To be Argued by:
PHILIP E. KARMEL

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New York Supreme Court

Appellate Division—First Department

In the Matter of the Application of

SIERRA CLUB and HUDSON RIVER FISHERMEN'S ASSOCIATION,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules

– against –

JOSEPH MARTENS, Commissioner, New York State Department of Environmental Conservation, and CONSOLIDATED EDISON COMPANY OF NEW YORK INC.,

Respondents-Respondents.

BRIEF FOR RESPONDENT-RESPONDENT CONSOLIDATED EDISON COMPANY OF NEW YORK INC.

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INTRODUCTION

This lawsuit alleges that the initial permit issued by the Department of Environmental Conservation ("DEC") for the East River Generating Station (the "facility") violated the Water Resources Protection Act of 2011 (the "WRPA") because DEC did not require closed-cycle cooling (*i.e.*, cooling towers) to reduce – or virtually eliminate – the volume of water the facility withdraws from the East River. Petitioners-Appellants further claim that DEC violated the State Environmental Quality Review Act ("SEQRA") by issuing the permit without first preparing an environmental impact statement ("EIS") to study closed-cycle cooling and other technologies to reduce the facility's water withdrawals.

The trial court, in a 30-page opinion by the Hon. Alice Schlesinger, held the lawsuit to be time barred because it was filed after expiration of the 60-day time limitations period established by section 15-0905(2) of the Environmental Conservation Law ("ECL"). A30-32. In addition, the trial court found the suit to be untimely because it seeks to overturn DEC determinations made in 2010 in a public permitting proceeding for the facility under Article 17, Title 8 of the ECL in which DEC rejected closed-cycle cooling, selected a different technology as the best technology available ("BTA") for protecting ecological resources, and decided not to prepare an EIS for the selected

technology. The trial court ruled that the issuance of the WRPA permit did not revive the long-expired limitations period for challenging those 2010 determinations. A32.

The trial court also found the suit barred by laches, because Petitioners-Appellants sat on their hands while Consolidated Edison Company of New York, Inc. ("Con Edison"), which owns and operates the facility, expended $44 million in 2012-2013 to install the technology DEC selected as BTA in 2010, and Con Edison would suffer "immense unjust costs" if required to install "a different water intake system at this late juncture, following years of acquiescence by petitioners" in DEC's BTA determination. A42.

But Petitioners-Appellants' claims were not dismissed just because they were untimely: the trial court held that they failed to state a claim. As the trial court noted, the WRPA provides that DEC "s*hall* issue an initial permit, subject to appropriate terms and conditions as required under this article, ... for the *maximum* [water withdrawal] capacity reported to [DEC] … before February [15, 2012]." ECL § 15-1501(9) (emphasis added). Observing that the word "shall" is "non-negotiable; it is a command" (A35), the trial court held that DEC had no choice but to issue the initial permit for the pre-existing water withdrawal at the maximum previously reported capacity of 373.4 million gallons per day, and could not impose conditions requiring a reduction in that

volume. Thus, the trial court held Petitioners-Appellants' WRPA claim – which seeks to reduce the facility's water withdrawals – to be without merit. A26-27. Moreover, since DEC was obligated to issue the initial permit for the maximum reported capacity, the trial court applied Court of Appeals precedent in holding such issuance to be a ministerial act exempt from SEQRA. A33-38.

In rendering its decision, the trial court denied Petitioners-Appellants' attempt to use the WRPA – a statute intended to conserve New York's water supplies – for the entirely different purpose of eliminating a once-through cooling operation that consumes almost none of the salt water it withdraws from the East River before returning it to the East River. Thus, the trial court held that Petitioners-Appellants' contentions "improperly seek[] to expand the [WRPA] beyond its intended scope." A39.

The trial court's opinion is grounded in the factual record and adheres to the language and purpose of the statutes at issue in this proceeding. Its judgment should be affirmed.[1]

[1] To avoid burdening the Court with additional briefing as to the subsidiary claim under the Waterfront Revitalization of Coastal Areas and Inland Waterways Act, Con Edison relies upon the brief submitted by the Attorney General as to that claim, and on the trial court's opinion dismissing the claim. A38. Petitioners-Appellants waived their "public trust claim" by failing to argue the claim in their Opening Brief.

QUESTIONS PRESENTED

1. Does the statute of limitations provision of Article 15 of the ECL – which establishes a 60-day period for seeking judicial review of "a decision made pursuant to this article," ECL § 15-0905(1) – apply to a proceeding seeking judicial review of a permit issued by DEC pursuant to Article 15, Title 15 of the ECL?

The trial court correctly answered "Yes." A30-31. Its ruling should be affirmed. *See* Point I.A, *infra.*

2. Does a DEC permitting action for a facility re-open for challenge final administrative determinations DEC made years earlier as to the best technology available to minimize the facility's ecological impacts and that installation of such technology does not warrant an EIS?

The trial court correctly answered "No." A32. Its ruling should be affirmed. *See* Point I.B, *infra.*

3. Does laches bar a litigation seeking very costly changes in environmental technology at a facility where the suit was filed after $44 million was spent to install the technology DEC determined to be the best available, when the litigant never challenged that earlier DEC determination, made in a public permit proceeding?

The trial court correctly answered "Yes." A40-43. Its ruling should be affirmed. *See* Point II, *infra.*

4. Did DEC violate the WRPA when it issued an initial permit pursuant to ECL § 15-1501(9) without requiring the implementation of measures to reduce water withdrawals below the previously reported volume?

The trial court correctly answered "No." A39-40. Its ruling should be affirmed. *See* Point III, *infra.*

5. Did DEC violate SEQRA when it determined that its non-discretionary issuance of an initial WRPA permit was not subject to SEQRA?

The trial court correctly answered "No." A33-38. Its ruling should be affirmed. *See* Point IV, *infra.*

6. Have Petitioners-Appellants established their standing when they submitted no admissible evidence that they have suffered harm from the WRPA permit they challenge?

The trial court incorrectly answered "Yes." A29-30. Its ruling should be reversed, thereby affirming the judgment of dismissal on alternative grounds. *See* Point V, *infra.*[2]

[2] A respondent on the appeal may raise an alternative ground for affirming the judgment. *See Parochial Bus Sys., Inc. v. Board of Educ. of City of New York,* 60 N.Y.2d 539, 545-546 (1983); *Town of Massena v. Niagara Mohawk Power Corp.*, 45 N.Y.2d 482, 488 (1978); *Nieves v. Martinez*, 285 A.D.2d 410, 411 (1st Dep't 2001).

COUNTER-STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. In 2010, DEC Determined the Best Technology Available for the Facility's Water Withdrawals and That the Technology Does Not Warrant an EIS.

A. The East River Generating Station

The facility is located on E. 14th Street between Avenue C and the FDR Drive in Manhattan. A581. It contains two electric generating units – Unit 6 and Unit 7 – that have used East River water for non-contact cooling since they were placed into service in 1951 and 1955, respectively. A580.

Units 6 and 7 are "steam-electric units" that heat water until it turns to high pressure steam that spins a turbine generator, producing electricity. A601; A581-582. The steam then flows through a condenser, where heat is transferred from the steam to the non-contact cooling water drawn from the East River. *Id.* The steam is thereby condensed back into water that is sent back to the boiler to be made into high pressure steam again. *Id.*

The facility withdraws the non-contact cooling water from the East River through intake bays that connect to tunnels extending beneath the FDR Drive. A582. After being used for cooling, the water is returned to the East River, at a higher temperature, through discharge tunnels located north of the intake bays. *Id.* The water in the East River, which connects Long Island Sound and the Atlantic Ocean, is salt water. *Id.*

The facility does not consume East River water in the cooling operation, because virtually all the water withdrawn is returned to the river. *Id.* But it does have an effect on aquatic organisms (including fish, eggs and larvae), which are drawn towards the intake structures along with the flow of cooling water, and can be impinged on the screens covering the mouth of the intakes or entrained into the cooling system. *Id.*

Units 6 and 7 are critical to the reliability of electric service in Manhattan (*i.e.*, avoiding blackouts). A602-603. The shutdown of these units, in addition to compromising reliability, would increase ratepayers' utility bills by between $60 million and $110 million per year. A601-602.

In addition to Units 6 and 7, the facility and adjoining land contain other Con Edison equipment and buildings, including five boilers that generate steam for the district steam system, two cogeneration units that produce electricity and steam, a large substation, a substantial amount of electrical equipment, a fuel oil storage facility, office building, parking facilities and two ballfields for community use. A581, A587-588, A722-723, A730-732. Space is limited at the site, the expansion of which is constrained because it is bounded by multi-family housing to the south and west and by John J. Murphy Park, the FDR Drive and the East River to the north and east. *Id.*

B. In 2010, DEC Made a Final Determination as to the Best Technology Available for the Facility's Water Withdrawals, after Public Notice and Issuance of a Negative Declaration under SEQRA, and Incorporated that Determination in a SPDES Permit Modification.

A permit is required for the facility under the DEC-administered State Pollution Discharge Elimination System ("SPDES") program established under the Clean Water Act and Article 17, Title 8 of the ECL. Such permits require the use of the best technology available for minimizing the adverse environmental impacts of cooling water intakes. *See* 33 U.S.C. § 1326(b) (requiring that "the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact."); 6 N.Y.C.R.R. § 704.5 ("The location, design, construction and capacity of cooling water intake structures … shall reflect the best technology available for minimizing adverse environmental impact.").

DEC's determination as to the best technology available for reducing the environmental impacts of the facility's water withdrawals was the result of a thorough analysis based upon years of data collected under DEC supervision. Con Edison and its consultants collected data and submitted studies to DEC as to the available and best technology in 1994 (A584), 1996 (*id.*), 1999 (*id.*), 2000 (A584-85, A636.1-706), 2003 (A586-588, A721-818), 2004 (A819-860), and 2007 (A880.1-891). Among the technologies evaluated

was "closed-cycle cooling," which would use cooling towers to eliminate the use of East River water. A586-588, A723-724, A755-765. This is the technology that the Sierra Club and Hudson River Fishermen's Association seek to impose through this litigation. *See* A61-63, A69-73, A80 (Petition ¶¶ 44, 49-50, 54-56, 90, 93-95, 99-100, 106, 107, 142). The studies recommended against closed-cycle cooling because the cooling towers would be enormous and could not practicably be located at the facility, and for other reasons specified in the record. A587-88, A723-724, A755-765.

In 2010, based on the technical studies and after holding a public comment period, DEC rejected closed-cycle cooling and required a different technology to minimize environmental impacts. A592-93, A111-113. More specifically, DEC required the facility's cooling water intake structure to be equipped with traveling intake screens with fish protective features (known as "Ristroph screens"), fine mesh intake screen panels and a low stress fish return system. A592, A97-98, A112-13. DEC determined that this technology would reduce fish impingement mortality by 90 percent and entrainment mortality by 75 percent. *Id.* On May 28, 2010, after issuing a "negative declaration" under SEQRA (*i.e.*, a determination that no EIS is required, *see* 6 N.Y.C.R.R. §§ 617.2(y), 617.7(a)(2)), DEC modified the facility's SPDES permit to require installation of this technology. A88-114.

These DEC determinations – rejecting closed-cycle cooling, requiring the installation of the specified BTA at the facility, and deciding not to prepare an EIS for this technology – were all made with due public notice in a public permit proceeding. A88-114, A591-593, A892-895.

In 2012-2013, Con Edison undertook a major capital project at a cost of more than $44 million to install the new technology, as required by the modified SPDES permit issued in 2010. A593-594.[3]

At no point during the years of investigation did the Sierra Club or Hudson River Fishermen's Association participate in the effort to identify BTA for the facility; nor did they submit comments with respect to or challenge the 2010 SPDES permit issued to Con Edison requiring the installation of the BTA DEC selected. A585, A591, A593, A596. It is only with the instant proceeding – brought in 2015, after Con Edison installed the required improvements in 2013 – that these groups now challenge DEC's determinations, made in 2010, rejecting closed-cycle cooling, requiring installation of different technology and deciding that an EIS is not needed for this technology.

[3] The impingement and entrainment data at pages 18-19 of the Opening Brief were purportedly collected in 2005-2006 (A498), *before* BTA was installed in 2013.

II. DEC Issued the WRPA Permit Incorporating the BTA Requirements of the SPDES Permit by Reference.

In 2009, the Legislature enacted a law requiring the filing of annual water withdrawal reports. *See* L. 2009, ch. 59, Part CCC (codified at ECL § Art. 15, Title 33, until its repeal by L. 2011, c. 401 § 8). The facility submitted the required reports to DEC for 2011, 2012 and 2013. A596; A950-963. They stated that the facility withdraws 373.4 million gallons of water per day from the East River. *Id.*

In 2011, the Legislature enacted the WRPA to conserve water "vital to New York's residents and businesses, who rely on these resources for drinking water supplies, and to support agriculture, manufacturing and other industries and recreation in the State." A988 (N.Y.S. Assembly memorandum). It is therefore anomalous, at best, to apply the law to the East River – whose sources, the salt waters of the Atlantic Ocean and Long Island Sound – are not in short supply.

Nevertheless, on May 30, 2013, Con Edison submitted an application for an initial permit for the facility under the WRPA. A257-272. The application sought a permit allowing the facility to continue withdrawing 373.4 million gallons of water per day from the East River (A260), the same volume reported to DEC in its annual water withdrawal reports. A950-963.

On June 1, 2014, DEC determined that Con Edison's application for a WRPA permit was a "ministerial action" not subject to SEQRA. A287. DEC reasoned that it had no discretion but to issue the initial permit, citing ECL § 15-1501(9), which provides that DEC "shall issue an initial permit, subject to appropriate terms and conditions as required under this article, to any person … for the maximum water withdrawal capacity reported … pursuant to the requirements of … title thirty-three of this article…." *See also* 6 N.Y.C.R.R. § 601.7(d) ("An initial permit that is issued by the Department … is for the withdrawal volume equal to the maximum withdrawal capacity reported to the Department on or before February 15, 2012.").

On November 21, 2014, DEC issued the initial permit, allowing the facility to continue the 373.4 million gallon per day water withdrawal from the East River as required by ECL § 15-1501(9) and 6 N.Y.C.R.R. § 601.7(d). A325. The permit also incorporates by reference the BTA requirements of the SPDES permit that reduce impacts to East River biota. A325.

Petitioners-Appellants now assert that DEC acted illegally by issuing the initial permit without first considering whether closed-cycle cooling should be imposed under the WRPA. A70 (Pet. ¶¶ 93-95).

III. The Trial Court Dismissed the Petition as Barred by the Statute of Limitations and Laches and Because It Fails To State A Claim.

The trial court – recognizing that, at bottom, "Petitioners … are advocating for installation of a closed-cycle cooling system" (A16) – rejected their claims and dismissed the lawsuit. The trial court noted the efforts made by Con Edison and DEC over the years to identify the best technology available for minimizing the impacts of the facility's withdrawals on the East River biota and recognized that DEC already had selected as BTA "'traveling intake screens modified with fish protective features … , use of fine mesh intake screen panels and a low stress fish return system.'" A22 (citation omitted). The court also noted that: (i) DEC rendered its BTA determination in modifying the facility's SPDES permit in 2010, and did so with due public notice and after issuing a negative declaration under SEQRA that explained why it rejected closed-cycle cooling; and (ii) Petitioners-Appellants neither submitted comments in response to that notice nor challenged the 2010 negative declaration or permit. A22-23. The trial court further noted that Con Edison expended $44 million in 2012-2013 installing the system DEC had identified as BTA, and that "Petitioners did not challenge or question Con Edison's actions at any point during the installation process." A24.

With this factual background, the trial court dismissed the claims as untimely, barred by laches and substantively deficient. It held Petitioners-

Appellants' claims to be barred by the 60-day statute of limitations imposed by ECL § 15-1905(2) for the judicial review of a permit issued under Article 15 of the ECL. A30. It also found those claims to be untimely because they seek to challenge BTA determinations made by DEC in 2010 under the SPDES program. A32. The trial court held that "laches further supports dismissal" because Con Edison would suffer "immense unjust costs" if it were required to go back to square one and install different technology to address the facility's environmental impacts "following years of acquiescence by petitioners during the most important periods of the BTA evaluation process." A40, A42. The trial court held the WRPA claim to be without merit, since the initial permit was issued in accordance with the statutory directive to allow water withdrawals at the "maximum withdrawal capacity" previously reported. A25. In light of that statutory directive, the court also held that DEC's issuance of the initial permit to be a ministerial act exempt from SEQRA. A34-35. Finally, it dismissed the claim under the Waterfront Act, since an action not subject to SEQRA is likewise exempt from that statute's requirements. A38.

POINT I

THE TRIAL COURT PROPERLY HELD THE PETITION TO BE TIME BARRED

The lawsuit is barred by the statute of limitations because it was filed after expiration of the 60-day limitations period for seeking judicial review

of a WRPA permit and because it challenges final DEC determinations made five years before the suit was filed.

A. The Petition Is Time Barred Because It Was Not Brought Within The 60-Day Limitations Period for Article 15 Permits.

The WRPA permit was issued pursuant to Article 15, Title 15 of the ECL. A323 (citing ECL § 15-1501(9)). Article 15 of the ECL establishes a 60-day limitations period to challenge such permits:

> 1. [A]ny person . . . which has filed a notice of appearance in the proceedings before the department and is affected by a decision made pursuant to this article, may review such decision under the provisions of article 78 of the Civil Practice Law and Rules.
>
> 2. A special proceeding for such review must be commenced within sixty days after the service in person or by mail of a copy of the decision upon the attorney of record of the applicant and of each person who has filed a notice of appearance, or to such applicant in person directly if not represented by an attorney.

ECL § 15-0905(1) and (2) (enacted L. 1972, ch. 664 § 2).

It is well established that this 60-day limitations period applies to challenges to any DEC determination under Article 15 of the ECL, including the issuance of permits. *See Rochester Canoe Club v. Jorling*, 150 Misc.2d 321, 325-26 (Sup. Ct. Monroe Cnty. 1991), *aff'd*, 179 A.D.2d 1097 (4th Dep't 1992) ("*Rochester Canoe*"); *Spinnenweber v. DEC*, 120 A.D.2d 172, 175 (3d

Dep't 1986) ("*Spinnenweber*"); *Loon Lake Estates, Inc. v. Adirondack Park Agency*, 83 Misc.2d 686, 690-91 (Sup. Ct. Essex Cnty. 1975).

On August 11, 2014, the Sierra Club, along with other environmental groups, appeared in the DEC proceeding for the initial permit by filing comments raising the same objections asserted in this lawsuit. A303-309, A323-24. The permit thereafter was issued on November 21, 2014. A325. On the same day, DEC provided written notice of its decision to the Sierra Club and to other persons who had appeared in that proceeding. A323-24. The Article 78 Petition was filed approximately four months later, on March 23, 2015, and thus after the 60-day limitations period had passed. A45. It is therefore time-barred, and the trial court's decision dismissing the proceeding on this basis should be affirmed.

Petitioners-Appellants assert that the SEQRA and other non-WRPA claims are subject to a four month limitations period even if the WRPA claim is subject to a 60-day limitations period. *See* Opening Br. at 54-55. But they cite no authority to back up their assertion, which is contrary to well established law. A claim asserting a violation of SEQRA or other statutory prerequisites for the issuance of a permit (or other governmental approval) must be commenced within the same limitations period for a proceeding to challenge the permit itself. *See, e.g., Long Island Pine Barrens Soc'y, Inc. v. Planning*

Bd. of Town of Brookhaven, 78 N.Y.2d 608, 611-12 (1991) (SEQRA claim must be brought within the 30-day limitations period for challenging a subdivision approval under Town Law § 282); *Aubin v. State of New York*, 185 Misc.2d 338, 347-48 (Sup. Ct. Albany Cnty. 2000) (SEQRA claim must be brought within 60-day limitations period for challenging a permit issued by the Adirondack Park Agency pursuant to Executive Law § 818(1)), *aff'd*, 282 A.D.2d 919, 922 (3d Dep't 2001); *Rochester Canoe*, 150 Misc.2d at 326 (SEQRA claim must be brought within the 60-day limitations period for challenging a DEC water permit under ECL § 15-0905). Thus, the SEQRA and all other claims asserted in this proceeding to challenge the WRPA permit are subject to the same 60-day limitations period that applies to the WRPA permit.

Petitioners-Appellants contend that ECL § 15-0903(1) renders the 60-day limitations period inapplicable to suits challenging permits issued under certain titles of the ECL, including the WRPA. As the trial court correctly held, that provision relates to hearing procedures, and has no bearing on the statute of limitations:

> *Hearing procedure.*
> 1. The provisions of this title shall not apply to applications for permits, requests for permit renewals and modifications, or to permit modification, suspension or revocation proceedings initiated by the department where any of such actions involve title 5, 15 or 27 of this article.

ECL § 15-0903(1) (emphasis added) (enacted L. 1979, ch. 233 § 4).

This provision, enacted years after the 60-day limitations statute, serves only to exempt DEC's pre-decisional proceedings under the referenced Article 15 titles from the administrative hearing procedures of Title 9 of Article 15 so that such proceedings are conducted pursuant to the uniform DEC administrative hearing procedures enacted in 1977, codified at Article 70 of the ECL § . *See* L. 1979, S. Bill 3955 ("An act to amend the Environmental Conservation Law, in relation to conforming provisions thereof to chapter seven hundred twenty-three of the laws of nineteen hundred seventy-seven, relating to establishing uniform procedures and time periods for department action on permits and certain provision of such law relating thereto."); L. 1979, A. Bill 7552 (same). In a contemporaneous legislative memorandum, DEC explained the purpose of § 15-0903(1) as follows:

> **Purpose**
> To conform inconsistent procedural provisions of the Environmental Conservation Law to article 70 of the Environmental Conservation Law, the Uniform Procedures Act. The bill includes no substantive changes in existing law.
>
> **Summary of provisions**
> All existing procedural provisions of the Environmental Conservation Law that have been superseded by article 70 are amended to reflect the uniform approach to procedures intended by article 70.

McKinney's 1979 N.Y. Sess. Laws 1687 (reproducing text of DEC Memorandum on L. 1979, ch. 233).

Ignoring the statutory title "hearing procedures" and legislative history, Petitioners-Appellants assert that the phrase "provisions of this title" in ECL § 15-0903(1) is all encompassing. However, when read in context, the phrase "provisions of this title" refers to the provisions of Title 9 relating to hearing procedures. Thus, consistent with the statutory heading ("Hearing procedure") and the legislative history quoted above, this provision operates only to exempt permit proceedings under Titles 5, 15 or 27 of Article 15 from the administrative hearing procedures in Title 9, and subjects such permit proceedings to the uniform DEC hearing procedures in ECL Article 70. *See Rochester Canoe,* 150 Misc.2d at 325. Accordingly, this provision has nothing to do with the 60-day limitations period set forth in ECL § 15-0905.

This conclusion finds further support in the statute of limitations language of § 15-0905, as compared to the language of § 15-0903(1). Section 15-0905 requires that a challenge to a permit "*decision*" made pursuant to Article 15 be filed within 60 days after DEC's service of the "*decision.*" *See* ECL § 15-0905(1) ("a *decision* made pursuant to this article" (emphasis added)); ECL § 15-0905(2) ("within sixty days after the service … of the *decision*" (emphasis added)). By contrast, § 15-0903(1) does not use the word

"*decision*" because the subject of that provision is the "*[h]earing procedure*" for "*applications* for permits" or "*requests* for permit renewals and modification" or "permit modification, suspension or revocation *proceedings* initiated by the department." ECL § 15-0903(1) (emphasis added). Thus, by its own terms, § 15-0903(1) applies to the hearing procedures governing the consideration a permit rather than a DEC "decision" made after those procedures have been completed, and does not affect the 60-day limitations period for challenging a permit "decision."

Petitioners-Appellants would have the Court read the words "provisions in this title" in § 15-0903(1) outside of their context – and without regard to the clear distinction between the *other* words used in § 15-0903(1) as compared to those appearing in § 15-0905(2). Doing so would violate a fundamental principle of statutory construction: that words are to be interpreted in the context in which they are used. *See, e.g., Yates v. United States*, 135 S. Ct. 1074, 1081-82 (2015) (the meaning "'of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole'" (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)); *Mowczan v. Bacon*, 92 N.Y.2d 281, 285 (1998) ("Generally, [judicial] inquiry must be made of the spirit and purpose of the legislation, which requires

examination of the statutory context of the provision as well as its legislative history." (internal quotation marks and citations omitted)).

Rejecting the same argument made by Petitioners-Appellants here, the court in *Rochester Canoe* properly held that ECL § 15-0903(1) does not create an exemption from the 60-day limitations period. *See Rochester Canoe*, 150 Misc.2d at 325-26, *aff'd*, 179 A.D.2d 1097 (4th Dep't 1992). Petitioners-Appellants seek to distinguish *Rochester Canoe* and *Spinnenweber* on the ground that the permits at issue in those cases were issued under Title 5 rather than Title 15 of Article 15 (*see* Opening Br. at 53), but that is a distinction without a difference. There is nothing in ECL § 15-0903(1) or § 15-0905 that differentiates permits issued under Title 5 from those under Title 15.

Petitioners-Appellants float an equitable argument as to "fair notice" (Opening Br. at 54), but the 60-day limitations period of § 15-0905(2) and clear-cut caselaw applying this limitations period to DEC permits issued under Article 15 of the ECL provided ample notice. Moreover, appeals to equity do not defeat a statute of limitations defense. CPLR § 201 ("No court shall extend the time limited by law for the commencement of an action.").

Petitioners-Appellants cite *Niagara Mohawk Power Corp. v. State of New York*, 300 A.D.2d 949 (3d Dep't 2002) ("*Niagara Mohawk*"), *see* Opening Br. at 53, but it provides no support for their argument. *Niagara*

Mohawk held that the 60-day limitations period applies to a permit issued by DEC, but not to the decision of a river regulating district, because ECL § 15-0905(1) and 15-0905(3) use the word "department." *Id.* at 951.

B. The Challenge to DEC's Technology and EIS Determinations Are Time-Barred Because Subsequent Administrative Proceedings Do Not Re-Open Earlier Determinations Impervious to Attack Because of the Statute Of Limitations.

In issuing the 2010 SPDES permit, DEC determined that: (i) the installation of traveling intake screens with fish-protective features is the best technology available at the facility to protect ecological resources (A97-98, A112-113); and (ii) this determination would not result in significant adverse environmental impacts warranting preparation of an EIS (A107-108, A111-113). While the Petition has been crafted around the WRPA, it is these decisions that are challenged here, because at its core Petitioners-Appellants' claim is that DEC should have used the initial permit under the WRPA to require installation of the very same technology DEC rejected in 2010. A64-73. The claim is time barred because the issuance of the initial permit does not re-open the limitations period to challenge determinations DEC made in 2010.

The Court of Appeals addressed the interplay among successive agency determinations, SEQRA and the running of the limitations period in *Young v. Board of Tr. of Vill. of Blasdell*, 89 N.Y.2d 846 (1996). In that case, a village board approved a lease of property for a solid waste facility, and months

later issued a negative declaration under SEQRA. The Court of Appeals held that the later-issued negative declaration did not re-open the earlier lease determination to a SEQRA claim, because the limitations period for review of that earlier determination had expired. *Id.* at 849. Likewise, in the case at bar DEC's permitting actions in 2014 do not re-open for challenge its 2010 decisions not to require closed-cycle cooling at the facility and that selection of BTA does not require an EIS.

In *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218 (2003), the New York City Department of Environmental Protection ("NYCDEP") had issued a negative declaration for a proposed power project, concluding that it did warrant an EIS. Subsequently, DEC issued an air permit for the project. In a proceeding challenging both agency actions, the Court of Appeals held that DEC's later permitting decision did not re-open the limitations period to challenge NYCDEP's earlier SEQRA determination. Similarly, here DEC's later permitting decision in 2014 did not reopen the limitations period for challenging the BTA and SEQRA determinations made in 2010.

This conclusion is driven home by *E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359 (1988), which ruled that a planning board's review of a modification to a previously approved site plan "impervious to attack on

SEQRA grounds because of the Statute of Limitations" is not an occasion for re-examining the board's earlier approval. *Id.* at 373.

In 2010, Petitioners-Appellants passed over their opportunity to challenge DEC's determinations on closed-cycle cooling and not to prepare an EIS. These determinations cannot be challenged now in the guise of a proceeding seeking judicial review of a later permitting decision for the facility.

POINT II

THE TRIAL COURT PROPERLY HELD THE CLAIMS BARRED BY LACHES

The Petition challenges the technology now in place at the facility to protect aquatic resources (A69-73), which DEC determined to be the best technology available for that purpose in 2010. A97-98. It also challenges DEC's decision not to prepare an EIS for this technology (A64-69), a determination that DEC also made in 2010. A107-114. In 2012-2013, in reliance on the modified SPDES permit issued in 2010, Con Edison spent more than $44 million to install the technology DEC had selected. Because Petitioners-Appellants neglected to challenge – or even object to – DEC's decisions before Con Edison incurred such costs to install the technology, the claims are barred by laches.

Laches bars a plaintiff's unreasonable delay in asserting a claim where the delay would prejudice the defendant if the plaintiff were accorded the

relief sought. *See Philippine Am. Lace Corp. v. 236 W. 40th St. Corp.*, 32 A.D.3d 782, 784 (1st Dep't 2006). Prejudice may be established by a "showing of injury, change of position . . . or some other disadvantage resulting from the delay." *In re Linker*, 23 A.D.3d 186, 189 (1st Dep't 2005) (citation omitted).

In *Save The Pine Bush, Inc. v. DEC*, 289 A.D.2d 636 (3d Dep't 2001), the court held that "[i]t is well settled that where neglect in promptly asserting a claim for relief causes prejudice to one's adversary, such neglect operates as a bar to a remedy and is a basis for asserting the defense of laches." *Id.* at 638 (citation omitted). The petitioners there had brought an article 78 proceeding challenging a variance allowing the expansion of a landfill. *Id.* A day before the limitations period was to expire, and after construction had begun, petitioners commenced the proceeding, seeking to annul the variance. *Id.* The Appellate Division affirmed the lower court's dismissal of the proceeding, holding that petitioners' delay and respondent's expenditure of over 70 percent of the project costs warranted application of laches. *Id.* at 638-39.

Similarly, in *Birch Tree Partners, LLC v. ZBA of Town of East Hampton*, 106 A.D.3d 1083 (2d Dep't 2013), the petitioner brought an article 78 proceeding to challenge a real estate development but waited until after one of the residential buildings had been constructed before bringing suit. Its "challenge was barred by the doctrine of laches." *Id.* at 1084. *See also*

Zimmerman v. Planning Bd. of Town of Schodack, 294 A.D.2d 776, 777-78 (3d Dep't 2002) (dismissing article 78 proceeding where gravamen of the complaint related to a time-barred claim regarding the construction of a road and not the planning board's approval of an office building site plan); *Marshall v. City of Albany*, 45 A.D.3d 1064, 1066 (3d Dep't 2007) ("In light of the repeated failure to act promptly and the considerable prejudice to and expense incurred by the [respondent], we find laches … appropriate.").

The gravamen of the Petition here relates to the same issues addressed by DEC in 2010: the aquatic impacts of the facility's water withdrawal, the best technology available to minimize these impacts and whether an EIS should be prepared to consider such issues. Petitioners-Appellants were or should have been aware of the extensive information developed by Con Edison over the years with respect to the facility's aquatic impacts and the technology to minimize the impacts; and they certainly knew or should have known of DEC's 2010 determinations.

The 2010 SPDES permit modification was issued pursuant to legally mandated public notice and hearing procedures. *See* ECL § 17-0804; 6 N.Y.C.R.R. Parts 621 and 624. Thus, on January 13, 2010, DEC published notice of its intent to modify the facility's SPDES permit to include the BTA determination made pursuant to Section 316(b) of the Clean Water Act and

6 N.Y.C.R.R. § 704.5. A892-895. The notice stated that the modified permit would include a requirement to install the DEC-selected BTA at the facility, consisting of the installation of "traveling intake screens modified with fish protective features (aka Ristroph screens), use of fine mesh intake screen panels and a low stress fish return system." A893. It also indicated that DEC had issued a negative declaration under SEQRA, and established a deadline for submission of public comments on the proposal. A894.

Petitioners-Appellants did not challenge the 2010 SPDES permit modification, and Con Edison proceeded with the procurement and installation of the technology DEC required – and expended tens of millions of dollars in doing so. A594. Con Edison would be gravely injured if Petitioners-Appellants, having slept on their rights while the new technology was procured and installed, are permitted to maintain their long-delayed claims.

Petitioners-Appellants assert that the application of laches would "effectively nullify the new water permitting law." Opening Br. at 51. Not so. Nothing in the record supports their assertion that "most large water users subject to permitting under [the WRPA] already have SPDES permits." *Id.* Section 316(b) of the Clean Water Act and its BTA requirement apply only to cooling water intake structures, *see* 33 U.S.C. § 1326(b), not to all water withdrawals. Moreover, Con Edison's contention here is not based on the fact

that DEC issued a SPDES permit to the facility in 2010; it is based on DEC's BTA and SEQRA determinations made in 2010, which Petitioners-Appellants failed to challenge at that time. The claim made by Petitioners-Appellants in this suit has nothing to do with the legislative purpose of the WRPA – water conservation – as the facility returns the salt water it withdraws back to the East River. Rather, their claim is based on the aquatic impacts of the facility's water withdrawal, the same issue DEC addressed in 2010 when it determined the best technology available to minimize such impacts. Petitioners-Appellants are now pressing for the same technology – closed-cycle cooling – that DEC previously evaluated and rejected in a public permit proceeding, and doing so only after Con Edison installed the different technology DEC determined to be the best available for this facility. There is no basis for their assertion that application of laches here would "nullify" the WRPA.

Petitioners-Appellants further contend that they "have performed no actions … that have caused … any injury to [Con Edison's] operations." Opening Br. at 49. But the application of laches turns not on whether a litigant's *action* has caused injury but whether its *inaction* – a delay in asserting its claim – would do so. Here, Petitioners-Appellants are seeking to use this litigation to require the installation of closed-cycle cooling (A70), an entirely different technology than the one DEC determined to be the best technology

available for the facility. If they were to prevail in challenging DEC's 2010 decision, Con Edison and its ratepayers would shoulder an *additional* $44 million in costs (because they would bear the cost of the cooling towers *plus* the $44 million technology the cooling towers would render inoperative). It is precisely such a circumstance – where the defendant would be harmed by the unreasonable delay in the litigant's assertion of a claim – that warrants the application of laches, as the trial court correctly held. A40-43.

POINT III

THE TRIAL COURT PROPERLY HELD THAT DEC DID NOT VIOLATE THE WRPA IN ALLOWING THE FACILITY TO CONTINUE WITHDRAWING 373.4 MILLION GALLONS OF WATER PER DAY FROM THE EAST RIVER

Petitioners-Appellants argue that DEC should have reduced water withdrawals at the facility by including a condition in the initial permit imposing closed-cycle cooling as an "environmentally sound and economically feasible water conservation measure." A70 (Pet. ¶¶ 90, 95); A307. The trial court rejected this claim because "[i]ssuance of the Initial Permit was mandatory," A39; the statute requires the initial permit to allow the facility to continue its water withdrawals at its previously reported "'maximum water withdrawal capacity,'" A35 (quoting ECL § 15-1501(9)); the "once-through system [at the facility] returns virtually all of the withdrawn water, which is saltwater, back to its source," A40; and "closed-cycle methods … have already

been considered [by DEC] at length and rejected." A40. Its decision is consistent with the language and purpose of the WRP and should be upheld.

A. The Trial Court Correctly Ruled that Issuance of an Initial Permit is Mandatory under the WRPA.

In 2009, the State Legislature enacted a law requiring the filing of annual water withdrawal reporting forms. *See* L. 2009, ch. 59, Part CCC. Thereafter, it enacted the WRPA, requiring any facility withdrawing water at the rate of more than 100,000 gallons per day to obtain a permit from DEC. *See* ECL Art. 15, Title 15. The statute creates two categories of permits: an "initial permit" and a permit for new or increased water withdrawals. With respect to the first category, the statute directs 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 . . . for the *maximum water withdrawal capacity* reported to the department . . . on or before February [15, 2012]." ECL § 15-1501(9) (emphasis added).

The legislative history reinforces this directive, stating that the statute "provide[s] 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." A986 (N.Y.S. Assembly memorandum (emphasis added)).

An entirely separate statutory provision (ECL § 15-1503) applies to the issuance of water withdrawal permits that are not "initial permits" governed by § 15-1501(9). As to these other permits, DEC has discretion as to whether to "grant or deny a permit or grant a permit with such conditions as may be necessary." ECL § 15-1503(4).

With respect to permits issued under § 15-1503, the statute provides for DEC to exercise its discretion based on its determinations regarding eight criteria: whether (a) "the *proposed water withdrawal* takes proper consideration of other sources of [water] supply that are or may become available," (b) "the quantity of supply will be adequate for the *proposed use*," (c) "the *project* is just and equitable to all affected municipalities and their inhabitants ...," (d) "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," (e) "the *proposed water withdrawal* is limited to quantities that are considered reasonable for the purposes for which the water use is proposed," (f) "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," (g) "the *proposed water withdrawal* will be implemented in a manner that incorporates environmentally sound and economically feasible

water conservation measures," and (h) "the *proposed water withdrawal* will be implemented in a manner that is consistent with applicable … laws as well as regional interstate and international agreements." ECL § 15-1503(2)(a)-(h) (emphasis added).

Section 15-1503(2) directs DEC to consider whether these criteria – each of which requires a prospective determination relating to a "proposed withdrawal," a "proposed use" or a "project" – have been satisfied "[i]n making its decision to grant or deny a permit or to grant a permit with conditions …." ECL § 15-1503(2). Thus it is only with respect to applications for *prospective* withdrawals that DEC is to make a judgment call to grant or deny a permit, or to impose permit conditions based on the foregoing criteria.

Moreover, it is readily apparent that the eight criteria in ECL § 15-1503(2)(a)-(h) are inapplicable to an initial permit for a pre-existing water withdrawal because the exercise of discretion to grant or deny a permit based on them would be at odds with an eligible facility's *entitlement* to an initial permit. In addition, application of the criteria – which involve consideration of measures to *reduce* water withdrawals – would contravene the directive that an initial permit be issued for the maximum previously reported withdrawal capacity.

The regulations promulgated to implement the statute reflect the same distinction between an initial permit for pre-existing water withdrawals and permits for new or increased withdrawals. The regulation for the issuance of an initial permit states that "[a]n initial permit issued by the department . . . is for the withdrawal volume equal to the maximum withdrawal capacity" previously reported. 6 N.Y.C.R.R. § 601.7(d).

The regulation for other permits is codified at 6 N.Y.C.R.R. § 601.11. That separate provision calls for DEC to exercise discretion to "grant or deny a permit, or grant a permit with conditions." *Id.* § 601.11(a). As with the statute, this regulation calls upon DEC do so by considering several criteria – all of which relate by their terms to "proposed" water withdrawals and not to historic operations qualifying for the statutory entitlement.

Thus, the language and structure of the WRPA and implementing regulations distinguish between initial permits under § 15-1501(9) – which *must* be issued by DEC at the maximum previously reported capacity – and permits for new or modified withdrawal systems under § 15-1503(2) and (4), which are discretionary and subject to the specified statutory criteria.

B. The Trial Court's Decision Is Consistent With The Purpose of the WRPA.

The trial court saw this lawsuit for what it is: an attempt to use the WRPA – enacted to conserve water supplies – to pry open a determination DEC

made years ago under the SPDES program that closed-cycle cooling will not be required to further minimize the facility's ecological effects on East River biota. A39.

The WRPA was enacted to conserve water "vital to New York's residents and businesses, who rely on these resources for drinking water supplies, and to support agriculture, manufacturing and other industries and recreation in the State." A988 (N.Y.S. Assembly memorandum). As Petitioners-Appellants themselves note, the statute was passed to implement the Great Lakes-St. Lawrence River Basin Water Resource Compact (the "Great Lakes Compact") to protect the fresh water of the Great Lakes-St. Lawrence River Basin. A51 (Pet. ¶ 14). The legislative debate on the WRPA sheds further light on the statutory purpose. *See* N.Y. Assembly Debate, 2011 Chap. 401, May 2, 2011 at 157 ("[A]lthough we have tended in New York State to take clean, fresh water kind of for granted because it is an abundant resource in this State, we shouldn't be doing that. We should be a little bit more careful about understanding the resource . . . and preserving it . . . ." (A993)); *id.* at 158 ("[W]e see such a broad array of support for the bill . . . [from] many others whose bottom line concern is having a clean, fresh water source that remains abundant in this State. That is the bottom line here." (A994)); N.Y. Senate Debate, 2011 Chap. 401, June 16, 2011 at 1 ("With our Great Lakes containing

more than one-fifth of the world's freshwater, steps are necessary to prevent its depletion." (A1001)).

The cooling water withdrawal for the East River Generating Station gives rise to none of these concerns, since it does not consume any substantial quantity of water, but returns that water (at a higher temperature) to the East River. And that water source – the salt waters of the Atlantic Ocean and Long Island sound – is superabundant. Indeed, the WRPA regulations *exempt* from the permitting requirements altogether "direct withdrawals from the Atlantic Ocean or Long Island Sound." 6 N.Y.C.R.R. § 601.9(i). While the facility's withdrawal from the East River may not fit neatly into this exemption, the affected waters are the same because the East River is a strait that exchanges water between the ocean and sound through tidal action.

Thus, the trial court correctly observed that the statute "was enacted to conserve water [and] … [t]he instant proceeding does not concern the conservation of freshwater. Rather, it pertains to petitioners' concerns regarding local aquatic life and its objections to the once-through system. To the extent this proceeding concerns water, this court notes that the once-through system returns virtually all the withdrawn water, which is saltwater, back to its source." A39-40. The trial court rejected Petitioners-Appellants' attempt to use "themes underlying the WRL as a basis to require further consideration of

closed-cycle methods" in an initial permit under the WRPA, since "[s]uch closed-cycle methods … have already been considered and rejected." A40.

The trial court applied the WRPA as it was written, and consistent with its purpose. Petitioners-Appellants should not be allowed to misuse the statute to make an end run around the statute of limitations for challenging the DEC BTA determination that is really at issue in this case.

C. Petitioners-Appellants Misconstrue the WRPA.

One would think that Petitioners-Appellants are reading from a different set of books when they assert that "it is apparent that the clear wording of [the WRPA] and the accompanying regulations require that the same standards be applied to the issuance of initial permits to existing users as to permits issued to new users." Opening Br. at 24. According to Petitioners-Appellants, there is no distinction at all between the mandate set forth in § 15-1501(9) that DEC "shall" issue an initial permit for an eligible pre-existing withdrawal at the maximum previously reported capacity and DEC's discretionary authority to "grant or deny a permit or grant a permit with conditions" in light of standards relating by their terms to "proposed withdrawals" and "projects" under § 15-1503(2) and (4).

Petitioners-Appellants' argument is a textbook example of circular reasoning. First, they note that under § 15-1501(9) initial permits are to contain

"appropriate terms and conditions as required under this article." Opening Br. at 21. They then note that "ECL 15-1503(2) specifies a number of determinations that must be made by DEC in deciding whether to grant or deny a permit." *Id.* at 22. Without explaining whether or how the two provisions they cite are – or are not – related, they then posit that the "appropriate terms and conditions" contemplated by § 15-1501(9) can be crafted by DEC only by first making determinations under the § 15-1503(2) criteria. *Id.* But the sole rationale as to why this may be so is because "[i]f the required determinations are not made, adequate conditions cannot be imposed." *Id.*

But pretzel logic cannot turn language making an initial permit subject to the "appropriate terms and conditions as required under this article," ECL § 15-1501(9), into an obligation for DEC to scrutinize an application for such a permit under the § 15-1503(2) criteria, for several reasons.

First, by their terms, the § 15-1503(2) criteria relate only to "proposed water withdrawal[s]," "proposed use[s]" and "projects" – *not* to pre-existing withdrawals.

Second, as Petitioners-Appellants themselves acknowledge, the § 15-1503(2) criteria are to be considered by DEC in deciding whether to *grant* or *deny* a permit, *see* Opening Br. at 22, or to *grant* a permit with conditions,

and *not* in imposing the "appropriate terms and conditions" in a permit that DEC is duty-bound to issue.

Third, the statute distinguishes between the conditions to be included in an initial permit under § 15-1501(9) and those that may be imposed under § 15-1503. The narrow class of conditions to be incorporated in an initial permit are those "*required* under this article." ECL § 15-1501(9) (emphasis added). The discretion for the imposition of conditions in a permit for a new water withdrawal is markedly broader: "[t]he department may grant or deny … or grant a permit … with such conditions *as may be necessary to provide satisfactory compliance by the applicant with the matters subject to department determination pursuant to subdivision 2 of this section.*" ECL § 15-1503(4) (emphasis added). The difference as to scope of the conditions to be imposed in each type of permit is clear from the language of the statute: there is a world of difference between statutorily "required" conditions (applicable to initial permits) and those that are "necessary to provide satisfactory compliance" with a long list of criteria (applicable to permits for new withdrawals). Contrary to Petitioners-Appellants' contentions (Opening Br. at 22), the fact that the statute contemplates that *some* conditions are to be placed in each type of permit does not subject an initial permit to criteria applicable to permits for new withdrawals.

As the trial court properly found, § 15-1501 itself provides "the 'appropriate terms and conditions' referenced in Section 15-1501(9)." A25. It does so in § 15-1501(6), which sets forth mandatory monitoring and reporting requirements for "[e]ach person who is required under this section to obtain a permit" with respect to "water usage and water conservation measures undertaken during the reporting period." ECL § 15-1501(6). These are the conditions "required under this article" to be imposed in an initial permit.

At the heart of their case is Petitioners-Appellants' assertion that DEC should have imposed closed-cycle cooling as an "appropriate condition" of the initial permit so as to radically reduce or even eliminate the facility's water withdrawals. Acceptance of this argument would read out of the statute the § 15-1501(9) directive that DEC issue an initial permit at the maximum volume of the facility's reported water withdrawals. Such an interpretation would violate the "'accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided.'" *Springer v. Board of Educ. of City Sch. Dist. of City of New York*, 27 N.Y.3d 102, 107 (2016) (citation omitted).

Moreover, it is well settled that "'[a] statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent.'" *N.Y.S. Psychiatric Ass'n, Inc. v.*

N.Y.S. Dep't of Health, 19 N.Y.3d 17, 23-24 (2012) (citation omitted). To do so here, it must be concluded that DEC has no authority to condition an initial permit so as to require a reduction in the volume of water withdrawals, as such a condition would contravene the statutory provision requiring an initial permit to be for "maximum capacity." The trial court properly rejected, as contrary to the express language of § 15-1501(9), Petitioners-Appellants' effort to impose closed-cycle cooling as an "appropriate condition" of the initial permit.

Petitioners-Appellants' interpretation of the DEC implementing regulations is similarly misguided. The Opening Brief makes no mention of the fact that the requirements for initial permits and those for other withdrawal permits are set forth in two entirely separate sections. Glossing over the distinction between these separate regulatory provisions, Petitioners-Appellants cite the criteria of 6 N.Y.C.R.R. § 601.11(c) as if they were applicable to initial permits – with no mention that under the plain language of that regulation such criteria apply only where DEC is "making its decision to grant or deny a permit or to grant a permit with conditions." 6 N.Y.C.R.R. § 601.11(c).

As to the regulation that *does* govern an initial permit, Petitioners-Appellants trumpet the provision stating that an initial permit may include "environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies." 6 N.Y.C.R.R. § 601.7(e). By its own

terms, this provision relates only to the "efficient *use* of supplies." Thus, it appears to contemplate DEC imposing conditions requiring such measures as a leak detection system to make sure that water withdrawn from "supplies" is *used* efficiently (*i.e.*, not wasted). Such regulatory language addressing the efficient *use* of withdrawn water does not authorize DEC to require a reduction in the volume that is withdrawn, particularly because the very same section of the DEC regulations states that "[a]n initial permit … is for the withdrawal volume equal to the maximum withdrawal capacity reported to the department on or before February 15, 2012." *Id.* § 601.7(d).

In an attempt to turn § 601.7(e) into a back door to an initial permit condition requiring closed-cycle cooling, Petitioners-Appellants strain to equate a condition "to promote the efficient *use* of supplies" (§ 601.7(e)) to one that would *reduce* water withdrawals in the first instance. But this interpretation flies in the face of the plain language of § 601.7(e) and would eviscerate the immediately preceding regulation – § 601.7(d) – requiring an initial permit to authorize a withdrawal volume at the previously reported maximum capacity. Such an interpretation would violate the canon that a "'construction which renders one part meaningless should be avoided.'" *Springer v. Board of Educ.*, 27 N.Y.3d at 107 (citation omitted).

Here, the facility returns virtually all of the water it withdraws back to the East River, and Petitioners-Appellants have not alleged that the facility is inefficient with respect to the use of the water it withdraws. Consequently, a regulatory provision contemplating a condition to promote efficient use of supplies provides no support for their claims.

The last nail in the coffin for Petitioners-Appellants' interpretation of the WRPA is provided by their observation that the primary purpose of the statute is to implement the Great Lakes Compact. Opening Br. at 8-9.[4] They note that the Compact includes provisions obligating the State of New York and other Compact parties to impose "requirements that water withdrawals must 'incorporate environmentally sound and economically feasible water conservation measures' and 'result in no significant individual or cumulative adverse impacts to the quantity or quality'" of the affected waters. Opening Br. at 9 (quoting Great Lakes Compact § 4.11(3) and (4)). They further observe that such requirements align with the criteria appearing in ECL § 15-1503(2), and on that basis assert that such standards apply to all WRPA permits. Opening Br. at 11. But Petitioners-Appellants fail to note one critical point: the provisions of the Compact they cite do not apply to pre-existing withdrawals.

[4] ECL § 21-1001 reprints the text of the Great Lakes Compact for easy reference.

The "Decision-Making Standard" criteria they cite apply only to "[p]roposals subject to management and regulation in Section 4.10" (Great Lakes Compact § 4.11), but Section 4.10 applies only to "the management and regulation of New or Increased Withdrawals and Consumptive Uses." *Id.* § 4.10. By contrast, with respect to existing withdrawals, the Compact parties need do nothing more than compile "[a] list of the capacity of existing systems as of the effective date of this Compact," to create a baseline for future basin management. *Id.* § 4.12(2)(ii). The Great Lakes Compact that was the genesis of the WRPA *confirms* that the ECL § 15-1503(2) criteria apply to new and increased withdrawals, and not to initial permits for pre-existing uses.

Thus, Petitioners-Appellants pile one error upon another in conjuring up their claim that DEC violated the WRPA in issuing the initial permit for the East River facility's water withdrawal. As described above, they misconstrue the clear language of the WRPA, the WRPA regulations, and the Compact the statute was enacted to implement. But there is an even more fundamental problem with their case. Petitioners-Appellants are attempting to use the WRPA – a water conservation law – to require installation of immense cooling towers at the facility, as if that technology was a "water conservation measure" within the meaning of the WRPA. But nowhere in their brief do they explain how closed-cycle cooling would conserve water that is not consumed in

the facility's cooling operation and which is returned to the salt waters of the East River. The trial court properly dismissed the Petitioners-Appellants' claim as misreading the relevant statutory and regulatory provisions, and as a misapplication of the WRPA. Its decision should be affirmed.

POINT IV

THE TRIAL COURT PROPERLY FOUND THAT ISSUANCE OF THE INITIAL PERMIT IS EXEMPT FROM SEQRA

Under SEQRA, "agencies . . . shall prepare … an environmental impact statement on any *action* they propose or approve which may have a significant effect on the environment." ECL § 8-0109(2) (emphasis added). As the trial court properly held, the issuance of the initial permit was not an "action" as defined by SEQRA and therefore was not subject to the statute.

The SEQRA regulations define the term "action" as including an agency "approval." 6 N.Y.C.R.R. § 617.2(b). The term "approval" is defined as "a discretionary decision by an agency to issue a permit…." *Id.* § 617.2(e). Here, DEC did not make "a discretionary decision … to issue a permit" because the statute *mandated* that the initial permit be issued. *See* ECL § 15-1501(9) ("The department shall issue an initial permit…."). As the trial court properly observed, the "word 'shall' is non-negotiable; it is a command. Further the legislative history explains this term as a referring to an 'entitlement.'" A35.

Thus, "given that the East River Station complied with the statutory reporting requirements, … DEC had no discretion under Section 15-1501 but to issue the Initial Permit." *Id.* In these circumstances, the issuance of the permit was not an "approval" and thus not an "action" subject to SEQRA.

The trial court also correctly held (A34-35) that the issuance of the initial permit fell under the SEQRA exclusion for "official actions of a ministerial nature." ECL § 8-0105(5). The Court of Appeals addressed the scope of this exemption in *Incorporated Vill. of Atl. Beach v. Gavalas*, 81 N.Y.2d 322 (1993) ("*Gavalas*"). The issue in *Gavalas* was whether the issuance of a building permit that under the relevant ordinance involved the exercise of "some discretion" by the building inspector was subject to SEQRA. Examining the ordinance, the Court found that the building inspector had some discretion, but it was limited to considering consultants' reports designed to assist in determining whether the proposed construction met certain predetermined criteria. Given the limited nature of such discretion, the Court found that SEQRA did not apply. In reaching its decision, the Court articulated two governing principles.

First, rejecting a "mechanical distinction" between ministerial and discretionary acts, the Court found the dispositive issue to be "whether the information contained in an EIS may form the basis for a decision whether or

not to undertake or approve such action." 81 N.Y.2d at 326 (internal quotation marks and citation omitted). Thus, the Court held that "when an agency has some discretion, 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 . . . ." *Id.*

In reaching this result, the Court distinguished its prior decision in *Pius v. Bletsch*, 70 N.Y.2d 920 (1987). There, the discretion involved an agency's exercise of site plan approval authority. Identifying the critical distinction between the two cases, the Court noted the presence of a "relationship" between the environmental concerns elucidated by an EIS and the issues that are germane to an agency's site plan approval power. *Gavalas*, 81 N.Y.2d at 327 ("site plan approval necessarily encompasses land use and environmental considerations, and a building inspector vested with that type of discretion or decision-making authority clearly would be aided by, and entitled to rely upon, the information contained in an EIS").

Second, the Court noted that performance of an environmental review by an agency would be a "meaningless and futile act" where it lacks the authority to base its approval on environmental concerns. *Id.* Thus, the "pivotal inquiry" according to the Court, "is whether the information contained

in an EIS may 'form the basis for a decision whether or not to undertake or approve such action.'" *Id.* at 326 (internal citations omitted).

The Second Department followed *Gavalas* in *Lighthouse Hill Civic Assoc. v. City of New York*, 275 A.D.2d 322 (2d Dep't 2000). The Court there held an authorization issued by the City Planning Commission ("CPC") allowing site work that facilitated subsequent construction to be a ministerial action exempt from SEQRA. Since CPC had discretion to determine whether the work would "disturb existing drainage patterns and soil conditions in the area," project opponents alleged that the authorization required review under the statute. The Appellate Division rejected that claim, ruling that, like the ordinance at issue in *Gavalas*, the Zoning Resolution circumscribed CPC's discretion to a considerably more limited set of issues than those addressed in an EIS. *See also Island Park, LLC v. N.Y.S. Dep't of Transp.*, 61 A.D.3d 1023 (3d Dep't 2009) (DOT's issuance of an order for the closure of a private rail crossing was exempt from SEQRA where DOT's discretion was confined to consideration of safety issues unrelated to the environmental concerns that might be raised in an EIS); *Ziemba v. City of Troy*, 37 A.D.3d 68 (3d Dep't 2006) (discretion granted by city code for issuance of a demolition permit was limited to a narrow set of criteria unrelated to environmental concerns, such that environmental review would be meaningless and futile).

Under the WRPA, the limited discretion DEC may exercise in issuing an initial permit relates to determining whether the applicant is eligible for the entitlement under ECL § 15-1501(9) and 6 N.Y.C.R.R. § 601.7(a); whether its application was submitted by the deadline imposed by 6 N.Y.C.R.R. § 601.7(b)(2); and to imposing required conditions relating to such matters as metering and annual reporting. ECL § 15-1501(6).[5] DEC's determinations with respect to such matters would not benefit from the wealth of environmental information that would be developed during the course of an environmental review. Nor could the information in an EIS help DEC decide whether to issue the initial permit or whether to reduce the permitted volume of water withdrawals in the initial permit, because the WRPA does not grant DEC discretion on these issues: the initial permit must be issued, and it must be issued at the previously reported maximum capacity. Under *Gavalas*, the exercise of DEC's narrowly-channeled discretion with respect to an initial permit is exempt from SEQRA, because preparation of an EIS would be a meaningless and futile act under the circumstances.

The Court below took these principles into careful account in deciding that DEC's issuance of the initial permit was ministerial. It was

[5] In the initial permit for the East River Generating Station, DEC also incorporated the requirements of the SPDES permit by reference, but any discretion in designing those requirements was exercised in that earlier proceeding.

unpersuaded by Petitioners-Appellants' contention that the reference in § 15-1501(9) to "appropriate terms and conditions as required under this article" threw the door open to the sort of discretion meriting an all-encompassing environmental review. Since only those terms and conditions "required by" the WRPA are to be included in such permits, the trial court observed that the conditions DEC imposed called only for "submission of an annual water withdrawal report, annual calibration of water measuring devices, and installation/maintenance of meters or other measuring devices." A36. Given the nature of such conditions, the trial court determined that an "environmental review would not have added anything to the analysis that the parties did not already know …." *Id.* Thus, it found that under these circumstances, the "issuance of the Initial Permit was a … ministerial action exempt from environmental review under SEQRA." A37. This determination is right in line with the instruction of the Court of Appeals in *Gavalas* that an action is ministerial where the information contained in an EIS would not "form the basis for a decision whether or not to undertake or approve such action." *Gavalas*, 81 N.Y.2d at 326 (citation omitted).

Petitioners-Appellants insist that the process for issuing initial permits "requires the exercise of extensive discretion by DEC." Opening Br. at 45. But this assertion is built on sand, because the only arguments put forward

to support it relate to discretion that would be exercised by DEC if it were to measure an application for an initial permit against the criteria set forth in ECL § 15-1503(2). *See* Opening Br. at 46-47. As discussed *supra* at 30-32, such criteria have no bearing on DEC's mandatory issuance of an initial permit for the "maximum capacity" timely reported by an applicant.[6]

Since issuance of the initial permit was exempt from SEQRA, no environmental review was required to address the effect of the facility's continued water withdrawal on the aquatic resources of the East River. However, as discussed *supra* at 8-10, those issues were thoroughly addressed by DEC over the course of several years under the SPDES program, and Petitioners-Appellants could have raised their concerns in the various SEQRA reviews that were performed by DEC in issuing and renewing SPDES permits for the facility. The fact that they did not bestir themselves to participate in those extensive proceedings is no reason to reopen issues that already have been addressed and resolved in the proper forum. As the trial court stated in rejecting their SEQRA claim: "The court is here only to rule upon the issuance of the Initial Permit; the last, and one of the least significant and complicated

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[6] Petitioners-Appellants claim that issuance of the initial permit was a Type I action, which is presumed to require preparation of an EIS, because the water withdrawal exceeds certain volume thresholds. Opening Br. at 42. But issuance of a permit cannot be a Type I action if it is not an "action." *See* 6 N.Y.C.R.R. § 617.2(ai) (defining "Type I action" as "an action … identified in section 617.4"). Since "official actions of a ministerial nature" are not an "action," *see* ECL § 8-0105(5), the non-discretionary issuance of the initial permit was not a Type I action.

steps in the timeline. Petitioners failed to join the conversation or challenge DEC's determinations until the instant proceeding, which was after the critical decisions had already been made and installation of the disliked system had already been completed." A36-37. Since the facility does not consume East River water, the WRPA's directive to conserve water, even if applicable to an initial permit, would not be the occasion to re-examine DEC's earlier determination as to the best technology available to minimize the facility's impacts on East River biota.[7]

The trial court's conclusion that "DEC's discretion regarding the Initial Permit was minimal at best" and that "issuance of the Initial Permit was a … ministerial action exempt from environmental review" (A37) is correct and should be upheld.

[7] Any lingering doubt as to what is really at issue in this case disappears upon reading pages 30-37 of the Opening Brief. Petitioners-Appellants' extended discussion of issues addressed by DEC under the SPDES program is of no relevance to claims challenging an initial permit under the WRPA, a statute enacted for the distinct purpose of conserving New York's water supplies. Because the issuance of an initial permit under the WRPA is not an occasion to rehash the cooling tower saga that has unfolded under the SPDES program, this brief does not address that portion of the Opening Brief.

POINT V

PETITIONERS-APPELLANTS DO NOT HAVE STANDING BECAUSE THEY SUBMITTED NO EVIDENCE OF INJURY

The trial court erred in holding that Petitioners-Appellants have standing to bring this suit. The bedrock principle of standing is that a plaintiff must prove that it will suffer a cognizable, concrete injury from the action it seeks to challenge. Here, no admissible proof was submitted.

Petitioners-Appellants plead "informational injury" as a result of "the lack of … [an EIS] covering the … permit." A48-49 (Pet. ¶¶ 2-3). New York law requires proof of a concrete injury-in-fact from the permit or other proposed action, not merely proof that an EIS has not been prepared:

> Standing requirements are not mere pleading requirements but rather an indispensable part of the plaintiff's case and … must be supported in the same way as any other matter on which the plaintiff bears the burden of proof…. [P]laintiffs may be put to their proof on the issue of injury, and if they cannot prove injury their cases will fail.

Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d 297, 306 (2009) (internal quotation marks and citations omitted).

Neither the affidavit of Gilbert Hawkins (A29-30, A492-513) nor the other affiant (A354-363) mentions the facility's technology to meet the 90% impingement and 75% entrainment reductions required by the 2010 SPDES permit. Neither affiant testifies that a further reduction in impingement or

entrainment would benefit recreational fishing, which is the only activity cited as the basis for standing. A493-494, A355.

Moreover, the trial court did not address Con Edison's evidentiary objections to the affidavits. Neither affiant states (or provides a basis for inferring) that his testimony is based on personal knowledge. Such testimony lacks any foundation or evidentiary value. *GTF Mktg., Inc. v. Colonial Alum. Sales, Inc.*, 66 N.Y.2d 965, 967-68 (1985); *Key Bank of Maine v. Lisi*, 225 A.D.2d 669 (2d Dep't 1996). Neither affiant is a scientist. The fact that a person fishes in the Hudson River watershed (A494) or has served as a lobbyist (A356) does not provide a foundation for offering an opinion as to the cause of any purported decline in fish populations. *See Schecter v. 3320 Holding LLC*, 64 A.D.3d 446, 450 (1st Dep't 2009) (repairman with 20 years of experience maintaining elevators not qualified to offer an expert opinion on the cause of an elevator's mechanical failure). Petitioners-Appellants failed to submit any admissible evidence that the WRPA permit is harming their members and therefore failed to establish their standing.

CONCLUSION

The judgment dismissing this proceeding should be affirmed.

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Respectfully submitted,

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