permit to TC Ravenswood on the basis of statutory specifications regardless of environmental concerns, the lower court correctly determined that there was no violation of the 2011 WRPA.

2. Did the lower court correctly find that NYSDEC's issuance of TC Ravenswood's "Initial" water withdrawal permit was a nondiscretionary action such that it was as a Type II action under the State Environmental Quality Review Act ("SEQRA")?

ANSWER: Yes, because NYSDEC lacked discretion and TC Ravenswood was entitled to an Initial Permit under the 2011 WRPA and implementing regulations, the lower court correctly held that NYSDEC's action was properly classified as a ministerial, Type II action not subject to environmental review under SEQRA.

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[1] The caption contained in the Notice of Appeal and Appellants' Brief inaccurately identifies "TC Ravenswood, LLC" as "TRANS CANADA RAVENSWOOD LLC."

3. Did the lower court correctly find that NYSDEC's issuance of the TC Ravenswood "Initial" water withdrawal permit was exempt from review under the New York State Coastal Management Program and the New York City Waterfront Revitalization Program?

ANSWER: Yes, because the issuance of the TC Ravenswood Initial Permit was properly classified as a Type II action under SEQRA, the lower court correctly found that it was exempt from review under the New York State Coastal Management Program and the New York City Waterfront Revitalization Program.

4. Did the lower court's decision address Appellants' claim that NYSDEC violated its public trust obligations in issuing an Initial Permit to Respondent TC Ravenswood?

ANSWER: Yes, the lower court appropriately addressed Appellants' claim alleging violations of the public trust doctrine when it correctly determined that the 2011 WRPA and its implementing regulations required NYSDEC to issue TC Ravenswood an Initial Permit for pre-existing water withdrawals already subject to sufficient conditions in TC Ravenswood's New York State Pollutant Discharge Elimination System ("SPDES") permit without further environmental review under SEQRA.

5. Is Appellants' challenge to the TC Ravenswood Initial Permit barred as a collateral attack on the Facility's SPDES permit because Appellants' true challenge is to the Legislature's mandate in the 2011 WRPA that existing sources were entitled

to an Initial Permit, as further confirmed in NYSDEC's implementing regulations?

ANSWER: Yes, Appellants' collateral attacks on the 2011 WRPA, NYSDEC's implementing regulations, and the TC Ravenswood SPDES permit, all of which the Appellants elected not to challenge, are time-barred and not properly before this Court.

PRELIMINARY STATEMENT

Non-Party Respondent TC Ravenswood respectfully submits this brief in support of the Decisions dated October 1, 2014 and October 2, 2014, and Judgment made on November 25, 2014 as filed and recorded on December 10, 2014 by the Honorable Robert J. McDonald of the Supreme Court, Queens County, including that portion holding that the 2011 WRPA did not give NYSDEC discretion to deny TC Ravenswood an Initial Permit, that NYSDEC is entitled to judicial deference in its interpretation of the 2011 WRPA, and that issuance of TC Ravenswood's Initial Permit was a Type II action under SEQRA and, thus, exempt from environmental review. R.A. 5-21. The Decision and Judgment should be upheld.

Appellants' real challenge here is to the 2011 WRPA mandate that NYSDEC implement a comprehensive permitting program in which existing sources would be *entitled* to an Initial Permit, as well as to the implementing regulations promulgated by NYSDEC which further confirmed that existing sources would be issued an Initial Permit, subject only to compliance with predefined criteria. Such challenges, however, are patently improper here with respect to the Initial Permit issued to TC Ravenswood. They are also time-barred. Appellants had ample opportunity to challenge either the 2011

WRPA or NYSDEC's implementing regulations but they chose not to. They cannot now be heard to complain.

To the extent that Appellants' arguments concern TC Ravenswood directly, those arguments attack the Ravenswood Facility's pre-existing SPDES permit and the Best Technology Available ("BTA") selected for the facility, which in Appellants' estimation should be a closed-cycle cooling system. Tellingly, Appellants' did not challenge the TC Ravenswood's SPDES permit, or its BTA determination, at the time NYSDEC issued the SPDES permit. Such a challenge is now barred. Furthermore, the 2011 WRPA did not authorize NYSDEC to set a new requirement for closed-cycle cooling because TC Ravenswood was *entitled* to continue withdrawing water at the maximum capacity reported to NYSDEC as of February 2012. Appellants' challenge here, therefore, is nothing but an untimely and improper attempt to revisit NYSDEC's substantive determination authorizing the Ravenswood Facility's long-standing use of a once-through cooling system.

Even assuming the propriety of Appellants' claims, the lower court correctly found that NYSDEC did not violate the 2011 WRPA when it determined that issuance of an Initial Permit to TC Ravenswood was a ministerial, Type II action, exempt from environmental review under

SEQRA. The 2011 WRPA, its implementing regulations, and the legislative history all confirm that the NYSDEC lacked discretion in issuing TC Ravenswood's Initial Permit and that TC Ravenswood was *entitled* to an Initial Permit as an existing operator that appropriately reported its maximum withdrawal capacity. Moreover, NYSDEC's decision-making was rationally based and entitled to substantial deference. Because Appellants' other claims flow from the Type II classification, the lower court also correctly determined that they lack merit.

COUNTERSTATEMENT OF FACTS

A. The Ravenswood Facility's Long-Standing Operations

TC Ravenswood owns and operates an electric generating facility located in Long Island City, Queens, New York (the "Ravenswood Facility"). R.A.[2] 498. The Ravenswood Facility produces electricity for use throughout New York City. R.A. 498. With a combined capacity of approximately 2,480 megawatts ("MW"), the Ravenswood Facility has the ability to, and has, produced up to approximately 20% of the total electricity used by New York City. R.A. 498.

[2] "R.A." refers to the Record on Appeal.

The Ravenswood Facility consists of three (3) steam boiler turbine/generators, known as Units 10, 20 and 30; a combined cycle unit, known as Unit 40 and; several simple cycle combustion turbines. R.A. 54, 144, 498. Units 10, 20 and 30 were constructed in the early to mid-1960s, while Unit 40 went into service in 2004. R.A. 498.

For over 50 years, the Ravenswood Facility has used the same once-through cooling water system that withdraws water from the East River, which is circulated through the cooling system to cool the Unit 10, 20 and 30 boiler equipment, turbines, and auxiliary equipment, and then discharged back into the East River. R.A. 58, 498. Importantly, the water withdrawn by the Ravenswood Facility for cooling purposes is not consumed. R.A. 459. Rather, the water is withdrawn, circulated, and substantially all of the water that is withdrawn is returned to the East River pursuant to a previously approved SPDES permit. R.A. 459.

Cooling water from the East River is a critical component of the production of electricity at the Ravenswood Facility, as it is necessary for proper operation, and to prevent overheating. R.A. 59, 499. The maximum capacity of the Ravenswood Facility's cooling water system, which has not changed since the facility was initially installed in the 1960s, is 1,527.84 million gallons per day ("MGD"). R.A. 499. This ensures that there is

sufficient water to keep the units properly cooled and to prevent overheating. R.A. 499. The actual amount of cooling water needed per day to keep the boilers and equipment at the Ravenswood Facility from overheating varies based on which units are operating and the amount of time that the units are operating (i.e. load). R.A. 499. For example, the daily average amount of water withdrawn from the East River by TC Ravenswood, and subsequently discharged back to the East River, was 480 MGD in 2012 and 363.1 MGD in 2013. R.A. 500.

B. The Ravenswood Facility's SPDES Permit

The Ravenswood Facility's cooling water intake system, which withdraws water from the East River, has been regulated under the Clean Water Act ("CWA") since the 1970s, and by the SPDES regulations since 1975 when New York State received approval to administer its own water permitting program. R.A. 442, 500, 502. The Ravenswood Facility, therefore, is subject to the BTA requirements for cooling water intake structures under Section 316(b) of the CWA and Section 704.5 of Title 6 of the New York Compilation of Codes, Rules and Regulations ("N.Y.C.R.R."). R.A. 500.

The purpose of BTA is to minimize environmental impacts associated with cooling water intake structures, including impingement and entrainment

of aquatic organisms. R.A. 442-43, 500. As such, the effects of the impingement and entrainment associated with the Ravenswood Facility's cooling water intake system have been studied since at least 1974. R.A. 442-43. A series of diagnostic studies were completed by then-owner Consolidated Edison Company of New York, Inc. between 1991-1994, which assessed the Ravenswood Facility's impact on aquatic resources in the East River and provided information to support a BTA determination. R.A. 443. Additional studies were conducted between 2000 and 2001 in support of a final action plan detailing measures and an implementation schedule for BTA at the Ravenswood Facility, which was approved by NYSDEC in 2005. R.A. 443.

The CWA Section 316(b) and Section 704.5 BTA requirements applicable to the Ravenswood Facility are contained in its SPDES permit issued by the NYSDEC in 2007, and renewed on November 1, 2012.[3] R.A. 117-37, 167-87, 500. The following actions, in combination, were determined by NYSDEC to represent BTA: use of variable speed pumps; strategic timing of scheduled outages; upgrading traveling screens; and continued use of low-stress fish returns. R.A. 443-44. While NYSDEC

[3] The only parties that commented on the draft 2012 SPDES permit during the public comment period were TC Ravenswood and the United States Environmental Protection Agency. *See* R.A. 510-512.

evaluated closed-cycle cooling, it determined that it was not feasible at the Ravenswood Facility due to the limited space available for cooling towers on the site. R.A. 443-44. TC Ravenswood's SPDES permit underwent SEQRA review when it was originally issued in 2007. R.A. 113-15, 500.

The NYSDEC issued guidance on BTA for Cooling Water Intake Structures on July 10, 2011 under its department policy, CP-52.[4] NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, CP-#52 / BEST TECHNOLOGY AVAILABLE (BTA) FOR COOLING WATER INTAKE STRUCTURES (Jul. 10, 2011) [hereinafter "CP-52"]. According to CP-52,

> Facilities for which a BTA determination has been issued prior to the effective date of this policy and which are in compliance with an existing compliance schedule of BTA implementation and verification monitoring will not be subject to new requirements as a result of this policy unless/until the results of verification monitoring demonstrate the necessity of more stringent BTA requirements.

CP-52, at 2. TC Ravenswood's BTA determination was issued prior to the effective date of CP-52. R.A. 156, 287. TC Ravenswood implemented its BTA requirements in accordance with its existing compliance schedule and is currently in the process of completing its verification monitoring program.

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[4] Although the NYSDEC's CP-52 guidance document is not included in the Record on Appeal, these facts are being presented in direct response to new arguments made in Appellants' brief on appeal. *See* Appellants' Brief, at 31-32.

R.A. 148, 177. Accordingly, TC Ravenswood is in full compliance with CP-52.

During the public comment and review period, Appellants' failed to comment on the draft 2012 SPDES permit, or the BTA requirements applicable to the Ravenswood Facility's cooling water intake contained therein, or otherwise challenge TC Ravenswood's 2012 SPDES permit or BTA requirements. R.A. 501.

C. Initial Water Withdrawal Permit

Due to its long-standing non-consumptive water withdrawals from the East River and the existence of its SPDES permit, which contains appropriate conditions to mitigate the environmental impacts associated with the Ravenswood Facility's cooling water intake system, following promulgation of the NYSDEC's regulations implementing the 2011 WRPA, TC Ravenswood submitted an application for an Initial Permit to the NYSDEC on May 31, 2013. R.A. 52-86, 501. TC Ravenswood's application for an Initial Permit sought authorization to withdraw water in an amount and kind similar to what had been previously authorized by NYSDEC for the Ravenswood Facility for approximately 50 years. *See* R.A. 52-86, 498, 500.

NYSDEC issued notice of its tentative determination to issue an Initial Permit to TC Ravenswood in the Environmental Notice Bulletin ("ENB") on August 7, 2013 and again on August 28, 2013. R.A. 88-96, 97-101. The August 28, 2013 notice made clear that the water withdrawal that would be authorized by the Initial Permit for TC Ravenswood was not new. R.A. 99 (stating that "[t]he applicant has applied for an initial permit for the *continued* withdrawal of 1.5 billion GPD of water for operation of the Ravenswood Generating Station.") (emphasis added).

NYSDEC issued the Initial Permit for the Ravenswood Facility on November 15, 2013 and, due to corrections made to the annual water withdrawal reports previously submitted by TC Ravenswood, NYSDEC issued a revised Initial Permit for the Ravenswood Facility on March 7, 2014, which permits the withdrawal of the maximum capacity of the Ravenswood Facility's cooling water intake system. R.A. 104-07, 206-09.

PROCEDURAL HISTORY

On February 18, 2014, Sierra Club and Hudson River Fishermen's Association filed an Article 78 petition with the New York State Supreme Court, Queens County challenging NYSDEC's issuance of a water withdrawal permit to TC Ravenswood for the Ravenswood Facility. R.A. 22-47. On April 24, 2014, TC Ravenswood filed a motion to dismiss with

supporting affidavits. R.A. 464. Also on April 24, 2014, Respondent NYSDEC served its Verified Answer and supporting affidavits. R.A. 395. No oral arguments were heard, and no hearing was held. On November 25, 2014, the lower court issued its judgment denying the petition and dismissing the proceeding on the merits based on its decisions dated October 1, 2014 and dated October 2, 2014. R.A. 5-7. The lower court's Judgment was filed and recorded on December 10, 2014. R.A. 7. On January 7, 2015, Appellants filed a Notice of Appeal. R.A. 3-4. On July 27, 2015, Appellants perfected their brief along with the Record of Appeal. Appellants' Brief, at 68.

ARGUMENT

POINT I

ISSUES NOT RAISED BELOW ARE NOT PROPERLY BEFORE THIS COURT

Certain issues raised here by Appellants were not raised before the lower court and, therefore, are not properly before this Court. As a general and broad rule, any points not raised before the lower court will not be reviewed on appeal to avoid waste. *Kolmer-Marcus, Inc. v. Winer*, 32 A.D.2d 763 (1st Dep't 1969), *aff'd*, 26 N.Y.2d 795 (1970); *Davidson v. Public Administration*, 283 A.D.2d 538, 540 (2d Dep't 2001). "[A]n 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 trial." *Rentways, Inc. v. O'Neill Milk & Cream Co.*, 308 N.Y. 342, 349 (1955). Where a party's failure to raise an issue at the lower court has denied the opposing party the opportunity to submit evidence and arguments in opposition and has also deprived the appellate court of a complete record upon which to make a reasoned review, the claims should be dismissed with prejudice. *See Northville Indus. v. National Union Fire Ins. Co.*, 218 A.D.2d 19, 34 (2d Dep't 1995).

Here, Appellants raise new issues before this Court that were not heard below, thus depriving the Respondents of the opportunity to submit

evidence or arguments to refute those claims, and depriving this Court of a complete record. New issues not previously litigated include Appellants' contentions that (1) NYSDEC's factual correction of TC Ravenswood's maximum water withdrawal capacity was an exercise of discretion (Appellants' Brief, at 41-42); (2) NYSDEC's interpretation that it lacks discretion under the 2011 WRPA conflicts with NYSDEC's interpretation of other non-related statutes (Appellants' Brief, at 52-53); and, (3) TC Ravenswood is not in compliance with NYSDEC's CP-52 BTA Policy (Appellants' Brief, at 31-32). Because Appellants did not raise these arguments below, Respondents were denied an opportunity to submit arguments and evidence in opposition, thus depriving this Court of a complete record. Therefore, this Court must dismiss these new claims with prejudice.

POINT II

THERE HAS BEEN NO VIOLATION OF THE 2011 WRPA

A. The Eight Determinations of ECL Section 15-1503(2) Do Not Apply to Existing Users, Like TC Ravenswood, who are Entitled to an Initial Permit.

Appellants contend that NYSDEC violated the 2011 WRPA by issuing TC Ravenswood an Initial Permit for the Ravenswood Facility without making the required determinations set forth in Section 1503(2) of

Title 15 of New York's Environmental Conservation Law ("ECL"). Appellants' Brief, at 22-28. The lower court correctly rejected this argument, finding that NYSDEC lacked any discretion to consider other factors in issuing an Initial Permit for an existing water withdrawal. R.A. 20. As the lower court properly found, Section 15-1503 is not applicable to Initial Permits for previously existing water withdrawals and "the [2011 WRPA] left DEC with only one course of action regarding Ravenswood – the issuance of a permit allowing the facility to withdraw water from the East River at existing volume." R.A. 20. Therefore, any findings or conclusions from evaluation of the eight determinations set forth in ECL Section 15-1503(2) would have been superfluous.

Appellants have not shown, because they cannot, that NYSDEC was required to use the determinations set forth in ECL Section 15-1503(2) in issuing the Initial Permit to TC Ravenswood. This is because the plain language of the 2011 WRPA, its unequivocal legislative history, and NYSDEC's own implementing regulations refute Appellants' arguments and definitively establish that the determinations listed in ECL Section 15-1503(2) do not apply to Initial Permits for previously existing water withdrawals, like the one issued to TC Ravenswood. As such, Appellants' arguments should be dismissed and the lower court's decision upheld.

1. The Plain Language of the 2011 WRPA and Legislative History Establish That The Eight Determinations Listed in ECL Section 15-1503(2) Do Not Apply to Initial Permits.

Prior to 2011, ECL Article 15, Title 15 required permits only for certain public water supplies without regard to the size of the water withdrawal. R.A. 526. The 2011 WRPA expanded the statutory coverage to include commercial, manufacturing, industrial, oil and gas development, and other purposes for withdrawals that exceeded a threshold volume of 100,000 gallons per day ("gpd"). R.A. 526.

The 2011 WRPA, as codified at ECL Section 15-1501(1)(a), authorized NYSDEC to implement a comprehensive permitting program for water withdrawals from (1) an existing source; (2) a new source; or (3) an increased water withdrawal from an existing permitted source. ECL § 15-1501(1)(a) (2015). Therefore, for water withdrawal systems that did not require a permit before the 2011 WRPA, two separate types of permits were established: "Initial" permits for existing sources and "New" permits for proposed sources.

Specific to *existing* sources, the 2011 WRPA mandates that "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

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.

ECL § 15-1503(2) (emphasis added).

As is apparent, these determinations are couched in terms of the NYSDEC's decision to "grant or deny," which is at direct odds with the ECL Section 15-1501(9) mandate that existing water withdrawals would be "entitled" to a permit. Furthermore, all of the determinations are applicable to future or "proposed" uses and withdrawals, with one determination applicable to a "project," which similarly connotes future use. Not a single determination implies that it would be applicable to a source that is already withdrawing water at the time of the Initial Permit application.

Thus, while NYSDEC had discretion to consider these enumerated determinations in its decision to "grant or deny" a new permit, because

NYSDEC was mandated to issue Initial Permits to existing operators for the maximum capacity reported based solely on whether the operator timely reported existing withdrawals, the eight determinations listed under ECL Section 15-1503(2) have no bearing on and are irrelevant to issuance of an Initial Permit. Accordingly, these statutory determinations do not, because they cannot, apply to NYSDEC's issuance of the TC Ravenswood Initial Permit, an existing withdrawal. Appellants' urgings to the contrary are without merit and would require this Court to adopt a contorted construction of the 2011 WRPA.

Furthermore, not only is Appellants' reading of the 2011 WRPA at odds with its plain language, it also is contrary to the unrefuted legislative history. Pertinent legislative history explains that the 2011 WRPA "provide[s] that existing water withdrawals would be *entitled* to an initial permit based on their maximum water withdrawal capacity reported to DEC on or before February 15, 2012 pursuant to existing law." R. 336 (Bill Sponsor's Memorandum in Support) (emphasis added).

2. NYSDEC's Regulations Implementing the 2011 WRPA Further Confirm That ECL Section 15-1503(2)'s Eight Determinations Are Inapplicable to Initial Permits.

Section 15-1501(4) of the ECL directed NYSDEC to promulgate regulations to implement the new permitting program for water withdrawals. ECL § 15-1501(4). As part of its rulemaking process, NYSDEC published a notice of proposed rulemaking and notice of adoption in the New York State Register. R.A. 518-31. In both notices, NYSDEC reiterated the legislature's mandate that "existing water withdrawals above the size threshold are *entitled* to an initial permit." R.A. 520, 526 (emphasis added). NYSDEC explained that "the amended legislation includes provisions allowing existing systems to utilize the more efficient and less costly initial permit process" to address concerns from industry groups that it would be burdensome for existing operators to apply for permits for withdrawals that have already existed and are already permitted. R.A. 522.

From the outset of NYSDEC's promulgation of the regulations, it has been clear that, just like the 2011 WRPA contemplated, two separate permit review and approval processes would be implemented: one for "Initial" permits for existing sources and one for "New" permits for proposed sources. Specifically, and noticeably absent from Appellants' brief,

NYSDEC promulgated a separate provision specifically for Initial Permits at Section 601.7 of Title 6 of the New York Codes, Rules and Regulations, entitled "Initial Permits." N.Y. COMP. CODES R. & REGS. tit. 6 § 601.7 (2015) [hereinafter "N.Y.C.R.R."].

Under Section 601.7, NYSDEC established that all applicable existing operators "*shall* apply for an initial permit." 6 N.Y.C.R.R. § 601.7(b) (emphasis added).[5] It further confirmed that an Initial Permit would be issued for the withdrawal volume equal to the maximum withdrawal capacity reported to NYSDEC by February 15, 2012. 6 N.Y.C.R.R. § 601.7(d). An Initial Permit also would be for a fixed term not to exceed ten years, and could be modified, if necessary, to correct technical mistakes. 6 N.Y.C.R.R. §§ 601.7(e), 601.15(b)(4). Further, Section 601.7 permits NYSDEC to include both generic conditions as well as conditions necessary to ensure that the water withdrawal system employs "environmentally sound

[5] Any existing user that failed to report existing withdrawals by February 15, 2012 were directed to "submit a complete application for a permit in accordance with section 601.6" under the standard, "new," permit application process. 6 N.Y.C.R.R. § 601.7(c). Operators that did not register or report existing withdrawals would not be eligible for the "quicker and less costly 'initial permit' and [would] instead be required to apply for and obtain a standard water withdrawal permit under its more time consuming and more costly process." R.A. 522. Therefore, an existing source that did not comply with the statutory preconditions would be considered to be a "new" permit and proceed via the standard permit process codified at ECL §15-1503.

and economically feasible water conservation measures to promote the efficient use of supplies." 6 N.Y.C.R.R. § 601.7(e).

Finally, Section 601.7(f) provides that, when a water withdrawal system is subject to a SPDES permit, as is the Ravenswood Facility, NYSDEC will review the Initial Permit application in coordination with the SPDES permit.

The NYSDEC implemented separate regulations for new sources. 6 N.Y.C.R.R. § 601.11. Specifically, Section 601.11(c) states:

> In making its decision to grant or deny a permit or to grant a permit with conditions, the department shall determine whether:
>
> (1) the *proposed* water withdrawal takes proper consideration of other sources of water supply that are or may become available;
>
> (2) the quantity of supply will be adequate for the *proposed* use;
>
> (3) the *proposed 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;
>
> (4) the need for all or part of the *proposed* water withdrawal cannot reasonably be avoided through the efficient use and conservation of existing water supplies;
>
> (5) the *proposed* water withdrawal is limited to quantities that are considered reasonable for the purposes for which the water use is proposed;
>
> (6) 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, including aquatic life; this determination may include an evaluation of whether all withdrawn water that is not lost to reasonable consumptive use will be returned to its source New York major drainage basin;

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

(8) 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.

6 N.Y.C.R.R. § 601.11(c) (emphasis added).

Just like with the 2011 WRPA, it is clear that the determinations are to be used to evaluate future, proposed projects, not existing withdrawals. First, the provision speaks to NYSDEC's ability to "grant or deny" a permit. *Id.* Second, each and every factor speaks to "proposed," not existing, sources. *Id.* Therefore, the regulatory determinations did not apply to NYSDEC's issuance of the TC Ravenswood Initial Permit because it was an existing withdrawal, not a proposed or new project.

Further, it is telling that Sections 601.7 and 601.11 have duplicate provisions, which would be wholly unnecessary if Section 601.11 applied to Initial Permits as well as new permits. This duplication, thus, further

confirms that the factors detailed in Section 601.11(c) do not apply to Initial Permits.[6]

Appellants also mistakenly contend that the "project justification" criteria in Section 601.10(k) should be used to evaluate an Initial Permit. Project justification criteria include:

> (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

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[6] For example, both sections call for the use of "environmentally sound and economically feasible water conservation measures." *Compare* 6 N.Y.C.R.R. § 601.7(e) *with* 6 N.Y.C.R.R. § 601.11(c)(7). Also, both sections state that the Initial permit or permit is valid "for a fixed term not to exceed ten years." *Compare* 6 N.Y.C.R.R. § 601.7(e) *with* 6 N.Y.C.R.R. § 601.11(b). Finally, both sections specify that NYSDEC will review the Initial permit or permit application in coordination with the SPDES or other permit program. *Compare* 6 N.Y.C.R.R. § 601.7(f) *with* 6 N.Y.C.R.R. § 601.11(h).

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

6 N.Y.C.R.R. § 601.10(k) (emphasis added). Again, these regulations refer to projects in the future tense, as opposed to references to existing withdrawals, as noted by repeated use of the word "proposed." *Id.* Therefore, by the plain language of the regulation, the project justifications do not apply to an Initial Permit. *Compare* 6 N.Y.C.R.R. § 601.7 *with* 6 N.Y.C.R.R. § 601.11.

In sum, based upon the plain language of the 2011 WRPA, the unambiguous legislative history and the implementing regulations, Appellants' contentions must fail. There can be no doubt that NYSDEC was *required* to issue an Initial Permit to TC Ravenswood as an existing water withdrawal source without regard for any of the determinations in ECL Section 15-1503(2). As such, NYSDEC complied with the 2011 WRPA in all respects, and Appellants' arguments to the contrary should be rejected.

B. The Terms and Conditions of the TC Ravenswood Initial Permit Set by NYSDEC Met the Requirements of the WRPA.

Appellants also argue that NYSDEC violated the 2011 WRPA by not imposing sufficient terms and conditions to address the factors set forth in ECL Section 15-1503. Appellants' Brief, at 28-31. In particular, Appellants

maintain that appropriate water conservation conditions were improperly omitted from TC Ravenswood's Initial Permit because NYSDEC did not address issues that might have been identified had it considered the eight determinations set forth in ECL Section 15-1503(2) when it reviewed TC Ravenswood's Initial Permit application. Appellants' Brief, at 28-29. Appellants also contend that the facility's SPDES permit conditions are not a substitute for compliance with the 2011 WRPA. Appellants' Brief, at 31-32. Appellants' arguments here, too, lack merit.

The lower court properly found that ECL Section 15-1503 does not apply to the issuance of an Initial Permit. *See* Point II(A), *supra*. Further, Appellants collateral attack on the Ravenswood Facility's SPDES permit and its BTA is improper. *See* Point V, *infra*. Because Appellants have not established otherwise, the terms and conditions included in the TC Ravenswood Initial Permit comply in all respects with the 2011 WRPA.

An application for a WWP must include a water conservation program, as defined at Section 601.10(f).

> 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 N.Y.C.R.R. § 601.10(f) (emphasis added); Appellants' Brief, at 29.

Here, TC Ravenswood submitted its water conservation program on the Water Conservation Program Form ("WCPF") provided by NYSDEC, which was accepted as complete by NYSDEC. R.A. 64-69. The WCPF includes questions for whether water conservation measures include source and customer metering; frequent system water auditing; system leak detection and repair; recycling and reuse; and ability to enforce water restrictions during drought. R.A. 64-69.

Appellants argue that the water conservation measures were inadequate and incomplete because the TC Ravenswood water conservation program did not contain each and every measure listed in Section 601.10(f). Appellants' Brief, at 28-31. Specifically, Appellants contend that the TC Ravenswood Initial Permit failed to include conditions regarding frequent system water auditing; system leak detection and repair; recycling and reuse (such as closed-cycle cooling system); and the ability to enforce water restrictions during drought, the very same elements included in the NYSDEC's WCPF. *See* Appellants' Brief, at 29-31; R.A. 64-69.

Because the Ravenswood Facility utilizes once-through cooling, and because it withdraws water from the East River, which is not actually a river but a strait between Long Island Sound and New York Harbor, not every water conservation measure is relevant or germane to the Ravenswood Facility. R.A. 108. Therefore, not every water conservation measure specified in Section 601.10(f) was included by NYSDEC in the TC Ravenswood Initial Permit. R.A. 104-08.

Despite Appellants' argument to the contrary, the facility's water conservation program complies with NYSDEC's standards for leak detection and reporting by using personnel and water usage data. R.A. 67, 458-59. Because the East River is not actually a River, but a strait, NYSDEC determined that drought related information such as rainfall, riverflow, contributed watershed size upstream withdrawal were not germane. R.A. 108 In addition, TC Ravenswood's water conservation program includes the facility's SPDES permit requirement for variable frequency drives, which has led to a twenty-six percent reduction in the Ravenswood Facility's water withdrawals over an eight month period from July 2012 to April 2013. R.A. 68, 458-59.

NYSDEC determined that no water auditing was necessary for the Ravenswood Facility because there is no "consumptive loss." R.A. 459. In

other words, water withdrawn from the East River by the Ravenswood Facility is passed-through the facility, and "substantially all of the water that is withdrawn from the East River is returned to the East River." R.A. 459. Simply stated, contrary to Appellants misleading statements comparing the size of water withdrawn by the Ravenswood Facility to the amount of water *consumed* by the City of New York and other power plants with different configurations and geography/hydrology, very little water is actually consumed by TC Ravenswood. Appellants' Brief at 12-14; R.A. 459. The Ravenswood Facility utilizes a once-through cooling system in which the amount of water that is withdrawn from the river is practically the same as the amount returned to the river with little consumptive loss. R.A. 458-59. As a result, almost all of the water used in the Ravenswood Facility's once-through-cooling system is recycled because it is continuously returned to the East River in accordance with the previously approved SPDES permit. R.A. 458-59.

Appellants take issue with the fact that the Initial Permit does not require TC Ravenswood to employ a closed-cycle cooling system. However, the Initial Permit could not set a new condition requiring closed-cycle cooling at the Ravenswood Facility because Initial Permit holders were entitled to continue withdrawing water at the existing maximum

capacity reported to NYSDEC by the statutory deadline. *See* ECL § 15-1501(9); 6 N.Y.C.R.R. § 601.7(d); *see also* Point II(A), *supra*. Appellants' urgings that this Court require NYSDEC to impose stricter measures for the protection of aquatic life in TC Ravenswood's Initial Permit, above and beyond the measures already imposed by its SPDES permit, are inapt. An Initial Permit is not an appropriate vehicle for those measures.[7]

In sum, NYSDEC determined that the conditions included in the TC Ravenswood Initial Permit combined with the SPDES Biological Requirements and the water conservation measures described in the WCPF "meet the requirements for an environmentally sound an economically feasible water conservation program." R.A. 458. While Appellants may disagree with the propriety and sufficiency of these terms and conditions, using its substantive expertise, NYSDEC appropriately incorporated all necessary terms and conditions in TC Ravenswood's Initial Permit. *See* Point IV, *infra*.

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[7] According to 6 N.Y.C.R.R. § 601.7(f), "[w]here the water withdrawal system listed in an initial permit application is associated with a project, facility, activity or use that is subject to a SPDES permit . . . , the department will review the initial permit application in coordination with the SPDES . . . permit program, particularly with respect to any pending permit renewals." This coordinated review, however, does not authorize NYSDEC to modify an existing source's SPDES permit or BTA.

POINT III

THERE WAS NO VIOLATION OF SEQRA; ISSUANCE OF THE INITIAL PERMIT WAS A MINISTERIAL TYPE II ACTION NOT SUBJECT TO ENVIRONMENTAL REVIEW

Appellants argue that the lower court erred when it determined that there had been no violation of SEQRA when NYSDEC issued TC Ravenswood an Initial Permit without conducting a determination of environmental significance under SEQRA. Appellants' Brief, at 33. Central to their argument is their assertion that the Initial Permit was a Type I action subject to environmental review because permit issuance was not ministerial. Appellants' Brief, at 36-39. Appellants' various arguments in this regard all lack merit. As the lower court correctly concluded, NYSDEC properly classified the issuance of the TC Ravenswood Initial Permit as a ministerial, Type II action not subject to SEQRA review. R.A. 21.

A. Issuance of the TC Ravenswood Initial Permit was Properly Classified as a Ministerial Act, Not Subject to SEQRA.

The crux of Appellants' argument is that NYSDEC improperly classified issuance of the TC Ravenswood's Initial Permit as a ministerial act under SEQRA to avoid environmental review. However, the statutory mandate of 2011 WRPA was clear that NYSDEC lacked any discretion to

deny an Initial Permit. Therefore, Appellants' claims in this regard must be rejected.

SEQRA expressly exempts "official acts of a ministerial nature, involving no exercise of discretion" from environmental review. ECL § 8-0105(5)(ii); 6 N.Y.C.R.R. § 617.5(c)(19). Whether a particular act is ministerial depends on the underlying regulation or code authorizing the act. *Atlantic Beach v. Gavalas*, 81 N.Y.2d 322, 325 (1993); *Ziemba v. City of Troy*, 37 A.D.3d 68, 73 (3d Dep't 2006); *see also Lighthouse Hill Civic Ass'n v. City of New York*, 275 A.D.2d 322, 323 (2d Dep't 2000); *Dujmich v. New York State Freshwater Wetlands Appeals Bd.*, 240 A.D.2d 743, 743 (2d Dep't 1997) (holding that landowners were entitled to their permit as a matter of right and not subject to SEQRA because the proposed septic system satisfied all applicable conditions imposed by the Department of Health). The pivotal inquiry is whether the underlying regulatory scheme vests the agency with the authority to act or refuse to act based on the type of information contained in an environmental impact statement ("EIS"). *Atlantic*, 81 N.Y.2d at 326; *Ziemba*, 37 A.D.3d at 73-74.

Where an agency is only empowered to issue or deny a permit based on compliance with predetermined statutory criteria, evaluation of environmental impacts would be an exercise in futility because the agency

lacks authority to deny the action, regardless of environmental conditions. *Atlantic Beach*, 81 N.Y.2d at 327 (finding "preparation of an EIS would be a meaningless and futile act, since an agency vested with discretion in only a limited area could not deny a permit on the basis of SEQRA's broader environmental concerns."); *see also Filmways Communications of Syracuse v. Douglas*, 106 A.D.2d 185, 187 (4th Dep't 1985).

Here, as the lower court found, "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.A. 20. Moreover, when the legislature has mandated a particular action, as here, the action is deemed nondiscretionary and ministerial for purposes of SEQRA because the agency lacks any latitude of choice but to fulfill the legislative mandate. *Citizens for Orderly Energy Policy, Inc. v. Cuomo*, 78 N.Y.2d 398, 415 (1991). For initial water withdrawal permits, ECL Section 15-1501(9) mandates that:

> 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 the section, for the maximum water withdrawal capacity reported to the department . . . on or before February fifteenth, two thousand twelve.

ECL § 15-1501(9). The 2011 WRPA, therefore, does not vest NYSDEC with the authority to deny an operator an Initial Permit based on any other criteria, including environmental concerns, as long as the statutory specifications were met. In this case, the predetermined criteria for issuance of the Initial Permit (submission of maximum water withdrawal capacity to NYSDEC by the deadline) bore no relationship to the broader environmental concerns evaluated in an EIS. Therefore, preparation of an EIS would have been an exercise in futility because NYSDEC was bound by the statute to issue the permit regardless of the findings in an EIS. The lower court's finding that NYSDEC's issuance of the TC Ravenswood Initial Permit was a ministerial act was therefore proper and should be upheld.

B. Limited Discretion in Setting Underlying Terms of the TC Ravenswood Initial Permit Does Not Grant NYSDEC Discretion for Wholesale Denial of the Initial Permit.

Appellants argue that issuance of the Initial Permit was not a ministerial act because some measure of discretion was used by NYSDEC for underlying and unrelated issues. Appellants' Brief, at 50-52. Appellants assert that because NYSDEC used discretion when it established the terms and conditions of the TC Ravenswood Initial Permit, revised errors to the maximum water withdrawal, incorporated conditions of the TC Ravenswood SPDES permit, and set the permit term, that NYSDEC's act of *issuing* an

initial permit was discretionary and, therefore, subject to SEQRA. Appellants' Brief, at 50-52. However, Appellants misunderstand the purpose and requirements of SEQRA, and this claim must fail.

Here, the lower court correctly found that "[w]hile ECL § 15-1501(9) does state that DEC 'shall issue an initial permit, subject to appropriate terms and conditions as required under this article,' the statute does not give the agency the type and breadth of discretion which would allow permit grant or denial to be based on environmental concerns detailed in an EIS." R.A. 20.

If an agency has some limited discretion to grant or deny a permit, "but that discretion is circumscribed by a narrow set of criteria which do not bear any relationship to the environmental concerns that may be raised in an EIS, its decisions will not be considered 'actions' for purposes of SEQRA's EIS requirements." *Atlantic*, 81 N.Y.2d at 326; *Ziemba*, 37 A.D.3d at 74; *Island Park v. New York State Dep't of Transportation*, 61 A.D.3d 1023, 1028 (3d Dep't 2009) (finding that the Department of Transportation's decision to close a rail crossing was ministerial despite that the agency had the discretion to consider safety issues).

Under the 2011 WRPA, NYSDEC was required to issue an Initial Permit to TC Ravenswood to allow the Ravenswood Facility to continue its

existing water withdrawals from the East River, up to the maximum capacity reported in conformance with the statute, because existing operators that complied with the statutory specifications were *entitled* to an Initial Permit. *See* Point II, *supra.* While ECL Section 15-1501(9) provides that an Initial Permit shall be "subject to appropriate terms and conditions as required under [Article 15]," the terms and conditions applicable to Initial Permits are not, however, the types of environmental issues and concerns that would be raised and addressed in an EIS, as urged by Appellants.

The terms and conditions appropriate for Initial Permits are not based on the determinations in ECL Section 15-1503(2) as Appellants claim. *See* Point II, *supra.* ECL Section 15-1501(6) requires that every permit issued under the 2011 WRPA shall report information requested by NYSDEC, including information related to water usage and conservation. The 2011 WRPA also authorized NYSDEC to promulgate regulations to provide for monitoring and reporting, protection of potable water supply, and maintenance of stream flows. *See* ECL § 15-1501(4). Finally, an Initial Permit is for a fixed term not to exceed ten years. 6 N.Y.C.R.R. § 601.7(e). For facilities, like the Ravenswood Facility, that are subject to a SPDES permit, the Initial Permit application is reviewed in coordination with the facility's SPDES permit program. 6 N.Y.C.R.R. § 601.7(f).

Taken together, however, these terms and conditions for an Initial Permit do not authorize NYSDEC to deny issuance of an Initial Permit if the statutory requirements are met. ECL § 15-1501(9). As the lower court correctly found, "[w]hatever 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.A. 20, *citing Filmways*, 106 A.D.2d at 186. In short, the real action at issue here is issuance of the TC Ravenswood Initial Permit, for which NYSDEC lacked the statutory discretion to deny. *See* Points II & III(A), *supra*. That NYSDEC determined the appropriate terms and conditions to include in the TC Ravenswood Initial Permit, set the permit length for less than ten years,[8] incorporated TC Ravenswood's SPDES permit BTA conditions, and revised the maximum withdrawal capacity due to a reporting mistake, did not empower NYSDEC with the type of discretion that would allow NYSDEC to deny issuance of the Initial Permit to TC Ravenswood, or to take the issuance of the Initial Permit out of the Type II ministerial category. *See Atlantic*, 81 N.Y.2d at 326; *Ziemba*, 37 A.D.3d at 74; *Island Park*, 61 A.D.3d at 1028.

[8] NYSDEC set a permit term of less than ten years for the TC Ravenswood Initial Permit to ensure that any renewal would be considered in tandem with the Ravenswood Facility's SPDES permit renewal. R.A. 456.

Accordingly, NYSDEC rationally determined that the issuance of an Initial Permit to TC Ravenswood was a ministerial Type II action because NYSDEC does not have the discretion to deny an Initial Permit based on the 2011 WRPA mandate that it "shall" issue such permit if the statutory requirements are met. The lower court's decision in this regard should be affirmed.

C. Exceedance of a Type I Threshold Does Not Reclassify a Ministerial Type II Action as Type I.

Appellants argue that issuance of the TC Ravenswood Initial Permit should have been classified as a Type I action because the volume of water withdrawn exceeds the Type I threshold of 2,000,000 gallons per day for projects that use ground or surface water. Appellants' Brief, at 38. Appellants fail to understand that once an action is determined to be ministerial, the inquiry ends regardless of whether it could be considered a Type I action in another circumstance.

Whether an action is classified as a Type II action depends on if it is listed in Section 617.5(c) of NYSDEC's SEQRA regulations. 6 N.Y.C.R.R. § 617.5(c). Ministerial actions are expressly listed as a Type II action and are, therefore, not subject to SEQRA. 6 N.Y.C.R.R. §§ 617.5 (a), (c)(19). Contrary to Appellants' claims, Type I thresholds do not apply to Type II

actions, unless such a limitation is expressly stated in Section 617. *See e.g.* 6 N.Y.C.R.R. § 617.5(c)(2) (defining in-kind structure replacements as a Type II action not subject to SEQRA "unless such action meets or exceeds any of the [Type I] thresholds in section 617.4"). No limitation is incorporated into the designation of a ministerial action as a Type II action. *See Id.* § 617.5(c)(19). Therefore, the Type I thresholds do not apply when an action is determined to be ministerial. *See Westwater v. New York City Bd. of Standards & Appeals*, No. 100059-13, 2013 N.Y. Misc. LEXIS 4707, at *16-17 (N.Y. Sup. Ct. Oct. 15, 2013) (finding that the revised construction plans for a building were properly classified as a Type II ministerial action despite contentions that the Type I thresholds were exceeded.).

Appellants further contend that the TC Ravenswood Initial Permit should be classified as a Type I action merely because, under SEQRA, a Type I action generally carries a presumption that it is likely to have a significant adverse impact on the environment and may require an EIS. Appellants' Brief, at 38. However, NYSDEC's regulations promulgated at Part 621 to implement the 2011 WRPA expressly categorize Initial Permits as a "minor water withdrawal project." 6 N.Y.C.R.R. § 621.4(b)(2)(v). Under Section 621.2, "minor" actions "are projects which by their nature

and with respect to their location are not likely to have a significant impact on the environment." 6 N.Y.C.R.R. § 621.2(s). Appellants' argument that an Initial Permit should automatically be considered a Type I action because it would have a significant impact on the environment is, therefore, belied by the contrary findings of the NYSDEC's regulations.

Appellants claim that the long-standing operations of the Ravenswood Facility are irrelevant to the application of SEQRA. Appellants' Brief, at 44. However, such a claim that an Initial Permit's long-existing water withdrawal history is irrelevant grossly ignores the purpose of SEQRA. SEQRA evaluates whether an action will have a significant impact on the environment. 6 N.Y.C.R.R. § 617. As part of the criteria for determining significance, the action is evaluated to see if there will be a substantial adverse change in existing conditions. 6 N.Y.C.R.R. § 617.7(c)(1)(i). Where the action will result in conditions *no different* from existing conditions, there will be a zero-sum change and no adverse environmental impact. Here, as a result of the issuance of the Initial Permits to TC Ravenswood, TC Ravenswood will continue its lawful existing withdrawal of water from the East River. The conditions pre and post issuance of the TC Ravenswood Initial Permit will be the same, with a zero-sum change and no adverse environmental impact.

D. The Plain Meaning of NYSDEC's SEQRA Regulations Dispel Appellants' Attempt to Reclassify Type II Actions as Type I.

Appellants' argument that a Type I action cannot be a Type II action, and that, therefore, an Initial Permit cannot be considered a Type II ministerial action, is based on an inaccurate and incomplete reading of the regulations. Appellants' Brief, at 39. Appellants cite Section 617.5(b) of NYSDEC's SEQRA regulations as support. Appellants' Brief, at 39. However, when read in context, it is clear that the Appellants' claims are based on an inaccurate reading of the regulations and must, therefore, be dismissed.

Section 617.5(b) of NYSDEC's SEQRA regulations allow other agencies to adopt their own lists of Type I actions and provide provisions for those agencies to follow in creating such a list. 6 N.Y.C.R.R. § 617.4(a)(2). Appellants inaccurately assert that Section 617.5(b) should also guide NYSDEC's determination of whether an action is classified as a Type II action. Appellants selectively reference the portion of Section 617.5(b) that states "[a]n action categorized as a Type I action, cannot be a Type II action." Appellants' Brief, at 39. However, Appellants' selective reference to only parts of the Section 617.5 distorts and misapplies the regulation in an attempt to give more meaning to this section than plain reading provides.

The section partially quoted and taken out of context by Appellants applies only to *other agencies* who wish to adopt their own list of Type II actions, not NYSDEC. Section 617.5(b) reads in its entirety:

> *Each agency may adopt its own list of Type II actions to supplement the actions in subdivision (c) of this section. No agency is bound by an action on another agency's Type II list. An agency that identifies an action as not requiring any determination or procedure under this Part is not an involved agency.* 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.

6 N.Y.C.R.R. § 617.5(b) (emphasis added). The omitted portions in italics provide the proper context in which the regulation is to be read. From the plain reading of the full section, it is clear that subsections 1 and 2 apply only to *other agencies* adopting and expanding upon the Type II list of actions set forth by the NYSDEC in Section 617.5(c). As such, the Appellants' interpretation of only a portion of a section which has been taken out of context must be rejected.

Moreover, the NYSDEC's provisions in Section 617.4 directed at other agencies state the exact opposite of Appellants' claim that a Type I

action cannot be a Type II action. 6 N.Y.C.R.R. § 617.4(a)(2) (stating that "[a]n agency may not designate as Type I any action identified as Type II in section 617.5."). In light of these misstatements of the regulations, the Appellants' claim that reclassification is mandated for a ministerial Type II action if a Type I threshold is exceeded cannot stand.

E. NYSDEC's Comments During Promulgation of the Implementing Regulations Have No Effect on NYSDEC's Requirement to Issue an Initial Permit.

Appellants contend that NYSDEC's position that it lacks discretion to issue or deny an Initial Permit conflicts with NYSDEC's earlier responses to comments during promulgation of its regulations implementing the 2011 WRPA. Appellants' argument fails.

First, Appellants' argument impermissibly neglects to consider NYSDEC's full set of responses. Appellants' attempt to craft the impression that NYSDEC's interpretation of the WRPA is based solely on a self-serving selection of NYSDEC's responses to comments. A full and holistic reading of NYSDEC's full set of responses, however, confirms that NYSDEC has never changed its position that an existing water withdrawal user, like TC Ravenswood, would be entitled to an Initial Permit.[9]

[9] In addition to providing responses to particularized individual comments, such as those selectively referenced by Appellants, NYSDEC also provides global responses

Even assuming Appellants are correct, the 2011 WRPA is clear on its face that existing users are entitled to a permit, and any statement to the contrary cannot override this simple statutory construction. *See* ECL § 15-1501(9); Point II, *supra;* Point IV *infra; see also Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984) (finding that the court as well as the agency must give effect to the unambiguously expressed intent of the statute); *Henn v. Perales*, 186 A.D.2d 740, 741 (2d Dep't 1992) (concluding that the petitioner was not entitled to rely on guidelines or interpretive statements of an agency because such statements did not have the force of law, even if the agency later rescinded the guidance.). Moreover, Appellants misconstrue the comments and NYSDEC's responses.

As the lower court concluded, NYSDEC had no authority to deny an Initial Permit and was statutorily mandated to issue an Initial Permit to an existing user that complied with the basic statutory requirements. *See* R.A. 336; *see also* Point II, *supra*. While an Initial Permit would be subject to terms and conditions, application of appropriate terms and conditions to an

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to "Frequent Comments," which are those comments submitted on the same or similar topic by numerous members of the public. In its Response to Frequent Comment #1, NYSDEC stated that "[p]ursuant to ECL § 15-1501(9), the Department *must* issue initial permits for these withdrawals for the maximum water withdrawal capacity reported to the Department as of February 15, 2012." (emphasis added) NYSDEC's Responses to Frequent Comments were not included in the record.

Initial Permit did not grant NYSDEC discretion to wholly deny an Initial Permit. *See* Point III(B), *supra*. Further, the comments highlighted by Appellants do not suggest, explicitly or otherwise, that an environmental review under SEQRA would be required for an Initial Permit application. Indeed, while they note that ECL Section 15-1503 would apply to all permits, NYSDEC's responses are directed at "permit application requirements and standards for permit issuance[.]" This is not contrary to NYSDEC's current interpretation of the 2011 WRPA that subsection (2), which sets forth the eight determinations relevant to NYSDEC's decision to "grant or deny" a new permit, does not apply to Initial Permits. *See, e.g.*, ECL § 15-1503(1) (identifying application requirements which would apply to Initial and New Permits alike). Further, the response itself explicitly confirms that the 2011 WRPA requires NYSDEC to issue existing users an Initial Permit such that it lacks any discretion whether to grant or deny an Initial Permit application.

F. Appellants' Reliance on Other Unrelated Regulations is Inaccurate and Misleading

Appellants argue that the term "shall" in the 2011 WRPA gives NYSDEC the type of discretion that triggers SEQRA, by pointing to what they allege to be similar wording under other non-related provisions of the

ECL. In particular, Appellants argue that NYSDEC's application of the word "shall" here in the 2011 WRPA is at odds with its interpretation of the same word in ECL Article 23 regarding well spacing in oil and natural gas pools and fields. Appellants' argument, however, fails on multiple grounds.

First, this argument was not raised below, and, therefore, is not properly before this Court. *See* Point I, *supra*. Second, even if this Court were to entertain this new argument, a comparison of the two statutory schemes establishes that Appellants' argument lacks any merit and should be dismissed.

Pointing to the language in ECL Section 23-0503(2) that NYSDEC "*shall* issue a permit to drill, deepen, plug back or convert a well, if the proposed spacing unit submitted to the department pursuant to paragraph a of subdivision 2 of section 23-0501 of this title to statewide spacing . . . .[,]" Appellants maintain that NYSDEC's preparation of a Generic Environmental Impact Statement ("GEIS") for the overall oil and gas program, which was most recently supplemented in 2015, establishes that NYSDEC did not categorize oil and gas permits as Type II actions exempt from environmental review under SEQRA. Appellants' Brief, at 52-53.

However, the use of the word "shall" in ECL Section 23-0503(2) lends no support for Appellants' argument that the NYSDEC was vested

with discretion when issuing an Initial Permit under the 2011 WRPA. First, unlike the oil and gas program under ECL Article 23, the 2011 WRPA's legislative history confirms that an existing source is "entitled" to an Initial Permit. R.A. 336 (noting that "existing water withdrawals would be *entitled* to an initial permit based on their maximum water withdrawal capacity reported to DEC on or before February 15, 2012 pursuant to existing law.") (emphasis added).

Second, ECL Section 23-0503(2) is directed at the spacing unit for an oil and gas well, which concerns the surface size of a drilling unit and is dictated by the underlying geological formation. ECL § 23-0503(2). And, third, ECL Section 23-0503(2) is applicable to new oil and gas wells that conform to NYSDEC's predetermined statewide spacing. *Id.* This is in contrast to pre-existing wells for which spacing would already have been established. Indeed, there is no dichotomy in ECL Article 23, as there is in the 2011 WRPA, for new versus existing sources.

In short, Appellants' reliance on ECL Section 23-0503(2) is both improper and misplaced. It should therefore be rejected.

POINT IV

NYSDEC IS ENTITLED TO SUBSTANTIAL DEFERENCE

The lower court correctly found that NYSDEC's interpretation of the 2011 WRPA and its implementing regulations as well as its interpretation of when and how to issue an Initial Permit is entitled to judicial deference. R.A. 20-21. Appellants have not established any reason why NYSDEC should not be granted substantial deference.

It is well settled that an agency's interpretation of a statute or regulation should be granted substantial deference if that agency is responsible for administering the statutory program and its decision is rationally based. *Chevron*, 467 U.S. at 842-43; *City Council v. Town Bd.*, 3 N.Y.3d 508, 518 (2004); *Carver v. State of New York*, 87 A.D.3d 25, 33 (2d Dep't 2011). This includes determinations of whether an action is classified as a Type I or Type II action. *See Stephentown Concerned Citizens v. Herrick*, 280 A.D.2d 801, 804 (3d Dep't 2001) (deferring to NYSDEC's decision that a renewal application was appropriately classified as a Type II action).

"While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to

'weigh the desirability of any action or [to] choose among alternatives'" *Riverkeeper v. Town of Southeast*, 9 N.Y.3d 219, 232 (2007), *citing Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990); *see also Village of Chestnut Ridge v. Town of Ramapo*, 99 A.D.3d 918, 925 (2d Dep't 2012); *New York Youth Club v. New York City Envtl. Control Bd.*, 39 Misc. 3d 1204(A), *3 (N.Y. Sup. Ct. Queens County 2013) ("Upon judicial review, a court is not free to substitute its judgment for that of the agency on substantive matters."). Therefore, even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of NYSDEC. *Consolidated Edison Co. v. New York State Div. of Human Rights*, 77 N.Y.2d 411, 417 (1991); *Trump on the Ocean, LLC v. Cortes-Vasquez*, 76 A.D.3d 1080, 1092 (2d Dep't 2010); *Westwater*, 2013 N.Y. Misc. LEXIS 4707, at *28. Moreover, if an agency's interpretation of a statute is reasonable, it must be upheld even if the statute is reasonably subject to a different construction. *Howard v. Wyman*, 28 N.Y.2d 434, 438 (1971) (finding that an agency's construction of a statute or regulation should be upheld if not irrational or unreasonable); *Trump*, 76 A.D.3d at 1093.

Contrary to Appellants argument that NYSDEC should only be granted deference if the issue is particular to its expertise (Appellants' Brief,

at 53-59), other circumstances warrant deference as well. Courts have deferred to an administrative agency "(1) where the statute employs technical terms within the agency's expertise, so that interpretation or application of legislative language entails 'understanding of underlying operational practices or evaluation of factual data and inferences to be drawn therefrom'; (2) where the general statutory language and legislative history indicate that the Legislature intended to adopt a broad policy approach to the subject matter of the statute, delegating to the administrative agency comprehensive, interpretive and subordinate policy-making authority, interstitially to 'fill in the blanks' consistently with the over-all policy of the statute, either by administrative rule making or case-by-case decisions;" and "(3) where the agency participated in the legislative activity leading to the authorizing legislation and the agency's interpretation of the statute is contemporaneous with enactment." *Judd v. Constantine*, 153 A.D.2d 270, 272-73 (3d Dep't 1990), *citing Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980), *Levine v. Whalen*, 39 N.Y.2d 510, 515-16 (1976), and *Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 390 (1984).

NYSDEC is the agency responsible for administering the statutory programs for the 2011 WRPA as well as SEQRA. It is also the agency

charged with implementing regulations for each. Here, the 2011 WRPA employs technical terms within the NYSDEC's expertise such that its interpretation entails the particular understanding of underlying operational practices. It is well within NYSDEC's expertise to interpret the statute to require issuance of Initial permits for existing operations so as not to disrupt the continuing lawful uses of the water withdrawals, or as is the case for TC Ravenswood, the continued operation of a 2,480 MW electric generation facility for which water withdrawal is a crucial component and for which a thorough regulatory permitting process, including review under SEQRA, had already been performed. R.A. 454.

The 2011 WRPA gave NYSDEC broad authority to promulgate regulations to implement the new program, thus evincing that NYSDEC would be delegated authority to "fill in the blanks" with policy and regulations as it saw fit, but consistent with the statute. ECL § 15-1501(4). Here, NYSDEC's interpretation that issuance of an Initial Permit would be a ministerial act comports with the statute, NYSDEC's implementing regulations, and the SEQRA regulations.

NYSDEC also participated in the legislative activity of the 2011 WRPA. In its recommendation for approval of the 2011 WRPA, NYSDEC noted that it had worked extensively with stakeholders, including industry

and environmental advocates, to resolve their concerns in drafting the bill. R.A. 343-45. In that recommendation, NYSDEC reassured that "all existing water withdrawals would be entitled to an initial permit." R.A. 345. Moreover, NYSDEC's interpretation of the 2011 WRPA was contemporaneous with its enactment. R.A. 345.

Appellants assert that NYSDEC should not be granted deference because the issue is one of statutory interpretation. Appellants' Brief, at 54. Even if this Court finds that deference to NYSDEC is not warranted (which it should not), the plain reading of the statute and regulations shows that existing operators were entitled to an Initial Permit. There is no ambiguity in the statute and its mandatory language that the NYSDEC "*shall*" issue an initial permit to any person who meets the statutory preconditions. ECL §15-1501(9); *see also New York Pub. Interest Research Group*, 83 N.Y.2d at 384 (1994) (finding a provision was "cast in mandatory terms, as evidenced by the repeated use of the word 'shall'").

Should a court find that the statute and use of "shall" is ambiguous, rules of statutory construction permit a court to look at the legislative history. *Thomas v. Bethlehem Steel Corp.*, 95 A.D.2d 118, 120 (3d Dep't 1983); *Jaronczyk v. Nassau County Interim Fin. Auth.*, No. 12934-13, 2014 N.Y. Misc. LEXIS 2669, *44 (N.Y. Sup. Ct. Nassau Co. Mar. 11, 2014)

("When the law is doubtful or ambiguous however, judicial inquiry into legislative intent is appropriate as an aid to statutory interpretation."). Review of the legislative history, which states that existing operators would be *entitled* to a permit, supports the mandatory language of the statute as well as NYSDEC's interpretation. R.A. 336 (emphasis added).

Appellants have not shown how any of the concerns it cites would overturn the lower court's finding that the NYSDEC properly issued the TC Ravenswood Initial Permit as-of-right and its finding that NYSDEC's decision-making was rational. Therefore, the lower court's ruling that NYSDEC's interpretation of the 2011 WRPA and its implementing regulations, as well as its decision to grant deference to NYSDEC's decision to classify TC Ravenswood's Initial Permit as a Type II action, should be upheld.

POINT V

APPELLANTS' CLAIMS ARE IN FACT IMPROPER COLLATERAL ATTACKS THAT ARE UNTIMELY

A. The TC Ravenswood SPDES Permit is Not at Issue Here, and Any Challenges Would Be Untimely.

Appellants maintain that closed-cycle cooling should have been selected as the BTA for the Ravenswood Facility as part of its SPDES permit, or that closed-cycle cooling should have been made part of the Initial Permit.[10] Appellants' Brief, at 32. These claims are improper and untimely collateral attacks on the TC Ravenswood SPDES permit and should be dismissed. As the lower court correctly found, the 2011 WRPA did not vest NYSDEC with the discretion to compel TC Ravenswood to switch to a closed-cycle cooling system. R.A. 20.

Central to the Appellants' challenge to TC Ravenswood's Initial Permit is their apparent objection to the Ravenswood Facility's cooling water intake structures and their allegation that the associated environmental impacts have not been appropriately mitigated by NYSDEC. Appellants'

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[10] Appellants also argue that the TC Ravenswood SPDES permit requirements are insufficient to meet the water conservation program requirements of a WWP for water system auditing, leak detection and repair, recycling and reuse. These arguments also arise from the same erroneous claim that close-cycle cooling should have been the BTA for the SPDES permit.

Brief, at 32-33, 37. Such impacts (e.g., fish impingement and entrainment), however, were squarely addressed by the NYSDEC as part of its consideration and issuance of the Ravenswood Facility's SPDES permit.

The TC Ravenswood SPDES permit was issued in 2007 and more recently renewed in 2012. R.A. 117, 167, 177. NYSDEC completed an environmental review under SEQRA at the time the Ravenswood Facility's 2007 SPDES permit was issued, wherein the BTA requirements for the facility were established. R.A. 128.[11]

Appellants failed to submit any comments on the Ravenswood Facility's 2012 SPDES permit renewal, which was when issues associated with cooling water intake BTA would have been appropriately raised and considered by NYSDEC. Appellants' assertion that the Ravenswood Facility's BTA does not comply with the NYSDEC CP-52 guidance also should have been brought at the time the 2012 SPDES permit was issued so that NYSDEC could have considered it.

Furthermore, such assertion is wholly without merit. Closed-cycle cooling systems are not mandated for existing facilities by NYSDEC's CP-

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[11] The 2012 SPDES permit was a permit renewal such that additional SEQRA review was not required. *See* 6 N.Y.C.R.R. § 617.5(c)(26); *see also Stephentown Concerned Citizens v. Herrick*, 280 A.D.2d 801, 804 (3d Dep't 2001) ("a renewal application ordinarily is considered a type II action under SEQRA").

52 guidance, and are a matter left to the substantive discretion of NYSDEC. *See Entergy Corp. v. Riverkeeper*, 556 U.S. 208, 216, 224 (2009) (upholding EPA's decision to decline to mandate adoption of closed-cycle cooling systems or equivalent reductions in impingement and entrainment in part because of high costs, and finding that the decision was a legitimate exercise of its discretion); *see also* Point IV, *supra*.

In addition to Appellants' failure to raise their concerns regarding the Ravenswood Facility's SPDES permit with NYSDEC, Appellants did not challenge either the facility's 2007 SPDES permit or 2012 renewal in court. Because NYSDEC issued the 2012 SPDES permit for the Ravenswood Facility on November 1, 2012, the statute of limitations to challenge the 2012 SPDES permit has long since past.[12] Thus, to the extent that the Appellants' arguments are a collateral attack on Ravenswood's SPDES permit, and the BTA requirements contained therein, they are untimely.

Due to their failure to exhaust administrative remedies and because the statute of limitations has expired, Appellants' collateral attacks to the Ravenswood Facility's 2012 SPDES permit, or the BTA provisions

[12] The applicable statute of limitations is four months from the time a final agency decision is made. *See* N.Y. C.P.L.R. 217(1) (2014).

contained therein, via this challenge to the facility's Initial Permit, are improper and time-barred.

B. Appellants' Challenge to the 2011 WRPA is Untimely.

A review of the appeal as a whole establishes that Appellants' real challenge is to the manner in which NYSDEC carried out the Legislature's directive to create a new permitting program for water withdrawals. *See, e.g.*, Appellants' Brief, at 4 ("[t]he fundamental issue presented in 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."); *id.* ("[t]he 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."); *id.* at 12-14 (discussing other Initial Permits issued to facilities that take water from the East River and noting that each permit was determined to be a Type II action and not subject to environmental review under SEQRA); *id.* at 15-19 (discussing impact of power plants in general, and not just the Ravenswood Facility on the Hudson River Estuary); *see also* R.A. 518-31 (explaining in both the NYSDEC's proposed rulemaking in November 2011 and its final rulemaking in November 2012 that "existing

water withdrawals above the size threshold are *entitled* to an initial permit.") (emphasis added).

In a similar vein, Appellants' challenge effectively concerns the Legislature's determination and directive to NYSDEC when crafting the 2011 WRPA that existing water withdrawals were to be exempt from environmental review by explicitly removing any discretion from NYSDEC regarding whether to issue a permit to facilities with existing water withdrawals. R.A. 336 (stating that "existing water withdrawals would be *entitled* to an initial permit based on their maximum water withdrawal capacity reported to DEC on or before February 15, 2012 pursuant to existing law.") (emphasis added); *see also* ECL § 15-1501(9).

Importantly, the 2011 WRPA was signed into law on August 15, 2011 and became effective on February 15, 2012. Not only did Appellants fail to convince the Legislature and Governor to require existing water withdrawals to undergo environmental review anew, Appellants failed to directly challenge the 2011 WRPA in Court. Appellants also failed to directly challenge NYSDEC's implementing regulations, which explicitly confirmed that facilities such as the Ravenswood Facility would be entitled to a permit without undergoing repetitive environmental review.

The Appellants' petition to the lower court, therefore, was an improper attempt to raise an untimely challenge to the 2011 WRPA and NYSDEC's implementing regulations. The lower court's decision that NYSDEC was required to issue TC Ravenswood an Initial Permit should, therefore, be upheld.

In sum, Appellants real claims are untimely collateral attacks on the TC Ravenswood SPDES permit, the 2011 WRPA and NYSDEC's implementing regulations, none of which are issues that are properly before this Court. Appellants' had multiple and redundant opportunities to raise their challenge and failed to do so in a timely manner.

POINT VI

THE LOWER COURT CORRECTLY FOUND NO VIOLATION OF STATE OR CITY COASTAL ZONE LAWS

Appellants contend that NYSDEC violated state and city coastal zone laws when it failed to prepare an EIS or certify impacts of the Ravenswood Facility's Initial Permit application. Appellants' Brief, at 59-63. The crux of Appellants' argument here is that NYSDEC improperly characterized issuance of the TC Ravenswood Initial Permit as a Type II action under SEQRA. Appellants' Brief, at 59. The lower court properly concluded that the NYSDEC's issuance of an Initial Permit to TC Ravenswood without

conducting an assessment did not violate any coastal zone laws because, as detailed in Point III, *supra*, issuance of the Initial Permit was a Type II action. R.A. 21.

Appellants concede that the provisions of 19 N.Y.C.R.R. Part 600, which requires a coastal zone consistency review, only apply if the action is a Type I or Unlisted action. Appellants' Brief, at 62 ("Section 600.2(b) of the regulations defines 'actions' to mean 'either type I or unlisted actions. . .; the term shall not include excluded actions as defined in SEQR (6 N.Y.C.R.R. 617.2)[.'] Type II actions under SEQRA are therefore excluded from the requirements of the [Coastal Management Program.]"); *see also* 19 N.Y.C.R.R. § 600.2(b) (2015). Similarly, coastal zone consistency reviews are required under SEQRA only if the action is classified as Type I or Unlisted. 6 N.Y.C.R.R. § 617.6(a)(5). Here, as presented in Points II and III, *supra*, NYSDEC's issuance of the initial water withdrawal permit for the Ravenswood Facility was a ministerial, Type II action. Issuance of the Initial Permit was not a Type I or Unlisted action, and no coastal zone consistency review was required. Therefore, Appellants' alleged violations of coastal zone laws and SEQRA are meritless. The lower court's decision should be upheld.

POINT VII

THERE WAS NO VIOLATION OF THE PUBLIC TRUST DOCTRINE

According to Appellants, NYSDEC violated its public trust obligation because it failed to adequately protect fish and wildlife in the East River when it issued the TC Ravenswood Initial Permit. Appellants' Brief, at 63-64. However, Appellants miscomprehend the scope of the public trust doctrine and applicability to the instant case.

The lower court's conclusion that the 2011 WRPA and its implementing regulations did not leave NYSDEC with a latitude of choice did not necessitate a further finding regarding Appellants' public trust claim because it was clear that the legislature mandated that water withdrawal permits be issued for existing withdrawals. *See Sohn v. Calderon*, 78 N.Y.2d 755, 762 (1991) (noting that the lower court implicitly rejected the defendant's subject matter jurisdiction arguments because the matter was set down for trial by the lower court); *D'Agrosa v. Newsday*, 158 A.D.2d 229, 234 (2d Dep't 1990) (finding that the lower court implicitly denied defendant's arguments that dismissal was warranted because the lower court found triable issues of fact existed).

Under the public trust doctrine, the State is responsible for protecting the public's right to use certain resources including waters of the State. *Syracuse v. Gibbs*, 283 N.Y. 275, 283 (1940); *Suffolk County v. Water Power & Control Commission*, 245 A.D. 62, 64 (3d Dep't 1935). A protected resource that is used for purposes other than public use, either for a period or permanently, requires the direct and specific approval of the State Legislature. *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623, 632 (2001). As such, the Legislature may allow taking of water from a public source because the conservation or diversion of waters is a legislative function. *Suffolk County*, 245 A.D. at 64.

Appellants complain that NYSDEC violated its public trust obligation when it issued the Initial Permit to TC Ravenswood without i) conducting an environmental review, ii) conducting a coastal consistency review, or iii) imposing adequate water conservation measures. Appellants' Brief, at 66-68. However, as discussed in Points III and VI, no environmental review or coastal zone consistency review was required because the Initial Permit was properly classified under SEQRA as a Type II ministerial action. *See* Points III and VI, *supra.* Moreover, water conservation measures were, in fact, included in the Initial Permit issued to TC Ravenswood. R.A. 64-69. Therefore, Appellants' argument that NYSDEC violated its public trust

obligation is meritless and should be rejected. This is especially true, where, as here, NYSDEC has thoroughly reviewed the Ravenswood Facility, including its cooling water intake structures, under all applicable federal and state environmental laws.

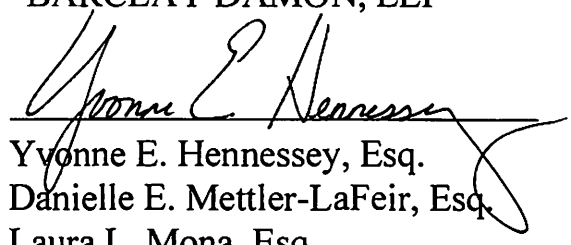
Here, the Legislature determined through its enactment of the 2011 WRPA that water withdrawal systems are a beneficial use of the State's water and that existing withdrawals could continue to lawfully operate if they reported their withdrawals, and applied for and obtained an Initial Permit. Because the lower court found that existing operators were entitled to a permit if the statutory specifications were met, there was no need to address the underlying public trust claim. R.A. 20. Therefore, Appellants' argument that NYSDEC violated its public trust obligation is meritless and should be dismissed.

CONCLUSION

For all of the reasons set forth herein, TC Ravenswood respectfully submits that the lower court's decision should be upheld, and the appeal should be dismissed *in toto*.

Dated: November 24, 2015
Albany, New York

BARCLAY DAMON, LLP

By: 

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APPELLATE DIVISION – SECOND DEPARTMENT
CERTIFICATE OF COMPLIANCE

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Dated: November 24, 2015

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