SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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In the Matter of the Application of

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

Petitioners,

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

-against-

JOSEPH MARTENS, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent,

TRANS CANADA RAVENSWOOD LLC,

Necessary Party.

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Index No. 2949-2014

Hon. Robert J. McDonald

**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S VERIFIED ANSWER AND IN OPPOSITION TO THE VERIFIED PETITION**

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TABLE OF CONTENTS

## ABBREVIATIONS

| | |
|---|---|
| DEC | New York State Department of Environmental Conservation |
| ECL | Environmental Conservation Law |
| MGD | Million gallons per day |
| NPDES | National Pollutant Discharge Elimination System |
| SEQRA | State Environmental Quality Review Act (ECL Article 8; 6 NYCRR 617) |
| SPDES | State Pollutant Discharge Elimination System |
| Waterfront Act | Waterfront Revitalization and Coastal Resources Act (Article 42 of Executive Law; 19 NYCRR 600) |

Respondent Joseph Martens, Commissioner of the Department of Environmental Conservation ("DEC"), submits this memorandum of law in opposition to the verified petition and in support of Respondent's verified answer.

## PRELIMINARY STATEMENT

In 2011, the New York State Legislature amended the Water Resources Law, codified in Environmental Conservation Law ("ECL") Article 15, to require DEC-issued permits to operate certain large-quantity water withdrawal systems. The Legislature directed DEC to issue Initial permits to preexisting water withdrawal systems that reported their maximum withdrawal capacity to DEC by February 15, 2012.

The Ravenswood Generating Station, in Long Island City, has operated a water withdrawal system since 1963 and timely reported its maximum water withdrawal capacity to DEC. Ravenswood has also been subject for decades to permits issued pursuant to the federal Clean Water Act and the State Pollutant Discharge Elimination System ("SPDES"), requiring it to conduct studies and take measures to protect the aquatic life affected by its withdrawal of water from the East River. On November 15, 2013, DEC, in keeping with the statutory directive of the Water Resources Law, issued Ravenswood an Initial water withdrawal permit.

In this Article 78 proceeding, Petitioners Sierra Club and Hudson River Fishermen's Association, New Jersey Chapter, Inc., challenge the Ravenswood Initial permit, which authorizes Ravenswood to continue withdrawing water from the East River for cooling and other processes related to electrical generation. Petitioners challenge the Ravenswood Initial permit on four grounds. First, they assert that DEC violated the State Environmental Quality Review Act ("SEQRA") by determining that the issuance of the Initial permit is exempt from environmental impact analysis under SEQRA. Second, they allege that DEC violated the

Waterfront Revitalization and Coastal Resources Act ("Waterfront Act") by failing to conduct a coastal consistency review of Ravenswood's Initial permit application. Third, they allege that DEC violated the Water Resources Law by failing to apply appropriate terms and conditions to the Ravenswood Initial permit. Fourth, they assert that DEC violated the public trust doctrine by failing to consider the impact that the Ravenswood water withdrawal will have on water users and the environment.

Petitioners' challenge to the Initial permit is without merit. In essence, Petitioners seek to impose measures for the protection of aquatic life in Ravenwood's Initial permit that would be above and beyond the measures already imposed by its SPDES permit, but an Initial permit is not an appropriate vehicle for those measures. Because DEC was required to issue an Initial permit authorizing Ravenswood to continue to withdraw water at its prior reported level, the issuance is a ministerial act that is exempt from environmental impact analysis under SEQRA and coastal consistency review under the Waterfront Act. Moreover, an environmental impact analysis would not have informed the narrow discretion that DEC has to impose conditions on the Initial permit, and therefore, was unnecessary. The Ravenswood Initial permit also satisfies the requirements of the Water Resources Law, and thereby the Public Trust Doctrine, by mandating that Ravenswood take steps to monitor water use and conserve water. Accordingly, the Court should deny all claims in the verified petition against the DEC Commissioner and uphold the Ravenswood Initial permit.

## STATUTORY FRAMEWORK

### A. The Water Resources Law

The Water Resources Law, ECL Article 15, declares that it is the State's sovereign power to regulate and control New York's water resources. ECL § 15-0103(1). It acknowledges that adequate and suitable water for agricultural, commercial, and industrial uses, including the production of power, is essential to the economic growth and prosperity of the State. *Id*. § 15-0103(3).

Prior to 2009, the Water Resources Law regulated only public water supplies, leaving agricultural, commercial, and industrial water withdrawals largely unregulated. In 2009, Title 33 was added to the Water Resources Law, requiring entities, such as Ravenswood, that withdraw more than 100,000 gallons of water per day to file Annual Water Withdrawal Reports with DEC. In 2011, Title 15 of the Water Resources Law was amended to authorize DEC to implement a comprehensive permitting system for most large water withdrawals across the State.

The Water Resources Law now requires a permit to operate certain high-volume water withdrawal systems. ECL § 15-1501(1). A water withdrawal system is defined as any equipment or infrastructure used to remove water from the waters of the State, including collection, pumping, treatment, transportation, transmission, storage, and distribution. *Id.* §§ 15-1502(15), (16). Water withdrawal systems with a withdrawal capacity equal to or greater than a specified "threshold volume" must receive permits. *Id.* § 15-1501(1). The threshold volume for non-agricultural water withdrawal systems is 100,000 gallons per day.[1] *Id.* § 15-1502(14).

[1] Several types of water withdrawals are exempted from the permit requirements including withdrawals for public emergency purposes and existing withdrawals for agricultural purposes that were registered with DEC by February 15, 2012. ECL § 15-1501(7).

The Water Resources Law distinguishes between "existing" and "new" water withdrawals, *id.* § 15-1501(1), and the type of permit that is issued to authorize those withdrawals. DEC may issue two types of permits for water withdrawal systems that did not need permits before the 2011 amendments: "Initial permits" for most systems that were in existence as of February 2012 and reported their maximum capacity to DEC under the 2009 amendments, and new "permits" for all other systems.

**1. Initial Permits for Existing Water Withdrawals**

The 2011 amendments to the Water Resources Law mandate that DEC "shall issue" an Initial permit to operators of water withdrawal systems that reported the systems' maximum water withdrawal capacity to DEC by February 15, 2012, as required by the 2009 amendments to the Law. ECL § 15-1501(9). The legislative history of the 2011 amendments makes it clear that operators of existing water withdrawal systems, such as Ravenswood, that met this reporting requirement are "*entitled* to an Initial permit." New York State Assembly Memorandum in Support of Legislation, Petitioners' Ex. E at 000007 (emphasis added); DEC Memorandum Regarding A5318-A/S.3798, Petitioners' Ex. E at 000016. Accordingly, DEC has no authority or discretion to deny Initial permits when this criterion is met. *See* ECL § 15-1501(9).

ECL § 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 appropriate for Initial permits are listed in § 15-1501(6), which requires that every permit issued under § 15-1501 shall report information requested by DEC, including information related to water usage and conservation. ECL § 15-1501(4) also authorizes DEC to promulgate regulations that provide for monitoring and reporting, protection of potable water supply, and maintenance of stream flows.

To implement the Initial permit requirements, DEC promulgated 6 NYCRR § 601.7. The dates by which existing water withdrawal systems must apply for an Initial permit, based either

on their withdrawal capacity or SPDES permit status, are set forth in 6 NYCRR § 601.7(b). Since it has a SPDES permit, Ravenswood was required to apply for an Initial permit by June 1, 2013. 6 NYCRR § 601.7(b)(3).

An Initial permit will be issued for the withdrawal volume equal to the maximum withdrawal capacity reported to DEC by February 15, 2012. *Id.* § 601.7(d). An Initial permit is for a fixed term not to exceed ten years, and may be modified by DEC to correct technical mistakes. *Id.* §§ 601.7(e), 601.15(b)(4). In addition to generic conditions, an Initial permit may contain conditions to ensure that the water withdrawal system employs "environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies." *Id.* § 601.7(e). Those conditions include installing meters or other measuring devices on all sources of water supply (*Id.* § 601.19), calibrating those meters or other devices annually to ensure accuracy (*Id.* § 601.20(a)(2)), and filing an annual Water Withdrawal Reporting Form with DEC (*Id.* § 601.5).

Finally, 6 NYCRR § 601.7(f) provides that, when a water withdrawal system is subject to a State Pollution Discharge Elimination System ("SPDES") permit, as is Ravenswood, the Department will review the Initial permit application in coordination with the SPDES permit.

**2. New Permits**

Operators of water withdrawal systems that, unlike Ravenswood, did not report the systems' water withdrawal capacity to DEC by February 15, 2012 are ineligible for an Initial permit. These operators must apply for a new permit under ECL § 15-1503, and have no automatic entitlement to that permit.

Unlike an Initial permit granted under ECL § 15-1501(9), DEC may grant, deny, or impose conditions on a new permit based on the factors listed in ECL § 15-1503(2) including, for example, whether "the proposed water withdrawal takes proper consideration of other

sources of supply that are or may become available," and "the need for all or part of the proposed water withdrawal cannot be reasonably avoided through the efficient use and conservation of existing water supplies." These factors give DEC broad discretion, including the discretion to issue a new permit limiting the quantity of the water proposed to be withdrawn—a discretion that DEC does not have with respect to Initial permits.

To implement the requirements for new permits, DEC promulgated 6 NYCRR § 601.11. That regulation gives DEC the same broad discretion granted it by ECL § 15-1503(2).

**B. The National and State Pollutant Discharge Elimination Systems**

Authorized by the federal Clean Water Act, the National Pollutant Discharge Elimination System ("NPDES") permit program controls water pollution by regulating industrial and other sources that discharge pollutants into waters of the United States. Under the Clean Water Act, states have the option to supersede the federal program by developing and administering their own permitting programs, as long as the U.S. Environmental Protection Agency ("EPA"), finds those state programs to be at least as stringent as the federal program. *See* 33 U.S.C. §§ 1342(b), (c).

New York's program, the State Pollutant Discharge Elimination System ("SPDES"), was approved by EPA in 1975. *See* ECL §17-0701 *et seq.*; 6 NYCRR Parts 700-706 and 750 (implementing regulations). Like the Clean Water Act, New York's SPDES program requires a permit in order to discharge pollutants into the waters of the state. Since "pollutant" is defined under federal and state law to include "heat" (33 U.S.C. § 1362(6); ECL § 17-0105(17)), thermal discharges from a plant like Ravenswood are regulated under SPDES. *See* 6 NYCRR Part 704. In connection with thermal discharges, a facility's cooling water intake structures "shall reflect

the best technology available for minimizing the adverse environmental impacts." 6 NYCRR § 704.5; *see* 33 U.S.C. § 1326(b).

**C. The State Environmental Quality Review Act**

SEQRA, codified at Article 8 of the ECL, requires an environmental impact statement for any "action" proposed or approved by a government agency that may have a significant effect on the environment. ECL § 8-0109(2). The definition of "action" expressly *excludes* "official acts of a ministerial nature, involving no exercise of discretion." *Id.* § 8-0105(5)(ii). DEC's regulations implementing SEQRA define a "ministerial act" as "an action performed upon a given state of facts in a prescribed manner imposed by law without the exercise of any judgment or discretion as to the propriety of the act, such as the granting of a hunting or fishing license." 6 NYCRR § 617.2(w).

There are three types of actions under SEQRA—Type I, Type II or unlisted. If the action is classified as Type I or unlisted, further environmental review is conducted by the "lead agency," which is the agency "principally responsible for undertaking, funding or approving an action." *Id*. §§ 617.2(u), 617.6(a)(2),(3) & (b); *see also* ECL § 8-0111(6). There are two categories of Type II actions. The first category includes actions that do not require an EIS because they are precluded from environmental review under the ECL. 6 NYCRR § 617.5(a). The second category includes actions that are declared to be Type II actions by regulation because they have been determined not to have a significant impact on the environment. *Id*. § 617.5(b). Ministerial acts are categorized as Type II actions because they have been precluded from environmental review under SEQRA, which excludes ministerial acts from the definition of an "action". *Id.* § 617.5(c)(19).

**D. The Waterfront Revitalization of Coastal Areas and Inland Waterways Act**

The state Waterfront Revitalization of Coastal Areas and Inland Waterways Act ("Waterfront Act") was enacted pursuant to the federal Coastal Zone Management Act. *See* 16 U.S.C.A. § 1455(d)(2)(D). Under the Waterfront Act, codified at Executive Law Article 42, coastal municipalities in New York State can adopt and implement their own coastal policies through Local Waterfront Revitalization Plans. Executive Law § 915. Once a municipality adopts such a plan, State agencies must review proposed "actions" to determine if they are consistent with the plan. *Id.* § 916(1)(b). This process is known as a "coastal consistency review."

The New York State Department of State has promulgated regulations that implement the Waterfront Act. 19 NYCRR Part 600. These regulations require State agencies undertaking an "action" within a "Coastal Management area" to complete a coastal assessment form to assist in determining whether the "action" is consistent with local waterfront revitalization plans and whether it has a significant adverse environmental impact under SEQRA. 19 NYCRR § 600.4.

The Waterfront Act regulations adopt the SEQRA categorization of actions, defining "actions" as

> either type I or unlisted actions as defined in SEQR (6 NYCRR 617.2), which are undertaken by State agencies; the term shall not include excluded actions as defined in SEQR (6 NYCRR 617.2) or actions not subject to SEQR pursuant to other provisions of law.

19 NYCRR § 600.2(b). Therefore, an action that is not subject to review under SEQRA, including a ministerial act, is also not subject to coastal consistency review under the Waterfront Act.

## STATEMENT OF FACTS

The Ravenswood Generating Station is a 2,480 megawatt power plant located in Long Island City, Queens. Exhibit A, attached to Affidavit of Kent P. Sanders ("Sanders Aff."), at 1; Administrative Record ("AR") at 53; Sanders Aff. ¶ 7. It consists of multiple units employing steam turbine, combined cycle, and combustion turbine technology, fueled by natural gas, fuel oil, and kerosene. Exhibit A at 1; AR 3, 93; Sanders Aff. ¶ 7. Ravenswood has the capacity to serve approximately 21 percent of New York City's peak load. Exhibit A at 1; Sanders Aff. ¶ 7. It has been in operation since 1963 and is currently owned by TC Ravenswood LLC. AR 1, 93; Sanders Aff. ¶ 7.

### A. The Ravenswood SPDES Permit

Thermoelectric plants, such as Ravenswood, boil water to create steam, which then spins turbines to generate electricity. Affidavit of Roy A. Jacobson, Jr. ("Jacobson Aff.") ¶ 6. Once steam has passed through a turbine, it must be cooled back into water before it can be reused to produce more electricity. *Id*. Once-through cooling systems, as at Ravenswood, withdraw cooling water from nearby waterways, circulate it through pipes to absorb heat from the steam in systems called condensers, and then discharge the now warmer cooling water back to the waterway. *Id*. As a consequence of withdrawing water for cooling, fish and other aquatic life may be drawn into the facility and killed when larger fish become impinged on the intake screens (designed to keep debris in the water from entering the plant), or when early life stages of fish such as eggs and larvae and other small aquatic life pass through the screen mesh and into the facility (a process called entrainment). *Id*.

Since Ravenswood's cooling water system discharges pollutants, including heat, into State waters, it is regulated under SPDES[2] and its cooling water intake structures "shall reflect the best technology available for minimizing adverse environmental impacts." 6 NYCRR § 704.5; Jacobson Aff. ¶¶ 7, 8. The adverse environmental impacts of the Ravenswood cooling water intake system have been studied since at least 1974 when DEC required Ravenswood to submit reports containing a tabulation of all fish impingement and entrainment data collected to date. Exhibit 1, attached to Jacobson Aff., at 3; Jacobson Aff. ¶ 8. Ravenswood was also required to submit to DEC a "detailed biological study program designed to determine effects of facility operation on aquatic organisms" and based on that study, to "implement reasonable methods and procedures to reduce to the fullest extent possible the effects of facility operation on aquatic organisms." Exhibit 1 at 3.

Under a 1992 consent order with DEC concerning its SPDES permit, the previous owner of Ravenswood, Consolidated Edison Company of New York, conducted a series of studies to assess the plant's impact on aquatic resources in the East River and determine the best technology available for the cooling water intake system, as required by both the federal Clean Water Act and the SPDES program. AR 62, 104; Jacobson Aff. ¶ 9. Studies measuring the impingement and entrainment of aquatic life in the plant's cooling water intake structures were conducted between 1991 and 1994. *Id*. An additional study was then conducted to determine suitable locations to safely return impinged fish to the East River, and in 2005, three fish return pipes were constructed. AR 63, 104; Jacobson Aff. ¶ 11. More impingement and entrainment studies were conducted between March 2005 and February 2006. AR 63, 105; Jacobson Aff. ¶ 12.

[2] Since Ravenswood predates the state SPDES program, it was first regulated under the federal NPDES program. Jacobson Aff. ¶ 7.

In 2006, in order to determine the best technology available to minimize adverse environmental impacts from operation of the cooling water intake system, as required by the Clean Water Act and DEC regulations, DEC evaluated feasible technological and operational alternatives, including the use of closed-cycle cooling. AR 64-65, 105-106; Jacobson Aff. ¶ 12. DEC determined that the following actions, when conducted in combination, represent the best available technology: (1) installing variable speed pumps to reduce cooling water use during periods of low electrical generation; (2) scheduling of outages to shut down the cooling water pumps to reduce impingement and entrainment; (3) upgrading the existing traveling intake screens so they operate continuously; and (4) continuing use of the low stress fish returns, to increase fish impingement survival. *Id*. Implementation of these alternatives was required in the 2007 Ravenswood SPDES permit. AR 76-79; Jacobson Aff. ¶ 13; *see* AR 87-92. The permit's Performance Standards require that these alternatives must produce a ninety percent reduction in impingement mortality and a sixty-five percent reduction in entrainment. AR 77; Jacobson Aff. ¶ 13. These requirements are continued in the Biological Monitoring Requirements Section of the current Ravenswood SPDES permit, issued in November 2012. AR 125-127; Jacobson Aff. ¶ 13.

**B. Ravenswood's Water Withdrawal Reporting**

Since Ravenswood's water withdrawal system has the capacity to withdraw over 100,000 gallons of water per day, since 2010, it was required to file Annual Water Withdrawal Reports with DEC pursuant to Title 33 of the Water Resources Law.[3] Sanders Aff. ¶ 8. Ravenswood filed these reports with DEC by the February 1st deadline in 2010, 2011, and 2012. *Id*. Each report includes the facility's maximum water withdrawal capacity for the previous year. *Id*.

[3] Title 33 of the Water Resources Law was repealed in 2011 by the amendments to Title 15 of the Water Resources Law. Annual water withdrawal reporting is now required under ECL § 15-1501(6).

## C. The Ravenswood Initial Water Withdrawal Permit

On May 31, 2013, Ravenswood submitted an application to DEC seeking an Initial water withdrawal permit under the Water Resources Act. AR 1-35; Sanders Aff. ¶ 9. The application requested an Initial permit to withdraw up to 1,534.752 million gallons per day ("MGD") of water from the East River and contained exhibits applicable to its withdrawal including a general map, engineer's report, water conservation program, annual reporting form, and transmittal letter.[4] *Id.*; *see* 6 NYCRR § 601.10. The application included Ravenswood's 2012 Water Withdrawal Report, which showed that substantially all of the water withdrawn from the East River by the plant is returned to the East River (AR 21), and thus that the plant had no consumptive loss (Sanders Aff. ¶ 19). On August 1, 2013, DEC issued a notice of complete application to Ravenswood. AR 36; Sanders Aff. ¶ 11. The notice stated that the "[p]roject is not subject to SEQR because it is a Type II action." *Id.*

On August 7, 2013, DEC issued a notice in its Environmental Notice Bulletin stating that DEC had made a tentative determination to issue an Initial water withdrawal permit to Ravenswood authorizing a water withdrawal of approximately 1.5 billion gallons per day from the East River. AR 41-42; Sanders Aff. ¶ 12. The notice stated that the "[p]roject is not subject to SEQR because it is a Type II action" and therefore, no SEQR lead agency had been designated. *Id.* It also reported that the project is not located in a Coastal Management area and thus is not subject to the Waterfront Act. AR 42. The notice informed the public that comments on the Ravenswood Initial permit must be submitted by August 22, 2013. *Id.*; Sanders Aff. ¶ 12.

[4] The Ravenswood Initial permit application also included a project justification. AR 3; Sanders Aff. ¶ 9. However, project justifications are not applicable to Initial permits because those permits are for preexisting water withdrawal systems that are entitled to continue their withdrawals. Sanders Aff. ¶ 10. As Ravenswood was one of the first water withdrawal systems to submit an Initial permit application, it was not aware that a project justification was inapplicable to its application. *Id.* A watershed map is also inapplicable and unnecessary to the Ravenswood Initial permit application because the facility is located on the East River, which drains directly into the Atlantic Ocean. *Id.*

On August 28, 2013, DEC issued a second notice in the Environmental Notice Bulletin, extending the public comment period for the Ravenswood Initial permit until September 11, 2013. AR 47; Sanders Aff. ¶ 13. The notice stated that "DEC has determined that the issuance of 'Initial permits' under ECL section 15-501.9 as implemented by 6 NYCRR 601.7 is a ministerial action and therefore subject to the Type II exemption set out in 6 NYCRR 617.5(c)(19)." AR 48. In addition, the notice corrected DEC's earlier statement concerning the applicability of the Act, noting that the "project is located in a Coastal Management area" and therefore, subject to the Waterfront Act. *Id.*; Sanders Aff. ¶ 13. However, DEC later determined that the issuance of the Initial permit is exempt from a coastal consistency review under the Waterfront Act because it is a Type II action. Sanders Aff. ¶ 13.

On November 15, 2013, DEC issued an Initial permit for Ravenswood. AR 51, 53; Sanders Aff. ¶ 14. Although Ravenswood had requested authorization to withdraw 1,534.752 MGD, its annual report to DEC as of February 15, 2012 reported a maximum withdrawal capacity of 1,390 MGD. AR 1, 51. Accordingly, the Initial permit issued by DEC limited Ravenswood's water withdrawal to its reported capacity of 1,390 MGD, as required by ECL § 15-1501(9) and 6 NYCRR § 601.7(d). AR 51, 53; Sanders Aff. ¶ 14. The Initial permit runs concurrently with the Ravenswood SPDES permit, which is scheduled to expire on October 31, 2017, unless timely renewed. *Id.*; *see* 6 NYCRR § 601.7(f).

The Ravenswood Initial permit incorporates by reference the required measures for water conservation and fish protection contained in the Biological Monitoring Requirements Section of the Ravenswood SPDES permit. AR 54; Sanders Aff. ¶16. As reflected in the Ravenswood Initial permit application, these measures have decreased Ravenswood's water withdrawals by approximately twenty-six percent between July 2012 to April 2013. AR 9; Sanders Aff. ¶16.

DEC's regulatory reporting and measuring requirements are also incorporated into the Initial permit. *See* AR 54; Sanders Aff. ¶ 17. It requires Ravenswood to submit an annual Water Withdrawal Reporting Form to DEC, which contains information regarding approved sources of water supply, source capacities, average and maximum day water use data, and water conservation and efficiencies employed. *Id.*; *see* 6 NYCRR § 601.5. The Initial Permit also includes the regulatory requirement that all source meters or other water measuring devices be calibrated annually to ensure accuracy. AR 54; Sanders Aff. ¶ 17; *see* 6 NYCRR § 601.20(a)(2). And it requires Ravenswood to install and maintain meters or other appropriate measuring devices on all sources of water supply used in the water withdrawal system. AR 54; Sanders Aff. ¶ 17; *see* 6 NYCRR § 601.19. Ravenswood must read and record the meters or other measuring devices on a weekly basis, and must maintain records of the water withdrawn and used each year. *Id*. Ravenswood's permit application contained its 2012 Water Withdrawal Report, which showed that substantially all of the water withdrawn from the East River by the plant is returned to the East River. AR 21. DEC therefore concluded that the conditions it imposed ensure that the facility employs "environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies." 6 NYCRR 601.7(e); Sanders Aff. ¶17.

Although not statutorily required, DEC responded to public comments regarding the Ravenswood Initial permit when it issued the permit. AR 57-61; Sanders Aff. ¶ 21. DEC's response explained that neither a SEQRA review nor a coastal consistency review is required for the issuance of the Ravenswood Initial permit because it is a ministerial action. AR 58; Sanders Aff. ¶ 21. It also explained that measures to conserve water and reduce fish impacts have been considered and incorporated into the Ravenswood Initial permit by reference to the Biological

Monitoring Requirements Section of the Ravenswood SPDES permit. AR 59-61; Sanders Aff. ¶ 21.

On December 18, 2013, Ravenswood submitted a letter to DEC concerning its reported maximum water withdrawal capacity. AR 137-138; Sanders Aff. ¶ 22. It stated that its Annual Water Withdrawal Reports for the years 2009-2011 inadvertently omitted the water withdrawals for the plant's low pressure saltwater cooling system. *Id*. Taking these withdrawals into account raises the plant's maximum water withdrawal capacity to 1,527.840 MGD. *Id*. Ravenswood explained that this maximum capacity is necessary to maintain the reliability of the electrical grid and to provide critical electric generation during natural disasters or other emergencies. *Id*. For example, during and in the aftermath of Superstorm Sandy, Ravenswood provided approximately fifty percent of New York City's electric load, requiring all units to generate at maximum capacity. *Id.* Ravenswood also submitted revised Annual Water Withdrawal Reports for 2009-2011, and an engineer's certification stating that the low pressure saltwater cooling system dates back to 1962. AR 139-151; Sanders Aff. ¶ 22.

On February 19, 2014, DEC sent Ravenswood a letter stating that based on the corrected Annual Water Withdrawal Reports, DEC determined that it is necessary to modify the Initial permit to increase the maximum water withdrawal capacity from 1,390 MGD to 1,527.84 MGD. AR 152-153; Sanders Aff. ¶ 23. On March 7, 2014, DEC issued a corrected Initial permit to Ravenswood, allowing it to withdraw 1,527.84 MGD. AR 154; Sanders Aff. ¶ 24. The corrected Initial permit has the same expiration date of October 31, 2017 and contains the same conditions as the original Initial permit. AR 155-158; Sanders Aff. ¶24.

## ARGUMENT

## DEC'S ISSUANCE OF THE RAVENSWOOD INITIAL PERMIT WAS IN FULL COMPLIANCE WITH APPLICABLE STATUTORY REQUIREMENTS

### A. The State Environmental Quality Review Act Does Not Apply to the Issuance of the Ravenswood Initial Permit

#### 1. The Issuance of the Ravenswood Initial Permit Was a Ministerial Act

Under SEQRA, the purpose of an environmental review is to provide information about the effect a proposed action will have on the environment, in order to form the basis for a decision whether or not to approve the action. *Filmways Commc'ns of Syracuse, Inc. v. Douglas,* 106 A.D.2d 185, 187 (4th Dep't 1985), *aff'd* 65 N.Y.2d 878 (1985). When, as here, an agency is under a statutory mandate to approve an action, information about the effect the action will have on the environment serves no purpose because the agency may not disapprove the action based on the information. *Id.* For that reason, "official acts of a ministerial nature, involving no exercise of discretion" are excluded from the requirements of SEQRA. ECL § 8-0105(5)(ii).

Following from that reasoning, the Court of Appeals has stated that "the pivotal inquiry" in determining whether an agency decision is ministerial and thus outside SEQRA's purview "is whether the information contained in an EIS may 'form the basis for a decision whether or not to undertake or approve such action.'" *Inc. Vill. of Atlantic Beach v. Gavalas,* 81 N.Y.2d 322, 326 (1993) (quoting *Filmways,* 106 A.D.2d at 187). When an agency vested with discretion in only a limited area cannot "deny a permit on the basis of SEQRA's broader environmental concerns," "preparation of an EIS would be a meaningless and futile act." *Id*. at 327.

Here, an environmental review could not have formed the basis for DEC to deny Ravenswood its Initial permit because DEC was required to issue the Initial permit. In amending the Water Resources Law, the Legislature determined that preexisting water users are "entitled" to Initial permits to continue withdrawing water up to the maximum capacity they reported to

DEC under existing law. New York State Assembly Memorandum in Support of the Legislation, Petitioners' Ex. E at 000007 (stating that "ECL 15-1501 would be amended to . . . provide that existing water withdrawals would be entitled to an Initial permit."). Thus, ECL § 15-1501(9) states that the "department *shall issue* an Initial permit . . . for the maximum water withdrawal capacity reported to the department." (emphasis added). Accordingly, the Legislature gave DEC no discretion to deny an Initial permit to an applicant that reported its maximum water withdrawal capacity to DEC by February 15, 2012. As Ravenswood met this requirement, DEC could not deny it an Initial permit on the basis of a SEQRA review. *See Gavalas*, 81 N.Y.2d at 327.

Even when an agency has some discretion with respect to the conditions that it imposes when it takes ministerial actions, courts have found that its decisions will not be considered "actions" for purposes of SEQRA if "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." *Gavalas*, 81 NY2d at 326. Again, this is because in such situations an environmental review would not inform an agency's decision. For example, the granting of a building demolition permit is a ministerial matter, despite the fact that the Director of the Bureau of Code Enforcement has discretion in determining whether the demolition plan ensures safety and protection of the area surrounding the building and may require the applicant to modify the demolition plan prior to granting the permit. *Ziemba et al. v. City of Troy et al.*, 37 A.D.3d 68, 75 (3d Dep't 2006). Similarly, an order requiring the closing of a private rail crossing is a ministerial matter, despite the fact that the Commissioner of the Department of Transportation has discretion to consider the safety issues presented by a particular crossing and to determine whether to require alterations or the closure of such a crossing. *Matter of Island Park v. New*

*York State Dep't of Transp.*, 61 A.D.3d 1023, 1028 (3d Dep't 2009). In both cases, the court found that the agencies' discretion did not relate to the type of information contained in an environmental review, and therefore such a review would not inform their discretionary determinations.

Here, DEC had limited discretion to place conditions on the Ravenswood Initial permit concerning "environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies," 6 NYCRR § 601.7(e), but those conditions would not have been informed by an environmental review. Most of the conditions were required by the implementing regulations of the Water Resources Law—filing Annual Water Withdrawal Reports, installing measuring devices on all sources of water supply, and calibrating those devices once a year—and thus not discretionary. 6 NYCRR §§ 601.5, 601.19, 601.20(a)(2). Those same conditions are also generic for this type of facility and are based solely on information that Ravenswood provided in its Initial permit application, including that the water the plant withdraws from the East River is discharged back to the River with no consumptive loss. As a result, an environmental review would not have informed DEC's decision to impose them.

The Initial permit also incorporated the water conservation and fish protection measures in Ravenswood's SPDES permit, but DEC exercised its discretion with respect to those conditions—and reviewed them under SEQRA—when the SPDES permit was issued, not when the Initial permit was issued. The measures were incorporated into the Ravenswood Initial permit to ensure that the two permits would be viewed in conjunction, as required by 6 NYCRR § 601.7(f).

Petitioners mistakenly argue that DEC has "broad discretion in specifying the terms and conditions of all water withdrawal permits, including 'initial' permits." Petitioners' Memorandum of Law ("Pet. Mem.") at 16. That argument is based on their assertion that ECL § 15-1503(2) and 6 NYCRR § 601.11(c) apply to the issuance of Initial permits, and that "[t]here is no exemption from the requirements of Section 15-1503.2 for 'initial' permits." *Id*. at 16, 20. But the provisions of ECL § 15-1503(2) and 6 NYCRR § 601.11(c) apply only to the issuance of *new* permits, not to the issuance of *Initial* permits.

ECL § 15-1503(2) provides that, in deciding whether "to grant or deny a permit or to grant a permit with conditions," DEC is required to consider a number of factors that concern the quantity of water to be withdrawn by the permit applicant, including whether: (1) the quantity of the water supply will be adequate for the proposed use; (2) the project is just and equitable to all affected municipalities and their inhabitants with regard to their present and future needs for sources of portable water supply; (3) the need for all or part of the proposed water withdrawal cannot be reasonably avoided through the efficient use and conservation of existing water supplies; and (4) the proposed water withdrawal is limited to quantities that are considered reasonable for the purposes for which the water use is proposed. Those factors are irrelevant to an application for an Initial permit, and it would be futile for DEC to consider them in that context, because ECL §15-1501(9) mandates that DEC issue an Initial permit for the maximum water withdrawal capacity reported to DEC by the applicant and thus DEC can neither deny an Initial permit nor limit its withdrawal capacity on the basis of them. ECL § 15-1503(2) also refers primarily to "proposed water withdrawal[s]," not the existing water withdrawals for which an Initial permit is issued. Thus, ECL § 15-1503(2) applies only to new permits for which DEC has broad discretion to deny or limit withdrawal capacity.

DEC regulations also contain different requirements for Initial permits and new permits. The requirements for Initial permits are set forth in 6 NYCRR § 601.7, which is titled "Initial permits." As discussed above, DEC issued Ravenswood's Initial permit pursuant to that regulation and exercised only the limited discretion granted to it by 6 NRCRR § 601.7(e) to impose water conservation conditions on the permit.

The requirements for new permits are set forth in 6 NYCRR § 601.11, which echoes ECL § 15-1503(2), and directs DEC to make determinations that implicate the quantity of water to be withdrawn and thus have no relevance to Initial permits. Petitioners go so far as to argue that 6 NYCRR § 601.11(a) gives DEC the discretion to *deny* an Initial permit, Pet. Mem. at 20, but that would be entirely contrary to ECL §15-1501(9), which requires DEC to issue Initial permits. Indeed, 6 NYCRR § 601.11(a), which provides that "[t]he Department may grant or deny a permit, or grant a permit with conditions," shows that § 601.11 does not apply to Initial permits because DEC clearly may *not* deny an application for an Initial permit.

That 6 NYCRR §§ 601.7 and 601.11 apply to different types of permits is also evidenced by the duplication of certain provisions contained in those sections. For example, both sections call for the use of "environmentally sound and economically feasible water conservation measures." *Compare* 6 NYCRR § 601.7(e) *with* 6 NYCRR § 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 NYCRR § 601.7(e) *with* 6 NYCRR § 601.11(b). Finally, both sections specify that DEC will review the Initial permit or permit application in coordination with the SPDES or other permit program. *Compare* 6 NYCRR § 601.7(f) *with* 6 NYCRR § 601.11(h). Such duplication would be unnecessary if 6 NYCRR § 601.11 applied to Initial permits as well as new permits.

In short, DEC was not required to conduct a SEQRA review before it issued an Initial permit to Ravenswood because the issuance of that Initial permit was a ministerial act and the limited discretion that DEC exercised in imposing conditions in the Initial permit would not have been informed by an environmental review.

### 2. The Issuance of the Ravenswood Initial Permit is Not Considered an "Action" Under SEQRA

Additionally, Petitioners assert that the issuance of the Ravenswood Initial permit cannot be categorized as a Type II action because, under DEC's SEQRA regulations "a project or action that would use ground or surface water in excess of 2,000,000 gallons per day" is a Type I action requiring SEQRA review, and a Type I action cannot also be Type II action. Pet. Mem. at 27. Petitioners' argument fails to recognize that a ministerial act, such as the issuance of the Initial permit, is not an "action" under SEQRA and therefore cannot be a Type I action.

Petitioners' argument that a Type I action cannot also be a Type II action disregards the fact that there are two categories of Type II actions: (1) actions that "are otherwise precluded from environmental review under Environmental Conservation Law, article 8," which include ministerial acts (6 NYCRR § 617.5(a)); and (2) actions that are declared to be Type II actions by regulation (6 NYCRR § 617.5(b)). An action that is declared a Type II action by regulation may not also be a Type I action but that is not what occurred here. The issuance of Ravenswood's Initial permit is in the first category and is a Type II action because it is a ministerial act that is excluded from the definition of "action" under ECL § 8-0105(5)(ii).

## B. The Waterfront Act Does Not Apply to the Issuance of the Ravenswood Initial Permit

The regulations issued under the Waterfront Act, provide that an action is not subject to review under the Act if it is not subject to review under SEQRA. 19 NYCRR § 600.2(b). Since Initial permits are ministerial acts excluded from SEQRA review, they are also excluded from a

coastal consistency review under the Waterfront Act.

### C. The Ravenswood Initial Permit Contains Appropriate Terms and Conditions as Required By the Water Resources Law

Petitioners contended in their Article 78 petition that DEC failed to apply appropriate terms and conditions in the Ravenswood Initial permit as required by the Water Resources Law (Petition at 19) but do not make that argument in their memorandum of law and thus appear to have abandoned it. In any event, the Court should reject it.

As explained in section A1 above, the water conservation measures imposed in the Initial permit are the conditions required by DEC's regulations and the additional measures that are required by Ravenswood's SPDES permit. Consistent with DEC best practices on water metering, Ravenswood is required to meter or measure all sources of its water supply and calibrate those meters or other measuring devices annually. AR 14, 156; Sanders Aff. ¶ 17. Consistent with DEC best practices on water auditing, Ravenswood must submit annual water withdrawal reports, measure source master meters on a weekly basis, and maintain records of water withdrawn and consumptive use for each calendar year. AR 15, 156; Sanders Aff. ¶ 17. The Ravenswood water conservation program also complies with standards for leak detection and repair by using personnel and water usage data to detect leaks and address those leaks as soon as possible. AR 16; Sanders Aff. ¶ 18.

The Initial permit also incorporates the requirement in Ravenswood's SPDES permit that the plant use variable frequency drives, which have led to a twenty-six percent reduction in Ravenswood's water withdrawals over an eight month period from July 2012 to April 2013. AR 17; s*ee* AR 9; Sanders Aff. ¶ 16. Petitioners take issue with the fact that the Initial permit does not require Ravenswood to employ a closed-cycle cooling system, but an Initial permit could not set a new requirement for closed-cycle cooling because Initial permit holders are entitled to

continue withdrawing water at the maximum capacity reported to DEC by February 15, 2012.[5] *See* ECL § 15-1501(9), 6 NYCRR § 601.7(d).

The Initial Permit does not require Ravenswood to do an annual water audit because the facility has no consumptive loss, meaning that substantially all of the water that is withdrawn from the East River is returned to the East River. *See* AR 21; Sanders Aff. 19. As the vast majority of pipes carrying cooling water at the Ravenswood facility are above ground, there is no need to survey underground piping for leakage. Sanders Aff. ¶ 18. Although the volume of cooling water needed by Ravenswood makes it unfeasible to use rain or stormwater in lieu of water from the East River as a recycling measure, substantially all of the water used in the Ravenswood once-through-cooling system is recycled because it is continuously returned to its water source, the East River.

**D. DEC Did Not Violate the Public Trust Doctrine**

Petitioners make the novel argument that, in addition to violating SEQRA, the Waterfront Act, and the Water Resources Law, DEC violated the public trust doctrine by not conducting the reviews and imposing the additional measures required by those statutes. Pet. Mem. at 37. Petitioners cite no authority for the proposition that the public trust doctrine, a common law doctrine, is somehow incorporated into the statutes at issue here and thereby imposes requirements on DEC above and beyond the statutory requirements. Petitioners also explicitly recognize that the responsibility to protect resources for public use is a legislative function and the Legislature exercised that responsibility when it enacted SEQRA, the Waterfront Act and the Water Resources Law. *Id.* at 34-37. Thus, so long as DEC complied with those statutes—as it did here—it is in compliance with the public trust doctrine.

[5] An Initial permit may, however, incorporate requirements set forth in a SPDES permit. If a SPDES permit mandated closed-cycle cooling, such a requirement could be incorporated by reference into an Initial permit.

The public trust doctrine is the principle that certain resources are preserved for the public use, and that the State is responsible for protecting the public's right to that use. As relevant here, it is "the duty of the State to control and conserve its water resources for the benefit of all the inhabitants of the State. The public right to the benefit of such resources is an incident of sovereignty." *Syracuse v. Gibbs*, 283 N.Y. 275, 283 (1940). "In the exercise of this power, the State acts through the Legislature, as the conservation or diversion of waters is a legislative function." *Suffolk County v. Water Power & Control Comm'n.*, 245 A.D. 62, 64 (3d Dep't 1935), *modified and aff'd*, 269 N.Y. 158 (1935). The Legislature may, at will, grant the privilege of taking water from a public source. *See Gibbs*, 283 N.Y. at 283.

As discussed above, the Legislature has decided that water withdrawal systems are a publicly beneficial use of the State's water resources and has mandated that existing systems be issued an Initial permit if they met statutory reporting requirements. This is clearly within the Legislature's public trust authority. As also discussed above, DEC complied with the Legislature's mandate by issuing Ravenswood an Initial permit that included the conditions required by the Water Resources Act and incorporating the terms of Ravenswood's SPDES permit.

Petitioners criticize DEC for failing to mandate closed cycle cooling for the Ravenswood plant (*see* Petition ¶¶ 20-22), yet they fail to acknowledge that DEC has already considered and rejected this alternative as part of the SPDES Biological Monitoring Requirements. AR 105; Jacobson Aff. ¶ 12. As this argument represents a challenge to the Ravenswood SPDES permit, issued in 2012, it is time barred. *See* CPLR 217(1).

In any event, petitioners' claim that closed-cycle cooling is justified because the plant kills "hundreds of millions of eggs, larvae and young fish each year" as well as injuring or killing

"millions of larger fish" is also based on outdated impingement and entrainment studies. Those studies were conducted before Ravenswood implemented its SPDES permit measures to reduce impingement and entrainment by ninety percent and sixty-five percent, respectively. By including these SPDES measures in the Initial permit, DEC complied with its public trust obligations.

## CONCLUSION

For the foregoing reasons, the Commission's decision to grant an Initial water withdrawal permit to Ravenswood should be upheld, and the verified petition should be denied in its entirety.

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