SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------x

In the Matter of the Application of

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

Petitioners,

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

-against-

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

Respondents.

----------x

Index No. 2402/2019

Hon. Ulysses B. Leverett

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS BASIL SEGGOS' AND DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S VERIFIED ANSWER AND IN OPPOSITION TO THE VERIFIED PETITION

LETITIA JAMES
Attorney General of the State of New York
Attorney for Respondents DEC and Basil Seggos
28 Liberty Street, 19th Floor
New York, New York 10005
(212) 416-8469

GAVIN G. McCABE
Assistant Attorney General
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL STATUTES

STATE RULES AND REGULATIONS

ABBREVIATIONS

DEC New York State Department of Environmental Conservation

ECL Environmental Conservation Law

ENB Environmental Notice Bulletin

NPDES National Pollutant Discharge Elimination System

SEQRA State Environmental Quality Review Act
(ECL Article 8; 6 NYCRR Part 617)

SPDES State Pollutant Discharge Elimination System

WRPA – Water Resources Protection Act
(ECL Article 15, Title 15; 6 NYCRR Part 601)

Respondents Basil Seggos, Commissioner of the New York State Department of Environmental Conservation, and the New York State Department of Environmental Conservation (collectively "DEC"), submit this memorandum of law in opposition to the Verified Petition filed by Petitioners Sierra Club and Hudson River Fishermen's Association, New Jersey Chapter, Inc. ("Petitioners"), and in support of Respondent DEC's Verified Answer.

PRELIMINARY STATEMENT

A. Introduction

In this Article 78 proceeding, Petitioners ask the Court to annul a water withdrawal permit that DEC issued to co-respondent Helix Ravenswood, LLC ("Ravenswood") in February 2019 ("2019 Permit"). The 2019 Permit, issued pursuant to Environmental Conservation Law ("ECL") § 15-1501, sets terms to govern Ravenswood's continued withdrawal of water from the East River, for use in the cooling system and other processes at Ravenswood's electric power generating station in Long Island City. Ravenswood has been in operation, and withdrawing water for its cooling process, since 1963.[1] Because Ravenswood was a pre-existing withdrawer of water at the time the water withdrawal permitting system was established in 2011, ECL § 15-1501(9) required DEC to permit Ravenswood to continue to withdraw up to the facility's pre-permit maximum withdrawal capacity, which was approximately 1.5 billion gallons per day.[2]

Unlike some water withdrawals, Ravenswood's withdrawals are not for consumptive use, i.e., the facility's cooling system is designed such that substantially all of the water Ravenswood withdraws from the East River is returned to the East River. Furthermore, due to measures

---

1 Ownership of the Ravenswood facility has changed hands over the years, including during this water withdrawal permitting process. The current owner and holder of the 2019 Permit is Respondent Helix Ravenswood, LLC.

2 The 2019 Permit is in the Administrative Record ("AR") at pages 541-553.

required by DEC in related permitting and incorporated into the 2019 Permit, Ravenswood's actual daily average withdrawal amount is almost an order of magnitude lower than its permitted amount, coming in at approximately 371 million gallons per day in 2017. (AR 453.) The 2019 Permit also includes numerous other terms and conditions to ensure that Ravenswood's withdrawals do not have significant adverse impacts and that the facility uses environmentally sound and economically feasible conservation measures. (AR 541-543.)

Petitioners present two claims: 1) that DEC violated the Water Resources Law by failing to make certain determinations under ECL § 15-1503(2), including, inter alia, that the withdrawals authorized by the 2019 Permit will not have significant individual or cumulative adverse impacts on aquatic life, and that the withdrawals will incorporate environmentally sound and economically feasible conservation measures; and 2) that DEC violated the State Environmental Quality Review Act (SEQRA") by failing to take a "hard look" at the impacts of issuing the 2019 Permit and therefore issuing a Negative Declaration instead of an Environmental Impact Statement ("EIS"). However, Petitioners fall far short of meeting their burden under Article 78 to show that DEC's issuance of the 2019 Permit was arbitrary and capricious, affected by an error of law, or an abuse of discretion. (N.Y. C.P.L.R. § 7803.3.)

As explained below, the Administrative Record for DEC's permitting action, including DEC's SEQRA review, provides ample evidence that DEC made all determinations required under the Water Resources Law and that it took a "hard look" at the potential impacts of the withdrawals authorized by the 2019 Permit. Under the circumstances presented here, it was reasonable and appropriate, and well within the agency's discretion, for DEC to issue a Negative Declaration instead of preparing an EIS. The record documents are also explained and elaborated on in the Affidavit of Erik T. Schmitt ("Schmitt Aff.") and Affirmation of Lawrence

H. Weintraub ("Weintraub Aff.") filed in support of DEC's Verified Answer. Accordingly, the Court should dismiss the Petition and enter judgment for Respondents.

B. Procedural History

This case is the second round of litigation by these same Petitioners regarding DEC's permitting of water withdrawals at the Ravenswood facility. The history dates back to 2011 when the Legislature amended the Water Resources Law (Article 15 of the Environmental Conservation Law ("ECL")) to add Title 15: the Water Resources Protection Act ("WRPA"). The WPRA, for the first time, regulated commercial entities' withdrawals from water bodies in New York through a State-wide permit system. DEC was tasked with implementing this program through the issuance of water withdrawal permits and it adopted regulations, codified at 6 NYCRR Part 601, to carry out that responsibility. The WRPA and DEC's implementing regulations require both existing and new water users to obtain water withdrawal permits from DEC in order to continue, or begin, withdrawing water. One existing user that applied for a permit under the new program was the Ravenswood facility in Long Island City which, since 1963, had been withdrawing water from the East River to cool the steam it uses to generate electricity. (AR 5-40.)

For decades prior to the enactment of the WPRA, DEC had regulated Ravenswood's water discharge and withdrawal activities through a separate but related permitting program under the federal Clean Water Act and the State Pollutant Discharge Elimination System ("SPDES"), which required Ravenswood to conduct studies and undertake measures to protect water quality and aquatic life affected by its withdrawals from and discharges to the East River. Among the terms DEC included in Ravenswood's SPDES permit, as required by 6 NYCRR Section 704.5, is that water withdrawal technology that Ravenswood employs in cooling water

intake process must be the best technology available ("BTA"). DEC evaluated Ravenswood's cooling technology, known as a "once-through cooling system," under DEC's Policy CP-#52 "Best Technology Available (BTA) for Cooling Water Intake Structures" (AR 681-688) and appropriately determined that the BTA under the circumstances presented is a suite of technologies and operational measures, including variable speed drives and a fish return system, that reduce environmental impacts. DEC incorporated this determination into the 2012 SPDES permit. (AR 120-140.)

Petitioners' disagreement with the BTA determination is at the heart of this lawsuit: the core of their arguments that DEC failed to make the determinations required under the WRPA and failed to take a "hard look" under SEQRA is that they believe DEC was required to consider the impacts of Ravenswood's once-through cooling system by comparison to a different cooling technology, known as "closed-cycle cooling." (See, e.g., Petitioners Brief ("Pet. Br.") at 14-16, 26.) However, DEC considered and rejected "closed-cycle cooling" in making the determination that once-through cooling is BTA for Ravenswood's facility. (AR 105, 125-127.)[3] Neither the determinations to be made under ECL § 15-1503(2)(c) nor the SEQRA "hard look" criteria in 6 NYCRR 617.7(c) require DEC to make the type of comparative analysis of cooling technology that Petitioners demand. Nonetheless, as DEC stated in response to Petitioners' public comments raising these points, the factors that led to the prior BTA determination "remain unchanged and that determination has been reaffirmed." (AR 535.)[4]

---

3 DEC had previously made the same determination in conjunction with issuance of Ravenswood's 2007 SPDES permit. (AR 80-82.)

4 The Supreme Court of the County of Yates rejected virtually identical claims brought by Petitioner Sierra Club in an Article 78 challenge to DEC's issuance of a water withdrawal permit to Greenidge Generation, LLC, an existing user which employs the same once-through cooling technology Ravenswood uses. (*Sierra Club, et al., v DEC, et al.*, State of New York Supreme

The WRPA acknowledges the distinction between existing and new water users, including this very important limitation on DEC's authority as to existing users: it allows DEC no discretion to decrease the amount of water that existing facilities can withdraw. On the contrary, it mandates that DEC "shall issue" existing users, like Ravenswood, an "initial permit" for the "maximum water withdrawal capacity" of their existing water withdrawal system, as long they reported that capacity to DEC by February 2012. ECL § 15-1501(9). DEC followed this command in issuing a water withdrawal permit to Ravenswood in 2013 (the "2013 Permit"). DEC also interpreted this statutory directive as limiting its discretion regarding other aspects of water withdrawal permitting, including DEC's determination that issuance of an initial permit to an existing user was a ministerial act not subject to review under SEQRA.

In December 2013, Petitioners in this action filed an Article 78 action challenging the 2013 Permit on a variety of grounds, including violation of the WRPA and SEQRA. The Supreme Court of the County of Queens (McDonald, J.) rejected all of Petitioners' claims and dismissed the petition. The Appellate Division, Second Department, reversed the trial court ruling but its holding was limited to one narrow issue: "that the issuance of an 'initial permit' for making water withdrawals pursuant to Environmental Conservation Law § 15-1501(9) is not a ministerial act that is excluded from the definition of 'action' under the State Environmental Quality Review Act." *Sierra Club v Martens* (158 A.D.3d 169, 170 (2d Dep't 2018)).

While the Appellate Division agreed that the WRPA gave DEC no discretion to decrease the amount of water an existing user could withdraw, it nevertheless found that the WRPA does allow DEC discretion as to other aspects of permitting. *Id.* at 177. The court expressly did not

---

Court, County of Yates, Index No. 2017-0232 (November 8, 2018.)) The *Greenidge* slip opinion is attached as Exhibit 1 to the Weintraub Affirmation.

reach any issues beyond its SEQRA holding, deeming such issues "academic;" it annulled the permit based solely on the SEQRA ruling regarding classification, and remanded the matter back to DEC for further proceedings consistent with the court's ruling. *Id.* at 178.

In compliance with the Appellate Division's ruling, DEC immediately reinitiated a water withdrawal permitting process for the Ravenswood facility. DEC instructed Ravenswood to update its prior water withdrawal permit application materials by advising if any changes to its water withdrawal system had been made since August 2, 2017 when DEC approved a change in the name of the permittee from TC Ravenswood, LLC to Helix Ravenswood, LLC and directed Ravenswood to submit Part 1 of a Full Environmental Assessment Form (EAF). (AR 336-337.) DEC provided public notice and an opportunity to comment on the proposed permit in DEC's Environmental Notice Bulletin ("ENB"). (AR 394-395.)

DEC complied with all applicable requirements of the WRPA, made the determinations under ECL § 15-1503(2) (a) through (h), and performed SEQRA review of the proposed permitting action, culminating in issuance of a Negative Declaration. Following completion of this administrative process, including a 45-day public comment period that yielded more than two thousand public comments, and DEC's review and response to those comments, DEC issued the 2019 Permit to Ravenswood on February 20, 2019. Petitioners were among the commenters and DEC fully considered and responded to their comments. The administrative record for this action is over three thousand pages long.

C. Current Litigation

Petitioners now challenge the 2019 Permit on two grounds: 1) that DEC violated the WRPA by failing to make determinations required by ECL § 15-1503(2) and therefore failed to include appropriate permit conditions; and 2) that DEC violated SEQRA by failing to take a

"hard look" at the impacts of the 2019 Permit and therefore making the discretionary determination to issue a Negative Declaration rather than require the preparation of an EIS. Both claims are without merit. The record reflects that DEC made all determinations required by the WRPA and that DEC fully complied with SEQRA in issuing its Negative Declaration. The Schmitt Affidavit and Weintraub Affirmation filed herewith explain and elaborate on the record documents, addressing the WPRA and SEQRA respectively.

In essence, Petitioners disagree with the manner in which DEC exercised its discretion and ask the Court to second guess DEC's expert judgment and substitute Petitioner's preferred outcome for DEC's determinations. However, that is not the role of a reviewing court in a case of this nature. As the record amply demonstrates, DEC complied with the WRPA and SEQRA and Petitioners fall far short of meeting their heavy burden to demonstrate that DEC abused its discretion or that its actions were arbitrary and capricious. Accordingly, the Petition should be dismissed in its entirety and judgment should be entered for DEC.

STATUTORY FRAMEWORK

A. The Water Resources Law

The Water Resources Law, ECL Article 15, declares that it is the State's sovereign power to regulate and control New York's water resources. ECL § 15-0103(1). It acknowledges that adequate and suitable water for agricultural, commercial, and industrial uses, including the production of power, is essential to the economic growth and prosperity of the State. *Id.* § 15-0103(3). Prior to 2009, the Water Resources Law regulated withdrawals only for public drinking water supplies, leaving agricultural, commercial, and industrial water withdrawals largely unregulated. In 2009, Title 33 was added to the Water Resources Law, requiring entities, such as Ravenswood, that withdraw more than 100,000 gallons of water per day to file Annual Water

Withdrawal Reports with DEC. In 2011, the Legislature passed the WRPA, which repealed Title 33 and replaced it with Title 15, which authorizes DEC to implement a comprehensive permitting system for most large water withdrawals across the State.[5]

The WRPA now requires a permit to operate certain high-volume water withdrawal systems. ECL § 15-1501(1). A water withdrawal system is defined as any equipment or infrastructure used to remove water from the waters of the State, including collection, pumping, treatment, transportation, transmission, storage, and distribution. *Id.* §§ 15-1502(15), (16). Water withdrawal systems with a withdrawal capacity equal to or greater than a specified "threshold volume" must receive permits. *Id.* § 15-1501(1). The threshold volume for non-agricultural water withdrawal systems is 100,000 gallons per day.1 *Id.* § 15-1502(14). Several types of water withdrawals are exempted from the permit requirements including withdrawals for public emergency purposes and existing withdrawals for agricultural purposes that were registered with DEC by February 15, 2012. ECL § 15-1501(7).

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

---

5 As Petitioners observe the WRPA was enacted to "ensure that New York upholds its commitments under the Great Lakes Compact." (Pet. Br. at 4.) However, the Great Lakes Compact addresses new or increased withdrawals or consumptive uses, not existing water withdrawals such as Ravenswood's. *See* ECL § 21-1001 (Great Lakes Compact § 4.10). And, in any event, Ravenswood is not located in the Great Lakes watershed.

1. Initial Permits for Existing Water Withdrawals

The 2011 amendments to the Water Resources Law mandate that DEC "shall issue" an initial permit to operators of water withdrawal systems that reported the systems' maximum water withdrawal capacity to DEC by February 15, 2012, as required by the 2009 amendments to the Law. ECL § 15-1501(9). Accordingly, DEC has no authority or discretion to deny initial permits when this criterion is met. *See* ECL § 15-1501(9). The Second Department confirmed this point. *Sierra Club, supra,* 158 A.D.3d at 177. ECL § 15-1501(9) provides that an initial permit shall be "subject to appropriate terms and conditions as required under" Article 15. ECL § 15-1501(6) requires that every permit issued under § 15-1501 shall report information requested by DEC, including information related to water usage and conservation. The Second Department's decision in the *Sierra Club* also directed DEC, in making its decision to grant or deny a permit, to make the determinations identified in ECL § 15-1503(2).

To implement the initial permit requirements, DEC promulgated 6 NYCRR § 601.7. The dates by which existing water withdrawal systems must apply for an initial permit, based either on their withdrawal capacity or SPDES permit status, are set forth in 6 NYCRR § 601.7(b). Since it has an SPDES permit, Ravenswood was required to apply for an initial permit by June 1, 2013. 6 NYCRR § 601.7(b)(3). Ravenswood timely met this deadline. (AR 005-040.) An initial permit will be issued "for the withdrawal volume equal to the maximum withdrawal capacity reported to [DEC] on or before February 15, 2012." *Id.* § 601.7(d). An initial permit is for a fixed term not to exceed ten years, and may be modified by DEC to correct technical mistakes. *Id.* §§ 601.7(e), 601.15(b)(4).

In addition to other standard water withdrawal permit terms and conditions, an initial permit must include "environmentally sound and economically feasible water conservation

measures to promote the efficient use of supplies." *Id.* § 601.7(e). Those conditions include installing meters or other measuring devices on all sources of water supply (*Id.* § 601.19), calibrating those meters or other devices annually to ensure accuracy (*Id.* § 601.20(a)(2)), and filing Annual Water Withdrawal Reports with DEC (*Id.* § 601.5). Finally, when a water withdrawal system is subject to an SPDES permit, as is Ravenswood's, DEC "will review the initial permit application in coordination with the SPDES or other permit program, particularly with respect to any pending permit renewals." 6 NYCRR § 601.7(f)

B. The National and State Pollutant Discharge Elimination Systems

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

New York's version of the NPDES program, known as SPDES, was approved by EPA in 1975. *See* ECL §17-0701 *et seq.*; 6 NYCRR Parts 700-706 and 750 (implementing regulations). Like the Clean Water Act, New York's SPDES program requires a permit in order to discharge pollutants from a point source into the waters of the state. Since "pollutant" is defined under federal and state law to include "heat" (33 U.S.C. § 1362(6); ECL § 17-0105(17)), thermal discharges from a power plant like Ravenswood are regulated under SPDES. *See* 6 NYCRR Part 704. In connection with thermal discharges, a facility's cooling water intake structures "shall reflect the best technology available for minimizing the adverse environmental impacts." 6 NYCRR § 704.5; *see* 33 U.S.C. § 1326(b). In addition to impacts from heated effluent upon

discharge, adverse environmental impacts from a cooling water intake structure consist of impingement and entrainment of aquatic organisms, including fish eggs and larvae.

C. The State Environmental Quality Review Act

SEQRA, codified at Article 8 of the ECL, requires New York State agencies to assess the environmental significance of all actions they have discretion to approve, fund or directly undertake. DEC's regulations implementing SEQRA are codified at 6 NYCRR Part 617.

Under SEQRA, a state or local agency that is funding, approving or directly undertaking an "action" as defined in 6 N.Y.C.R.R. § 617.2(b) must first determine whether the action may have a potentially, significant adverse impact on the environment. See ECL § 8-0109(4); 6 N.Y.C.R.R. § 617.3. In carrying out this obligation, the agency must identify relevant areas of environmental concern, take a "hard look" at them, and make a reasoned elaboration of the basis of its determination.

If the agency finds that the action will not result in any significant adverse impacts to the environment, it will issue a "negative declaration" to that effect. See 6 N.Y.C.R.R. §§ 617.2(y) and 617.7(a) (2). If the agency finds that the action may result in at least one significant adverse environmental impact, it must issue a "positive declaration" and prepare or require the preparation of an EIS before the action is funded, approved, or undertaken. See ECL § 8-0109 (2); 6 N.Y.C.R.R. §§ 617.2 (ac), 617.7(a)(1), and 617.9.

Consistent with the statute, DEC's regulations classify actions as Type I, Type II or Unlisted *(see* 6 NYCRR 617.2(ai), (aj), (ak)). Type I actions are those actions that "may have a significant adverse impact on the environment and require the preparation of an EIS" (6 NYCRR 617.4(a)(l)). However, designation of an action as Type I does not, per se, necessitate the filing of an environmental impact statement." (*Matter of Mombaccus Excavating, Inc. v Town of*

Rochester, N. Y., 89 A.D.3d 1209, 1211 (2011) Type II actions are activities that "have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8" (6 NYCRR 617.5(a)). Unlisted actions are "all actions not identified as a Type I or Type II action in this Part" (6 NYCRR 617.2(ak)).

Once an agency has determined that a particular activity is an "action" within the meaning of SEQRA[6], it then conducts an initial review to determine the type of action. 6 NYCRR 617.6. If an action is determined to be Type II, no further action is required (6 NYCRR 617.6(a)(l)(i)). If the agency determines the action is Type I or Unlisted, then it must prepare an Environmental Assessment Form ("EAF"), whose purpose is to aid an agency "in determining the environmental significance" (6 NYCRR 617.6(a)(2), (3); 6 NYCRR 617.2(m)). The EAF includes three parts; Part I is filled out by the permit applicant/project proponent, while Parts II and III are filled out by the agency. If, after reviewing the EAF, the agency determines that a Type I or Unlisted action "may include the potential for at least one significant adverse environmental impact," an EIS is required (6 NYCRR 617.7(a)(l)). If the agency determines "that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant" no EIS is required and the agency will instead prepare a Negative Declaration. (6 NYCRR 617.7(a)(2)). The agency determines significance by evaluating the action and its potential impacts under the criteria set forth in 6 NYCRR 617.7(c).

---

6 At issue in the *Sierra Club* case was DEC's prior determination that issuance the 2013 Initial Permit to Ravenswood was not subject to review under SEQRA because it was of a an "official act[] of a ministerial nature" under ECL § 8-0105(5)(ii). *Sierra Club, supra*, 158 A.D. 3d at 176-177. Based on the Court's ruling rejecting that interpretation, DEC now considers issuance of initial water withdrawal permits to be actions that are subject to SEQRA review.

STATEMENT OF FACTS

Much of the factual background is set forth By the Second Department in the *Sierra Club* decision, (*Sierra Club, supra*, 158 A.D.3d at 170-74), but DEC provides additional background here. The Ravenswood Generating Station, in Long Island City, has operated a cooling water intake structure and water withdrawal system for the purposes of generating electricity since 1963. The Ravenswood facility includes a thermoelectric power plant that boils water to create steam, which then spins turbines to generate electricity. Once the steam has passed through a turbine, it must be cooled and converted back into water before it can be reused to produce more electricity. Ravenswood's thermo-electric plant uses a "once-through" cooling system that withdraws water from the East River, circulates it through pipes to absorb heat from the steam in systems called condensers, and then discharges this warmer water back to the East River. Substantially all of the water withdrawn and used by the plant for power production is returned to the East River. (AR 7, 258.)

The water intake system that draws in water for cooling has screens, which are designed to keep debris and fish in the river from entering the plant. When water is drawn into the pipes, small fish and other aquatic organisms may be killed when they are caught on the intake screens (known as impingement). Fish that are in the early stages of life, such as eggs and larvae as well as other small aquatic life also sometimes pass through the intake screens and can be killed as the water travels through the facility (known as entrainment). DEC has long required the facility to address these impacts through its implementation of Commissioner's Policy 52 – Best Technology Available for Cooling Water Intake Structures ("CP-52") (AR 681-688), as incorporated into the facility's SPDES Permits. (AR 70-90; 120-140.)

A. Ravenswood's SPDES permit

Because it has been discharging heated water through a point source into the East River for many years, Ravenswood has been required to have an SPDES permit for decades. Ravenswood's SPDES permit addresses not only discharges but also the operation of the facility's cooling water intake structure. Ravenswood is required to use the best technology available for minimizing adverse environmental impacts such as impingement and entrainment of aquatic life in order to comply with the BTA requirements as determined under CP-52, which are incorporated into its SPDES permit (AR 129-131; 681-688.)

For example, DEC has required Ravenswood to (i) install variable speed pumps, which allow the plant to reduce the volume of cooling water withdrawn; (ii) schedule outages of the cooling water pumps, to reduce the impact on aquatic life; (iii) upgrade intake screens so that the screens work continuously; and (iv) use "low stress fish returns" to increase survival of the larger fish that are impinged on the screens. (AR 129-131.) In accordance with CP-52, DEC considered and rejected proposals to require Ravenswood to use a closed-cycle cooling system, of the type Petitioners would prefer. DEC has noted, among other things, that a closed-cycle cooling system would have required Ravenswood to install large cooling towers and that there was insufficient space available on site to construct and locate such towers. (AR 535.) Ravenswood's 2012 SPDES Permit was set to expire in 2017 but was extended under Section 401(2) of the State Administrative Review Act. (AR 120, 541.)

B. Ravenswood's 2013 Initial Water Withdrawal Permit

Following promulgation of the NYSDEC's regulations implementing the WRPA, on May 31, 2013, the prior operator of the facility, TC Ravenswood, LLC, submitted an application to DEC for an initial water withdrawal permit to withdraw up to 1,534,752,000 gallons per day

("GPD") of water from the East River for once through cooling and other processes related to electrical generation. (AR 5-39.) Following a notice and public comment period, DEC issued an initial water withdrawal permit for the facility on November 15, 2013. (AR 55, 57.) The initial water withdrawal permit allowed the facility to withdraw a maximum capacity of 1,390,000,000 GPD, not 1,534,752,000 GPD as requested by Ravenswood because 1,390,000,000 GPD was the amount listed in Ravenswood's Annual Water Withdrawal Report to DEC as of February 15, 2012. AR 55-60; *see* ECL § 15-1501(9).

On or about December 18, 2013, DEC received a letter from Ravenswood, stating that its Annual Water Withdrawal Reports submitted for the years 2009-2011 inadvertently omitted certain withdrawals from its maximum reported capacity. AR 141-42. The letter explained that this maximum capacity is necessary to maintain the reliability of the electrical grid and to provide critical electric generation during natural disasters and other emergencies. AR 142. Ravenswood also submitted revised Annual Water Withdrawal Reports for 2009-2011, and a Professional Engineer certification dated December 17, 2013 regarding the maximum water withdrawal capacity of the facility. AR 143-155. Taking the facility's low pressure saltwater cooling system withdrawals into account raises the facility's maximum water withdrawal capacity to 1,527,840,000 GPD. AR 141-43.

On the basis of the submittals by Ravenswood, on or about March 7, 2014, DEC issued a corrected initial water withdrawal permit to Ravenswood to withdraw 1,527,840,000 GPD of water from the East River for once through cooling and other processes related to electrical generation. AR 158-162. Litigation regarding the 2013 Permit commenced in December 2013 and was completed when the Appellate Division made its ruling in January 2018.

C. Ravenswood's 2019 Water Withdrawal Permit

Following the Appellate Division's ruling annulling the 2013 Permit, DEC informed Ravenswood in April 2018 that it would need to submit a new application. (AR 336-37.) DEC explained that it that would incorporate information from Ravenswood's original 2013 water withdrawal permit application, as well as information from the facility's August 2, 2017 permit renewal application, and that Ravenswood would also need to provide information about any changes since August 2, 2017. (Id.) Ravenswood completed the new application in September 2018 (AR 338-39, 340-57, 360-61, 362-65).

In addition to following the process for issuance of an initial permit in 6 NYCRR 601.7, DEC also made the determinations listed in ECL Section 15-1503.2(a)-(h). (Schmitt Aff. ¶¶ 17-31.) And in compliance with the instructions of the Appellate Division in the *Sierra Club* decision, DEC also reviewed the permitting action under SEQRA. It classified the action as a Type 1 action (AR 336) and required Ravenswood to fill out and submit Part 1 of the full Environmental Assessment Form. (AR 336, 502-529, Weintraub Aff ¶ 8.) DEC evaluated the action under the criteria for determining significance in 6 NYCRR 617.7(c) and concluded that there would be no significant adverse environmental impacts. (Id.) DEC therefore prepared a Negative Declaration instead of preparing an EIS. (Id.) DEC published notice of the new proposed 2019 Permit in the ENB on October 3, 2018 (AR 394-96) and allowed for public comment until November 16, 2018. (AR 471-73.)

Although not statutorily required, DEC responded to public comments regarding the 2019 Initial Permit when it issued the permit. (AR 532-539.) In light of public comments received, DEC also issued an Amended Negative Declaration. (AR 540, Weintraub Aff ¶ 13.) Thereafter, on February 20, 2019, DEC issued an initial water withdrawal permit to Helix Ravenswood,

LLC to withdraw 1,527,840,000 GPD of water from the East River for once through cooling and other processes related to electrical generation (the "2019 Initial Permit"). (AR 541-546.) The 2019 Permit runs concurrently with Ravenswood's SDPDES Permit, which is currently SAPA extended, and will expire on February 19, 2025 unless timely renewed. (AR 541.)

Required measures for water conservation and the reduction of impacts to the fisheries resource contained in the Biological Monitoring Requirement section of the 2012 SPDES Permit (AR 129-131) have been incorporated by reference into the 2019 initial water withdrawal permit for the facility. (AR 544.) Two of those Biological Monitoring Requirements reduce the quantity of water used by the facility: 1) the installation of variable speed pumps and ancillary equipment, and 2) the scheduling of a planned outage process to shut down the facility's CWPs. Section 3 of the Engineer's Report in the 2013 and 2017 water withdrawal permit application materials states that Ravenswood has installed VFDs on its CWPs to reduce the quantity of water withdrawn from the East River. AR 12-13, 263-64. In addition, the 2019 Ravenswood water withdrawal permit (AR 543-46) contains several conditions to ensure the efficient use and conservation of water. These measures include: 1) installing and maintaining meters or other appropriate measuring devices, 2) calibration of meters and measuring devices at least once per year, 3) maintaining records, 4) conducting an annual system-wide water audit to determine unaccounted-for water, and 5) submitting Annual Water Withdrawal Reports to DEC. AR 544-45. These technologies and operational controls are designed to meet performance standards that require 90% reduction in impingement mortality, and 65% reduction in entrainment, from the calculation baseline. (AR 130, 549-550.)

ARGUMENT

A. The Court Should Apply a Deferential Standard of Review

In an Article 78 proceeding, the court may overturn an agency decision only when that decision is arbitrary and capricious, affected by an error of law, or an abuse of discretion. N.Y. C.P.L.R. § 7803.3. The "review of an agency determination that was not made after a quasi-judicial hearing is limited to consideration of whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion." (*Matter of Harpur v Cassano*, 129 A.D. 3d 964, 965 (2nd Dep't 2015)(lv denied 26 N.Y. 3d 916); *see also, Town of Marilla v Travis*, 151 A.D.3d 1588, 1589 (4th Dep't 2017)). When a statute expressly provides an agency with the authority to exercise discretion, as SEQRA and the WRPA required of DEC in issuing the 2019 Permit, a court may only overturn the agency's decision when it is arbitrary and capricious or lacks a rational basis. *Flacke v. Onondaga Landfill System*, 69 N.Y.2d 355, 363 (1987); *Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974).

Most importantly, where, as here, "the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld." *Kurcsics v Merchants Mut. Ins. Co.*, 49 N.Y.2d 451,459 (1980). Further, in assessing an agency's determinations under SEQRA, "[i]t is not the province of the courts to second-guess thoughtful agency decisionmaking . . . . [t]he lead agency, after all, has the responsibility to comb through reports, analyses and other documents before making a determination; it is not for a reviewing court to duplicate these

efforts . . . .'[w]hile judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives.'" *Matter of Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, (citations omitted) 9 N.Y.3d 219, 231-232 (2007.)

B. DEC Complied with the WRPA in Issuing the Ravenswood 2019 Initial Permit

Petitioners present what amount to three arguments under the WRPA. First, they assert broadly that DEC failed to make the determinations required by ECL § 15-1503.2(a)-(h)[7] and therefore failed to include appropriate conditions in the 2019 Permit. (Pet. Br. at 5-10.) Relatedly, Petitioners argue that DEC improperly substituted the incorporation of terms from Ravenswood's SPDES permit into the 2019 Permit in lieu of making the determinations required by ECL Sections 1503.2(a)-(h). (Pet. Br. at 17-19.) Second, Petitioners focus in specifically on Section 15-1503.2(f) and repeat, in more detail, their argument that DEC failed to make the required determination. Third, Petitioners similarly focus in specifically on Section 15-1503.2(g) and repeat, in more detail, their argument that DEC failed to make the required determination. As set forth below, none of these arguments can be sustained.

As an initial matter, Petitioners also suggest, without explicitly stating a preclusion argument, that the Court could conclude that the 2019 Permit violates the WRPA simply because the terms of the 2019 and 2013 Permits are similar and the 2013 Permit was annulled. (Pet. Br. at 6.) The Court should disregard Petitioners' suggestion for two main reasons: 1) the Appellate Division expressly did not pass judgment on the terms of the 2013 Initial Permit, finding that those issues were "academic" in light of the SEQRA holding (*Sierra Club, supra*, 158 A.D.3d at

---

7 Petitioners also reference 6 NYCRR 601.11(c)(1)-(8), but DEC issues initial permits pursuant to 6 NYCRR 601.7. Regardless, those provisions just mirror ECL Section 15-1503.2((a)-(h).

178); and 2) issuance of the 2019 Permit was a separate administrative action from issuance of the 2013 Permit, based on a separate administrative process with a separate administrative record. Therefore, the Court, in this separate Article 78 proceeding, must evaluate the terms of the 2019 Permit against the statute and regulations based on the current record. As explained below, and as set forth in detail in the Schmitt Affidavit, DEC made all of the determinations required by ECL § 15-1503.2(a)-(h) and included appropriate conditions in the 2019 Permit.

1. DEC made the Determinations Required by ECL § 15-1503.2(a)-(h)

Petitioners argue alternately that DEC entirely failed to make the determinations required by ECL § 15-1503.2(a)-(h), or that it improperly considered its incorporation of terms from Ravenswood's SPDES permit as satisfying the requirement to make those determinations. (Pet. Br. at 5-10 and 17-19.) Both assertions are false. As to the first point, DEC's Response to Public Comments directly addresses the issue: "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 533.) DEC then specifically stated its determination as to each of the categories identified in ECL § 15-1503.2(a)-(h). (Id.)

Petitioners complain that there is no document in the administrative record other than DEC's Response to Public Comments that shows that DEC made the determinations under Section 15-1503.2(a)-(h). (Pet. Br. at 9.) As explained below and in the Schmitt Affidavit filed herewith, that assertion is incorrect. However, Petitioners do not dispute that the Response to Public Comments is in the record, nor do they identify any requirement as to the quantity of documents that must be present in the record to provide evidence that a determination was made. They also fail to provide any support for their implication that a response to public comments

should be accorded less weight than any other piece of relevant evidence in the record. DEC collected comments from all interested parties on the proposed water withdrawal permit and, after nearly three months of deliberation, issued detailed responses to those comments. AR 471, 532-539. This part of DEC's process is as valid as any other.[8]

Regardless, there are numerous other documents in the record that support DEC's determinations. Because there was no standard form or checklist to record the determinations in one place, DEC staff drew on different sources of information in the record to make each determination. DEC's determinations under Sections 15-1503(2)(a), (b), (c), (d) and (h) are described below, while those for Sections 1503(2)(f) and (g) are addressed in their own subsections that follow, to correspond to Petitioners' separate argument sections addressing those two provisions.

- **ECL § 15-1503(2)(a): whether "the proposed water withdrawal takes proper consideration of other sources of supply that are or may become available."** The water withdrawal permit application materials explain that the facility is located at 38-54 Vernon Boulevard, in Long Island City, Queens, New York and that the facility had been withdrawing saltwater from the East River for its once through cooling system. AR 10-15, 261-66. The East River is a strait to the Atlantic Ocean with a vast supply of water in comparison to other possible sources of water supply such as headwaters of tributaries or groundwater aquifers. AR 14-15, 265-266. Section (k) of the portion of the 2013 and 2017 water withdrawal permit application materials relating to requirements under 6 NYCRR § 601.10 states that "the siting of the electric generating facility along the East River is ideal due to plentiful surface water supply for once thru cooling." AR 7, 258. Siting of the facility at the East River also allows for almost immediate distribution of power to New York City. Section 3 of the Engineer's Report in the 2013 and 2017 water withdrawal permit application materials states that the facility will always need cooling water, but that the facility has retrofitted its Circulating Water Pumps ("CWPs") with Variable Frequency Drives ("VFDs") to reduce its demand for water. AR 12-13, AR 263-64. For these reasons, DEC made the determination that the East River is a proper source of water withdrawal, taking into proper consideration other sources of water supply that are or may become available. (Schmitt Aff. ¶ 20)

---

8 In an Article 78 proceeding, the administrative record is the sum of the grounds presented by the agency for its determination. *Scanlan v. Buffalo Public School System*, 90 N.Y.2d 662, 678 (1997).

- **ECL § 15-1503(2)(b): whether "the quantity of supply will be adequate for the proposed use."** The facility has been making similar withdrawals since it commenced operation in 1963 without any water quantity issues. Importantly, as stated regarding 1Section 503(2)(a), the East River is a strait to the Atlantic Ocean that provides a much greater supply of water than other possible sources of water supply. Section 11 of the Engineer's Report in the 2013 and 2017 water withdrawal permit application materials explains the details of the source water. AR 14-15, 265-66. Ravenswood's cooling system withdraws approximately one percent (1%) of the mean tidal flow in the East River and, as the application materials state, returns all of the water that it withdraws to the East River so that there is no net water loss to the source. AR 7, 258. Accordingly, DEC made the determination that the quantity of water supply will be adequate for the use that Ravenswood sought in its water withdrawal permit application. (Schmitt Aff. ¶ 21.)

- **ECL § 15-1503(2)(c): whether "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 supply."** The Ravenswood water withdrawal does not impact the ability of other existing or proposed water withdrawers to supply potable water to their inhabitants. Ravenswood withdraws saltwater from the East River. AR 10-15, 261-266. No municipalities in the area withdraw water from the East River for potable water purposes. In addition, because Ravenswood returns all of the water that it withdraws back to the East River (AR 7, 258), there are no quantity issues caused that would hinder the ability of a municipality to withdraw water from the East River. Thus, DEC made the determination that 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 supply. (Schmitt Aff. ¶ 22.)

- **ECL § 15-1503(2)(d): whether "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."** Ravenswood was not seeking to increase its water withdrawal through its water withdrawal permit application. During times of peak demand it is necessary for Ravenswood to operate its water withdrawal system at full capacity in order to meet the power needs of New York City. AR 141-42. Required measures for water conservation and the reduction of impacts to the fisheries resource contained in the Biological Monitoring Requirement section of the 2012 SPDES Permit (AR 129-131) have been incorporated by reference into the 2019 initial water withdrawal permit for the facility. AR 544. Two of those Biological Monitoring Requirements reduce the quantity of water used by the facility: 1) the installation of variable speed pumps and ancillary equipment and 2) the scheduling of a planned outage process to shut down the facility's CWPs. Section 3 of the Engineer's Report in the 2013 and 2017 water withdrawal permit application materials states that Ravenswood has installed VFDs on its CWPs to reduce the quantity of water withdrawn from the East River. AR 12-13, 263-64. In addition, the 2019 Ravenswood water withdrawal permit (AR 543-46) contains several conditions to ensure the efficient use and conservation of water. These measures include:

1) installing and maintaining meters or other appropriate measuring devices, 2) calibration of meters and measuring devices at least once per year, 3) maintaining records, 4) conducting an annual system-wide water audit to determine unaccounted-for water, and 5) submitting Annual Water Withdrawal Reports to DEC. AR 544-45. For all of these reasons, DEC determined that the need for all or part of Ravenswood's water withdrawal cannot be reasonably avoided through the efficient use and conservation of existing water supplies. (Schmitt Aff. ¶ 23.)

- **ECL § 15-1503(2)(e): whether "the proposed water withdrawal is limited to quantities that are considered reasonable for the purposes for which the water use is proposed."** The Annual Water Withdrawal Reports of Ravenswood demonstrate that the withdrawals are limited to the needs of the facility for cooling purposes. AR 24-28, 144-55, 554-55, 556-60, 561-65, 566-73, 575-82, 583-90, 593-94, 595-602. The quantity of water withdrawn is also reasonable because all of the water that is withdrawn is returned to its source. AR 7, 258. Ravenswood has installed VFDs on its CWPs. Section 3 of the Engineer's Report in the 2013 and 2017 water withdrawal permit application materials states that the facility's CWPs "have been retrofitted with VFDs to allow for reduced surface water withdrawal at reduced generation loading and reduced cooling water temperatures." AR 12, 263. The associated chart from Section 3 of the Engineer's Report documents the considerable water conservation that has been achieved. AR 13, 264. (*See also* Part VI of the Water Conservation Program Form from these application materials). AR 17-22, 268-273. These factors, together with the other requirements described in paragraph 23 of this affidavit, limit Ravenswood's withdrawal to reasonable quantities for its purposes. Accordingly, DEC was able to make the determination required by ECL § 15-1503(2)(e). (Schmitt Aff. ¶ 24)

- **ECL § 15-1503(2)(h): whether "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 2013 and 2017 application materials state that "the current water withdrawal system utilized at Ravenswood complies with various federal, state, and local laws." AR 7, 258. Furthermore, in the signature portion of the application, the applicant affirms that the information provided on the application form and all attachments submitted therewith is true to the best of the applicant's knowledge and belief. AR 31, 287. The permit appropriately incorporates terms from Ravenswood's SPDES permit and as such is consistent with the federal Clean Water Act and the ECL. Thus, DEC determined that the water withdrawal associated with the 2019 Ravenswood initial water withdrawal permit will be implemented in a manner that is consistent with applicable municipal, state and federal laws as well as regional interstate and international agreements. (Schmitt Aff. ¶ 27.)

As for Petitioners' assertion that DEC improperly attempted to substitute its incorporation of terms from Ravenswood's SPDES for making the determinations required by

ECL § 15-1503.2(a)-(h), DEC addressed this precise point in its Response to Comments, explaining that the agency takes appropriate account of aspects of SPDES permits that overlap with the considerations to be made in issuing a water withdrawal permit, and may even incorporate SPDES permit terms by reference. But allowing information received under a one permitting regime to inform a determination made under another is simply good government and certainly does not constitute failure to make the determination:

> NYSDEC has broad discretion over the form and format of its permits. In this instance, data, material, and information previously submitted to NYSDEC by the applicant supported NYSDEC's determination under ECL § 15-1503.2 to include some of the same permit conditions that appear in the facility's SPDES permit. NYSDEC has authority to incorporate the SPDES permit provisions by reference as the most appropriate way to coordinate the language of the two permits under 6 NYCRR 601.7.

(AR 536-537.)

Moreover, DEC's Response to Comment 1 (AR 532 -533) and the information provided above and in the two argument sections that follow fully refute the assertion; DEC independently made each separate determination under Section 15-1503(2) before issuing the 2019 Permit.

Finally, Petitioners also assert that the information submitted by Ravenswood was insufficient for DEC to make the required determinations. (Pet. Br. at 8-9.) DEC's Response to Comment 6 addresses this issue and confirms that Ravenswood's resubmitted Engineering Report, along with other information submitted over Ravenswood's long permitting history, "enabled NYSDEC to make the determinations in ECL § 15-1503.2." (AR 537.) The Court should decline to second guess DEC's exercise of discretion and technical judgment in determining what information its needs to make required determinations.[9]

9 Petitioners also express their confusion about DEC's Project Justification Checklist (AR 591). The Schmitt Affidavit at ¶¶ 28-29 explains that this document is just an internal checklist, not

2. DEC Determined, within its Discretion, Whether Ravenswood's Water Withdrawals would have a Significant Adverse Impact on Water Resources.

Petitioners second argument, while captioned as an argument that DEC failed to make the determination required by ECL § 15-1503.2(f), really just states Petitioners' disagreement with the way DEC made the determination. (Pet. Br. at 10-13.) This provision calls on DEC to determine whether "the proposed water withdrawal . . . 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). Petitioners misstate what the provision requires, asserting that "[t]o 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" (Pet. Br. at 10) and then argue based on their own misstatement of the appropriate standard.[10] DEC's Response to Comments identifies the proper scope of its inquiry -- "for an impact to be cumulatively significant, it must meaningfully add to the impact from all water withdrawals on the resource" -- and then explains how it determined that the impact here was not significant.

First, DEC made clear that it was evaluating the facility's "continuing, unchanged operation" under the 2019 Permit against a baseline of the current operations under the existing environmental and operational controls and technologies, i.e., the 2019 Permit would not authorize any increase in withdrawals. (AR 534.) Second, DEC explained that the facility makes

---

mandated by law, to help DEC keep track of whether it has the requisite application materials. On these forms, "P" means "present," "A" means "absent," and "N/A" means "not applicable." This form is not intended to document DEC's decision making analysis with respect to issuance of initial water withdrawal permits.

10 Petitioners similarly misconstrue the requirements of 6 NYCRR Section 601.10(k) in arguing, incorrectly, that Ravenswood's permit application was deficient. (Pet. Br. at 10.) That provision requires water withdrawal permit applicants to provide information regarding individual and cumulative impacts using language that mirrors the language of Section 1503.2(f).

a comparatively small contribution to overall levels of impacts in the East River (2-3%) and that the permit conditions require the facility to reduce impingement by an additional 90% and entrainment by 65% from previous baseline levels, its assessment was that the impacts on aquatic life from the action of issuing the 2019 Permit would not be individually or cumulatively significant. (Id.). This explanation not only refutes Petitioners' claim that DEC failed to make the determination under Section 1503.2(f), but reflects that DEC had ample basis for determining that the 2019 Permit would not have a significant cumulative adverse impact on aquatic life or any other water dependent resources. The Schmitt Affidavit at paragraph 25 provides further elaboration on how DEC made this determination.

Petitioners again complain that there is no document in the administrative record other than DEC's Response to Public Comments that shows that DEC made the determination under Section 15-1503.2(f). (Pet. Br. at 12.) However, as noted above, Petitioners do not dispute that the Response to Public Comments is in the record, nor do they identify any requirement as to the quantity of documents that must be present in the record to provide evidence that a determination was made. Regardless, the Schmitt Affidavit at paragraphs 25 and 23 provides further explanation of how DEC considered a wide range of information in its 2019 permitting analysis as to Section 15-1503.2(f), and identifies materials in the record that were relied on by DEC.

In short, DEC has provided a clear factual basis for its determination under Section 15-1503.2(f), including its Response to Public Comments, the extensive data regarding Ravenswood's entrainment and impingement levels under the facility's SPDES permit (AR 605-80) and the other information identified in the Schmitt Affidavit. DEC exercised its judgment based on that information and concluded that granting the permit would not have a significant individual or cumulative impact. This squarely qualifies as a determination under Section 15-

1503.2(f).

Petitioners argue that DEC's reference to the SPDES permit supports its contention that DEC did not make a separate determination regarding the water withdrawal system's effect on water resources. However, this is a mischaracterization of the role the SPDES permit played in DEC's considerations. In making its determination, DEC used Ravenswood's current operations as a baseline for evaluating how significantly the continued water withdrawal would affect the quantity and quality of water and water dependent natural resources. AR 534. Furthermore, DEC found that the water withdrawal would not result in any changes to those effects beyond those that had already occurred at Ravenswood and were being monitored under the SPDES permit. *Id.* Therefore, the inclusion of extensive entrainment and impingement data under the SPDES permit in the administrative record shows that DEC did not use the permit as a substitute for the required determinations under the WRPA, but instead used data compiled pursuant to one permit to make a separate determination in another permit.

Petitioners' final contention is that the entrainment and impingement data relied on by DEC is anomalously low compared to other facilities, and that because DEC did not explain the asserted anomaly to Petitioners' satisfaction, DEC lacked a sufficient basis for its determination under Section 15-1503.2(f). This contention fails for two reasons. First, other than expressing their own suspicion about the validity of the entrainment and impingement data because the figures for Ravenswood are lower than the figures at other facilities, Petitioners identify no flaw in the process for collecting the data or the methodology for assessing and reporting it. Nor do they present any contrary data for Ravenswood that DEC might have considered. Absent such information, it was not unreasonable for DEC to rely on the data notwithstanding that Petitioners view it as anomalous. Second, Petitioners again improperly ask the Court substitute its judgment

for DEC's as to a technical matter within DEC's expertise. Where "the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference." *Flacke*, 69 N.Y.2d at 363. The Court should decline this request.

In sum, the administrative record includes clear evidence that DEC made the determination required under ECL § 15-1503.2(f) and that it had a rational basis for that determination.

3. DEC Determined, within its Discretion, Whether Ravenswood's Water Withdrawals Incorporated Environmentally Sound and Economically Feasible Water Conservation Measures

Petitioners' argument that DEC failed to make the determination required by ECL § 15-1503.2(g) again just reflects Petitioners' disagreement with the manner in which DEC exercised its discretion in making the determination. (Pet. Br at 13-16.) This provision calls on DEC to determine whether "the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures." ECL § 15-1503.2(g). The crux of Petitioner's argument is their erroneous assertion that in order to make this determination, DEC was required to again evaluate closed-cycle cooling as an alternative water conservation measure. (Pet. Br. at 14.)[11]

As an initial matter, the Court should reject this argument because Petitioners are reading into the statute a requirement that isn't there. Evaluating whether Ravenswood's withdrawal will be environmentally sound and economically feasible does not require DEC to evaluate any

11 Petitioners also again misconstrue the requirements of 6 NYCRR Section 601.10(k) in arguing, that Ravenswood should have been required to submit application materials regarding closed-cycle cooling.

specific water conservation measure, much less to undertake a comparative analysis of once-through cooling with closed-cycle cooling. Petitioners' insistence on the need for DEC to consider requiring closed-cycle cooling at an existing facility, such as Ravenswood, reflects an unwillingness to accept that Section 15-1501(9) prevents DEC from reducing, below the facility's pre-existing withdrawal capacity, the amount of water that Ravenswood may withdraw. It would serve no useful purpose for DEC to include comparison of an alternative it could not legally require nor can the statute be read to compel such a comparison.

Petitioner Sierra Club raised this exact argument in the *Greenidge* case in Yates County Supreme Court and the court easily saw through it: "Petitioners contention that the DEC's failure to consider wet closed-cycle cooling as a viable alternative in the issuance of the water withdrawal permit violates [ECL 15-1503.2(g)] is without merit." (Weintraub Aff., Ex. 1 at 6-7.) The Greenidge facility, like Ravenswood, was an existing facility employing once-through cooling and was applying for an initial water withdrawal permit under 6 NYCRR 601.10. DEC performed the Section 15-1503.2(g) determination in an almost identical manner for Greenidge as it did here and the Yates County court found that to be in compliance with statute. *Id.* As the court explained:

> This Court finds that the DEC was required to consider the factors set forth in ECL15-1503. However, 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" (6 NYCRR 601.7). 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

(Weintraub Aff., Ex. 1 at 6-7)

The Ravenswood 2019 Initial Permit contains these same terms. (AR 543-545.)

Second, DEC responded to Petitioners' comment asserting that it needed to evaluate closed-cycle cooling and explained again (*see* AR 105-106) why that system was not feasible:

> 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 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.)

Petitioners assert that there is no document in the administrative record other than DEC's Response to Public Comments that shows that DEC considered the water conservation measure of closed-cycle cooling before the 2019 Permit was issued. (Pet. Br. at 16.) However, Petitioners do not dispute that the Response to Public Comments is in the record, nor do they provide any support for their implication that a response to public comments should be accorded less weight than any other piece of relevant evidence in the record. DEC collected comments from all interested parties on the proposed water withdrawal permit and, after nearly three months of deliberation, issued detailed responses to those comments. AR 471, 532-539. This part of DEC's process is as valid as any other. Regardless, the Schmitt Affidavit at paragraphs 26 and 23 provides further explanation of how DEC considered a wide range of information in its 2019 permitting analysis as to Section 15-1503.2(g), and identifies materials in the record that were

relied on by DEC.

At the same time, Petitioners acknowledge, in contradiction of their assertion that "there is no document" in the administrative record considering closed-cycle cooling, that 2019 Permit incorporates the 2006 Biological Fact Sheet (AR 547-553) which fully evaluated closed-cycle cooling. (Pet Br. at 16.) Petitioners attempt to discredit the Biological Fact Sheet because it is from 2006, but they ignore DEC's explanation that "[t]he 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.)

In sum, the record shows that DEC exercised its professional judgment regarding the technical issues addressed in Section 15-1503.2(g). Its determination that the withdrawal authorized by the 2019 Initial Permit will be implemented in manner that incorporates environmentally sound and economically feasible water conservation measures was not irrational and the Court should therefore reject Petitioners' argument.

C. DEC Complied with the State Environmental Quality Review Act in its Issuance of the Ravenswood Permit

Following the Second Department's 2018 decision in *Sierra Club, supra,* that SEQRA applies to issuance of an initial water withdrawal permit to an existing user, DEC undertook SEQRA review of the permitting action and it complied with SEQRA's requirements. First, DEC conducted the initial review required by 6 NYCRR 617.6, and determined that the action is a Type I action based on the magnitude of Ravenswood's withdrawals. (AR 336-37; Weintraub Aff. ¶ 7.) This determination triggered the requirement for completion of the three part Full

Environmental Assessment Form ("EAF") to aid DEC "in determining the environmental significance of" of the proposed 2019 Initial Permit. (6 NYCRR 617.6(a)(2), (3); 6 NYCRR 617.2(m)). DEC informed Ravenswood of its determination that the action is a Type 1 action and instructed Ravenswood to complete and submit Part 1 of the EAF. (AR 336-37; Weintraub Aff. ¶ 7; Schmitt Aff. ¶ 17.)

Ravenswood completed and submitted Part 1 of the EAF to DEC on May 4, 2018. (AR 342-364; Schmitt Aff. ¶ 18.) DEC then reviewed the information provided by Ravenswood in Part I, as well as other information provided by Ravenswood in support of its application for an initial water withdrawal permit and other information available to DEC though its oversight of Ravenswood's compliance with its SPDES permit. (NYCRR 601.7(f).). Based on that review, DEC proceeded to complete Part 2 of the EAF on July 5, 2018. (AR 382-391; Weintraub Aff. ¶ 8-9.)

Based on DEC's review of Parts 1 and 2 of the EAF and other relevant materials, including Ravenswood's Annual Water Withdrawal Reports and its yearly Verification Monitoring Plan Status Reports, (AR 575-662), DEC completed Part 3 on September 25, 2018, concluding that there would be no significant adverse impacts from issuance of an initial permit to Ravenswood authorizing continued withdrawal of up to 1,527,840,000 gallons per day. (AR 392, Weintraub Aff. ¶¶ 10, 11.) DEC's determination of no significant adverse impacts was based on its analysis under the "hard look" standard codified in 6 NYCRR 617.7(c). (Weintraub Aff. ¶¶ 10, 11.) This completed Part 3 of the EAF constituted DEC's Negative Declaration. (Id.) DEC therefore did not prepare or cause an EIS to be prepared. (6 N.Y.C.R.R. § 617.7(a)(2); Weintraub Aff. ¶¶ 10, 11.)

Many of the public comments in response to DEC's October 4, 2018 ENB which provided notice of the September 25, 2018 Negative Declaration addressed SEQRA issues that had not been directly addressed in the Negative Declaration. While none of the comments raised potentially significant issues that required the preparation of an EIS, after completing its Response to Public Comments DEC determined that it was appropriate to issue an amended Negative Declaration to further address the SEQRA-related comments. (AR 528, 540; Weintraub Aff. ¶ 13.) As the Amended Negative Declaration explains, DEC's review under Part 2 of the EAF identified only one potential impact as moderate to large (Item 7 – Impacts on Plants and Animals) but DEC then explains why that potential does not meet level of significance under 6 NYCRR 617.7 to require an EIS. (AR 528.) DEC thus took the "hard look" required by SEQRA and therefore fully complied with SEQRA in issuing the 2019 Initial Permit.

Petitioners take issue specifically with DEC's determination that the action will not have significant adverse impacts under 6 NYCRR 617.7(c). Like their claims regarding DEC's compliance with ECL §§ 15-1503.2(f) and (g), Petitioners mislabel their SEQRA argument as a claim that DEC failed to take a mandatory action, i.e., that DEC "fail[ed] to take a 'hard look'" as required by 6 NYCRR 617.7. (Pet. Br. at 19-27.) Once again however, their argument amounts to a disagreement with the way DEC exercised its discretion in taking a hard look, and a request that the Court second guess DEC's discretionary determination to prepare a Negative Declaration instead of an EIS. However, "is not the province of the courts to second-guess thoughtful agency decisionmaking . . . . while judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives" *Matter of Riverkeeper, Inc., supra,* 9 N.Y.3d at 231-232 (upholding agency determination not to prepare supplemental EIS.)

The record demonstrates that DEC did not "[fail] to take a hard look," but that it followed the process for determining significance laid out in 6 NYCRR 617.7 and explained its conclusion that issuance of the 2019 Permit would not have significant impacts. As DEC explained in its response to Petitioners' comment objecting to the Negative Declaration:

> The negative declaration remains appropriate and NYSDEC has taken the "hard look" required under SEQRA. NYSDEC evaluated the Verification Monitoring Report required under the 2012 SPDES permit for the facility. Helix LLC submitted that report to NYSDEC in 2018. NYSDEC reviewed that report and requested additional information from Helix. As required under the BTA provisions of its SPDES permit, Helix LLC must propose additional measures to NYSDEC for approval to meet the SPDES' permit's stated performance goals. The levels of reductions obtained by the facility to date are consistent with NYSDEC's determination under ECL S 15-1503.2(f) and 6 NYCRR 617.7(b) that there are no significant individual or cumulative adverse effects from issuance of the water withdrawal permit for the existing, unchanged operation. To further address concerns raised during the public comment period NYSDEC is issuing an Amended Negative Declaration for this action.

(AR 538.)

Petitioners' disagreement with DEC's significance determination is rooted in their failure to accept that the baseline for DEC's analysis of the impacts of issuing an initial withdrawal permit to an existing facility is the facility's already existing withdrawal capacity. As discussed above, Ravenswood timely filed a report to qualify for an initial water withdrawal permit under ECL § 15-1501(9). Ravenswood initially reported a withdrawal capacity of 1.3 billion gallons per day but later submitted a correction showing that its actual capacity had always been 1,527,840,000 gallons per day. (R. 203-204, 460.)[12] DEC accepted this corrected withdrawal capacity (AR 205) and Petitioners offer no dispute as to its accuracy. Section 15-1501 therefore

12 Ravenswood explained that it had inadvertently omitted the capacity of its existing low-pressure saltwater cooling system, which it uses to provide increased electric generation during natural disasters or other emergencies. (R. 188-89.) For example, during Superstorm Sandy and the storm's aftermath, Ravenswood supplied approximately fifty percent of New York City's electricity, requiring all units to generate at maximum capacity. (R. 188.)

allowed Ravenswood to continue withdrawing up to its reported capacity in the period leading up to completion of its withdrawal permit as well as mandating that DEC's permit not decrease that amount. Accordingly, DEC's analysis of the impacts of issuing an initial permit allowing withdrawals of up to 1.5 billion gallons per day was based on a pre-existing scenario in which Ravenswood was already withdrawing up to 1.5 billion gallons per day or, as DEC response terms it, the permit was for "an existing, unchanged operation." (AR 538; Weintraub Aff. ¶ 11.)

The Yates County Supreme Court considered and rejected Petitioner Sierra Club's identical attack on DEC's determination to issue a negative declaration as to issuance of the initial water withdrawal permit in the *Greenidge* matter. (Weintraub Aff. ¶ 12, and Ex. A at 11-12.) The Court also considered and rejected Petitioner's argument about baseline in its consideration of the challenge to Greenidge's SPDES permit, where Greenidge was recommencing operations after a period of being off-line:

> "Petitioners contend that the DEC utilized the wrong baseline in determining that the recommencement of operations at the Greenidge Facility would not result in any significant adverse environmental impacts. Specifically, the Petitioners contend that the baseline should have been "no operations" rather than pre-layup operations. Petitioners are unable to cite any authority for their position that the Facility's lay-up status required using a baseline as if there was no existing facility. The determination to use a pre-layup baseline was not arbitrary or capricious."

(Weintraub Aff., Ex. 1 at 17.)

This Court should similarly reject Petitioners' argument that baseline should be measured as if the Ravenswood plant had not been lawfully operating prior to the initial water withdrawal permit.[13]

---

13 See also, *Matter of Hells Kitchen Neighborhood Assn. v City of New York*, 81 A.D.3d 460, 462-63 (1st Dep't 2011), rejecting attack on determination of no significant traffic or transportation impacts where agency issuing negative declaration "reasonably used the existing

Petitioners take issue with DEC's explanation of the baseline in the Amended Negative Declaration (Pet. Br. at 26 asserting that DEC "is incorrect.") However, Petitioners misstate DEC's position and, seemingly, miss the point. Contrary to Petitioners' assertion (Pet. Br. at 26-27), DEC does not contend that the baseline is drawn from Ravenswood's SPDES permit, which does not set a withdrawal limit. Instead, DEC considers the baseline to have been set by operation of law under Section 15-1501(9), which requires DEC to consider the prior withdrawal capacity in permitting continued withdrawal at the same amount. Petitioners fail to confront Section 15-1501(9), nor do they explicitly identify what other baseline DEC should have considered. It appears that Petitioners believe the baseline should be zero, or some other amount below 1.5 billion gallons per day, but they provide no rationale for any lower baseline than what DEC determined was appropriate.

For example, Petitioners point to Ravenswood's impingement and entrainment studies (AR 605-675) as evidence that the criterion for determining significance under Section 617.7(c)(1)(ii)[14] is met and an EIS was therefore required. (Pet. Br. at 24-25.)[15] Measured

---

environmental setting as a baseline to project future traffic conditions," and rejecting petitioners' arguments that "ignore [] reality" and "fail to take account of existing conditions."

14 This criterion addresses "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."

15 Petitioners also seem to suggest, with no legal support, that the quantity of the withdrawal capacity alone – "764 times as large as a type of action included on the list of Type 1 actions" – should be dispositive of the significance determination. (Pet. Br. at 24.) However, while Type I projects are presumed to require an EIS, DEC is still required to determine significance and the magnitude of withdrawal does not create some heightened scrutiny or greater presumption. Petitioners also overlook that substantially all of the water withdrawn by Ravenswood is returned to the East River and that actual average withdrawals are far lower than the maximum capacity.

against a baseline of zero (i.e., for permitting of a new facility instead of an existing facility), this analysis would make sense. DEC, however, has to take into account ECL § 15-1501(9) and Ravenswood's pre-permit withdrawal capacity. Thus, while Ravenswood's water withdrawals undeniably impact aquatic organisms, DEC did not act arbitrarily or contrary to law in considering the significance of its permitting action by comparing pre-permit withdrawal impacts against post-permit withdrawal impacts. Indeed, it would have been arbitrary for DEC to ignore the baseline in making the determinations under Section 617.7. In short, Petitioners fail to show that DEC was irrational or arbitrary in determining a baseline based on Ravenswood's preexisting maximum withdrawal capacity, nor do they offer any alternate baseline that would not run afoul of Section 15-1501(9).

Petitioners also argue that 6 NYCRR 617.7(c) requires DEC to evaluate impacts without relying on its analyses conducted with respect to Ravenswood's SPDES permit and, similarly, that DEC was required to evaluate closed-cycle cooling as an alternative to Ravenswood's once-through cooling technology without reliance on the BTA analyses conducted in accordance with CP-52 and incorporated into the 2007 and 2012 Ravenswood SPDES permits. (Pet. Br. at 26-27). Not only is there no support for this argument in the plain language of 6 NYCRR 617.7(c), it directly contradicts the requirement that DEC will review initial water withdrawal permit applications "in coordination with the SPDES or other permit program, particularly with respect to any pending permit renewals." (6 NYCRR 601.7(f).) Petitioners do not identify any change in conditions or any other reason why the prior analysis is no longer valid. Finally, Petitioners restate their prior assertion that DEC failed to make the determination required by ECL Section 15-1503.2(f) as a ground for the Court to find that DEC's Determination of Significance under

Section 617.7 was flawed. (Pet. Br. at 25.) This argument should be rejected for all of the reasons stated in Argument Section B.2 above.

In sum, DEC fully complied with SEQRA in issuing the 2019 Initial Permit to Ravenswood, and Petitioners have failed to meet their burden of demonstrating that DEC's determination to issue a Negative Declaration was arbitrary and capricious or an abuse of discretion.

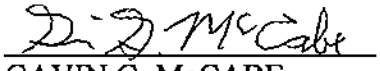
CONCLUSION

For all of the reasons stated above, the verified petition should be denied in its entirety.

Dated: New York, New York
August 12, 2019

Respectfully Submitted,

LETITIA JAMES
Attorney General of the State of New York
Attorney for Respondents Basil Seggos and DEC

By: 
GAVIN G. McCABE
Assistant Attorney General
NYS Office of the Attorney General
Environmental Protection Bureau
28 Liberty Street, 19th Floor
New York, New York 10005
(212) 416-8469
Gavin.McCabe@ag.ny.gov