SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

In the Matter of the Application of

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

Petitioners,

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

Index No. 2402/19

–against–

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, BASIL SEGGOS, COMMISSIONER, and HELIX RAVENSWOOD LLC,

Respondents.

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED PETITION

RICHARD J. LIPPES
Lippes & Lippes
1109 Delaware Avenue
Buffalo, NY 14209-1601
Telephone: (716) 884-4800
Email: rlippes@lippeslaw.com

RACHEL TREICHLER
7988 Van Amburg Road
Hammondsport, New York 14840
Telephone: (607) 569-2114
Email: treichlerlaw@frontiernet.net

JONATHAN GEBALLE
11 Broadway, Suite 615
New York, NY 10004
Telephone: (212)732-0800
Email: jg@jonathangeballe.com

Attorneys for Petitioners

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PRELIMINARY STATEMENT

The key legal issue to be determined in this proceeding is whether the action of Respondent New York State Department of Environmental Conservation ("Respondent DEC") in issuing a water withdrawal permit to Respondent Helix Ravenswood LLC ("Respondent HRLLC") for operation of its Ravenswood Generating Station in Long Island City, Queens that is substantially the same permit as the permit invalidated by the Appellate Division Second Department its decision in *Sierra Club v. Martens*, 158 A.D.3d 169 (2nd Dep't 2018) is consistent with the requirements of the Water Resources Law (the "WRL"), Environmental Conservation Law ("ECL") Article 15, Title 15, 15-1501 *et se* . and the State Environmental Quality Review Act, ("SEQRA") ECL Article 8, 8-0101 *et se* .

Determining this issue is significant because *Sierra Club v. Martens* is the first appellate court decision to interpret the requirements of the 2011 amendments to the WRL and the decision in this case will further elucidate the requirements of the law.

STATEMENT OF FACTS

In 2011 the New York State Legislature enacted amendments to the WRL requiring for the first time that private users whose water withdrawals exceed 100,000 gallons per day obtain water withdrawal permits from Respondent DEC and setting terms and conditions to be determined by Respondent DEC in issuing such permits. Petitioners challenged the first water withdrawal permit issued to a private user under the new law, the permit issued to Ravenswood Generating Station (then under different ownership) in 2013 (the "2013 Ravenswood Permit") on the ground that the permit did not comply with the requirements of the new permitting law and that issuance of a permit to an existing user, such as Ravenswood Station, was not exempt from review under SEQRA, In January 2018, the Second Department annulled the 2013 Ravenswood

Permit on the ground that Respondent DEC had not conducted a SEQRA review and that Respondent DEC's claim that it had no discretion under the WRL in setting the terms and conditions of the 2013 Ravenswood Permit was not consistent with the provisions of the WRL. *Sierra Club v. Martens, supra.*

Responding to the application of Respondent HRLLC, the new owner of Ravenswood Station, for a replacement permit, Respondent DEC issued a water withdrawal permit on February 20, 2019, authorizing Respondent HRLLC to withdraw up to 1,527,840,000 gallons of water per day from the East River in the New York Harbor Estuary for operation of Ravenswood Station's once-through cooling system (the "2019 Ravenswood Permit"). Administrative Record ("AR") 541-546. The 2019 permit and the 2013 permit, which are for the same amount, are the largest permits issued to date under the WRL. The only differences in the terms and conditions of the two permits are two relatively insignificant conditions added to the 2019 Ravenswood Permit: condition (8) "Permittee Must Maintain Records" and condition (9) "Conduct Water Audits." Compare AR 541-546 to AR 158-162. The other terms and conditions of the 2019 Ravenswood Permit are identical to the terms and conditions of 2013 Ravenswood Permit. *d.*

In accordance with the ruling in *Sierra Club v. Martens* that a SEQRA review is required of a water withdrawal permit application for operation of Ravenswood Station, Respondent DEC determined that issuance of the 2019 Ravenswood Permit is a Type I action under SEQRA, and issued a negative declaration that issuance of the permit would not have a significant impact on the environment on September 25, 2018. AR 392-393. On February 14, 2019, after receiving thousands of comments objecting to the negative declaration, AR 689-3280, and five days before the 2019 Ravenswood Permit was issued, Respondent DEC amended its SEQRA determination

and revised the reasoning set forth in the negative declaration (the "Amended Negative Declaration"). AR 528-529.

Petitioners served and filed a Notice of Petition and Petition on April 18, 2019, asserting that in issuing the 2019 Ravenswood Permit, Respondent DEC has again failed to properly apply the requirements set forth in the WRL and has failed to take a "hard look" under SEQRA at the environmental impacts of issuing the permit. This is the Petition currently before this court.

ARGUMENT

POINT I

DEC VIOLATED THE WATER RESOURCES LAW IN ISSUING A WATER WITHDRAWAL PERMIT TO HRLLC WITHOUT MAKING THE REQUIRED DETERMINATIONS OR INCLUDING ADEQUATE CONDITIONS

Respondent DEC violated the WRL and its implementing regulations, 6 NYCRR Part 601, when it issued the 2019 Ravenswood Permit with virtually the same terms and conditions as the invalidated 2013 Ravenswood Permit without making the determinations required by the WRL, or including new conditions in the permit to address those determinations.

A. The 2011 Amendments to the WRL Were Enacted to Comply with the Great Lakes-St. Lawrence River Basin Compact

In June 2011 the New York legislature enacted the Water Resources Protection Act of 2011, Chapters 400-402, Laws of 2011. The Act, which amended the WRL, ECL Article 15, Title 15, was signed into law by Governor Cuomo on August 15, 2011. The 2011 amendments are the first statutory provisions in New York law to require that users other than public water supply systems obtain water withdrawal permits. Water withdrawal permits have been required for public water supply systems since 1905. The amendments require that any person taking

100,000 gallons or more per day from any of the state's waters obtain a water withdrawal permit (with certain exemptions). ECL 15-1501.

The 2011 amendments to the WRL were enacted to comply with the requirements of Great Lakes-St. Lawrence River Basin Compact (the "Compact" or the "Great Lakes Compact"). ECL 21-1001. The Compact is a bi-national agreement between the federal governments of the United States and Canada, eight US states and two Canadian provinces. The purpose of the Compact is to protect the waters of the Great Lakes-St. Lawrence River Basin, one of the largest fresh water reservoirs in the world. Shortly after the Compact was ratified in 2008, Respondent DEC drafted new water withdrawal permitting legislation to bring New York into compliance with the Compact and give Respondent DEC additional powers to regulate water withdrawals in New York. The Governor's press release announcing his signing of the 2011 amendments stated that "This law will ensure that New York upholds its commitments under the [Great Lakes-St. Lawrence River Basin Water Resources] Compact."[1] The press release also quoted Senator Mark Grisanti, Chairman of the Senate Environmental Conservation Committee in 2011, "Passage of this monumental legislation will protect our environment by regulating the amount of water that can be extracted. Under current law, the state does not have the proper oversight to regulate water withdrawals, and with this legislation they will be able to better protect our state's greatest natural resource its water."[2]

The 2011 amendments to the WRL apply the decision-making standards required by the Compact for water withdrawals in the Great Lakes Basin to water withdrawal permits issued throughout New York State. These decision-making standards include the Compact

[1] "Governor Cuomo to Sign Law to Protect New York's Waters," Governor's Press Office, August 15, 2011, http://www.governor.ny.gov/news/governor-cuomo-sign-law-protect-new-yorks-waters [accessed July 12, 2019].

[2] *d.*

requirements that withdrawals must "incorporate environmentally sound and economically feasible water conservation measures" and "result in no significant individual or cumulative adverse impacts to the quantity or quality of the waters and water-dependent resources in the source watershed." ECL 21-1001, Sections 4.2 and 4.15. The 2011 amendments incorporate these decision-making standards as a series of determinations that Respondent DEC is required to make before issuing a water withdrawal permit. ECL 15-1503.2(a)-(h). The incorporation of the Compact decision-making standards is reinforced in new regulations Respondent DEC promulgated in 2012 to implement the 2011 amendments, which require the same determinations as ECL 15-1503.2(a)-(h). See 6 NYCRR 601.11(c)(1)-(8). The regulations became effective April 1, 2013.[3]

B. Respondent DEC Failed to Make the Required Determinations or to Impose Appropriate Conditions in the 2019 Ravenswood Permit

DEC violated the WRL and its implementing regulations when it issued the 2019 Ravenswood Permit without making the determinations required in the law or setting conditions to address those determinations. ECL 15-1503.2(a)-(h) provides that "[i]n making its decision to grant or deny a permit or to grant a permit with conditions," DEC shall make eight determinations. These are:

> (a) the proposed water withdrawal takes proper consideration of other sources of supply that are or may become available;
>
> (b) the quantity of supply will be adequate for the proposed use;
>
> (c) the project is just and equitable to all affected municipalities and their inhabitants with regard to their present and future needs for sources of potable water

[3] Water Withdrawal Permit Program, Water Supply Law Revision, https://www.dec.ny.gov/permits/6036.html.

supply;

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

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

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

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

(h) the proposed water withdrawal will be implemented in a manner that is consistent with applicable municipal, state and federal laws as well as regional interstate and international agreements.

The same eight determinations are required by Section 601.11(c)(1)-(8) of the regulations. ECL 15-1503.4 provides that these determinations are to be applied in setting appropriate terms and conditions in a water withdrawal permit. Respondent DEC failed to make the determinations required by ECL 15-1503.2(a)-(h) and Section 601.11(c)(1)-(8) and therefore failed to include appropriate conditions in the 2019 Ravenswood Permit.

The fact that the terms and conditions of the 2019 Ravenswood Permit are virtually the same as the terms and conditions of the 2013 Ravenswood Permit shows that Respondent DEC has not made the required determinations for the 2019 Ravenswood Permit. At the time Respondent DEC issued the 2013 Ravenswood Permit, Respondent DEC claimed that it did not have the authority to make the determinations required by ECL 15-1503.2 and 6 NYCRR 601.11(c) on that ground that these determinations were not required for permits issued to existing users such as the owners of the Ravenswood Generating Station. The court in *Sierra*

Club v. Martens did not accept this argument. That court ruled that Respondent DEC's claim that it had no discretion in setting the terms and conditions of a water withdrawal permit issued to an existing user was not consistent with the authority granted to Respondent DEC under the WRL. The Court invalidated the 2013 Ravenswood Permit on the ground that Respondent DEC does have discretion under the WRL in setting the terms and conditions of water withdrawal permits issued to existing users. The Court stated that whether 'the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures' will almost certainly vary from operator to operator, or from water source to water source. . . . Whether a condition is 'appropriate' for a given operator is a matter that falls within the DEC's expertise and involves the exercise of judgment, and, therefore, implicates matters of discretion." *d*. at 177.

The administrative record provided by Respondent DEC makes it apparent that Respondent DEC did not collect the information necessary to make the required determinations for the 2019 Ravenswood Permit. First and foremost, Respondent DEC failed to require the necessary data and analysis in the Respondent HRLLC's application materials. Subsection (k) of section 601.10 of the regulations requires a "Project Justification," which is required to show:

> (1) why the proposed project was selected from the evaluated alternatives;
>
> (2) why increased water conservation or efficiency measures cannot negate or reduce the need for the proposed water withdrawals;
>
> (3) why the proposed water withdrawal quantity is reasonable for the proposed use;
>
> (4) why the proposed water conservation measures are environmentally sound and economically feasible;
>
> (5) whether the proposed water supply is adequate;

(6) whether the proposed project is just and equitable to other municipalities and their inhabitants in regards to present and future needs for sources of potable water;

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

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

6 NYCRR 601.10(k). No information regarding these issues is included in the project justification provided in the support of Respondent HRLLC's application for the 2019 Ravenswood Permit. In fact, Respondent DEC allowed Respondent HRLLC to resubmit the same Engineer's Report and Project Justification provided by the previous owner of Ravenswood Station in 2013 in support of its application for the 2013 Ravenswood Permit. AR 336-337. Consequently, Respondent DEC did not have information in the application materials to support making the determinations required by ECL 15-1503.2 and 6 NYCRR 601.11(c). Petitioners disagree with the claim made by Respondent DEC in its Response to Public Comments on the proposed 2019 Ravenswood Permit, dated February 14, 2019, AR 537, that the Engineering Report submitted in 2013 with the original water withdrawal permit application and resubmitted by Respondent HRLLC in 2018, which "indicated no change from existing operations," contained the information required under 6 NYCRR 601.10(k) to enable Respondent DEC to make the determinations in ECL §15-1503.2 and 6 NYCRR 601.11(c). The detailed requirements of 6 NYCRR 601.10(k) are not satisfied by a statement that there will be no change from existing operations. To interpret section 601.10(k) in this manner would effectively nullify the requirements of the WRL, since the vast majority of the withdrawals subject to the WRL are existing withdrawals

Although Respondent DEC states in its Response to Public Comments that "upon the court's annulment of the 2013 initial water withdrawal permit, and remittance of the permit to NYSDEC for further processing, NYSDEC subsequently made the determinations that appear in ECL §15-1503.2" and lists a series of eight determinations, AR 532-533, there is no document in the administrative record provided by Respondent DEC in this proceeding other than the Response to Public Comments itself that shows that the determinations listed in the Response to Public Comments were made before the 2019 Ravenswood Permit was issued. The determinations listed in the Response to Public Comments do not appear in the Project Justification Review Checklist Supplement at AR 591. That half-page document lists a series of questions with "P" responses. It is not apparent what the "P" responses mean. The Project Justification Review Checklist Supplement is undated and unsigned and contains only a handwritten word, "Ravenswood" at the top to connect the questions listed to Ravenswood Station. The short questions are not specific to the circumstances of Ravenswood Station. For example, one of the questions is "601.10 (k)(4) Why the proposed water conservation measures are environmentally sound and economically feasible [15-1503.2(g)]." *d*. The response is "P." *d*. No proposed water conservation measures are listed.

In view of the following facts: (1) Respondent DEC's insistence in 2013 that it was not authorized to make the determinations required by ECL 15-1503.2 and 6 NYCRR 601.11(c) or to use those determinations to set appropriate terms and conditions for the 2013 Ravenswood Permit, (2) that the terms and conditions of the 2019 Ravenswood Permit are virtually identical to the terms and conditions of the 2013 Ravenswood Permit, (3) the absence of any demonstration that Respondent actually made the required determinations or set appropriate conditions in the 2019 Ravenswood Permit, and (4) the absence of necessary information in

Respondent HRLLC's application materials to support such determinations, it is clear that Respondent DEC has not made the determinations required by ECL 15-1503.2 and 6 NYCRR 601.11(c).

1. Respondent DEC Failed to Make the Determination Required by ECL 15-1503.2(f)

Among the determinations DEC was required to make and did not make before issuing the 2019 Ravenswood Permit is the determination required by ECL 15-1503.2(f) and 6 NYCRR 601.11(c)(6), that "the proposed water withdrawal will be implemented in a manner to ensure it will result in no significant individual or cumulative adverse impacts on the quantity or quality of the water source and water dependent natural resources." ECL 15-1503.2(f) and 6 NYCRR 601.11(c)(6) correspond to the requirements in the Great Lakes Compact requiring the assessment of cumulative impacts. ECL 21-1001, Section 4.15 (4). To make this determination, DEC should have examined the cumulative impacts of all the power plants and other large water users operating in the Hudson River estuary. There is no information in the application materials to provide a basis for such a determination, contrary to the requirements of 6 NYCRR 601.10(k)(7). A 2011 Sierra Club report gives a summary of the type of information that should have been provided and evaluated, but was not. The report, *Giant Fish Blenders: How Power Plants Kill Fish & Damage Our Waterways*, Sierra Club, July 2011,[4] notes that 17 power plants affect the Hudson River estuary:

> A total of 17 power plants using once-through cooling are located in the region: four on the Hudson River, eight on the Long Island Sound and five in New York Harbor. . . . All these plants use exorbitant amounts of water. . . . The Hudson River plants have a combined intake capacity of nearly 5 billion gallons per day; the Long Island Sound plants have a combined intake capacity exceeding 5 billion gallons per day; and the New York Harbor and East River plants have a combined intake capacity of more than 3.5 billion gallons per day. Altogether, the 17 plants

[4] https://vault.sierraclub.org/pressroom/media/2011/2011-08-fish-blenders.pdf .

> can withdraw almost 14 billion gallons per day from the two estuaries and the harbor. . . .
>
> Because of these waters' importance as spawning and nursery grounds, it is unsurprising that entrainment of eggs and larvae occur in astronomic numbers. . . .
>
> [P]ower plants using once-through cooling on the Hudson have a huge, detrimental impact on the ecology of the estuary—and this impact goes well beyond the loss of large numbers of individual fish. In a 2007 report, New York State found that the cumulative impact of multiple facilities on the river substantially reduces the population of young fish in the entire river. In certain years those plants have entrained between 33 and 79 percent of the eggs and larvae spawned by striped bass, American shad, Atlantic tomcod and five other important species. Over the time the plants have been operating, the ecology of the Hudson River has been altered, with many fish species in decline and populations becoming less stable. Of the 13 key species subject to intensive study, ten have declined in abundance, some greatly. Power plants have played a considerable role in that decline.[5]

Respondent DEC addresses the claim that it should have made a determination regarding cumulative impacts in its response to Public Comments on the proposed 2019 Ravenswood Permit. Respondent DEC states that:

> NYSDEC has made that determination. Under ECL § 15-1503.2(f), NYSDEC has determined that there are no significant cumulative adverse effects from issuance of the initial water withdrawal permit to Helix for its continued, unchanged operation. The baseline against which to evaluate changes for the purposes of determining environmental impact is the current operations as authorized by the existing environmental controls of the facility. There is no change from the previously authorized operations. The water withdrawal permit allows Helix to withdraw the same volume of water it has historically been withdrawing and incorporates operational controls and technologies previously determined by NYSDEC to be protective of the environment.
>
> The impacts from the continued water withdrawals of the Ravenswood Generating Station have previously been fully reviewed under SEQR during the 2006 SPDES permit renewal and were determined to not have a significant negative impact on the environment. There is no new factual change or basis for now considering those same impacts to be significant either individually or cumulatively in the current application for Helix's initial water withdrawal permit.

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[5] *d*, 16-17, citing DEC's New York State Water Quality Report 2006 (published 2007).

> For an impact to be cumulatively significant it must meaningfully add to the impact from all the water withdrawals on the resource. Pre-2007 studies, as referenced in your comment, demonstrated that the Ravenswood Generating Station only accounted for approximately 2 to 3 percent of entrainment/ impingement resulting from five New York Harbor power plants prior to the installation of any operational controls or technologies. Since 2012, the facility's SPDES permit required the facility to run with operational controls and technologies that reduce impingement by an additional 90 percent and entrainment by 65 percent from previous baseline levels. Given the comparatively small percentage of the facility's contribution to the overall levels of impacts to the river, and the further reduction of such impacts resulting from the SPDES permit BTA provisions, the environmental impacts on aquatic organisms from the permitting of existing operations at the facility are not individually or cumulatively significant under ECL § 15-1503.2(f) or 6 NYCRR 617.7.

AR 533-534. Notwithstanding Respondent DEC's claim that it made the determination required by ECL 15-1503.2(f) and 6 NYCRR 601.11(c)(6), as well as by 6 NYCRR 617.7 of the SEQRA regulations, there is no document in the administrative record provided by Respondent DEC in this proceeding other than the Response to Public Comments itself that shows that the factors regarding cumulative impacts described in Respondent DEC's Response to Public Comments were considered and that a determination that there would be no cumulative impacts for the Ravenswood Generating Station was made before the 2019 Ravenswood Permit was issued. The fact that Respondent DEC made a SEQRA determination about cumulative impacts thirteen years before it issued the 2019 Ravenswood Permit pursuant is not a substitute for considering cumulative impacts at the present time in light of current water usage demands in the Hudson River estuary. Respondent DEC was required to consider current cumulative impacts in 2019 pursuant to the requirements in ECL 15-1503.2(f), 6 NYCRR 601.11(c)(6) and 6 NYCRR 601.10(k)(4), and its statement regarding its consideration of cumulative impacts in 2006 is tantamount to an admission that it did not do so.

Respondent DEC's assertion, based on information presented by Petitioner Sierra Club in its comments on the proposed 2019 Ravenswood Permit, AR 477-478, that pre-2007 studies

show that Ravenswood Station "only accounted for approximately 2 to 3 percent of entrainment/ impingement resulting from five New York Harbor power plants prior to the installation of any operational controls or technologies," AR 534, ignores the point made in Petitioner Sierra Club's comments that "[]he low entrainment and impingement data for Ravenswood, the largest power plant operating in the estuary, is highly anomalous compared to the figures for the other plants shown in the table, particularly when the size of Ravenswood's withdrawals are taken into account. This anomaly needs to be explained." AR 478. Respondent DEC provides no explanation as to why Ravenswood Station should have impingement and entrainment numbers that are miniscule compared to the other stations in the estuary, including the Astoria Generating Station and Con Ed's East River Station which, like Ravenswood Station, each operate on the East River. A genuine consideration of cumulative impacts would address this point.

Respondent DEC's failure to require information about the current cumulative impacts in HRLLC's application materials, its failure to make any determination regarding current cumulative impacts and its failure to set terms and conditions to address these impacts is a violation of the requirements of ECL 15-1503.2(f), 6 NYCRR 601.11(c)(6) and 6 NYCRR 601.10(k)(7).

2. DEC Failed to Make the Determination Required by ECL 15-1503.2(g)

A second determination that DEC was required to make and did not make before issuing the 2019 Ravenswood Permit is the determination required by ECL 15-1503.2(g) and 6 NYCRR 601.11(c)(7) as to whether the withdrawal "will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures." "Environmentally sound and economically feasible water conservation measures" are defined in ECL §15-1502(9) to mean:

> [T]hose measures, methods, technologies or practices for efficient water use and for reduction of water loss and waste or for reducing a withdrawal, consumptive use or diversion that: (i) are environmentally sound; (ii) reflect best practices applicable to the water use sector; (iii) are technically feasible and available; (iv) are economically feasible and cost effective based on an analysis that considers direct and avoided economic and environmental costs; and (v) consider the particular facilities and processes involved, taking into account the environmental impact, age of equipment and facilities involved, the processes employed, energy impacts and other appropriate factors.

Such a determination required by the Great Lakes Compact. Section 4.2 (4) requires that signatories to the Compact promote "Environmentally Sound and Economically Feasible Water Conservation Measures." ECL 21-1001, Section 4.2 (4).

To make a determination about environmentally sound and economically feasible water conservation measures at Ravenswood Station, Respondent DEC should have required Respondent HRLLC to provide information in its application materials about the potential impacts of requiring recycling or closed-cycle cooling to replace the plant's once-through cooling system as a water conservation measure to substantially reduce the plant's water usage in accordance with the project justification requirements of 6 NYCRR 601.10(k)(4) and Respondent DEC should have made evaluated the ability of closed-cycle cooling to substantially reduce the plant's water usage. A once-through cooling system such as the system used at Ravenswood Station withdraws water from the source waterbody, runs it through the condenser system, and then discharges it without recirculation. In contrast, closed-cycle cooling -systems recirculate and reuse cooling water. A 2010 report on the impact of once-through cooling systems in New York power plants concludes, "Closed-cycle cooling is a proven technology that reduces power plant water intake by up to 98 percent, thereby reducing the damage to aquatic

life by up to 98 percent."[6] Closed-cycle cooling is required by DEC's 2011 guidance on Best Available Technology ("BTA") for Cooling Water Intake Structures for new and repowered electric generation plants. AR 681-688. The water usage of the Athens Generating Station in Greene County, New York shows that the benefits of closed cycle cooling can be even greater than a 98% reduction in water usage. Athens Generating Station is permitted to take 1.5 million gallons of water per day from the Hudson River for the facility's air-cooled closed-cycle cooling system.[7] This is only one/one thousandth or 0.001% of the 1,527,840,000 gallons per day Ravenswood Station is permitted to take from the East River. Yet the generating capacity of Athens Station is 47% of the generating capacity of Ravenswood Station. According to Respondent DEC's DART database, the generating capacity of Athens Station is 1,080 MW,[8] while the generating capacity of Ravenswood Station is 2,288 MW as stated in the 2012 Title V air permit attached to Respondent HRLLC's July 28, 2017, application for permit transfer. AR 302.

Respondent DEC addresses the claim that it should have considered closed-cycle cooling in its response to Public Comments on the proposed 2019 Ravenswood Permit. Respondent DEC states that:

> Previously, in developing the best technology available (BTA) for the facility's 2006 SPDES permit, NYSDEC evaluated closed cycle cooling for the Ravenswood facility. The limited physical area of the facility property, the intensity of the immediately neighboring development, and other site constraints preclude the construction of a new closed cycle cooling system that uses "dry" cooling towers. A closed cycle cooling system that uses "wet" cooling methods would cause exhaust plumes of cooling vapor and suspended salt, followed by the

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[6] *Reeling in New York s Aging Power Plants: The Case for Fish-Friendlier Power*, Kyle Rabin, Network for New Energy Choices, June 2010, http://www.gracelinks.org/141/reeling-in-new-york-s-aging-power-plants .

[7] DEC's Permit Applications (DART) database, https://www.dec.ny.gov/cfmx/extapps/envapps/index.cfm?view=detail&applid=978743 .

[8] *d.*

> salt solids falling to the ground (aerial salt deposition) in the most densely-populated city in the state. The cost of either dry or wet closed-cycle cooling systems were determined to be "wholly disproportionate" to the gains to be obtained from alternative operational controls and technologies that were evaluated. For these reasons NYSDEC previously determined in its selection of BTA for the facility's SPDES permit, consistent with CP-52, and sections 704.5 of 6 NYCRR and 316(b) of the federal Clean Water Act, that a closed cycle cooling system is not an 'available' technology for Ravenswood. The factors that led to the SPDES permit BTA determination remain unchanged and that determination has been reaffirmed. Based upon the same information and reasons cited for its BTA selection, closed cycle cooling is not an economically feasible and environmentally sound water conservation measure for the Ravenswood Generating Station.

AR 535. There is no document in the administrative record provided by Respondent DEC in this proceeding, other than the Response to Public Comments itself, that shows that Respondent DEC considered the water conservation measure of closed-cycle cooling for the Ravenswood Generating Station or that Respondent DEC a determination that closed cycle cooling is not an economically feasible and environmentally sound water conservation measure before the 2019 Ravenswood Permit was issued. The fact that Respondent DEC made a determination about closed-cycle cooling thirteen years before pursuant to statutes and regulations that do not apply to the issuance of water withdrawal permits under the WRL is not a substitute for making a new determination regarding closed-cycle cooling pursuant to the water conservation requirement of the WRL in light of new technologies, the WRL's new regulatory requirements and new circumstances at Ravenswood Station. Respondent DEC was required to consider cumulative impacts in 2019 pursuant to the requirements in ECL 15-1503.2(f), 6 NYCRR 601.11(c)(6) and 6 NYCRR 601.10(k)(4), and its statement regarding closed-cycle cooling in its Response to Public Comments on the 2019 Ravenswood Permit is tantamount to an admission that it did not do so.

C. The Inclusion of Conditions from the Ravenswood SPDES Permit Is Not a Substitute for Making the Determinations Required by the WRL

Respondent DEC's inclusion of a condition in the 2019 Ravenswood Permit incorporating the biological monitoring requirements of the State Pollution Discharge Elimination System ("SPDES") permit issued to Respondent HRLLC pursuant to the New York Water Pollution Control Law, ECL Article 17, 17-0101 et seq. (the "SPDES Law") and the SPDES regulations, 6 NYCRR Part 750, is not a substitute for making the determinations required by ECL 15-1503.2(a)-(h) and Section 601.11(c)(1)-(8) for water withdrawal permits. See Condition 5 of the 2019 Ravenswood Permit. AR 544. Although section 601.7(f) of the water withdrawal permitting regulations, 6 NYCRR 601.7(f), provides that Respondent DEC will review an initial water withdrawal permit application "in coordination with the SPDES or other permit program, particularly with respect to any pending permit renewals," neither this section nor any other section of the WRL and water withdrawal permitting regulations authorize incorporating provisions from a SPDES permit as a means of fulfilling Respondent DEC's obligations to make the determinations required in ECL 15-1503.2(a)-(h) and Section 601.11(c)(1)-(8). This section does not state that incorporating provisions from a SPDES permit will fulfill Respondent DEC's duties the make the determinations required in ECL 15-1503.2 and 6 NYCRR 601.11(c) or to incorporate the required water conservation conditions in the permit.

As described above, the New York legislature enacted the new water withdrawal permitting in 2011 because it perceived that Respondent DEC did not have adequate authority under existing laws, such as New York's State Pollutant Discharge Elimination System (SPDES) program, which implements the requirements of ECL Article 17, §§ 17-0101 et seq. Article 17, entitled "Water Pollution Control" and hereinafter referred to as the "SPDES Law," was enacted to protect New York waters from discharges of pollution. The statement of purpose in ECL 17-

0103 provides, "It is the purpose of this article to safeguard the waters of the state from pollution by preventing any new pollution and abating pollution existing when the predecessor of this chapter was enacted." Water conservation is not listed as one of the purposes of ECL Article 17. Every major water user in the state already has a SPDES permit. If water withdrawals and water conservation could be adequately regulated under the SPDES program, the legislature would not have seen a need for a new permitting program imposing significant water conservation requirements. The WRL and the SPDES Law have different objectives and different requirements. The standards to be applied is issuing a SPDES permit are not the same as the standards that apply under the WRL. Whatever determinations Respondent DEC has made under the SPDES law and regulations does not substitute for the necessity of separate, *de novo* determinations under the WRL.

The only water conservation requirements contained in the SPDES regulations, 6 NYCRR Part 750, are requirements applicable to publicly owned treatment works. 6 NYCRR Section 750-2.9(c)(1)(ii)(a). There are no water conservation requirements applicable to water dischargers that are not-publicly owned treatment works in the SPDES regulations. The biological monitoring conditions contained in the Ravenswood SPDES permit are designed to reduce impingement and entrainment of aquatic life, but none of the conditions in the Ravenswood SPDES permit require water recycling and reuse as required by 6 NYCRR 601.10(f), and therefore do not substitute for that requirement. AR 70-90.

Furthermore, Petitioners note that Respondent HRLLC's water intake structures are not in conformance with DEC's 2011 guidance on Best Available Technology ("BTA") for Cooling Water Intake Structures, AR 681-688. The guidance states that cooling water intake structures will be subject to one of four "performance goals" when selecting BTA—all four require

"closed-cycle cooling." *d*. The guidance also states, "This policy will be implemented when: (i) an applicant seeks a new SPDES permit; (ii) a permittee seeks to renew an existing SPDES permit; or (iii) a SPDES permit is modified either by the Department or by the permittee, for a facility that operates a CWIS in connection with a point source thermal discharge." Id. The issue of whether the BTA policy requiring closed-cycle cooling should have been implemented when the Ravenswood SPDES permit was renewed in 2012 is beyond the scope of this proceeding, but it is not appropriate to claim that because Respondent DEC has allowed Respondent HRLLC to continue operating Ravenswood Station with once-through cooling pursuant to its SPDES permit, Respondent DEC is allowed to rely on that determination in making the determination about environmentally sound and economically feasible water conservation measures required by by ECL 15-1503.2(g) and 6 NYCRR 601.11(c)(7) for the 2019 Ravenswood Permit. The water withdrawal permitting program is a completely separate program from the SPDES program and the application of the requirements of the WRL must be evaluated independently. This is not to say that the information collected pursuant to the evaluation made pursuant to the SPDES permit cannot be considered in evaluating the water withdrawal permit, just that the applicable information must be evaluated separately and the public given an opportunity to comment on the determinations before a water withdrawal permit is issued.

For each of the above reasons, Respondent DEC violated the WRL when it issued the 2019 Ravenswood Permit.

POINT II

DEC VIOLATED SEQRA IN FAILING TO TAKE A HARD LOOK AT THE IMPACTS OF ISSUING THE 2019 RAVENSWOOD PERMIT

Respondent DEC violated SEQRA when it issued a negative declaration for the 2019 Ravenswood Permit without taking a "hard look" at the impacts of the Ravenswood plant as

required by Section 6 NYCRR 617.7(b) of the SEQRA regulations and the many cases interpreting the "hard look" standard. See e.g., *Akpan v. Koch*, 75 N.Y.2d 561 (1990) and *Matter of Jackson v New York State Urban Dev. Corp.*, 67 N.Y.2d 400 (1986).

A. The Requirements of SEQRA

SEQRA was enacted by the New York State Legislature in 1976. The purpose of SEQRA is to:

> Declare a State policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the State.

ECL 8-0101. While SEQRA was patterned after its Federal counterpart, the National Environmental Policy Act ("NEPA"), 42 USCA 4332 *et se* ., the Legislature recognized that NEPA was merely a procedural statute that assures that environmental issues are considered by a decision maker prior to taking any action. NEPA does not require substantive decisions by the decision maker. See *City of Buffalo v New York State Department of Environmental Conservation*, 184 Misc.2d 243 (Erie Cty 2000). The Legislature wished to provide greater protection to the environment when it passed SEQRA, and therefore, made significant changes from NEPA, including the requirement that environmental impact statements must be prepared in a much broader category of actions, and the requirement of substantive duties on the part of the decision maker to assure that environmental consequences that are identified will be avoided or mitigated. *d.* As pointed out in the *City of Buffalo* case:

> The substantive mandate of SEQRA is much broader than that NEPA. 42 USCA Section 4332 requires federal agencies to prepare an EIS [Environmental Impact Statement] for 'any major federal action significantly affecting the quality of the human environment.' This should be contrasted with Section 8-0109 of

> SEQRA which is more expansive it its terms. Subdivision 2 of this Section requires an EIS for 'any action which is proposed or approved which *may* have a significant effect on the environment.' Only a 'low threshold' is required to trigger SEQRA review."

d. at 249 [citations omitted, emphasis added].

The heart of SEQRA lies in its provision regarding Environmental Impact Statements. *Williamsburg Around the Bridge Block Association v. Giuliani*, 223 A.D.2d 64 (1st Dep't 1996). The law provides that whenever an action *may* have a significant impact on the environment, an Environmental Impact Statement ("EIS") shall be prepared. ECL 8-0109(2). An EIS is required to contain all the information necessary to assure that the decision-making body, called the "lead agency," can ultimately determine to go forward or not with a project in a manner that will create the least negative impact to the environment. The agency having principle responsibility for carrying out or approving the project or activity, in this case Respondent DEC, is charged with the responsibility of determining whether the project under consideration may have significant adverse environmental effects, and if so, must prepare an EIS. *d*. The EIS is made available to the public so that they are apprised of possible adverse environmental consequences and may comment and propose mitigating measures. *d*. The "lead agency" is the entity charged with carrying out the procedures mandated by SEQRA. Therefore, the lead agency must "act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid environmental effects." ECL 8-0109(1).

Since the early landmark cases of *Town of Henrietta v Department of Environmental Conservation*, 76 A.D.2d 215 (4th Dep't 1980), and *H.O.M.E.S. v New York State Urban Development Corporation*, 69 A.D.2d 222 (4th Dep't 1979), New York courts have addressed the requirements and responsibilities of agencies pursuant to SEQRA on numerous occasions. Early on in these cases, courts recognized that because of the importance placed upon SEQRA

responsibilities by the Legislature, substantial compliance with SEQRA will not suffice; rather the statute must be strictly and literally construed, and compliance with the procedural requirements must be enforced. *Matter of Rye Town/King Civic Association v Town of Rye*, 82 A.D.2d 474 (2nd Dep't 1981), *lv. app. dism.* 56 N.Y.2d 985 (1982); *Schenectady Chemicals v Flack*, 83 A.D.2d 460 (3rd Dep't 1991); *Williamsburg Around the Bridge Block Association v. Giuliani*, 223 A.D.2d 64 (1st Dep't 1996).

In addition, the courts have recognized that to assure that both the spirit and letter of SEQRA are followed, courts cannot allow a lead agency the rubric of "substantial compliance" to escape the environmental goals of the Act. See, *e.g., Stony Brook Village v Reilly*, 299 A.D.2d 481 (2d Dep't 2002), *Matter of Rye Town*, 82 A.D.2d 474.

While SEQRA requires a strict standard of compliance, the lead agency is allowed to fulfill substantive duties in making its final decision and choosing from appropriate alternatives is within their discretion. However, the broader discretion that resides with an agency concerning its substantive duties does not insulate the agency from judicial review. Indeed, in the case of *Akpan v Koch*, 75 N.Y.2d 561 (1990), the court elucidated the standard of review concerning substantive matters:

> Nevertheless, an agency, acting as a rationale decision-maker, must have conducted an investigation and reasonably exercised its discretion so as to make a reasoned elaboration as to the affect of a proposed action on a particular environmental concern. Thus, while a court is not free to substitute its judgment for that of the agency on substantive matters, the court must insure that, in light of the circumstances of a particular case, the agency has given due consideration to pertinent environmental factors.

75 N.Y.2d at 571, citations omitted.

The universally applied standard in determining whether or not a lead agency has fulfilled its SEQRA obligations was first espoused in the *H.O.M.E.S.* case, *supra*, and eventually

incorporated in the SEQRA regulations at 6 NYCRR 617.7(b). The standard is commonly called the "hard look standard." It requires that the agency:

1. Identify all areas of relevant environmental concern;

2. Thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and

3. Present a reasoned elaboration for why these identified environmental impacts will not adversely affect the environment, in the event that it is determined that an EIS need not be drafted.[9]

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

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

6 NYCRR 617.4(a). In contrast, Type II actions do not require environmental review under SEQRA. Type II actions are identified in Section 617.5 of the regulations. Unlisted actions are those actions that are neither Type I nor Type II. 6 NYCRR 617.2(ak).

An EIS must be prepared if a proposed action "may include the potential for at least one significant adverse environmental impact." 6 NYCRR 617.7(a)(1). Conversely, to determine that

[9] 6 NYCRR 617.7(b).

an EIS will not be required for an action, "the lead agency must determine either that there will be no adverse environmental impacts or the identified adverse environmental impacts will not be significant." 6 NYCRR 617.7(a)(2).

B. Respondent DEC Failed to Address the Significant Adverse Impacts of the 2019 Ravenswood Permit

In the present case, Respondent DEC has classified its action in issuing the 2019 Ravenswood Permit as a Type I action under SEQRA. The permit, which authorizes Respondent HRLLC to take up to 1,527,840,000 gallons per day from the East River in the Hudson River Estuary for operation of its Ravenswood Generating Station, involves withdrawals that are 764 times the Type I threshold provided in Section 617.4(b)(6)(ii), which lists "a project or action that would use ground or surface water in excess of 2,000,000 gallons per day," as a category of Type I actions that, because of their size, are likely to have a significant adverse impact. In addition to being 764 times as large as a type of action included on the list of Type I actions, the Ravenswood withdrawals meet the criteria set forth in 6 NYCRR 617.7(c) for determining whether unlisted and Type I actions have a significant adverse impact on the environment. These criteria include:

> (ii) the removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area; substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse impacts to natural resources; . . . .

6 NYCRR 617.7(c)(ii). Under this standard, the destruction of aquatic life by the cooling water intake structures of the Ravenswood Station has a significant adverse impact. As documented in the plant's own impingement and entrainment studies, AR 605-675, the plant's massive water withdrawals through its cooling water intake structures remove and destroy large quantities of fish and other aquatic life from the estuary. These massive withdrawals substantially interfere

with the movement of resident and migratory fish in the estuary. Under the standards set forth in 6 NYCRR 617.7(c)(ii) it is clear that the destruction of aquatic life by the cooling water intake structures of the Ravenswood plant has a significant adverse impact under the SEQRA standards. Issuance of the 2019 Ravenswood Permit thus requires preparation of an EIS.

Respondent DEC addresses Petitioners' claim that it did not take a "hard look" at the impacts of issuing the 2019 Ravenswood Permit in its response to Public Comments on the proposed permit, February 20, 2019. AR 538. The justifications offered by Respondent DEC is that it looked at the impacts of issuing the water withdrawal permit when it reviewed the operations of Ravenswood Station pursuant to the Ravenswood SPDES Permit and that it reviewed the operations of Ravenswood Station when it issued its "determination under ECL 15-1503.2(f) and 6 NYCRR 617.7(b) that there are no significant individual or cumulative adverse effects from issuance of the initial water withdrawal permit for the existing, unchanged operation." *d*. Respondent DEC also states that "[t]o further address concerns raised during the public comment period NYSDEC is issuing an Amended Negative Declaration for this action." *d*. None of the justifications offered provide a satisfactory explanation. Firstly, as demonstrated in the discussion above, there are no documents in the administrative record showing that Respondent DEC made the determination under ECL 15-1503.2(f) and 6 NYCRR 617.7(b) and the claims by Respondent DEC that it did so in its Response to Public Comments does not change that fact. Secondly, a previous environmental review of a SPDES permit is not a substitute for a current environmental review of a water withdrawal permit application. No provision of SEQRA or the SEQRA regulations indicates that because previous impacts have occurred, consideration of those impacts is to be excluded in evaluating the potential future impacts of an action under review. For this reason, it is not proper for Respondent DEC to rely

on the SEQRA determinations it has made for the Ravenswood SPDES permit in making its SEQRA determination for issuance of the Ravenswood water withdrawal permit in 2019 without a current evaluation of those impacts. The SEQRA review for the 2019 Ravenswood Permit must evaluate current fish impingement and entrainment impacts and must consider alternative technologies that might further minimize fish entrainment and impingement such as closed cycle cooling. It must also consider the current cumulative impacts of the Ravenswood cooling water intake system and the other water withdrawals from the East River and the Hudson River estuary. For these reasons, the statements in the Amended Negative Declaration issued by Respondent DEC on February 14, 2019 references requirements contained in the Ravenswood SPDES permit without consideration of the current impacts of those requirements does not constitute a "hard look" at the possible impacts of issuing the 2019 Ravenswood Permit. The Amended Negative Declaration refers to Part 2 of the Environmental Assessment Form ("EAF") prepared by Respondent DEC on July 6, 2018. AR 518-527. Oddly, none of the questions on Part 2 of the form relating to whether impacts may occur and what size of impacts may occur are answered. Id. The form is therefore substantially incomplete and does not support the negative declaration made in Part 3 of the EAF.

Respondent DEC claims in the Amended Negative Declaration that "[u]nder SEQR, the magnitude of the impact is measured by the difference between existing conditions and that proposed change that would be brought about by a proposed permit," AR 528, is incorrect. As discussed above, SEQRA does not exclude consideration of previous impacts in evaluating the potential future impacts of an action under review. Respondent DEC's claim in the Amended Negative Declaration that "there is no difference between the amount of water withdrawn under the SPDES permit and the amount that may be withdrawn under the water withdrawal permit" is

also incorrect. The Ravenswood SPDES permit does not regulate the size of plant's water withdrawals. Instead, the SPDES permit regulates the size of the plant's discharges. For this reason, it is incorrect to say that there is no difference between the amount of water withdrawn under the SPDES permit and the amount that may be withdrawn under the water withdrawal permit, when there is no limit under the SPDES permit as to how much water may be withdrawn, while the water withdrawal permit does include a limit. Indeed, as noted above, the reason the 2011 amendments to the WRL were enacted is to provide Respondent DEC with greater authority to regulate water withdrawals and require water conservation measures than Respondent DEC possesses under the SPDES law. The WRL requires specific determinations to be made regarding the impacts of water withdrawals permitted under the law and these impacts must also be evaluated under SEQRA.

Respondent DEC's failure to document that it made current evaluations of fish impingement and entrainment impacts, that it made current evaluations of alternative technologies that might further minimize fish entrainment and impingement such as closed cycle cooling, or that it made a current evaluation of the cumulative impacts of the Ravenswood cooling water intake system and the other water withdrawals from the East River and the Hudson River estuary demonstrates that Respondent DEC has not taken a "hard look" at the impacts of the Ravenswood plant as required by Section 6 NYCRR 617.7(b) of the SEQRA regulations and the many cases interpreting the "hard look" standard.

In view of the adverse environmental impacts of the 2019 Ravenswood Permit, the decision of Respondent DEC to issue a negative declaration was arbitrary and capricious and an abuse of discretion. For this reason, the Negative Declaration must be annulled and a full EIS must be required.

CONCLUSION

For the foregoing reasons, Sierra Club and Hudson River Fishermen's Association respectfully submit that the relief sought in the petition should be granted.

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Respectfully submitted,

RICHARD J. LIPPES
Lippes & Lippes
1109 Delaware Avenue
Buffalo, NY 14209-1601
Telephone: (716) 884-4800
Email: rlippes@lippeslaw.com

RACHEL TREICHLER
7988 Van Amburg Road
Hammondsport, New York 14840
Telephone: (607) 569-2114
Email: treichlerlaw@frontiernet.net

JONATHAN GEBALLE
11 Broadway, Suite 615
New York, NY 10004
Telephone: (212)732-0800
Email: jg@jonathangeballe.com

Attorneys for Petitioners