SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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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-

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

Respondents.

Index No. 2402/2019
Seq. No. 1

DECISION/ORDER

Present: **HONORABLE ULYSSES B. LEVERETT**:

Petitioners Sierra Club and Hudson River Fishermen's Association, New Jersey Chapter Inc. bring this Article 78 proceeding to challenge the actions of respondents New York State Department of Environmental Conservation (Respondent DEC) in issuing a water withdrawal permit to respondent Helix Ravenswood LLC (Respondent HRLLC) on February 20, 2019 authorizing HRLLC's Ravenswood Generating Station in Long Island City, Queens to withdraw up to 1,527,840,000 gallons of water per day from the East River in New York Harbor Estuary for operation of the station's once through cooling system (2019 Ravenswood Permit) and in making a determination on September 25, 2018, that the proposed action would have no significant impact on the environment (2018 Negative Declaration).

Petitioners assert that the 2019 Ravenswood Permit and the 2018 Negative Declaration were deficient because Respondent DEC failed to comply with the state water withdrawal permitting law, Environmental Conservation Law (ECL), Article 15, Title 15, the water permitting regulations, 6 NYCRR Part 601, the State Environmental Quality Review Act (ECL) Article 8 (SEQRA), and the SEQRA regulations, 6 NYCRR Part 617.

Petitioners seek a judgment and order vacating and annulling the 2019 Ravenswood permit and the 2018 Negative Declaration as being a violation of lawful procedure, affected by errors of law, arbitrary, capricious and an abuse of discretion.

Parties

Petitioner Sierra Club is a national grassroots nonprofit conservation organization formed in 1892. Its purposes include practicing and promoting the responsible use of earth's ecosystems and resources, and protecting and restoring the quality of the natural and human environment.

The protection of water resources is a key aspect of the Sierra Club's work. Sierra Club has approximately 800,000 members nationwide, including approximately 50,000 members in New York and approximately 21,000 members in New Jersey.

Petitioner Hudson River Fishermen's Association (HRFA) is a regional non-profit conservation organization founded in 1966. HRFA's mission is to encourage the responsible use of aquatic resources and protection of habitat. HRFA has approximately 300 members. HRFA's members are recreational fishermen who make active use of the Hudson River and its watershed, including the East River and the New York Harbor Estuary. The HRFA claim injury by environmental damage to the East River.

Petitioners have organizational standing to bring this petition based on their zone of interest in the aesthetic and environmental protection of New York water resources. *See* Affidavits of Roger Downs and Gilbert Hawkins, *see also Sierra Club v. Morton*, 405 U.S. 727 (1972), and *Association for a Better Long Island, Inc. v. New York State Department of Environmental Conservation*, 23 N.Y.3d 1 (2014).

Respondent DEC is an administrative agency of the State of New York. DEC is the governmental body responsible for environmental protection in the State of New York and for the protection of New York's natural resources, including New York's waters. DEC was established by chapter 140 of the Laws of 1970, and administers the water supply permit program pursuant to ECL Article 15, Title 15.

Respondent HRLLC is the current owner of the Ravenswood electric generating facility located on the East River in Long Island City, New York. Respondent's predecessor owner was Trans Canada Ravenswood LLC. The facility has the generating capacity of 2,480 megawatts and can produce up to 21% of the total electricity used by New York City. The Ravenswood facility has three steam boiler turbine/generators, known as Unit 10, 20 and 30; a combined cycle unit known as Unit 40 and several combustion turbines. Since the mid-1960s the 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 Units 10, 20 and 30. The once-through water is not consumed by the facility but discharged back in the East River. The withdrawn water is critical to prevent overheating during the production of electricity. The maximum withdrawal capacity of the facility cooling water system is 1,527,840,000 gallons of water per day but the actual amount of cooling water needed per day varies based on the units in operation and the time the unit is operating.

In 2017, the average withdrawal by the Ravenswood facility was approximately 371 million gallons per day (MGD). In 2018, the average withdrawal was 520 MGD.

Applicable Federal and State Laws and Regulations

The Ravenswood facility cooling water intake system, discharges heated/thermal water, a defined pollutant, back into the East River and is accordingly regulated by the National and State Pollutant Discharge Elimination System. *See* 33 USC §1362(6); ECL §17-0105(17) and 6 NYCRR Part 704.

The Federal Clean Water Act of 1972 (CWA) regulates discharge to surface water in the U.S. and authorized the National Pollutant Discharge Elimination System (NPDES) permit program to control US water pollution by regulating the industrial source. The CWA allows

states to supersede the federal program by developing and administering their own permitting programs, if the US Environmental Protection Agency (EPA) finds the state program to be as stringent as the federal program. See 33 USC §1342(b), (c).

The New York version of the NPDES program, known as State Pollutant Discharge Elimination System (SPDES), was established by the New York Legislature in 1973 and approved by the EPA in 1975. *See* ECL §17-0701 et seq.; 6 NYCRR Parts 700-706 and 750. In addition to impacts from heated effluent upon discharge, respondent facility adverse environmental impacts from cooling water intake, structure impingement of fish and entrainment of aquatic organisms, including fish eggs and larvae, are subject to Best Technology Available (BTA) requirements. Respondent DEC issued SPDES permit to Ravenswood Facility in 2007, which was renewed on November 1, 2012 and was applicable to the cooling water intake system contained therein and BTA determinations. *See* CWA §316(b) and 6 NYCRR §704.5.

Additionally, the Water Resource Law (WRL), ECL Article 15, declared New York State sovereign power to regulate and control its water resource. *See* ECL §15-0103(1). In 2009, Title 33 was added to the WRL to require entities such as respondent Ravenswood, that withdraw more than 100,000 gallons of water per day to file annual withdrawal reports with the DEC. In 2011, the legislature passed the Water Resources Protection Act (WRPA) which repealed Title 33 and replaced it with Title 15, which authorizes DEC to implement a statewide permitting system for commercial and industrial water withdrawal of 100,000 gallons or more per day. *See* ECL §15-1501(1); 15-1502(14).

Respondent DEC promulgated regulations implementing the new permit requirements in November 2012 which became effective April 1, 2013. See 6 NYCRR Part 601. The WRPA and the DEC implementing regulations distinguished between "existing" and "new" water withdrawals. DEC issued two types of water withdrawal systems that did not need permits prior to the 2011 amendments; "initial permits" for most systems that were in existence in February 2012 and reported their maximum capacity to the DEC under the 2009 amendments and "new permits" for all other systems.

On May 31, 2013, Ravenswood Facility as a holder of a SPDES permit, timely applied for an initial water withdrawal permit by the required date of June 1, 2013. See 6 NYCRR §601.7(b)(3). DEC issued an initial permit to Ravenswood on November 15, 2013, amended March 7, 2014, (2013 Initial Permit) which permitted withdrawal equal to the 1.5 billion GPD previously reported to DEC prior to February 15, 2012.

Finally, 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. The agency must take a "hard look" at relevant areas of environmental concerns, classify the "action" under review and make a reasoned elaborated basis for its determination of a positive declaration or negative declaration of significant adverse environmental impact. The DEC's regulation implementing SEQRA are codified at 6 NYCRR Part 617.

Relevant Prior Proceeding

In a prior related Supreme Court Article 78 proceeding, *Sierra Club, et al. v. Martens, Trans Canada Ravenswood LLC et al*, Index No. 2949/14 (New York Sup. Ct., Queens County, Oct. 1, 2014), petitioners challenged DEC issuance of the Ravenswood 2013 Initial Permit for

water withdrawal. There, defendant DEC argued that the issuance of an initial permit to the then owner Trans Canada Ravenswood facility was a ministerial act not subject to SEQRA review for environmental concerns as specified in the 2011 amendments to the Environmental Conversation Law, ECL §15-1501(9). The amended water withdrawal permit statute provided in relevant part:

> 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.

The petitioners in *Sierra Club, et al. v. Martens, Trans Canada Ravenswood LLC et al* argued that DEC had discretion pursuant to ECL §15-1503 to specify the terms and conditions of all water withdrawal, including whether the proposed water withdrawal would be implemented so that no significant individual or cumulative adverse impacts on the quantity or quality of water source or its natural resources.

The *Martens* Court decision by Justice Robert McDonald dated October 1, 2014 and judgment entered December 10, 2014, found in pertinent part, "The issuance of an initial permit is a ministerial act not subject to review under SEQRA or the Waterfront Act. Accordingly, the petition is denied."

The petitioners Sierra Club, et. al. appealed the decision and judgment denying their Article 78 review of DEC determination to grant respondent Trans Canada Ravenswood LLC's application for a water withdrawal permit pursuant to the Environmental Conversation Law, ECL §15-1501(9), to the Appellate Division, Second Judicial Department.

The Appellate Court by Opinion and Order in Sierra Club v. Martens, 158 A.D.3d 169 (2018) stated:

> We hold that the issuance of an "initial permit" for making water withdrawals pursuant to Environmental Conversation Law, ECL §15-1501(9) is not a ministerial act that is excluded from the definition of "action" under the State Environmental Quality Review Act.

The Appellate Court found,

> The DEC has the power to grant or deny permit, or to grant a permit with conditions, and in doing so, must consider a number of statutory factors, including whether "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," and 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][f], [g]).

The *Martens* Appellate Court noted ECL §15-1501(9) states, "[the DEC] shall issue an initial permit, subject to appropriate terms and conditions as required under this article...for the maximum water withdrawal capacity reported to the DEC on or before February 15, 2012." The DEC's implementing regulations of the Water Resources Protection Act ECL §15-1501et seq

provides that an "initial permit...includes all terms and conditions of a water withdrawal permit, including environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies, is subject to modification, suspension and revocation." 6 NYCRR 601.7[e].

The Appellate Court determined that the words "subject to appropriate terms and conditions as required under this article" in ECL §15-1501(9) gave DEC discretion to impose terms and conditions on the initial permit for the "action" of water withdrawal by defendant Ravenswood. The Appellate Court stated that DEC permitting process of the withdrawal "action" was discretionary requiring reason, judgment, agency expertise, and the application of law rather than a ministerial act requiring direct adherence. The Court found that ECL §15-1501(9) term "shall issue" an initial permit to an existing operator was for the existing amount of water usage but the permit was also "subject to appropriate terms and conditions" of the statute. *See also* ECL §15-1503(2).

The Appellate Court, in reversing the Supreme Court judgment, held that the initial permit, as amended, was annulled and the matter was remitted to DEC for further proceedings on Trans Canada Ravenswood's permit application in accordance with SEQRA. The remainder of the petition including the validity of the underlying Trans Canada Ravenswood Facility 2013 Initial Permit was denied as academic.

Rationale for 2018 Negative Declaration and 2019 Permit

The prior litigation regarding the November 2013 Permit commenced in December 2013 and continued until the Appellate Division ruling in January 2018. In August 2017, respondent HRLLC submitted an application to DEC to transfer the initial water withdrawal permit from Trans Canada Ravenswood LLC to HRLLCC based on the change in controlling membership of the facility's LLC. On September 29, 2017, DEC issued an initial water withdrawal permit to HRLLC to withdraw 1,527,840,000 GPD of water from the East River for once through cooling related to electrical generation. On January 10, 2018, the Appellate Division annulled the initial September 29, 2017 water withdrawal permit that DEC issued to HRLLC based on DEC's improper issuance of the permit as a ministerial act not subject to review under SEQRA.

Upon the Appellate Court remittal to DEC for further proceedings in accordance with SEQRA to determine significant adverse impact on the environment, the DEC reclassified the action from the non-ministerial Type II action to a Type I action based on the criteria in 6 NYCRR §617.4(b)(6)(ii). DEC consistent with actions classified as Type I and pursuant to its regulations in determining the "environmental significance," by letter dated April 13, 2018 asked respondent HRLLC the "project sponsor" to submit a completed and signed Part 1 of a 3 part Full Environmental Assessment Form (FEAF) and a letter from the owner or owner's representative indicating what changes to the water withdrawal system had been made since HRLLC initial transfer application of August 2, 2017. *See* 6 NYCRR §617.6(a)(2) and (3); 6 NYCRR §617.2(m).

Respondent HRLLC submitted Part 1 of the FEAF about May 4, 2018 and advised DEC that no changes had been made to HRLLC's water withdrawal system. DEC completed Part 2 of the FEAF on July 6, 2018 after review of relevant material including Ravenswood's Annual Water Reports, Yearly Verification Monitoring Plan Status Reports and SPDES permit information from 2006 and 2012.

Respondent DEC completed Part 3 of FEAF on September 25, 2018 concluding that there would be no significant adverse impacts by issuing the permit to HRLLC to withdraw up to 1,527,840,000 gallons per day. Following the September 25, 2018 issuance of the negative declaration, DEC provided public notice of the proposed permit on October 3, 2018 in the Environmental Notice Bulletin, and received comments until November 17, 2018. DEC also issued responses to comments on the 2019 Permit and amended the Negative Declaration on February 14, 2019 to address SEQRA related comments.

DEC asserts that its cumulative impact determination was rational and reasonable because DEC took a "hard look" at areas of environmental concern and made a reasoned elaboration for the basis of its determination of a Negative Declaration of impact which requires no prepared environmental impact statement (EIS). *See H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222 (4th Dept. 1979), and 6 NYCRR §617.2(a), §617.7(a)(1) and §617.7(c)(1)(i). DEC determined that respondent HRLLC's action or proposed permit made no change to the pre-existing condition or "baseline" withdrawal of 1.5 billion GPD that Ravenswood had previously lawfully withdrawn. *See Lazard Realty, Inc. v. New York State Urban and Dev. Corp.*, 142 Misc.2d 463 (Sup. Ct., New York Cnty. 1989) and *American Rivers v. Ferc*, 201 F.3d 1186 (9th Cir. 1999)(affirming existing conditions baseline.)

DEC also examined the eight statutory provisions in ECL §15-1503(2)(a) – (h) and supported its determination in responses to public comment and other documents in the administrative record as specially set forth in the New York State Attorney General memorandum of law pages 20 to 31 as well as respondents' supporting affidavit of engineer Erik Schmitt dated August 12, 2019.

The DEC made the eight determinations required for permitting which included 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 East River as strait to the Atlantic Ocean has a vast supply of water in comparison to headwater of tributaries or grand aquifers. Portions of the 2013 and 2017 water withdrawal permit states "the siting of the electric generating facility along the East River is ideal due to the plentiful surface water supply for once through cooling."

ECL §15-1503(2)(b): whether "the quantity of supply will be adequate for proposed use." The facility has been making similar withdrawal since 1963 without any water quantity issue. The engineer's report of 2013 and 2017 detailed the water source of the East River. The cooling system withdraws approximately 1% of the mean tidal of the East River and returns all withdrawn water back to the source. DEC determined quantity of the water supply to be adequate.

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 source of potable water supply." Ravenswood withdraws saltwater from the East River. No municipalities in the area withdraws water from the East River for potable water purposes. DEC determined that the project was equitable and just to municipalities and individuals regarding needs for potable water supply.

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 is not seeking increase to its water withdrawal in its permit application.

The water withdrawal capacity is needed to generate electrical power for the New York City Water Conversation Measure to reduce water use and impact on fisheries contained in the Biological Monitoring Requirement section of the 2012 SPDES Permit were incorporated by reference and includes installation of variable speed pumps and scheduling planned outage of the facilities circulation water pumps (CWP). The 2019 Permit also contains conditions of installing and maintaining meters and other measuring devices with yearly calibration, maintain records, conduct yearly audits to determine unaccounted waters, and submitting annual water withdrawal reports. DEC determined that the water withdrawal cannot be reasonably avoided through the use of efficient use and conservation of existing water supplies.

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 is proposed." Ravenswood's 2013 and 2017 engineers reported that circulating water pumps were retrofitted with variable frequency drives "to allow for reduced surface water withdrawal at reduced generation loading and reduced cooling water temperatures." The quantity of water withdrawn is returned to its source. DEC determined that the water withdrawal was reasonable for the purposes proposed.

ECL §15-1503(2)(f): whether "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 and quality of the water source and water dependent natural resources." Respondent DEC asserts that the 2019 Permit would not add to the impact from all water withdrawals from the resource because the 2019 Permit would not authorize any increase of withdrawal against a baseline of correct operations under existing environmental, operational and technology control. DEC determined that the facility overall level of impact was 2 – 3%, that the permit required reduced impingement by an additional 90% and entrainment by 65% from previous baselines. DEC provided documentation of information for its determination including review of comparable data from SPDES. See Schmitt Affidavit at paragraphs 23 and 25. DEC determined that the 2019 Permit would not have any significant cumulative adverse impact on aquatic life or other water dependent resources.

ECL §15-1503(2)(g): whether "the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures." DEC asserts that its evaluation of respondent HRLCC withdrawal to be environmentally sound and economically feasible, does not require DEC to evaluate any specific water conservation measure including a closed – cycle cooling system requested by petitioner. The respondent 2019 Permit included five general permit condition and ten site specific conditions including auditing and reporting, incorporation of SPDES water conservation and fisheries protection, installations variable speed pumps and scheduled power outages. *See* A.R. 544 – 545. Additionally DEC responded to petitioner closed – cycle cooling request and explained the non "availability" of the system at the particular facility site. The restrictions included the limited physical area on the property for required "dry" cooling towers, and intensity of the immediate neighboring development. A closed cycle cooling system that uses "wet" cooling methods would cause exhaust plumes of cooling vapor and suspended salt and followed by solid salt falling to the ground in this densely populated city. The reasons were previously determined by DEC in selecting BTA for the facility SPDES permits. These factors which lead to the Permit remained unchanged and were reaffirmed by DEC through public comment responses and other information. *See* Schmitt Affidavit paragraph 2. DEC determined that the closed cycle cooling system was economically disproportionate to the gains from

alternative operation controls and technologies that reduced the environmental impact of the cooling intake system. DEC ultimately determined that the water withdrawal authorized by the 2019 Initial Permit will be implemented in a manner that incorporates environmentally sound and economically feasible.

ECL §15-1503(2)(h): requires DEC to determine 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." Respondent DEC's review of HRLLC's water withdrawal application as well as its prior 2013 and 2017 application material which affirmed compliance with applicable laws including the State Environmental Quality Review Act, the Federal Clean Water Act and the ECL.

DEC affirmed that all attachments submitted to its application were true to the best of the applicant's knowledge and belief. DEC also took account of appropriate aspects of the SPDES permits that overlap considerations made in issuing a water withdrawal permit. DEC determined that the proposed water withdrawals were consistent with applicable laws, interstate and international agreements. *See* 6 NYCRR §601.7 and AR 540 – 553.

The judicial review of respondent DEC's interpretation of the relevant provisions of the ECL as they relate to SEQRA, the WRPA, and the 2019 Initial Permit is limited to whether the determination was made in accordance with lawful procedure, and whether the substantive determination was affected by error of law or was arbitrary and capricious or abuse of discretion. *See Akpan v. Koch*, 75 N.Y.2d 561 (N.Y. 1990) and CPLR §7803(3). 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. *See Carver v. State of New York*, 87 A.D.3d 25 (2d Dept. 2011).

The Court may not substitute its judgment for that of the agency by weighing the desirability of an action or choose among alternatives. *See Riverkeeper, Inc. v. Town of Southeast, 9 N.Y.3d 219* (N.Y. 2007) and *Village of Chestnut Ridge v. Town of Ramapo*, 99 A.D.3d 918 (2d Dept. 2012).

The Court finds based on the foregoing, that respondents have complied with SEQRA and applicable laws in the initial water withdrawal permit that DEC issued on February 20, 2019 to Helix Ravenswood, LLC and the issuance is not arbitrary, capricious in contravention of law or an abuse of discretion.

Accordingly, the petition is denied.

FILED & RECORDED

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COUNTY CLERK
QUEENS COUNTY

Dated: October 31, 2019

Ulysses B. Leverett, JSC

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