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

-against-

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

Respondent,

TRANS CANADA RAVENSWOOD LLC,

Necessary Party.

Index No. 002949/2014

Hon. Robert J. McDonald

MEMORANDUM OF LAW IN SUPPORT OF TC RAVENSWOOD'S MOTION TO DISMISS

HISCOCK & BARCLAY, LLP
Attorneys for TC Ravenswood, L.L.C.
Office and Post Office Address
80 State Street
Albany, New York 12207-2543
Telephone: (518) 429-4200

Yvonne E. Hennessey, Esq.
Danielle E. Mettler, Esq.
Laura L. Mona, Esq.
of Counsel

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PRELIMINARY STATEMENT

Respondent TC Ravenswood, LLC ("TC Ravenswood")[1] respectfully submits this Memorandum of Law and accompanying papers in support of its motion to dismiss the Petition, dated February 18, 2014.

At the outset, Sierra Club and Hudson River Fisherman's Association, New Jersey Chapter, Inc. ("HRFA") (collectively referred to as "Petitioners") lack standing to challenge the water withdrawal permit ("WWP") issued by Respondent New York State Department of Environmental Conservation ("NYSDEC") to TC Ravenswood for the Ravenswood Generating Station ("Ravenswood Facility"). Petitioners have each failed to establish that at least one member of their organization has suffered an injury in fact sufficient to confer standing to sue individually. Indeed, they could not – the Ravenswood Facility has withdrawn water from the East River since the 1960s such that the challenged WWP did not authorize any new activity that could cause an injury in fact. Moreover, Petitioners' attempts at establishing a sufficient injury in fact are vague, conclusory, too generalized and riddled with hearsay. They are also no different in kind than that of the public at large. Further, Petitioners' claim of "informational injury" is, at best, misplaced. Finally, even assuming arguendo that Petitioners could establish standing of an individual member of each organization, Petitioners' failure to join any such member, let alone even identify them by name, is fatal.

Petitioners fare no better with respect to the substance of their claims. The Ravenswood Facility has been in operation for decades, during which time it has been authorized to withdraw water from the East River. The WWP for the Ravenswood

[1] The caption contained in the Petition inaccurately identifies "TC Ravenswood, LLC" as "TRANSCANADA RAVENSWOOD LLC."

Facility, which Petitioners are challenging in this proceeding, did not authorize any activity that was not already authorized by the NYSDEC. Moreover, despite Petitioners' claims, the Ravenswood Facility's water withdrawals have been thoroughly reviewed by the NYSDEC. In particular, TC Ravenswood's State Pollution Discharge Elimination System ("SPDES") permit for the Ravenswood Facility requires Best Technology Available ("BTA") in order to minimize to the maximum extent practicable the environmental impacts associated with the Ravenswood Facility's cooling water intake structures and associated water withdrawals.

Given the foregoing, there is no merit to Petitioners' claims that the NYSDEC improperly processed the initial WWP for the Ravenswood Facility. Indeed, the newly enacted Water Resources Protection Act ("Act"), the implementing regulations promulgated by the NYSDEC, and the legislative history all confirm that the NYSDEC lacked discretion in issuing TC Ravenswood an initial WWP for the Ravenswood Facility such that its action was properly classified as a ministerial Type II action under the State Environmental Quality Review Act ("SEQRA"). Moreover, the NYSDEC's decision making was rationally based and entitled to substantial deference. Because Petitioners' other claims flow from the Type II classification, they also lack merit and should be dismissed as a matter of law.

STATEMENT OF FACTS

A. The Ravenswood Facility Long-Standing Operations

TC Ravenswood owns and operates the Ravenswood Facility, an electric generating facility located in Long Island City, Queens, New York. *See* Affidavit of Daniel O'Donnell, dated April 23, 2014 ("O'Donnell Aff."), ¶ 7. The Ravenswood

Facility produces electricity for use throughout New York City. O'Donnell Aff. ¶ 8. With a combined capacity of 2,480 megawatts ("MW"), the Ravenswood Facility has the ability to, and has, produced up to 21% of the total electricity used by New York City. *Id.* ¶¶ 10-11.

The Ravenswood Facility consists of three (3) steam boiler turbine/generators, known as Units 10, 20 and 30; a combined cycle unit, known as Unit 40 and; several simple cycle combustion turbines. *Id.* ¶ 9; A.R.[2] at 3, 93. Units 10, 20 and 30 were constructed in the early to mid-1960s, while Unit 40 went into service in 2004. O'Donnell Aff. ¶¶ 7, 12.

For approximately 50 years, the Ravenswood Facility has used a once-through cooling water system, which withdraws water from the East River that is circulated through the cooling system to cool the Unit 10, 20 and 30 boiler equipment, turbines, and auxiliary equipment, and then discharged back into the East River. O'Donnell Aff. ¶ 13; A.R. at 7.

Cooling water from the East River is a critical component of the production of electricity at the Ravenswood Facility, as it is necessary for proper operation, and to prevent overheating. O'Donnell Aff. ¶ 15; A.R. at 8. The maximum capacity of the Ravenswood Facility's cooling water system, which has not changed since the facility was initially installed in the 1960s, is 1527.84 million gallons per day ("MGD"). O'Donnell Aff. ¶ 16. This ensures that there is sufficient water to keep the units properly cooled and to prevent overheating. *Id.* ¶ 17. The actual amount of cooling water needed per day to keep the boilers and equipment at the Ravenswood Facility from overheating

[2] "A.R." refers to the Administrative Record, dated March 13, 2014.

varies based on which units are operating and the amount of time that the units are operating (i.e. load). *Id.* ¶ 18.

Until enactment of the Act in 2011 and the implementing regulations in 2012, the Ravenswood Facility's cooling water intake system, including the associated water withdrawals from the East River, were regulated solely under the Clean Water Act ("CWA"). *Id.* ¶¶ 22, 34. Under the CWA, the Ravenswood Facility is subject to the BTA for cooling water intake structure requirements contained in section 316(b) of the CWA and 6 N.Y.C.R.R. Part 704.5. *Id.* ¶ 23. The purpose of BTA is to minimize environmental impacts associated with cooling water intake structures. *Id.* ¶ 24.

The §316(b) and §704.5 requirements applicable to the Ravenswood Facility are contained in its SPDES permit issued by the NYSDEC in 2007, and renewed on November 1, 2012.[3] *Id.* ¶ 25; A.R. at 66-86, 116-36. TC Ravenswood's SPDES permit underwent SEQRA review when it was originally issued in 2007. O'Donnell Aff. ¶ 26; A.R. at 62-65.

Petitioners failed to comment on the draft 2012 SPDES Permit, or the BTA requirements applicable to the Ravenswood Facility's cooling water intake contained therein, during the public comment period or otherwise challenge TC Ravenswood's 2012 SPDES Permit. O'Donnell Aff. ¶ 31.

B. Water Withdrawal Permit

Despite its long-standing water withdrawals from the East River and the existence of its SPDES permit, which contained appropriate conditions to mitigate the

[3] The only parties that commented on the draft 2012 SPDES permit during the public comment period were TC Ravenswood and the United States Environmental Protection Agency. *See* NYSDEC Response to Comments attached to the O'Donnell Affidavit as Exhibit D.

environmental impacts associated with the Ravenswood Facility's cooling water intake system, following promulgation of the NYSDEC's regulations implementing the Act, TC Ravenswood submitted an application for an initial WWP to the NYSDEC on May 31, 2013 ("WWP Application"). O'Donnell Aff. ¶ 39; A.R. at 1-35. The WWP Application did not seek authorization to withdraw water in an amount or kind different than what had been previously authorized at the Ravenswood Facility for approximately 50 years. *See* O'Donnell Aff. ¶ 13, 39; A.R. at 1-35.

NYSDEC issued notice of its tentative determination to issue an initial WWP to TC Ravenswood in the Environmental Notice Bulletin ("ENB") on August 7, 2013 and again on August 28, 2013. A.R. at 37-45, 46-50. The August 28, 2013 notice made clear that the water withdrawal that would be authorized by the initial WWP for TC Ravenswood was not new. A.R. at 48. (stating that "[t]he applicant has applied for an initial permit for the *continued* withdrawal of 1.5 billion GPD of water for operation of the Ravenswood Generating Station.") (emphasis added). NYSDEC issued the initial WWP for the Ravenswood Facility on November 15, 2013 and, due to corrections made to the annual water withdrawal reports previously submitted by TC Ravenswood, NYSDEC issued a revised initial WWP for the Ravenswood Facility on March 7, 2014. A.R. at 53-56, 155-58.

ARGUMENT

POINT I

SIERRA CLUB AND HRFA LACK ORGANIZATIONAL STANDING

A. Petitioners Bear The Burden of Proving Organizational Standing

"Standing requirements 'are not mere pleading requirements but rather an indispensable part of the plaintiffs case' and therefore 'each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof.'" *Save the Pine Bush, Inc. v. City of Albany*, 13 N.Y.3d 297, 306 (2009) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Standing is a threshold requirement for any party seeking to challenge governmental action. *New York State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 2011 (2004). Standing in environmental cases is not automatic, nor can it be met by conclusory allegations of harm. *Id.* at 214-15; *See also Piela v. Van Voris*, 229 A.D.2d 94, 96 (3d Dep't 1997) (upholding dismissal based on lack of standing where the plaintiffs' conclusory allegations that they were "affected by [respondents'] actions" were sufficient to state a claim, but lacked probative value to establish it) (alteration in original).

In order for an organization to establish that it has standing to sue, it must (1) demonstrate that at least one of its members would have standing to sue individually; (2) that the interests it asserts are germane to its purpose; and (3) that the resolution of the claim does not require the participation of its individual members. *Save the Pine Bush, Inc. v. Town of Clifton Park*, 50 A.D.3d 1296, 1297 (3d Dep't 2008), *lv. denied*, 10 N.Y.3d 716 (2008) (quoting *Saratoga Lake Protection & Improvement Dist. v. Dep't of Pub. Works of City of Saratoga Springs*, 46 A.D.3d 979, 982 (2007), *lv. denied*, 10

N.Y.3d 706 (2008)); *see e.g. Dental Soc. of State v. Carey*, 61 N.Y.2d 330, 333 (1984) (stating that "[t]he standing of an organization such as respondent to maintain an action on behalf of its members requires that some or all of the members themselves have standing to sue, for standing which does not otherwise exist cannot be supplied by the mere multiplication of potential plaintiffs").

The requisite test for an individual member to establish standing to sue is comprised of two-prongs. First, the party must show "injury in fact." *New York State Ass'n of Nurse Anesthetists*, 2 N.Y.3d at 211. To do so, the party must demonstrate that it "will actually be harmed by the challenged administrative action." *Id.* The requirement of injury in fact is intended to balance the public's interest in efficient governmental actions with an interest in adequate judicial review. *Soc'y of Plastics Indus. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 779 (1991). Petitioners maintain the burden to show direct harm in some way different from that of the public at large. *Save the Pine Bush, Inc.*, 13 N.Y.3d at 304 (quoting *Soc'y of Plastics Indus.*, 77 N.Y.2d at 774).

Second, the alleged injury must fall within the "'zone of interests, or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted.'" *Id.* at 308 (quoting *Soc'y of Plastics Indus.*, 77 N.Y.2d at 773); *see also Colella v. Bd. of Assessors*, 95 N.Y.2d 401, 409-10 (2000).

As detailed above, each Petitioner bears the burden of establishing that it has standing to bring this proceeding and challenge the Ravenswood Facility's WWP. *See Soc'y of Plastics Indus*, 77 N.Y.2d at 769. In doing so, Petitioners must offer probative evidence, as allegations without evidentiary support are patently insufficient. *See id.* at 778.

B. Sierra Club Has Failed To Establish An Individual Member's Injury in Fact

A review of the Petition suggests that Sierra Club is a national non-profit organization with over 600,000 members, that its work includes the protection of water resources, and that some unidentified members "are injured by the environmental damage caused to the East River, the Hudson River, Long Island Sound, the New York Harbor and the New York Bight by Ravenswood's water usage for its cooling water intake structures." Petition ¶ 2. The Petition also alleges that Sierra Club and its members "suffer informational injury and injury to [their] public participation rights as a result of DEC's failure to conduct a full environmental assessment of Ravenswood's water withdrawals." *Id.* at 2-3.

The Affidavit of Roger Downs adds only that the Sierra Club has focused on fish kills by power plants in New York, that he has personal experience in fish entrainment and impingement issues, and that he lobbied on behalf of the Sierra Club for passage of the Act. *See, generally,* Affidavit of Roger Downs, dated March 21, 2014 ("Downs Aff.").

Taken as a whole, the Petition and Downs Affidavit fail to establish the Sierra Club's standing in this proceeding. The Sierra Club has not identified one member that lives near, uses, or has even visited the East River. Indeed, not even Mr. Downs makes such an allegation. Rather, the entire crux of Sierra Club's basis for standing are generalized concerns about cooling water intake structures that are not specific in any way to the Ravenswood Facility. *See Long Island Pine Barrens Soc'y v. Planning Bd.*, 213 A.D.2d 484, 485-86 (2d Dep't 1995) (noting that generalized allegations that a project will have a deleterious impact upon the petitioner or its members are insufficient

to establish standing; further stating that where an allegation of injury does not demonstrate that the individual petitioners will suffer an environmental injury which is in any way "different in kind and degree from the community generally," such allegations fail to satisfy the petitioner's burden of establishing an injury in fact); *see also Sun-Brite Car Wash v. Bd. of Zoning & Appeals,* 69 N.Y.2d 406, 413 (1987).

Moreover, Sierra Club's allegations and stated concerns are not even tied to the specific location of the Ravenswood Facility in the East River but rather focused on a much larger geographic area. *Compare* Downs Aff. ¶¶ 4-6 (noting concerns with power plants "in New York[,]" explaining report regarding how power plant intake structures harm "the Hudson River, Long Island Sound and New York Harbor[,]" and efforts regarding the Hudson River), *with* O'Donnell Aff. ¶¶ 45-48 (explaining location of the facility on the over 16 mile East River). The Sierra Club, therefore, fails to provide any bases upon which to establish that any individual member has suffered an injury in fact sufficient to confer standing.

Moreover, there can be no injury in fact here. As detailed above, the Ravenswood Facility has been in operation for approximately 50 years. During this time, it has withdrawn water from the East River for its cooling water intake structures. It was merely a change in law that required TC Ravenswood to secure a WWP, not a change in environmental impacts. Indeed, the water withdrawals permitted by the challenged WWP are no different in kind or amount than those previously authorized by the NYSDEC for this facility.

Finally, the Sierra Club's claim to have suffered an "informational injury" does not confer standing. Petitioners have not provided, and TC Ravenswood has been unable

to find, a single case in New York recognizing "informational injury." The legal viability of informational injury in New York is questionable at best. More to the point, to confer standing based solely on informational injury would effectively eradicate long-standing Court of Appeals' precedent and vitiate any need to establish standing in the context of SEQRA and related environmental cases. Indeed, under Sierra Club's premise, an organizational plaintiff would be able to undermine established principles of standing by simply requesting that an agency prepare an environmental impact statement ("EIS").

In short, the Sierra Club has failed to meet a key requirement of organizational standing. It therefore lacks standing to bring this proceeding and its claims, therefore, must be dismissed.

C. The HFRA Has Failed To Establish An Individual Member's Injury in Fact

The HRFA fares no better than the Sierra Club. In the Petition, HFRA indicates that it is a regional non-profit organization with members that are recreational fisherman who purportedly fish in the Hudson-Raritan Estuary every day and that, similar to the Sierra Club, some unidentified members "are injured by the environmental damage caused to the East River, the Hudson River, Long Island Sound, the New York Harbor and the New York Bight by Ravenswood's water usage for its cooling water intake structures." Petition ¶ 3. The Petition also alleges that HFRA and its members "suffer informational injury and injury to [their] public participation rights as a result of DEC's failure to conduct a full environmental assessment of Ravenswood's water withdrawals." *Id.* at 3.

The Affidavit of Gilbert Hawkins adds only that the HFRA holds meetings wherein members report on the fishing conditions in the New York Harbor and give tips

on fishing in various waterways, including the East River; unnamed members fish in the Harbor; he fishes whenever he can; and power plant fish kills is a concern of HFRA. *See, generally,* Affidavit of Gilbert Hawkins, dated March 21, 2014 ("Hawkins Aff.").

Taken as a whole, the Petition and Hawkins Affidavit fail to establish the HFRA's standing in this proceeding. The HFRA has not identified one specific member that lives near, uses, or has even visited the East River. According to Mr. Hawkins Affidavit, the only connection he has with the East River is that he attends HRFA meetings where reports are given by other fishermen that "often relate to fishing on the East River." Hawkins Aff. ¶ 3. And while he claims to fish whenever he can, he does not indicate where in fact he fishes. This interest is wholly insufficient to establish an injury in fact. Indeed, the claims of environmental harm contained in the Hawkins Affidavit are nothing more than generalized allegations about the environmental damage caused by cooling water intake structures, and the allegations of an unsubstantiated, indirect effect on the Hudson River of cooling water intake structures located on the East River. These claims may be applicable to whether the HRFA's interest in the subject is germane to its purpose, but do not establish the requisite injury in fact that is necessary for Mr. Hawkins, or any other HFRA member, to have individual standing.[4]

Further, as with the Sierra Club, there can be no injury in fact by an HFRA member because the water withdrawals permitted by the challenged WWP are no different in kind or amount than those previously authorized by the NYSDEC for this

[4] As for allegations concerning other members, Mr. Hawkins' affidavit cannot serve to establish whether or not these unnamed members might have standing as he fails to identify any member specifically and his allegations are complete hearsay and, therefore, inadmissible. *Santos v. ACA Waste Servs.*, 103 A.D.3d 788, 789 (2d Dep't 2013) (finding statements in an affidavit were inadmissible hearsay because they did not show that the affiant had personal knowledge of the facts).

facility. Finally, the HFRA's claim to have suffered an "informational injury" does not confer standing for the reasons set forth above relative to the Sierra Club.

In sum, HFRA also has failed to meet a key requirement of organizational standing. It therefore lacks standing to bring this proceeding and its claims, therefore, must be dismissed.

POINT II

PETITIONERS' FAILURE TO JOIN AN INDIVIDUAL MEMBER IS FATAL

Separate and apart from each Petitioner's failure to establish that one of its members has standing, petitioners' failure to join at least one of their members as a petitioner warrants dismissal. Courts have held that to have standing, the organization must join those member(s) that it claims would be harmed by the respondent's actions as petitioners to the proceeding. *Citizens Organized to Protect the Env't v. Town of Irondequoit*, 50 A.D.3d 1460, 1461 (4th Dep't 2008) (finding that non-participation by the individual members was fatal and that, for the organization to have standing, it should have joined as petitioners those member(s) that it claimed would be harmed by the respondent's actions) *see also Wind Power Ethics Group v. Town of Cape Vincent*, No. 2010-2882, slip op. at *5 (N.Y. Sup. Ct., Jan. 26, 2011) (dismissing Article 78 petition on grounds that petitioner failed to establish organizational standing due to its failure to name or join individual members in petition).[5]

Here, a similar outcome is warranted. Like in *Citizens Organized*, the only Petitioners named in the instant proceeding are the organizations, HRFA and Sierra Club,

[5] A copy of the *Wind Power* case can be found as Exhibit E to the Affirmation of Yvonne E. Hennessey, dated April 24, 2014.

and the conclusory and speculatively alleged "injury" is to all of the members' conservation, aesthetic, and recreational interests. *See* Petition ¶¶ 2, 3. While Sierra Club and HRFA each filed an affidavit of an individual member, which as discussed above are insufficient to establish individual standing of these members, no individual members were named or joined as petitioners. Petitioners' failure to join at least one member as a petitioner, therefore, warrants dismissal.

POINT III

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

A review of the Petition in this matter suggests that Petitioners' real concerns are threefold. First, the Petition is nothing but a collateral attack on the Ravenswood Facility's SPDES permit as initially issued in 2007 and more recently renewed in 2012. Indeed, Petitioners' allegations, when read as a whole, appear to take issue with the Ravenswood Facility's cooling water intake structures and whether the associated environmental impacts were appropriately mitigated by the NYSDEC. Petition ¶¶ 14-16, 63; Petitioners' Brief at 6-9, 26; Downs Aff. ¶¶ 6, 9. Such impacts (e.g., fish impingement) were squarely addressed by the NYSDEC as part of its consideration and issuance of the Ravenswood Facility's SPDES Permit.

The applicable statute of limitations is four months from the time the final decision is made. *See* N.Y. C.P.L.R. 217(1) (2014). Because NYSDEC issued the 2012 SPDES Permit for the Ravenswood Facility on November 1, 2012,[6] the statute of limitations to challenge the 2012 SPDES Permit has long since past. Thus, to the extent

[6] The Ravenswood 2012 SPDES Permit was issued to TC Ravenswood on November 1, 2012 – not November 1, 2013 as alleged by Petitioners. *See* Petitioners' Brief at 9.

that the Petitioners' arguments are a collateral attack on Ravenswood's SPDES permit, and the BTA requirements contained therein, they are untimely.

Moreover, Petitioners failed to submit comments on the Ravenswood Facility's 2012 SPDES Permit, which is when issues associated with cooling water intake BTA would have appropriately been raised and considered by the NYSDEC. Petitioners also incorrectly state that a SEQRA review was not conducted by NYSDEC for the Ravenswood 2007 or 2012 SPDES permit. The NYSDEC did complete an environmental review under SEQRA at the time the Ravenswood Facility's 2007 SPDES permit was issued, wherein the BTA requirements for Ravenswood were established. A.R. at 77.[7]

Because the statute of limitations has expired, to the extent that Petitioners are collaterally attacking the 2012 SPDES Permit, or the BTA provisions contained therein, their challenge is untimely and must be dismissed as time-barred.

Further, a review of the Petition as a whole establishes that Petitioners' real challenge is to the Legislature's determination when crafting the Act to exempt existing water withdrawals from environmental review by explicitly removing any discretion from NYSDEC regarding whether to issue a permit to facilities with existing water withdrawals. *See* BILL SPONSOR'S MEMORANDUM IN SUPPORT OF LEGISLATION, A.B. A5318 (S3798), L. 2011, ch. 401 at 7 (2011) (expressly noted that "existing water withdrawals would be *entitled* to an initial permit based on their maximum water withdrawal capacity reported to DEC on or before February 15, 2012 pursuant to existing

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

law.") (emphasis added). Importantly, the Act was signed into law on August 15, 2011 and became effective on February 15, 2012. Not only did Petitioners fail to convince the Legislature and Governor to require existing water withdrawals to undergo environmental review anew, Petitioners failed to directly challenge the Act in Court. Their back-handed attempt to do so here is, therefore, inappropriate and untimely.

Petitioners' other concern is directed at the NYSDEC regulations implementing the Act, which became effective on April 1, 2013. Once again, Petitioners failed to directly challenge the regulations, which explicitly confirmed that facilities such as the Ravenswood Facility would be entitled to a permit without undergoing repetitive environmental review. *See* XXXIII NY Reg. 9 (Nov. 23, 2011); XXXIV NY Reg. 3 (Nov. 28, 2012) (both the NYSDEC's proposed rulemaking in November 2011 and its final rulemaking in November 2012 explaining that "existing water withdrawals above the size threshold are *entitled* to an initial permit.") (emphasis added).

In sum, Petitioners' real claims are untimely. They cannot, therefore, be heard now to challenge that which they had multiple and redundant opportunities to challenge and failed to do so in a timely manner.

POINT IV

ISSUANCE OF THE INITIAL WATER WITHDRAWAL PERMIT WAS A MINISTERIAL TYPE II ACTION NOT SUBJECT TO SEQRA REQUIREMENTS

The crux of Petitioners' challenge is that the NYSDEC improperly classified issuance of the Ravenswood Facility's WWP under SEQRA to avoid environmental review. Specifically, they assert that the NYSDEC's action under SEQRA was a Type I action and not a Type II action.

SEQRA expressly exempts from environmental review "official acts of a ministerial nature, involving no exercise of discretion." N.Y. ENVTL. CONSERV. LAW § 8-0105 (5)(ii) (2014) [hereinafter "ECL"]; N.Y. COMP. CODES R. & REGS. tit. 6 § 617.5(c)(19) (2014) [hereinafter "N.Y.C.R.R."]. Whether a particular action is ministerial depends on the underlying regulation or code authorizing the action. *Atlantic Beach v. Gavalas*, 81 N.Y.2d 322, 325 (1993); *Ziemba v. City of Troy*, 37 A.D.3d 68, 73 (3d Dep't 2006); *see also Lighthouse Hill Civic Ass'n v. City of New York*, 275 A.D.2d 322, 323 (2d Dep't 2000); *Dujmich v. New York State Freshwater Wetlands Appeals Bd.*, 240 A.D.2d 743, 743 (2d Dep't 1997) (holding that landowners were entitled to their permit as a matter of right and not subject to SEQRA because the proposed septic system satisfied all applicable conditions imposed by the Department of Health). The pivotal inquiry is whether the underlying regulatory scheme invests the agency with the authority to act or refuse to act based on the type of information contained in an EIS. *Atlantic Beach*, 81 N.Y.2d at 326; *Ziemba*, 37 A.D.3d at 73-74.

If an agency has some limited discretion to grant or deny a permit, "but that discretion is circumscribed by a narrow set of criteria which do not bear any relationship to the environmental concerns that may be raised in an EIS, its decisions will not be considered 'actions' for purposes of SEQRA's EIS requirements." *Atlantic Beach*, 81 N.Y.2d at 326; *Ziemba*, 37 A.D.3d at 74. The reasoning is that where an agency is only empowered to act based on compliance with predetermined statutory criteria, it makes little sense to require preparation of an EIS. *Atlantic Beach*, 81 N.Y.2d at 327 (finding "preparation of an EIS would be a meaningless and futile act, since an agency vested with

discretion in only a limited area could not deny a permit on the basis of SEQRA's broader environmental concerns.").

A. Existing Users were Entitled to an Initial Permit Pursuant to Predetermined Regulatory Criteria

A plain reading of the Act shows that existing water withdrawals were *entitled* to a permit. The statute clearly states in no uncertain terms that, "[t]he Department *shall* issue an initial permit, subject to appropriate terms and conditions as required under this article, to any person not exempt from the permitting requirements of this section . . . ." ECL § 15-1501 (9) (2014) (emphasis added); *see also New York Pub. Interest Research Group v. Dinkins*, 83 N.Y.2d 377, 384 (1994) (finding a provision was "cast in mandatory terms, as evidenced by the repeated use of the word 'shall'").

Furthermore, in implementing regulations for the Act, the NYSDEC established Part 601.7 specifically for facilities with existing water withdrawals. 6 N.Y.C.R.R. § 601.7 (2014). Under 6 N.Y.C.R.R. Section 601.7, "initial" permits are granted based on compliance with predetermined criteria. *Id.* More specifically, initial permits must be issued if the water withdrawal: (1) existed as of February 15, 2012; (2) was over the threshold volume of 100,000 gallons per day pursuant to Section 601.2 (p); (3) was properly reported to NYSDEC by February 15, 2012 pursuant to ECL article 15; (4) was not a public water supply; (5) was not otherwise exempt; and (6) application was submitted to the NYSDEC by June 1, 2013 and no later than 180 days before the SPDES permit was scheduled to expire. 6 N.Y.C.R.R. §§ 601.7(a),(b) (2014); *see also* XXXIV N.Y. Reg. 4 (Nov. 28, 2012).

Based upon the foregoing language, there can be no doubt that the NYSDEC's issuance of initial WWPs to existing facilities, like TC Ravenswood, is ministerial.

However, should the court find that the plain reading of the statutes or regulations is ambiguous, the legislative history resolves any doubt.

The pertinent legislative history expressly notes that "existing water withdrawals would be *entitled* to an initial permit based on their maximum water withdrawal capacity reported to DEC on or before February 15, 2012 pursuant to existing law." BILL SPONSOR'S MEMORANDUM IN SUPPORT OF LEGISLATION, A.B. A5318 (S3798), L. 2011, ch. 401 at 7 (emphasis added), Hennessey Affirmation Ex. A, at 7. In addition, both the NYSDEC's proposed rulemaking in November 2011 and its final rulemaking in November 2012 explain that "existing water withdrawals above the size threshold are *entitled* to an initial permit." XXXIII NY Reg. 9 (Nov. 23, 2011); XXXIV NY Reg. 3 (Nov. 28, 2012) (emphasis added). Therefore, existing users were automatically entitled to an initial permit as long as the predetermined regulatory criteria were met.

Here, TC Ravenswood is an existing facility that operated a water withdrawal system with a capacity of 1,527,840,000 gallons per day as of February 15, 2012. A.R. at 155. TC Ravenswood reported its water withdrawals to the NYSDEC prior to the deadline as part of its annual water withdrawal report. A.R. at 137-51. TC Ravenswood is not a public water supply and was not exempt from permit requirements. TC Ravenswood submitted its application for an initial permit on May 31, 2013 before the June 1, 2013 deadline. A.R. at 1-35. The application was submitted more than 180 days before its SPDES permit was to expire on October 31, 2017. A.R. at 116. Therefore, TC Ravenswood met the predetermined regulatory criteria and NYSDEC was required to issue TC Ravenswood an initial WWP.

Because the predetermined criteria for issuance of the WWP bears no relationship to the broader environmental concerns evaluated in an EIS, preparation of an EIS would have been an exercise in futility. This makes sense, however, because contrary to Petitioners' contention that no SEQRA review was conducted for TC Ravenswood's water withdrawals, SEQRA review was indeed conducted as part of the facility's pre-existing SPDES permit.[8] In fact this may be exactly why the Legislature decided to make issuance of a WWP ministerial for existing facilities, like the Ravenswood Facility, that were already authorized by the NYSDEC to withdraw water; the only change in circumstances was the Act that required another permit and annual reporting.

Since the TC Ravenswood facility was entitled to an initial WWP as an existing user and because the NYSDEC's authority was limited to considering only the predetermined statutory and regulatory criteria, it was proper for the NYSDEC to classify issuance of the initial WWP as a ministerial, Type II action. Moreover, water withdrawals at the TC Ravenswood facility were subject to SEQRA review as part of the SPDES permit review. Therefore, no SEQRA review of the initial WWP was required, respondent NYSDEC did not violate SEQRA, and the Petitioners' claims should be dismissed as a matter of law.

[8] In 2006, NYSDEC reviewed TC Ravenswood's SPDES permit pursuant to SEQRA. Since the SPDES permit included the facility's cooling water intake, the SEQRA review necessarily included review of the very same cooling water intake that Petitioners are challenging here. NYSDEC concluded that the SPDES permit, including cooling water intake, would not have a significant impact on the environment and issued a negative declaration on December 11, 2006. Notice of the negative declaration published in the Environmental Notice Bulletin on December 20, 2006. O'Donnell Aff., Ex. C.

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

Petitioners argue that issuance of an initial WWP cannot be a Type II action because the volume of water exceeds the Type I threshold of 2,000,000 gallons per day for projects that use ground or surface water. 6 N.Y.C.R.R. § 617.4(b)(6)(ii).

Whether an action is classified as a Type II action depends on if it is listed in 6 N.Y.C.R.R. § 617.5(c). Ministerial actions are expressly listed as a Type II action and are, therefore, not subject to SEQRA. 6 N.Y.C.R.R. §§ 617.5(a), (c)(19). Type II actions that exceed a Type I threshold are not subject to SEQRA unless a limitation is expressly incorporated into the regulation. *See* 6 N.Y.C.R.R. § 617.5(c)(2); *see also Westwater v. New York City Bd. of Standards & Appeals*, No. 100059-13, 2013 N.Y. Misc. LEXIS 4707, at *16-17 (N.Y. Sup. Ct. Oct. 15, 2013) (finding that the revised construction plans for a building were properly classified as a Type II ministerial action despite contentions that the Type I thresholds were exceeded.).

C. Limitations on Type II Actions Should Not Be Read Into Other Provisions Where It Has Been Omitted From The Regulation.

Only one Type II action, which does not apply here, contains the qualifier that it will be reclassified as a Type I action if the Type I threshold is exceeded. *See* 6 N.Y.C.R.R. § 617.5(c)(2) ("replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading buildings to meet building or fire codes, unless such action meets or exceeds any of the thresholds in section 617.4 of this Part"). No other Type II action contains this limitation.

The universal maxim, *expressio unius est exclusio alterius*, is instructive here. This fundamental rule of statutory construction instructs that "where a law expressly

describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded." *Calenzo v. Shah*, 112 A.D.3d 709, 711 (2d Dep't 2013) (finding a Department of Health regulation intentionally omitted reference to a "stepparent" pursuant to *expressio unius est exclusio alterius*); *see also Town of Eastchester v. New York State Bd. of Real Prop. Servs.*, 23 A.D.3d 484, 485 (2d Dep't 2005) (quoting McKinney's Cons Laws of N.Y., Book 1, Statutes § 240).

Where particular language in one section of a regulation is omitted in another section of the same regulation, it is generally presumed that the omission was purposeful and intentional. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987); *see also* McKinney's Consol. Laws of N.Y., Book 1, Statutes § 74 ("[a] court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended.").

Accordingly, an irrefutable inference exists that if the NYSDEC had wanted Type II ministerial actions to be limited and reclassified as a Type I action if a Type I threshold was exceeded, the NYSDEC would have explicitly done so. The Court, therefore, should not heed Petitioners' suggestion that exceedance of a Type I threshold overrides classification as a Type II ministerial action.

D. Petitioners' Inaccurate Citation of the Law Distorts the Plain Meaning of the Regulation and Should Not be Followed.

The NYSDEC's SEQRA regulations direct that other agencies may adopt their own lists of Type I actions and provide provisions for those agencies to follow. 6

N.Y.C.R.R. § 617.4(a)(2). Petitioners inaccurately assert that these provisions also guide the determination of whether an action is classified as a Type II action. Petitioners state that "[a]n action categorized as a Type I action, cannot be a Type II action." Petitioners' Brief at 27. However, Petitioners' omission of pertinent parts of the same section distort and misapply the regulations in an attempt to give more meaning to this section than plain reading provides.

The section partially quoted and taken out of context by Petitioners applies only to *other agencies* who wish to adopt their own list of Type II actions. The complete Section 617.5(b) reads:

> *Each agency may adopt its own list of Type II actions to supplement the actions in subdivision (c) of this section. No agency is bound by an action on another agency's Type II list. An agency that identifies an action as not requiring any determination or procedure under this Part is not an involved agency.* Each of the actions on an agency Type II list must:
>
> (1) in no case, have a significant adverse impact on the environment based on the criteria contained in subdivision 617.7(c) of this Part; and
>
> (2) not be a Type I action as defined in section 617.4 of this Part.

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

Moreover, the NYSDEC provisions in Section 617.4 directed at other agencies state the exact opposite of Petitioners' claim that a Type I action cannot be a Type II

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

POINT V

THERE HAS BEEN NO VIOLATION OF NEW YORK WATER RESOURCES LAW

Petitioners argue that the NYSDEC violated the Act because it failed to apply terms and conditions as part of the TC Ravenswood WWP. Petition ¶ 80. However, the contents of the TC Ravenswood WWP and SPDES permit completely refute this allegation. TC Ravenswood's WWP expressly includes terms and conditions, such as incorporation of water conservation measures from the SPDES permit as well as metering of water intake sources. A.R. at 155-58. Petitioners may disagree with the propriety and sufficiency of these terms and conditions. However, the NYSDEC appropriately incorporated the terms and conditions required by the Act and its implementing regulations. Petitioners' claim that the water resources law was violated because the NYSDEC failed to include terms and conditions in the WWP, therefore, is wholly without merit and must be dismissed.

POINT VI

NYSDEC IS ENTITLED TO SUBSTANTIAL DEFERENCE

It is well settled that an agency's interpretation of a statute or regulation should be granted substantial deference if that agency is responsible for administering the statutory program and its decision is rationally based. *Chevron, U.S.A. v. NRDC*, 467 U.S. 837

(1984); *City Council v. Town Bd.*, 3 N.Y.3d 508, 518 (N.Y. 2004); *Carver v. State of New York*, 87 A.D.3d 25, 33 (2d Dep't 2011). This includes determinations of whether an action is classified as a Type I or Type II action. *See Stephentown Concerned Citizens v. Herrick*, 280 A.D.2d 801, 804 (3d Dep't 2001) (deferring to the NYSDEC's decision that a renewal application was appropriately classified as a Type II action).

"While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives'" *Riverkeeper, Inc. v. Town of Southeast*, 9 N.Y.3d 219, 232 (2007) citing *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990); *see also Village of Chestnut Ridge v. Town of Ramapo*, 99 A.D.3d 918, 925 (2d Dep't 2012); *New York Youth Club v New York City Envtl. Control Bd.*, 39 Misc. 3d 1204(A), *3 (N.Y. Sup. Ct. Queens County 2013) ("Upon judicial review, a court is not free to substitute its judgment for that of the agency on substantive matters."). Therefore, even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the NYSDEC. *Lane Constr. v. Cahill*, 270 A.D.2d 609, 611 (3d Dep't 2000); *Westwater*, 2013 N.Y. Misc. LEXIS 4707, at *28.

The NYSDEC is the agency responsible for administering statutory programs for the Act and SEQRA. It is also the agency charged with implementing regulations for each. Petitioners have not shown how any of the concerns it cites would negate the NYSDEC's finding that the initial WWP was issued as-of-right or that NYSDEC's decision-making was irrational. Therefore, NYSDEC's interpretation of the Act and its implementing regulations as well as its decision to classify TC Ravenswood's initial WWP as a Type II action should be afforded substantial deference.

POINT VII

PETITIONERS' REMAINING CLAIMS FAIL

Petitioners' remaining claims are based on the argument that issuance of the initial WWP was a Type I action. However, as discussed in Points IV and V *supra*, issuance of the TC Ravenswood WWP was a ministerial, Type II action. Therefore, Petitioner's remaining claims all fail as a matter of law.

Petitioners' coastal zone claims are meritless. Petitioners' concede that the provisions of 19 N.Y.C.R.R. Part 600, which requires a coastal zone consistency review, only apply if the action is a Type I or unlisted action. Petitioners' Brief at 32; *see also* 19 N.Y.C.R.R. § 600.2(b) (2014). Similarly, coastal zone consistency reviews are only required under SEQRA if the action is classified as Type I or unlisted. 6 N.Y.C.R.R. § 617.6(a)(5). Here, as presented in Points IV and V, the NYSDEC's issuance of the initial water withdrawal permit for the Ravenswood facility was a ministerial, Type II action. Issuance of the initial permit was not a Type I or Unlisted action, and no coastal zone consistency review was required. Therefore, Petitioners' claims alleging violations of coastal zone laws and SEQRA are meritless and should be dismissed as a matter of law.

Petitioners' public trust doctrine claim similarly lacks merit. According to Petitioners, the NYSDEC violated its public trust obligation when it issued the initial WWP to TC Ravenswood without conducting an environmental review, conducting a coastal consistency review, or imposing adequate water conservation measures. However, as discussed in Points IV and V, no environmental review or coastal zone consistency review was required because the initial permit was properly classified as a Type II ministerial action. Moreover, water conservation measures were, in fact,

included in the initial WWP issued to TC Ravenswood. Therefore, the argument that the NYSDEC violated its public trust obligation is meritless and should be dismissed as a matter of law. This is especially true, where, as here, the NYSDEC has thoroughly reviewed the Ravenswood Facility, including its cooling water intake structures, under all applicable federal and state environmental laws.

CONCLUSION

For all of the reasons set forth herein, TC Ravenswood respectfully submits that the Petition should be dismissed *in toto*.

Dated: April 24, 2014
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HISCOCK & BARCLAY, LLP

By: _____

Yvonne E. Hennessey, Esq.
Danielle E. Mettler, Esq.
Laura L. Mona, Esq.
Attorneys for TC Ravenswood, L.L.C.
Albany, New York 12207
(518) 429-4200