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

Hon. Ulysses B. Leverett

–against–

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

Respondents.

PETITIONERS' REPLY MEMORANDUM OF LAW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Federal Statutes

State Statutes

New York State Regulations

PRELIMINARY STATEMENT

This reply memorandum of law for the Petitioners Sierra Club and Hudson River Fishermen's Association ("Petitioner HRFA") is submitted in reply to issues raised by Respondents New York State Department of Environmental Conservation ("Respondent DEC") and Respondent Helix Ravenswood LLC (Respondent HRLLC") in their objections in point of law and memoranda of law. This reply memorandum of law will also clarify and support the arguments made in Petitioners' initial memorandum of law, as they relate to the arguments made by Respondents in their responses. Therefore, as will be seen, their arguments regarding procedural issues are not applicable to the facts of this case, and Respondents' arguments regarding the merits of Petitioners' claims do not affect the failure of Respondent DEC in fulfilling its legal obligations under the New York State Water Resources Law, Environmental Conservation Law, Article 15, Title 15 (the "WRL"); the New York State Pollutant Discharge Elimination System Law, Environmental Conservation Law, Article 17, Title 8 (the "SPDES Law"); and the New York State Environmental Quality Review Act, Environmental Conservation Law, Article 8 ("SEQRA") in issuing a water withdrawal permit to Respondent HRLLC for operation of its Ravenswood Generating Station on February 20, 2019 (the "2019 Ravenswood Permit") to replace the earlier permit invalidated by the court in *Sierra Club v. Martens*, 158 A.D.3d 169 (2nd Dep't 2018) (the "2013 Ravenswood Permit").

ARGUMENT IN REPLY

POINT I

PETITIONERS HAVE STANDING

Respondent HRLLC asserts that Petitioners have not met the applicable tests for standing. In fact, Petitioners Sierra Club and Hudson River Fishermen's Association ("HRFA") comfortably satisfy the criteria for organizational standing set forth in a long line of precedents including *Association for a Better Long Island v. New York State Department of Environmental Conservation*, 23 N.Y.3d 1 (2014); *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297 (2009); *Society of the Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761 (1991); *Matter of Dental Society. V. Carey*, 61 N.Y.2d 330 (1984) and *Douglaston Civic Ass'n, Inc. v. Galvin,* 36 N.Y.2d 1 (1974).

In the *Better Long Island* case decided by the Court of Appeals in 2014 and in the *Save the Pine Bush* case decided in 2009, the Court broadened standing rules for organizations whose members use and enjoy a natural resource more than the public at large –which accurately describes Petitioners. In *Save the Pine Bush*, the Court specifically adopted the standing rule established in the United States Supreme Court case of *Sierra Club v Morton*, 45 U.S. 727 (1972) which recognized that an injury to a particular plaintiff's "[a]esthetic and environmental well-being" are enough to confer standing. 13 N.Y.3d at 305, citing 45 U.S. at 734. *Save the Pine Bush* cited with approval the United States Supreme Court case of *Lujan v Defenders of Wildlife*, 504 U.S. 555, 562-563 (1992) in which the *Lujan* court said that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." 13 N.Y.3d at 305, citing 504 US at 562-563. Even under earlier Court of Appeals rulings, "proof of special damage or in-fact injury is not required in every instance."

Sun-Brite Car Wash, Inc. v. Board of Zoning Appeal, 69 N.Y.2d 406, 413 (1989), accord *Ecumenical Task Force of Niagara Frontier, Inc. v. Task Force of Love Canal Area Revitalization Agency* (179 A.D.2d 261, 265, (4th Dep't 1992), *app. dis'd* 80 N.Y.2d 758 (1992), (where a petitioner's interests "are within the 'zone of interest' protected" by a statute, the petitioner has standing, because "it is desirable that environmental disputes be resolved on their merits rather than by preclusive, restrictive standing rules").

It is worth noting that even the *Society of Plastics* case, which denied standing to a trade association because its interest was economic only and did not fall within the zone of interest of SEQRA, recognized that for "the more common scenario of associations dedicated to environmental preservation seeking to represent the interests of persons threatened with environmental harm. . . . , in-fact injury within the zone of interest of environmental statutes has been established by proof that agency action will directly harm association members in their use and enjoyment of the affected natural resources." 77 N.Y.2d at 775-776. Sierra Club and HRFA are such organizations. This proceeding is the common scenario of "associations dedicated to environmental preservation seeking to represent the interests of members threatened with environmental harm." *Id*. The Sierra Club, the oldest and largest environmental organization in the country, and HRFA, which was specifically formed to protect the aquatic resources of the Hudson River watershed, are recognized organizations dedicated to the preservation of the environment and water resources.

The instant proceeding asserts the rights of Petitioners' members to assure adequate environmental review of the issuance of a water withdrawal permit as required by the WRL and SEQRA, and therefore, the relief requested in the petition can be granted without the naming of any individual members of the organizations as captioned parties. Petitioners represent the long-

standing interests of their members, and each has the capacity to adjudicate the proceeding without the participation of its individual members. The interests of both Sierra Club and HRFA include the protection of New York's waters and the natural resources dependent thereon. Affidavit of Roger Downs, dated September 5, 2019 ("Downs Aff.") ¶¶ 4-30; Affidavit of Gilbert Hawkins, dated September 5, 2019 ("Hawkins Aff.") ¶¶ 4-29. Thus, both Petitioners' corporate interests are directly related to the subject matter of this proceeding, as both allege, inter alia, that Respondent DEC impermissibly bypassed its duty to make sound determinations regarding the consequences of permitting one of the State's largest water withdrawals, despite the clear mandate of the WRL and SEQRA that it do so. In determining whether an asserted claim or appropriate relief requires the participation of an individual member of the organization, the Court of Appeals has held, "It is enough to allege the adverse effect of the decision sought to be reviewed on the individuals represented by the organization; the complaint need not specify individual injured parties." *Dental Society*, 61 N.Y.2d at 334. "[W]e can identify no reason why the participation of individual members would be necessary to fully adjudicate this proceeding or to grant the relief sought," *Aeneas McDonald Police Benevolent Association, Inc. v. City of Geneva*, 92 N.Y.2d 326, 331 (1998). The Court of Appeals has regularly admonished against instituting rules of law that deny petitioners their ability to challenge administrative actions. The Court of Appeals has stated that standing rules "should not be heavy-handed," *Sun-Brite Car Wash,* 69 N.Y.2d 406 at 413, *Better Long Island*, 23 N.Y.3d at 6, which could "insulate governmental actions from scrutiny." *Society of Plastics*, 77 N.Y.2d at 779, citing *Har Enterprises v Town of Brookhaven*, 74 N.Y.2d 524, 529 (1989).

Petitioners also establish that they have at least one member who meets the injury-in-fact test of *Society of Plastics* as well as the broader standing rules set forth in *Save the Pine Bush*

and *Better Long Island*. Petitioners provide the affidavit of Gilbert Hawkins, an active member of both Sierra Club and HRFA. Mr. Hawkins is a Past President of HRFA, and currently serves as Director of Access and Environment. He has been a member of the Board of Directors of HRFA from 1996 to the present. Hawkins' Aff. ¶ 7. Mr. Hawkins has been a member of the executive committee for the Sierra Club Hudson-Midlands New Jersey Group since 2005. *Id.,* ¶ 9. Mr. Hawkins is an active fisherman who fishes "in the New York harbor estuary whenever he can. "Lately," he says, "that has been about once a month," *id*. ¶ 14, and which he claims is adversely affected by the fish kill caused by the Ravenswood intake, thereby satisfying the injury-in-fact argument raised by Respondent Helix Ravenswood LLC.

Mr. Hawkins attends each general membership meeting of HRFA, which are generally attended by approximately 75 to 100 members, where the members give reports on the fishing conditions in New York Harbor and the East River. *Id*. ¶ 12. Therefore, he is personally familiar with the activities of the members of HRFA concerning their fishing habits, and states that during the spring and fall fish migration seasons, HRFA members fish in the New York harbor estuary every day. *Id*. ¶ 17.

Establishing the long-running history of HRFA in promoting the health of the Hudson marine environment, Mr. Hawkins says that the power plant fish kills have been a concern of HRFA for many years. Further, the HRFA has joined in administrative challenges and has been a legal party in prior proceedings. HRFA was instrumental in stopping the mass slaughter of stripe bass by the first Indian Point Nuclear Power Plant, and participated in an administrative challenge to the fish kills caused by the once-through cooling system, the same cooling system at Ravenswood, at the Danskammer Power Plant on the Hudson River in 2006. Id. ¶ 5.

Concerning fish kills, Mr. Hawkins states that he is concerned that the fish kills caused by the once through cooling system at the Ravenswood generating stations are having a negative impact on his and other HRFA members' ability to catch fish and on the health of the fish population in the river. In fact, he indicates that he sees declines of some type of fish in the river, and he describes presentations made to HRFA asserting this. Id. ¶¶ 21-25.

In sum, Mr. Hawkins clearly shows that he complies with the in-fact-injury requirement for standing, and that his injury as a fisherman is different than the public at large. Obviously, not all members of the public are fishermen, and therefore, his injury is different from the public at large. Moreover, it is clear as a fisherman, he uses and enjoys the New York estuary, New York Harbor the Hudson River and the East River more than the public at large, and therefore, meets the standards as espoused in *Save the Pine Bush*. As previously indicated, the Court of Appeals in *Save the Pine Bush* quoted with approval the statement in *Lujan v Defenders of Wildlife* that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing." 504 U.S. at 562-563. Mr. Hawkins "use" or observation of an animal species, in this case fish, meets the *Save the Pine Bush* standard for standing.

Finally, Respondent HRLLC alleges that no one could meet the injury-in-fact standard since Ravenswood is doing nothing differently than it has done in the past. This argument simply ignores the very law on which this case is based; and on which DEC's previous water withdrawal permit was rejected: the intervening passage of the 2011 amendments to the WRL. This new law is the first statutory provision in New York law to require that users other than public water supply systems obtain water withdrawal permits. Among the requirements of the law are that proposed withdrawals "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 . . . [and] in a manner that incorporates environmentally sound and economically feasible water conservation measures. ECL 15-1503.2 (f) and (g). As discussed in Petitioners' initial memorandum of law, the new law was intended to and does provide for a new regimen of permitting of large industrial water users like Respondent HRLLC. The new law obligates Respondent DEC to implement conservation measures that preserve New York State's supply of water for all residents of the state, as well as the natural resources dependent upon that water. Respondent HRLLC's assertion on this point is contrary to the consistent holdings of the New York courts that standing requirements should not be so restrictive as to not allow anyone standing to challenge an administrative action.

For these reasons, Petitioner organizations have standing to challenge Respondent DEC's actions in issuing a water withdrawal permit to Respondent HRLLC for operation of its Ravenswood Generating Station on February 20, 2019.

POINT II

PETITIONERS' CLAIMS ARE NOT TIME-BARRED, MOOT, OR BARRED BY FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Respondent HRLLC raises three affirmative defenses in its answer that are not addressed in its memorandum of law but which, for the sake of completeness, Respondents reply to here: that Petitioners' SEQRA claims are time-barred, that Petitioners' SEQRA claims are moot, and that Petitioners have not exhausted their administrative remedies. For the reasons discussed below, none of these defenses are valid.

A. Petitioners' Claims Are Not Time-Barred

Petitioners' SEQRA claims are not time-barred because the verified petition filed on April 18, 2019, was filed less than two months after Respondent DEC issued a water withdrawal permit to Respondent HRLLC on February 20, 2019, and less than four months after DEC amended its negative declaration on the permit on February 14, 2019. AR 528-529. It appears that Respondent HRLLC has overlooked the February 14, 2019 amendment because it claims that the negative declaration was completed on September 25, 2018, more than four months before the date the petition was filed.

Even if Respondent DEC had not amended the negative declaration, Petitioners' SEQRA claims would not be time-barred because Respondent DEC's SEQRA determinations did not become ripe for review until Respondent DEC issued the permit on February 20, 2019. See *Matter of Ranco Sand v. Vecchio*, 27 N.Y.3d 92 (2016), and *Matter of Eadie v. North Greenbush Town Board* 7 N.Y.3d 306 (2006). The *Ranco Sand* case determined that a Town's positive declaration under SEQRA was not ripe for review because the rezoning application had not yet been approved. Similarly, Respondent DEC's negative declaration in this case was not ripe for review until Respondent DEC issued the 2019 Ravenswood Permit. The *Eadie* case determined that the statute of limitation runs from the end of the SEQRA process in front of a particular administrative agency. *Eadie* distinguished the court's holding in *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218 (2003), stating that:

> In that case, the petitioners challenged a conditioned negative declaration (CND) issued under SEQRA by the Department of Environmental Protection (DEP), determining that a project for the installation of a power generator on a barge would have no significant adverse impact on the environment. After DEP's issuance of the CND completed the SEQRA process, the proponent of the project obtained an air permit from another agency. We held that a challenge to DEP's determination of no adverse impact must be brought within four months of the CND, not the later issuance of the air permit.

Id. at 317. The validity of the reasoning in *Eadie* is well-demonstrated in this case. Until Respondent HRLLC's water withdrawal permit was issued, there remained the possibility that DEC would make further amendments to its SEQRA determination, and in fact Respondent DEC did just that when it amended its negative declaration on February 14, 2019, just before issuing the permit.

For these reasons, Petitioners' claims are not time-barred.

B. Petitioners' Claims Are Not Moot

Petitioners' claims are not moot. Respondent HRLLC states in its answer that, because Petitioners' claims are time-barred, Petitioners' claims are moot. HRLLC Ans. ¶ 76. As shown above, Petitioners' claims are not time-barred. For this reason, Respondent HRLLC's mootness defense fails as well.

C. Petitioners Have Exhausted their Administrative Remedies

The administrative record does not demonstrate any basis for Respondent HRLLC's affirmative defense that Petitioners' did not exhaust their administrative remedies "including but not limited to their failure to challenge Ravenswood's SPDES permit." HRLLC Ans. ¶ 67. Petitioner Sierra Club presented its concerns regarding Respondent DEC's compliance with the requirements of the WRL and SEQRA in its comment letter filed November 17, 2018, AR 474-473, and thousands of Sierra Club members and associates did likewise, AR 688-3280. These comments were sufficient to exhaust Petitioner Sierra Club's administrative remedies. Respondent DEC held no other administrative proceedings on the proposed Ravenswood water withdrawal permit in which Sierra Club and its members could have participated. Respondent DEC did not hold a public hearing on the proposed permit and DEC did not hold an issues conference to identify issues with the proposed permit.

Because Petitioner Sierra Club filed comments with Respondent DEC on the 2019 Ravenswood permit raising the issues that are raised in this proceeding and because Petitioner HRFA alleged direct harm and injury to their members that is different from that of the public at large and provided affidavits from their members to support those allegations, both the Petitioners have exhausted their administrative remedies under the rule established in *Matter of Shepherd v. Maddaloni*, 103 A.D.3d 901 (2nd Dep't 2013). In the *Shepherd* case, the court held that the petitioners were not precluded from challenging a site plan approval on the ground that they did not actively participate in the administrative proceeding where others had advanced their objections in the proceeding and where they alleged direct harm and injury that is in some way different from that of the public at large in their petition.

Petitioners are unaware of any basis for Respondent HRLLC's assertion that they had an obligation to challenge the Ravenswood SPDES permit.

For these reasons, Petitioners exhausted their administrative remedies.

POINT III

PETITIONERS ESTABLISH THAT RESPONDENT DEC FAILED TO COMPLY WITH THE WRL

For the reasons explained below, the arguments set forth in Respondents' memoranda of law and affidavits do not refute Petitioners' claim that Respondent DEC failed to comply with the WRL in issuing the 2019 Ravenswood Permit.

The principal issue to be decided in determining whether Respondent DEC complied with the WRL in issuing the 2019 Ravenswood Permit is the issue of whether or not Respondent DEC made the determinations required by ECL 15–1503.2(a)-(h) and 6 NYCRR 601.11(c) in a timely fashion. The issue of whether or not Respondent DEC is required to make these determinations for a permit issued to an existing user was decided in *Sierra Club v. Martens*, 158 A.D.3d above.

Respondent DEC acknowledges this obligation in its Response to Public Comments, where it states, "the Court in *Sierra Club. v. Martens* ruled that the clause, 'subject to appropriate terms and conditions,' as found in ECL § 15-1501.9, requires NYSDEC to make all of the findings or determinations required under ECL § 15-1503.2, even when issuing this initial water withdrawal permit to Helix for the continued and unchanged operation of an existing facility." AR 532-533. The position Respondent DEC takes in this proceeding is that it made these determinations in connection with the 2019 Ravenswood Permit. Petitioners' assert that if it did make the determinations, Respondent DEC did not do so within the timeframes mandated by the WRL, and that Respondent DEC's failure to make the determinations before the draft permit was prepared and before the public comment period on the proposed permit was announced foreclosed public review and comment on Respondent DEC's reasoning in setting the proposed permit conditions, an essential element in the procedural requirements of the WRL.

A. Strict Compliance with the WRL's Procedural Mandates Is Required

As demonstrated in Petitioners' initial memorandum of law, the requirement that Respondent DEC make the determinations listed in ECL 15–1503.2 lies at the core of the 2011 amendments to the WRL. The 2011 amendments were enacted to provide greater protections for New York's water resources than provided under existing law and to bring New York's water laws into compliance with the Great Lakes-St. Lawrence River Basin Compact (the "Compact" or the "Great Lakes Compact"), ECL 21-1001. The 2011 amendments 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 are implemented in the WRL in the determinations required by ECL 15–1503.2(a)-(h). Failure to make these determinations before preparing the draft permit or announcing the public

comment period on the permit application, as happened in this case, precludes the public from having an opportunity to comment on Respondent DEC's reasoning in setting the proposed permit conditions.

It is well-established in the SEQRA context that documents containing the lead agency's reasoning and rationale, but prepared subsequent to the issuance of a negative declaration, do not fulfill the mandate for a reasoned elaboration. See e.g., *Matter of Dawley v Whitetail 414, LLC*, 130 A.D.3d 1570, 1571 (4th Dep't 2015), *Matter of Rochester Eastside Residents for Appropriate Dev., Inc. v City of Rochester*, 150 A.D.3d 1678, 1680 (4th Dep't 2017). The same logic applies to the application of the WRL in this case. As the Court of Appeals has stated in the SEQRA context, excluding the public from the decision-making process means that the process becomes a "private bilateral negotiations between a developer and a lead agency when a project may have potentially significant environmental impacts which need full and open consideration." *Myerson v. McNally*, 90 N.Y.2d 742, 752 (1997).

The administrative record produced by Respondent DEC makes clear that Respondent DEC failed to make the determinations required by ECL 15–1503.2 before it informed the public on October 4, 2018, that it planned to reissue the same permit that had been invalidated by *Sierra Club. v. Martens*, AR 397, or before it announced a public comment period on October 3, 2018. AR 398, 402. Although Respondent DEC states in its Response to Public Comments dated February 20, 2019 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," AR 532-533, there is no document in the administrative record that shows that the determinations described in the Response to Public Comments were made before the public comment period was announced on October 3, 2019,

before the proposed draft permit circulated on October 4, 2018 or even before the amended negative declaration was issued on February 14, 2019. Respondent DEC acknowledges that the Project Justification Checklist included in the administrative record at AR 591 does not constitute the determinations. The DEC engineer overseeing Ravenswood Station says in his affidavit that he was the person who made the checklist, and states "[t]he Project Justification Checklist was not intended to document DEC's decision making analysis with respect to issuance of an initial water withdrawal permit to Ravenswood." Affidavit of Erik T. Schmitt, August 12, 2019, ¶ 29. Mr. Schmitt states, however, that Respondent DEC made the required determinations. *Id*. at ¶ 19. Although Mr. Schmitt states that the determinations were made, he does not specify who made the determinations or when the determinations were made. In his affidavit, Mr. Schmitt describes information that could have been used to make the required determinations, but he makes no representation that determinations were in fact made prior to October 3, 2018 or at any time prior to the date of his affirmation on August 12, 2019. *Id*. ¶¶ 19-27. Similarly, in its Response to Public Comments, Respondent DEC states 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," AR 532-533, but the Response to Public Comments does not state when the determinations were made or refer to a document containing the determinations. Petitioners' attorney states in her affirmation that the only document pertaining to the determinations provided to her when she requested a copy of Respondent DEC's determinations on November 13, 2018, was the checklist contained in AR 591. Affirmation of Rachel Treichler, September 5, 2019, ¶7, Ex. B. Thus it is apparent that Respondent DEC's determinations do not appear anywhere in the administrative record on a date prior to February 20, 2019.

Respondent DEC's assertions that it does not matter when it made the determinations or even if it made the determinations is not in accordance with the procedural mandates of the WRL Just as courts in New York require that administrative agencies strictly comply with the procedural mandates of SEQRA, *Matter of King v. Saratoga County Bd. of Supervisors*, 89 N.Y.2d 341, 347 (1996), so too Respondent DEC must be required to strictly comply with the WRL's procedural mandates. This means that Respondent DEC must prepare a document setting forth its reasoning in making the determinations required by ECL 15–1503.2 before the comment period on the proposed permit is announced. The same considerations that apply to procedural considerations in the SEQRA context, also apply to interpreting the WRL. As the Court of Appeals has stated with respect to the procedural requirements of SEQRA, "[t]he mandate that agencies implement SEQRA's procedural mechanisms to the 'fullest extent possible' reflects the Legislature's view that the substance of SEQRA cannot be achieved without its procedure, and that departures from SEQRA's procedural mechanisms thwart the purposes of the statute. Thus it is clear that strict, not substantial, compliance is required." *Id.* at 347, 348. Accord *Matter of Coalition to End Lead Poisoning v. Vallone*, 100 N.Y.2d 337 (2003) ("Strict compliance with SEQRA guarantees that environmental concerns are confronted and resolved prior to agency action and insulates rational agency determinations from judicial second-guessing"), *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); ("[I]t would be unwise to permit local agencies to substitute substantial compliance with the SEQRA for literal compliance therewith, thereby inevitably giving rise to numerous lawsuits challenging the sufficiency of the agencies' environment-safeguarding procedures. Uniform and literal enforcement of the provisions of SEQRA would render environmental review more objective, standardized, and consistent, and

would be more certain to promote the policies of the Legislature with respect to this fundamental concern of society.") *Matter of Scenic Hudson, Inc. v. Town of Fishkill*, 258 A.D.2d 654 (2nd Dep't 1999).

The WRL is a new statute and few court decisions have been rendered interpreting its requirements. This gives particular significance to the holding this court makes regarding the procedural issues in this case. In this regard, Petitioners contend that the case of *Sierra Club v DEC,* State of New York Supreme Court, County of Yates, Index No. 2017-0232 (November 8, 2018),[1] involving the water withdrawal permit issued for Greenidge Generating Station in Yates County, New York (the "*Greenidge* case"), was wrongly decided. Although the *Greenidge* court followed the Second Department's decision in *Sierra Club v. Martens* and held that "DEC was required to consider the factors set forth in ECL 15-1503," the court concluded that, "it is clear from the record that the DEC did consider the factors set forth in ECL 15-1503 when it placed permit conditions 'including environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies' . . . . The conditions placed on the Water Withdrawal Permit, including the installation of meters, water auditing, and reporting of audits and leaks as well as the 'Incorporation of the Cooling Water SPDES Water Conservation and Fisheries Protection Measures,' satisfied the requirements of both ECL 15-1503 and 6 NYCRR 601.7." *Id*., p.7. Petitioners take issue with this ruling. The conditions referenced in the *Greenidge* case are not evidence that the determinations required by ECL 15–1503.2 and 6 NYCRR 601.11(c) were made. The conditions in the Greenidge permit are the same as the conditions contained in the 2013 Ravenswood Permit invalidated in *Sierra Club v. Martens*. In both the *Sierra Club v. Martens* case and the *Greenidge* case, Respondent DEC

[1] Slip Opinion attached as Exhibit 1 to the Affidavit of Lawrence Weintraub. August 9, 2019.

claimed that it did not have discretion to make the determinations required by ECL 15–1503.2. It does not make sense, therefore, to find that conditions that were set without making the necessary determinations are evidence that the determinations were made. It is therefore apparent that the *Greenidge* court erred when it failed to require that DEC comply with the procedural requirements of the WRL and make the determinations required by ECL 15–1503.2.

For these reasons, Respondent DEC's failure to comply with the procedural requirements of the WRL and make the determinations required by ECL 15–1503.2 before the public comment period on the 2019 Ravenswood Permit does not fulfill the procedural requirements of the WRL. The permit must be invalidated and the process of issuing the permit redone.

B. Deference to Respondent DEC's Interpretation of the Procedural Requirements of the WRL Is Not Appropriate

The court in *Sierra Club v. Martens* declined to defer to Respondent DEC's interpretation of the statutory wording of the WRL, and so should this court. Respondent DEC's interpretation of the procedural requirements of ECL 15–1503.2 runs counter to the clear wording of ECL 15–1503.2, which provides that "[i]n making its decision to grant or deny a permit or to grant a permit with conditions," DEC shall make the eight determinations listed in that section, judicial deference to DEC's interpretation is not appropriate.

The rules for when a court should defer to an agency interpretation of a statute are set forth in *Raritan Development Corp. v. Silva*, 91 N.Y.2d 98, 102-103 (1997):

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

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

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

Id. at 103. Accord *Lighthouse Pointe v. NYS Dep't of Environ. Conservation*, 14 N.Y.3d 161 (2010) (holding that DEC's interpretation of the phrase "brownfield site" was contrary to the clear wording of New York's Brownfield Cleanup Program (BCP) and ruling that the petitioner was eligible for acceptance into the BCP as a matter of law), *Matter of Brown v. NYS Racing and Wagering Board*, 60 A.D.3d 107, 116 (2nd Dep't 2009) ("There being no ambiguity in the operative statutory terms, we must necessarily deem the pertinent provisions of the Education Law as subject to pure legal interpretation and give effect to their plain meaning, without necessarily deferring to the interpretation advanced by NYSED"), *HLP Properties, LLC, v. NYS Dep't of Environ. Conservation*, 21 Misc.3d 658, 669 (NY County 2008) ("while the implementation of a statute may place an agency in a position where they are forced to deal with competing interests, striking a balance between those interests is exclusively a legislative function.").

The cases cited by Respondents do not address the issue of the degree of deference due to agency determinations where the statutory language is clear. The cited cases are not relevant to determining the issue of what procedures are required to be followed under the WRL in making the determinations required by ECL 15-1503.2. Here, the statute is clear that Respondent DEC is

required to make the determinations set forth in ECL 15–1503.2 prior to setting the conditions for the water withdrawal permit it proposed to issue to Respondent HRLLC.

For these reasons, deference to DEC's interpretation of the procedural requirements applicable to ECL 15-1503.2 is not appropriate.

POINT IV

PETITIONERS ESTABLISH THAT RESPONDENT DEC FAILED TO COMPLY WITH SEQRA

Petitioners establish that 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 water withdrawals proposed for permitting as required by Section 6 NYCRR 617.7(b) of the SEQRA regulations and the many cases interpreting the "hard look" standard. Petitioners explain the "hard look" standard in their initial memorandum of law and explain why Respondent DEC's action in issuing the 2019 Ravenswood Permit failed to meet that standard. In response, Respondents assert that they are entitled to rely on a baseline of existing operations in evaluating environmental impacts and that deference is due to Respondent DEC's assessment of the impacts. These arguments are unpersuasive for the reasons explained below.

A. Existing Operations Are Subject to Review under SEQRA

SEQRA does not exclude consideration of previous impacts in evaluating the potential future impacts of an action under review. Respondents are incorrect in their assertions that Respondent DEC is entitled to use existing operations as a baseline for determining the significance of a Type I action, such as issuance of the 2019 Ravenswood Permit. The SEQRA regulations do not authorize excluding existing operations in determining the significance of a Type I Action. Consideration of whether an action will result in changes from existing

conditions is mentioned in only three of the twelve criteria for determining the significance of a Type I action set forth in 6 NYCRR 617.7(c)(1). Changes from existing conditions are not referenced in 6 NYCRR 617.7(c)(1)(ii), the criterion of greatest relevance to evaluating the environmental impacts of the operations of Ravenswood Generating Station. Section 617.7(c)(1)(ii) requires that "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" be considered. This provision does not require that changes in the "removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish" be considered. The clear wording of this provision requires that any "removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish" must be considered in making a determination of significance for a Type I action. The use of the word "changes" in other criteria listed in Section 617.7(c)(1) leaves no doubt that the term was deliberately left out of Section 617.7(c)(1)(ii). It is not appropriate for Respondent DEC to now offer a new and drastic reinterpretation of that subsection, particularly in view of the lengthy process that has recently been completed to amend the SEQRA regulations.[2]

[2] The lengthy process is described on Respondent DEC's website. "DEC initially noticed its proposal along with the availability of a combined Draft Generic Environmental Impact Statement and SAPA statement in the February 8, 2017 editions of both the State Register and Environmental Notice Bulletin. The comment period continued through May 19, 2017. In response to the many comments received, DEC modified the proposal and noticed a revised proposal along with the availability of a Revised Draft Generic Environmental Impact Statement in the April 4, 2018 editions of both the State Register and Environmental Notice Bulletin. The comment period continued through May 11, 2018, during which the Department received approximately 31 comments in response to the revised proposal. Comments were assessed and responded to in the FGEIS which the Department accepted on June 13, 2018. On June 27, 2018, DEC issued a Findings Statement and formally adopted the rule, which became effective January 1, 2019." See State Environmental Quality Review Act - Adopted Amendments 2018, https://www.dec.ny.gov/permits/83389.html.

The removal or destruction of large quantities of fish by the Ravenswood Generating Station was recognized by the Second Department in *Sierra Club v. Martens*, cited above. The court gave a detailed description of the cooling water intake system of Ravenswood Station and the impacts this system has on fish in the East River:

> In connection with electrical generation by three of the station's four steam generators, Ravenswood Station withdraws large amounts of water from the East River to cool the station's boiler equipment, turbines, and auxiliary equipment. The water is used only once and then discharged back into the East River. This "once-through cooling" system is the original cooling system that has been used by Ravenswood Station since it began operating in 1963. The station's fourth generator uses a multi-celled air-cooled condenser system that does not require the withdrawal of water from the river. When operating at full load, the station has a maximum withdrawal capacity of 1.5 billion gallons of water per day, although the actual amount of water used to operate the station is typically less, and varies depending upon the station's operating needs. This sizable water withdrawal has environmental consequences, most notably to fish and other local aquatic life. When the cooling water is drawn in, larger fish are killed when they become "impinged" on the screens that cover the intake structures to prevent debris in the water from entering. Juvenile fish, larvae, and eggs that are small enough to pass through the intake screens are killed when they become "entrained" in the cooling system. Additionally, the discharge of heated water back into the East River also has an impact on the aquatic environment. In the early 1990s, studies by ConEdison, the station's prior owner, demonstrated that, each year, approximately 83,000 fish became impinged and an average of 220 million eggs, larvae, and juvenile fish became entrained by the station's cooling system. Technology installed at the station in 2005 reduced annual impingement to approximately 25,000 fish and entrainment to 150 million organisms and eggs. Additional measures implemented in 2012 resulted in further reductions in impingement and entrainment.

Id. at 170-171. Respondent DEC's failure to consider all the impacts resulting from the removal or destruction of large quantities of aquatic organisms by the Ravenswood cooling water intake structure and huge withdrawals; the substantial interference the cooling water intake structure and huge withdrawals have on the movement of resident and migratory fish in the harbor estuary; the substantial adverse impacts the cooling water intake structure and huge withdrawals have on a threatened and endangered species of fish; and other significant adverse impacts to

natural resources is contrary to the clear wording of 6 NYCRR 617.7(c)(1)(ii), and resulted in an improper determination of no significance and a failure to require an EIS. As the Appellate Division stated in *Matter of Scenic Hudson, Inc. v. Town of Fishkill Town Board*, 258 A.D. 2d 654, 655 (2nd Dep't 1999)

> It is well settled that, where a Type I action is involved, there is a relatively low threshold that must be met to require the issuance of a positive declaration under SEQRA (*see,* 6 NYCRR 617.4 [a] [1]; *Matter of Chemical Specialties Mfrs. Assn. v Jorling,* 85 NY2d 382, 397.

The cases cited by Respondent HRLLC in support of its assertion that Respondent DEC is entitled to use a baseline of existing operations in making its SEQRA determination of significance do not support the baseline arguments Respondents are making in this case. The cited cases address a different issue—whether in reviewing the environmental impacts of a modification to a particular project SEQRA allows a *de novo* review of the entire project. The project at issue in this case—the issuance of a water withdrawal permit for operation of the Ravenswood Station—is not a modification of an earlier project. The issuance of the Ravenswood SPDES Permit in 2012 was a separate project. As explained in Petitioners' initial memorandum of law, the WRL and the SPDES law have separate purposes and the issuance of a water withdrawal permit and a SPDES permit are not segments of the same action. The SPDES program regulates water discharges, not water withdrawals.[3] Prior to the enactment of the 2011

[3] The New York Legislature established the SPDES program in 1973 to comply with the federal Water Pollution Control Act of 1972, 33 U.S.C. 1251 et seq. (1972). commonly referred to as the Clean Water Act (CWA). The CWA authorized development of a National Pollutant Discharge Elimination System (NPDES) to regulate discharges to surface waters of the United States. Section 301 of the CWA declares a prohibition against any discharge of any pollutant into waters of the United States except in compliance with a NPDES permit. The CWA authorizes the United States Environmental Protection Agency (EPA) to delegate the NPDES permit program to state governments, enabling states to perform many of the permitting, administrative and enforcement aspects of the NPDES Program. In order to take advantage of this federal delegation, New York State adopted its own SPDES permitting system, which is codified in Titles 7 and 8 of the Water Pollution Control Law, ECL Article 17. The provisions of ECL 17-0701 make clear that a SPDES permit authorizes water discharges, not water withdrawals. ECL 17-0701(1) provides, in pertinent part, "[i]t shall be unlawful for any person, until a written SPDES permit therefor has been granted by the commissioner, . . . , and unless such permit remains in full force and effect, to: a. Make or cause to make or use any outlet or point source for the discharge of sewage, industrial waste or other wastes

amendments to the WRL, water withdrawals by non-public water users in New York such as Ravenswood were not subject to permitting requirements, and were only restricted under the common law principle of riparian rights. Indeed, as noted above, the reason the 2011 amendments to the WRL were enacted is to provide Respondent DEC with greater authority to protect New York's water resources than Respondent DEC is granted under the SPDES law.

Although water withdrawals are not regulated under the SPDES program, discharges from power plant cooling systems are subject to special rules under the Clean Water Act which require that cooling water intake structures ensure "that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. 1316(b). Thus, while the manner of making withdrawals for power plant cooling systems is regulated under the CWA, the size of such withdrawals are not regulated. Therefore the assertions made by Respondent DEC in the amended negative declaration, AR 528-529, that "[t]here 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," and that "[t]he current water withdrawal regime was established by a Department initiated modification to the Facility's SPDES 2006 permit," are incorrect . To repeat—the amount of water that may be withdrawn by the Ravenswood Generating Station is not regulated under the Ravenswood SPDES permit.

Respondent DEC unsubstantiated assertion that it looked at the impacts of issuing the water withdrawal permit for operations at Ravenswood when it issued a determination under ECL 15-1503.2(f) that there are no significant individual or cumulative adverse effects from

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or the effluent therefrom, into the waters of this state." Unlike the water withdrawal law, the SPDES law has no threshold to the permitting requirements. Any discharge of wastes into the waters of New York State must be permitted.

issuance of the initial water withdrawal permit cannot be allowed to serve as justification for its negative declaration under SEQRA. As detailed above, the record demonstrates that no determinations under ECL 15-1503.2 were made before Respondent DEC issued a negative declaration on September 25, 2018, or issued the amended negative declaration on February 14, 2019. This unsubstantiated assertion cannot be used to justify Respondent DEC's negative declaration.

Respondent DEC also asserts that it looked at the impacts of issuing the water withdrawal permit when it issued when it reviewed the operations of Ravenswood Station pursuant to the Ravenswood SPDES Permit in 2006 and 2012. A previous environmental review under a different permit, while certainly relevant, must be considered in conjunction with a current review of the separate permit. The SEQRA review for the 2019 Ravenswood Permit must be based on a current evaluation impacts and must consider alternative technologies that might further conserve water and minimize fish entrainment and impingement such as closed cycle cooling. Such a review 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, which were not considered in the negative declarations issued for the Ravenswood SPDES Permit in 2006 and 2012.

For these reasons, none of the justifications offered in Respondent DEC's amended negative declaration constitute taking a "hard look" at the possible impacts of issuing the 2019 Ravenswood Permit. In view of the huge 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.

B. Deference to Respondent DEC's Interpretation of 6 NYCRR 617.7(c)(1)(ii) Is Not Appropriate

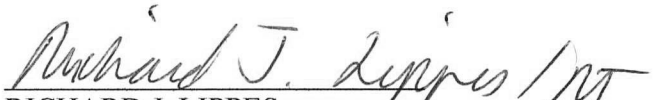
For the reasons discussed in Point III.B above that deference to Respondent DEC's interpretation of the clear statutory wording of the WRL is not appropriate, so too, deference to Respondent DEC's interpretation of the clear wording of the SEQRA regulations is not appropriate. The SEQRA regulations require that Respondent DEC take a hard look at potential impacts and nothing in the clear wording of the applicable regulations authorizes Respondent DEC to set a baseline of existing operations for examining impacts under the criterion of 6 NYCRR 617.7(c)(1)(ii). Deference to Respondent DEC's interpretation of the scope of Section 617.7(c)(1)(ii) is therefore not appropriate.

CONCLUSION

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

DATED: Buffalo, New York
September 5, 2019

Respectfully submitted,



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