MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - **IAS PART 34**

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SIERRA CLUB
85 Second Street, 2nd Floor San Francisco,
California 94105

HUDSON RIVER FISHERMAN'S ASSOCIATION, NEW JERSEY CHAPTER, INC.
P.O. Box 421
Cresskill, New Jersey 07626

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
625 Broadway Albany, NY 12233-1011,

Respondents,

TRANS CANADA RAVENSWOOD LLC
38-54 Vernon Boulevard
Long Island City, NY 11101,

Necessary Party.

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BY: McDONALD, J.

Index No.: 2949/14

Motion Date: 6/6/14

Motion Cal. No.: 104

Motion Seq. No.: 1

This is an Article 78 proceeding brought to annul the September 7, 2013 determination of the Commissioner of the New York State Department of Environmental Conservation that, inter alia, the application of Trans Canada Ravenswood LLC for the withdrawal of water from the East River can be classified as a "Type II" action under the relevant laws and regulations.

Trans Canada Ravenswood, LLC (TC Ravenwood) owns Ravenswood Generating Station, an electric generating facility located in Long Island City, New York. Ravenswood began operating in the early nineteen sixties, and it produces electricity which is sold

through the New York State Independent System Operator for use throughout New York City. The Ravenswood facility can generate 2,480 megawatts of electricity, and it has at times produced up to 21% of the electricity used in New York City.

The Ravenswood facility borders on the East River, a tidal strait which links upper New York Bay with Long Island Sound and which connects to the Hudson River through the Harlem River and Spuyten Devil Creek at the north end of Manhattan Island. The East River, about sixteen miles in length and from 600 to 4,000 feet wide, separates Manhattan Island from Brooklyn and Queens.

For about fifty years, the Ravenswood facility has used a "once through" cooling water system which takes water from the East River, circulates it through a cooling system to cool three steam boiler turbine/generators known as Units 10, 20, and 30, and discharges the water back into the East River. The cooling system, the same as that originally installed in the nineteen sixties, has a maximum withdrawal capacity of 1,527.84 million gallons per day (MGD) which is needed to prevent Units 10, 20, and 30 from overheating when all three are operating at maximum capacity. The water use varies with the number of units in operation and their time of operation. In 2012, the Ravenswood facility made a daily average withdrawal of about 480 MGD and in 2013 made a daily average withdrawal of 363.1 MGD. In times of emergency, such as Superstorm Sandy, all three units have operated at full capacity with a corresponding need for the maximum withdrawal of water.

According to the petitioners, the use of a "once through" water cooling system requires Ravenswood to withdraw an excessive amount of water from the East River. A closed cycle cooling system would be better for the environment, the petitioners assert. A closed cycle cooling system recirculates the cooling water by passing it through the condenser system where it is heated in the process of converting steam back into water, then transported to cooling towers or similar equipment to be cooled, and then returned to the condenser system. The petitioners quote an article which states "[c]losed-cycle cooling is a proven technology that reduces power plant water intake by up to 98 percent, thereby reducing the damage to aquatic life by up to 98 percent."

When water is withdrawn for cooling purposes, fish and other aquatic life may be killed by becoming impinged on intake screens or by passing through screens (entrainment), if small enough, and entering the facility. Gilbert Hawkins, the President of petitioner Hudson River Fishermen's Association, alleges that

"the East River is one of the main fish migration routes between the Atlantic Ocean and both the Hudson River and Long Island Sound." There are tidal flows in the East River, and, according to Hawkins, "[m]illions of fish are riding on these flows in the migratory seasons." The petitioners allege that a study has shown that Ravenswocd's water cooling system entrains millions of young fish, eggs, and larvae each year, and kills or injures millions of larger fish by impingement.

The Ravenswood facility's cooling water system is subject to the federal Clean Water Act ([CWA], 33 USC § 1251 et seq.)) and state regulation which require the operator of the plant to use the best technology available (BTA) for cooling water intake structures. (*See*, CWA § 316[b], 33 USC § 1326[b] and 6 NYCRR § 704.5). The court notes that the federal Environmental Protection Agency may use a cost benefit analysis in its determination of the best technology available for intake water cooling systems, and the agency has not mandated the use of closed cycle cooling systems in all cases. (*See, Entergy Corp. v. Riverkeeper, Inc.*, 556 US 208.) Moreover, the Ravenswood facility is operated with permits issued pursuant to the CWA and the State Pollutant Discharge Elimination System (SPDES). (The Ravenswood facility discharges heat which is regulated as a pollutant.)

The Ravenswood facility is also subject to the New York State Water Resources Law, codified as Article 15 of the Environmental Conservation Law, which declares that "[i]t is in the best interest of the state that provision be made for the regulation and supervision of activities that deplete, defile, damage or otherwise adversely affect the waters of the state and land resources associated therewith." (ECL 15-0103[13].)

On or about February 15, 2011, Assembly Bill 5318-A was introduced as "AN ACT to amend the environmental conservation law, in relation to regulating the use of the state's water resources ***." The Memorandum in Support of Legislation stated that: "The purpose of this bill is to authorize the Department of Environmental Conservation (DEC) to implement a water withdrawal permitting program to regulate the use of the State's water resources." The summary of provisions stated in relevant part: "Specifically, ECL §15-1501 would be amended to: *** (3) provide that existing water withdrawals would be <u>entitled</u> to an initial permit based on their maximum water withdrawal capacity reported to DEC on or before February 15, 2012 pursuant to existing law ***." (Emphasis added.) After passage by the New York State Legislature, Governor Cuomo signed the bill into law.

The act required operators of all water withdrawal systems

capable of withdrawing 100,000 gallons per day (gpd) or more to obtain a permit from the New York State Department of Conservation (DEC). (*See*, Environmental Conservation Law §15-1501 et seq.) The old law had not applied to the Ravenswood facility. After passage of the act, DEC could issue two types of permits for water withdrawal systems that did not need permits before the 2011 amendments: (1) initial permits for most systems that existed as of February, 2012 and reported their maximum capacity to DEC and (2) new permits for all other systems.

On or about May 31, 2013, TC Ravenswood submitted a water withdrawal application to DEC for an initial water withdrawal permit. The Ravenswood facility received an initial permit to which the DEC decided that it had an automatic entitlement. ECL §15-1501, "Water Withdrawals, permit," provides in relevant part: "9. The 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, for the maximum water withdrawal capacity reported to the department pursuant to the requirements of title sixteen or title thirty-three of this article on or before February fifteenth, two thousand twelve." (Emphasis added.)

In its response to public comments invited on the Ravenswood application for an initial water withdrawal permit, DEC explained the basis of its action: "As provided by ECL §15-1501.9 the Department has no discretion but to issue 'initial permits' for the amount of water withdrawals for users that were in operation and properly reported their withdrawals to the Department as of February 15, 2012. Under these circumstances, the issuance of the water withdrawal permit here is covered by the Type II category for ministerial actions set out in section 617.5(c)(19) of the Department's SEQR regulations. *** Here, above and beyond the amount of the permitted withdrawal (which is prescribed by statute), the Legislature has restricted the Department's discretion to the standard form permit and the imposition of sound water conservation measures." (Emphasis added.)

Operators of water withdrawal systems who did not meet the standard for an initial permit had to apply for a new permit pursuant to ECL §15-1503, and the DEC does not regard them as having an automatic entitlement to the permit. When issuing a new permit, DEC may take into consideration the numerous environmental criteria specified in ECL §15-1503, "Permits."

DEC adopted regulations pertaining to water withdrawal to implement the new law (*see*, 6 NYCRR Part 601), and these regulations reflected the restrictions on its discretion

expressed in ECL §15-1501(9) such as on withdrawal volumes. DEC regulation 6 NYCRR 601.7., "Initial permits," provides in relevant part: "(d) An initial permit that is issued by the Department under this subpart is for the withdrawal volume equal to the maximum withdrawal capacity reported to the Department on or before February 15, 2012."

On August 7, 2013, DEC issued a notice stating that it had made a tentative determination to issue an initial permit to TC Ravenswood allowing a water withdrawal of approximately 1.5 billion gallons per day. The notice stated further that the "[p]roject is not subject to SEQR because it is a Type II action" and that no SEQR lead agency had been designated. There are three types of actions under SEQRA - Type 1, Type 2, or unlisted. The distinction between Type 1 and Type 2 actions is essentially that the former require environmental review while the latter do not. 6 NYCRR 617.5, "Type 2 Actions," provides in relevant part: "(a) Actions or classes of actions identified in subdivision (c) of this section are not subject to review under this Part. These actions 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. The actions identified in subdivision (c) of this section apply to all agencies. *** (c) The following actions are not subject to review under this Part: ***(19) official acts of a ministerial nature involving no exercise of discretion ***."

On or about November 15, 2013, DEC issued an initial 601 WW permit to TC Ravenswood for water withdrawals from the East River at a maximum capacity of 1,390 MGD, and on or about March 7, 2014 DEC issued a revised Initial 601 WW permit with a maximum capacity of 1,527.84 MGD. The initial permit expires on October 31, 2017.

The New York State Environmental Quality Review Act ([SEQRA] ECL art 8) was enacted in 1975, and its "fundamental policy is to inject environmental considerations directly into governmental decision making ***." (*Coca-Cola Bottling Co. of New York, Inc. v. Board of Estimate of City of New York,* 72 NY2d 674, 679.) ECL § 8-0103, "Legislative findings and declaration," provides in relevant part: "Social, economic, and environmental factors shall be considered together in reaching decisions on proposed activities." SEQRA mandates an environmental impact statement (EIS) for any "action" proposed or approved by a governmental agency that may have a significant effect on the environment. ECL § 8-0109, "Preparation of environmental impact statement," provides in relevant part: "2. All agencies (or applicant as hereinafter provided) shall prepare, or cause to be prepared by

contract or otherwise an environmental impact statement on any action they propose or approve which may have a significant effect on the environment. ***."

However, SEQRA expressly exempts actions of a ministerial nature from environmental review. ECL §8-0105, "Definitions," provides in relevant part: "5. 'Actions' do not include: ***(ii) official acts of a ministerial nature, involving no exercise of discretion ***." (*See, Incorporated Village of Atlantic Beach v. Gavalas*, 81 NY2d 322; *Fisher v. New York City Bd. of Standards and Appeals*, 71 AD3d 487; *220 CPS "Save Our Homes" Ass'n v. New York State Div. of Housing and Community Renewal*, 60 AD3d 593.) 6 NYCRR 617.2, "Definitions," provides: "(w) 'Ministerial act' means an action performed upon a given state of facts in a prescribed manner imposed by law without the exercise of any judgment or discretion as to the propriety of the act, such as the granting of a hunting or fishing license."

"While the issuance of a permit may constitute an 'action' within the purview of the statute (*see*, ECL 8-0105[4]), SEQRA provides an express exemption from its application for 'official acts of a ministerial nature, involving no exercise of discretion' (ECL 8-0105[5] [ii]; 6 NYCRR 617.5 [c][19])." (*Ziemba v. City of Troy*, 37 AD3d 68, 73.)

"Where, as here, an administrative agency takes action without an evidentiary hearing, the standard of review is not whether there was substantial evidence in support of the determination (see CPLR 7803[4]), but rather, whether the determination had a rational basis, and was not 'arbitrary and capricious' (see CPLR 7803[3] ***. (*Ball v. New York State Dept. of Environmental Conservation*, 35 AD3d 732, 733; *Gramando v. Putnam County Personnel Dept.*, 58 AD3d 842.) "Further, in a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination ***." (*Ball v. New York State Dept. of Environmental Conservation, supra*, 733; *Gramando v. Putnam County Personnel Dept., supra.)* "[I]n a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious ***." (*Flacke v. Onondaga Landfill Sys.*, 69 NY2d 355, 363; *Fogelman v. New York State Dept. of Environmental Conservation*, 74 AD3d 809.)

In the case at bar, DEC determined that the issuance of an initial permit for the Ravenswood facility was a ministerial act

not requiring SEQRA review. In determining whether an act is merely ministerial in nature, "the pivotal inquiry ***is whether the information contained in an EIS may form the basis for a decision whether or not to undertake or approve such action ***." (*Incorporated Village of Atlantic Beach v.* Gavalas, *supra*, 326 [internal quotation marks and citations omitted]; *Filmways Communications of Syracuse, Inc. v. Douglas*, 106 AD2d 185, affd, 65 NY2d 878; *see, Island Park, LLC v. New York State Dept. of Transp.*, 61 AD3d 1023; *Ziemba v. City of Troy*, 37 AD3d 68.)

"It is well settled that the determination of whether a particular action is ministerial depends on the underlying regulation or municipal code authorizing the action ***. The pivotal inquiry does not turn on a mechanical distinction between ministerial and discretionary acts, however, but requires us to consider whether the underlying regulatory scheme invests the authorizing agency with discretion to act or refuse to act based on the type of information contained in an EIS ***." (*Ziemba v. City of Troy, supra*, 73-74; *see, Island Park, LLC v. New York State Dept. of Transp., supra.*)

In *Filmways Communications of Syracuse, Inc. v. Douglas* (*supra*), an applicant for a building permit brought an Article 78 proceeding in the nature of mandamus to compel a building inspector to issue the permit. The Appellate Division, Fourth Department, whose decision was affirmed by the Court of Appeals for the reasons stated by the lower court, held that the applicant was not required to comply with SEQRA and that the building inspector's granting or denying of a building permit for a 500-foot communication antenna tower was a ministerial act, not a discretionary act. "There is no provision in the building code," the Appellate Division wrote, "that gives the building inspector a latitude of choice." (*Filmways Communications of Syracuse, Inc. v. Douglas, supra*, 186.) The building inspector did not need information about the effect of the project on the environment because he had no discretion concerning the permit.

In *Incorporated Village of Atlantic Beach v. Gavalas (supra)*, The Court of Appeals held that the issuance of a building permit there was not the type of agency action which required an EIS because an underlying ordinance did not give the municipal building inspector the type of discretion which would allow permit grant or denial to be based on environmental concerns detailed in an EIS. In holding that the issuance of a building permit under the relevant regulatory scheme was a ministerial act, The Court of Appeals stated: "Logically, where an agency is empowered to 'act' by granting or denying a permit based only on compliance with a conventional Building Code or

fire safety regulations, it makes little sense to require preparation of an EIS. Such a requirement would certainly not advance the Legislature's clear intent that an EIS be used as an informational tool to aid in the planning process (see, ECL 8-0109[2])." (*Incorporated Village of Atlantic Beach v. Gavalas, supra,* 326.)

In *Island Park, LLC v. New York State Dept. of Transp.* (*supra*), The Appellate Division, Third Department, held that the Department of Transportation's issuance of an order for the closure of a private rail crossing was a ministerial act not subject to SEQRA because its determination had to be based upon consideration of the safety issues presented by the particular crossing and was unrelated to the environmental concerns that might be raised in an environmental impact statement. The issuance of the closure order was a ministerial act "because the Commissioner is 'vested with discretion in only a limited area' and could not, upon finding that the public safety could only be insured by closing a crossing, refuse to order such closure 'on the basis of SEQRA's broader environmental concerns' ***." (*Island Park, LLC v. New York State Dept. of Transp., supra,* 1028.)

In *Ziemba v. City of Troy (supra),* The Appellate Division, Third Department, held that the issuance of a demolition permit for historic buildings was a ministerial act pursuant to SEQRA, since the discretion allowed by the city code in issuing a demolition permit was limited to a narrow set of criteria that were unrelated to environmental concerns that an EIS statement would address. The issuance of the demolition permit was based on an applicant's compliance with predetermined statutory criteria concerning safety and was not based on the potential impact of the demolition on the environment.

Filmways Communications of Syracuse, Inc. v. Douglas (*supra*), *Incorporated Village of Atlantic Beach v. Gavalas* (*supra*), *Island Park, LLC v. New York State Dept. of Transp.* (*supra*), and *Ziemba v. City of Troy (supra)* guide this court to the conclusion that DEC had a rational basis in fact and law for classifying the issuance of an initial permit to TC Ravenswood as a ministerial act not subject to SEQRA review. While ECL §15-1501(9) does state that DEC "shall issue an initial permit, subject to appropriate terms and conditions as required under this article," the statute does not give the agency the type and breadth of discretion which would allow permit grant or denial to be based on environmental concerns detailed in an EIS. (*See, Incorporated Village of Atlantic Beach v. Gavalas, supra; Island Park, LLC v. New York State Dept. of Transp., supra.*) The statute

left DEC with only one course of action regarding Ravenswood - the issuance of a permit allowing the facility to withdraw water from the East River at existing volumes. The statute does not vest DEC with the discretion to in effect compel TC Ravenswood to switch to a closed cycle cooling system using lower water volumes because of information contained in an EIS.

In the case at bar, the 2011 amendments to the Environmental Conservation Law and the implementing regulations did not leave DEC with the discretion to refuse TC Ravenswood an initial permit. The Memorandum in Support of Assembly Bill 5318-A made it clear that the statute " would be amended to: *** (3) provide that existing water withdrawals would be entitled to an initial permit ***." (Emphasis added.) ECL §15-1501, "Water Withdrawals, permit," provides in relevant part that "The department shall issue an initial permit *** for the maximum water withdrawal capacity reported to the department pursuant to the requirements of title sixteen or title thirty-three of this article on or before February fifteenth, two thousand twelve." (Emphasis added.) The statute even denied DEC the discretion to change the "maximum water withdrawal capacity," and DEC regulation 6 NYCRR 601.7, "Initial permits," is consistent with the statute on that point. Whatever information DEC could have obtained from conducting an environmental review could not have affected its decision to issue or deny an initial permit to TC Ravenswood. (See, *Filmways Communications of Syracuse, Inc. v. Douglas, supra.*) The Environmental Conservation Law and implementing regulations did not leave leave DEC with a "latitude of choice." (*See, Filmways Communications of Syracuse, Inc. v. Douglas supra*, 186.) The DEC had to issue the initial permit to TC Ravenswood on the basis of statutory specifications regardless of environmental concerns (*see, Ziemba v. City of Troy, supra)* which, if met, as TC Ravenswood did, established that it was "entitled" to the permit. (*See, Incorporated Village of Atlantic Beach v. Gavalas, supra.)*

The petitioners argue that DEC had broad discretion to specify the terms and conditions of all water withdrawal permits, including initial permits, pursuant to ECL §15-1503, "Permits," which establishes various criteria for the issuance of permits such as "2f. the proposed water withdrawal will be implemented in a manner to ensure it will result in no significant individual or cumulative adverse impacts on the quantity or quality of the water source and water dependent natural resources ***." However, ECL §15-1501(9) is the more specific and applicable statute, and it is a rule of statutory construction that a general provisicn yields to a specific provision. (*Ford v. New York State Racing and Wagering Bd.,* 107 AD3d 1071.) Furthermore,

DEC did not interpret the ECL as authorizing it to issue initial permits based on broad environmental concerns, and the interpretation that an administrative agency with expertise places upon a statutory and regulatory scheme is entitled to judicial deference. (*See, LMK Psychological Services, P.C. v. State Farm Mut. Auto. Ins. Co.*, 12 NY3d 217; *Samiento v. World Yacht Inc.*, 10 NY3d 70; *Nestle Waters North America, Inc. v. City of New York*, - AD3d -, 990 NYS2d 512;) "It is well settled that the construction given statutes and regulations by the agency responsible for their ***administration, if not irrational or unreasonable, should be upheld." (*Howard v. Wyman*, 28 NY2d 434, 438; *Samiento v. World Yacht Inc., supra.*)

Contrary to the petitioner's contention, the issuance of an initial permit to TC Ravenswood by DEC without conducting an "assessment" did not violate New York State's Waterfront Revitalization of Coastal Areas and Inland Waterway Act (Executive Law, Article 42) and related acts. The issuance of an initial permit to TC Ravenswood was a Type II action, not a Type I action. The regulations issued under SEQRA and the Waterfront Act provide that an action is not subject to review under the Waterfront Act if it is not subject to review under SEQRA. (*See,* 6 NYCRR 617.6[a][5]; 19 NYCRR §600.2[b].) The issuance of an initial permit is a ministerial act not subject to review under either SEQRA or the Waterfront Act.

Accordingly, the petition is denied.

Settle judgment.

FILED

OCT 21 2014

COUNTY CLERK
QUEENS COUNTY

Dated: Long Island City, N.Y.
October 1, 2014

ROBERT J. McDONALD
J.S.C.

FILED

OCT 21 2014

COUNTY CLERK
QUEENS COUNTY