SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. ALICE SCHLESINGER PART 16

Justice

SIERRA CLUB and HUDSON RIVER FISHERMEN'S ASSOCIATION

INDEX NO. 100524/15

MOTION DATE

- v -

MOTION SEQ. NO. 001

JOSEPH MARTENS, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

The following papers, numbered 1 to _____, were read on this motion for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits— Exhibits _____ | No(s). _____

Replying Affidavits — Exhibits _____ | No(s). _____

In accordance with the accompanying memorandum decision, it is hereby

ORDERED and ADJUDGED that the petition is denied and dismissed with prejudice.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: September 29, 2016

ALICE SCHLESINGER J.S.C.

1. Check one: ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate: ..... MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER
   ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of

SIERRA CLUB and HUDSON RIVER FISHERMEN'S ASSOCIATION,

Index No. 100524/15

Petitioners,

-against-

Mot. Seq. 001 and 002

JOSEPH MARTENS, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Respondents.

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SCHLESINGER, J:

Introduction

In this Article 78 proceeding, petitioners Sierra Club and Hudson River Fishermen's Association ("HRFA") seek to vacate a November 21, 2014 final determination by respondent New York State Department of Environmental Conservation ("DEC").[1] In this determination, DEC issued an "Initial Permit" to respondent Consolidated Edison Company of New York, Inc. ("Con Edison") allowing the latter's thermoelectric power plant on the Lower East Side of Manhattan (the "East River Station") to continue making water withdrawals from the East River.

[1] DEC is sued herein as Joseph Martens, as Commissioner, New York State Department of Environmental Conservation. Mr. Martens was DEC's Commissioner at the time of the determination at issue. The current Commissioner is Basil Seggos.

The East River Station withdraws river water to feed its "once-through" cooling system. As discussed below in greater detail, this type of system takes water from a local source, and circulates it through pipes to condense and absorb heat from steam used to generate electricity. As its name implies, the cooling water is used only once; following condensation, the (now-warmer) cooling water is discharged back out to sea.

Such a system requires massive water withdrawals (*i.e.*, hundreds of millions of gallons of water, per day) to function. As a consequence, fish and other local aquatic life are often drawn in and killed in the intake process. Petitioners, non-profit entities who advocate for the responsible use and treatment of the Earth's ecosystems, resources, and aquatic life,[2] object to the "once-through" method. In contrast, they prefer a "closed-cycle" system, whereby cooling water is recycled for additional uses. Petitioners aver that this method would reduce harm to local aquatic life.

The East River Station has employed a once-through process since the 1950's. However, starting in the early-1990's, and continuing through 2010, DEC and Con Edison jointly evaluated alternative cooling methods and/or measures

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[2] Sierra Club is a large non-profit organization which promotes, among many other things, the responsible use of the Earth's ecosystems and resources. The protection of water and aquatic resources is of particular importance to the Sierra Club. Sierra Club alleges that it and its tens of thousands of members in the New York City metropolitan area have been injured by environmental damages caused to the East River and surrounding areas by Con Edison's once through cooling process and water usage. *See* Petition, ¶ 2.

HRFA is also a non-profit organization, which was founded to protect the aquatic resources of the Hudson River Watershed and adjoining waters. Its members are recreational fishermen who make active use of these waters. HRFA alleges similar injury to that alleged by the Sierra Club. *See* Petition, ¶ 3.

which could improve the existing system with a goal of determining the best-technology available ("BTA") for the East River Station. In 2010, DEC rendered its BTA determination and concluded that the once-through process would remain intact, albeit following the installation of new intake screens modified with fish protective features, new fine mesh intake screen panels, and a low stress fish return system. *See* Con Edison Motion to Dismiss, Ex. "J" at 2-3. DEC found that these technologies would significantly reduce fish mortality. *Id.* Thereafter, Con Edison spent three years and $44 million installing and implementing the above improvements.

Around this time, the New York State Legislature amended the laws governing water withdrawals, requiring entities such as Con Edison to file annual water withdrawing reporting forms and obtain an initial permit for further withdrawals, notwithstanding the fact that it had been making such withdrawals for decades. In May 2013, Con Edison applied for an initial permit. In June 2014, DEC determined that under the statutory scheme and based on Con Edison's compliance therewith, it had no discretion but to approve the permit. DEC also determined that the consideration of the initial permit did not require environmental review under the State Environmental Quality Review Act ("SEQRA").

Petitioners, who ultimately are advocating for installation of a closed-cycle cooling system, challenge the Initial Permit on four grounds. They first assert that DEC violated SEQRA by determining that issuance of the permit was exempt from environmental impact analysis. They next allege that DEC violated

the Waterfront Revitalization and Coastal Resources Act (the "Waterfront Act") by failing to conduct a coastal consistency review of the application for the Initial Permit. They then assert that DEC violated the Water Resources Law ("WRL") by failing to make required determinations and apply appropriate terms and conditions in the Initial Permit. Lastly, they allege that DEC violated the public trust doctrine by failing to consider the impact that the permitted water withdrawal will have on water users and the environment.

Both respondents oppose the petition, and Con Edison cross-moves for dismissal asserting petitioners' lack of standing, expiration of the statute of limitations, failure on the merits, and laches. For the reasons set forth below, Con Edison's cross-motion is granted.

Factual Background

Con Edison's East River Station is an electricity generating facility which occupies an area on the Lower East Side abutting the East River and near heavily used New York City parks and recreational ballfields. The East River Station has been producing electricity for New York City since 1926, and two of the station's generating units (the "Units") have drawn cooling water from the East River under a once-through process since the 1950's. Aff. of Paul Manning, P.E., ¶¶ 6, 13.

The Units operate by boiling water into high-pressure steam, which then passes through a turbine generator causing it to spin and produce electricity. Manning Aff., ¶ 14. At or near the same time, cooling water is drawn in. The steam then flows across thousands of tubes in a condenser, where heat is

exchanged from the steam to the cooling water. *Id.* The cooling water acts to condense the steam back into water, which is sent back to the boiler to be converted into steam all over again. *Id.* The cooling water, which absorbed heat from the steam during the condensation process, is then discharged back into the East River at an increased temperature.

The discharged heat is considered a pollutant. Thus, the East River Station is regulated by DEC under the New York State Pollution Discharge Elimination System ("SPDES").[3] As detailed below, DEC has issued the East River Station permits/renewed permits under SPDES in 2001, 2007, 2010 and 2014.

On one hand, the once-through process does not actually consume East River water, because essentially all of the cooling water is returned, albeit at a higher temperature. Manning Aff., ¶ 15. But on the other hand, the process negatively impacts local aquatic life. When the cooling water is drawn in, larger fish often become "impinged" on the screens covering the intake structures (which prevent debris in the water from entering the plant). Fish eggs and larvae are small enough to pass through the screens and often become "entrained" in the cooling system. *Id.* at 18.

Pre-Initial Permit History

Pursuant to New York City Regulations, "the location, design, construction, and capacity of cooling water intake structures [must] reflect the

[3] SPDES was derived from the federal Clean Water Act (33 U.S.C. §§ 1251, et seq.).

best technology available ["BTA"] for minimizing adverse environmental impact." *See* 6 NYCRR 704.5. Since entering into a Consent Order in 1992 (Manning Aff., Ex. "A"), DEC and Con Edison have worked together to determine the BTA for the East River Station. Under the Consent Order, Con Edison prepared five separate studies over an eight-year period examining the negative impacts of the cooling process on marine life and the potential ways to diminish such impacts. Manning Aff., Ex. "B." Based on these studies, Con Edison submitted to DEC a Final Action Report in January 2000, which discussed alternative measures to once-through to mitigate impingement and entrainment. Manning Aff., ¶ 24.

Two notable alternatives included a plume-abated, evaporative cooling tower system and a closed-cycle system. A closed-cycle system, which petitioners prefer, "recirculates the cooling water by passing it through the condenser system where it is heated in the process of converting steam back into water, then [transporting the water] to cooling towers or similar equipment to be cooled, and then returned to the condenser system."[4]

In a report to DEC dated October 2003 ("Phase I Report"), Con Edison recommended not installing either an evaporative cooling tower or closed cycle system. Manning Aff., ¶ 30. As to an evaporative cooling tower system, Con Edison concluded that it would encroach on the use and enjoyment of the parks

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[4] *See* October 1, 2014 decision of Robert J. McDonald, Supreme Court, Queens County. Aside from this quotation, Justice McDonald's decision will not be further discussed. Although the instant controversy is similar to the Queens proceeding in some aspects, it presents numerous legal issues not raised therein. This court believes the parties in this proceeding deserve an independent and thorough analysis of the specific facts raised herein.

and ballfields adjacent to the East River Station, negatively affect views of nearby apartment buildings, fail to eliminate vapor plumes entirely, generate excessive noise, and create air pollution. Manning Aff., ¶ 31.

As to a closed-cycle system, the Phase I Report noted that to install such a system for this particular station, the erection of two large dry-cooling towers would be necessary. However, such construction would be problematic, because the only feasible placement of the towers would require the elimination of the nearby ballfields. Other locations would not work due to the size of the towers and their impact on neighboring properties. Con Edison believed that such a project would result in substantial opposition by New York City, park proponents and community groups at the least, if not full-blown litigation. Additionally, a closed-cycle system would have significant noise impacts, as well as significantly increase costs, which would be borne by consumers. *See* Affidavit of William C. Nieder, ¶ 12.

Despite the impracticalities posed by a closed-cycle system, the Phase 1 Report acknowledged that a reduction in the flow of cooling water could reduce the negative impacts to local aquatic life. Thus, and in furtherance of its obligations under SPDES, DEC requested Con Edison to conduct a second phase of studies to focus on flow-reduction measures, as well as the use of protective intake screen technology. Con Edison conducted significant research in response to DEC's request, and submitted a report to this effect in December 2004 ("Phase II Report").

The Phase II Report analyzed the effectiveness of several alternative combinations of the flow management and screen technologies under review. These included variable speed pumps alone; modified "Ristroph" (fine mesh) screens alone; variable speed pumps combined with modified Ristroph screens; and variable speed pumps combined with wedge wire screens. Manning Aff., ¶ 35.

Subsequently, DEC required Con Edison to prepare a further analysis of the alternatives discussed in the Phase II Report. The analysis was to detail engineering feasibility, the benefits of each potential cooling process regarding impingement/entrainment, a cost-benefit analysis of each method, the expected completion date of installation of each method, and an estimation of adverse environmental impacts resulting from construction and use of each method. Manning Aff., ¶ 41. Con Edison submitted to DEC a responsive analysis in December 2007. Manning Aff., ¶ 44.[5]

In 2009 and 2011, the Legislature amended some of the laws governing water withdrawals. The legislative history is discussed in the next section below, but the court notes it now to provide context for the remaining timeline.

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[5] As a brief aside, permits issued by DEC under SPDES are not effective indefinitely once issued, and must be periodically renewed. Con Edison's SPDES permit for the East River Station was renewed in both 2001 and 2007, and leading up to both renewals, DEC published a public notice of Con Edison's intent to renew. Such notice afforded the public (*i.e.*, entities such as the petitioners) to comment on and challenge the proposed renewals. Petitioners did not comment on or challenge the proposed renewals either in 2001 or 2007.

In any event, the 2007 renewed permit was issued before DEC had made its final BTA determination on the East River Station. Thus, DEC required Con Edison to undertake further studies, which it did in this December 2007 analysis. Manning Aff., ¶ 41.

In January 2010, DEC initiated a formal process to modify the East River Station's SPDES permit to incorporate its forthcoming BTA determination. On January 13, 2010, DEC released a public notice (the "Notice") explicitly indicating its intent to modify the permit to include its BTA determination and its requirements to reduce impingement and entrainment. Manning Aff., ¶ 46. The Notice stated that the modified permit would include "a requirement to install traveling intake screens modified with fish protective features (*e.g.*, Ristroph screens), use of fine mesh intake screen panels and a low stress fish return system." Cross-Motion, Ex. "J" at 2-3.

The Notice further stated that DEC's BTA requirements for pre-existing cooling water intake structures (such as the East River Station) called for "minimum impact reductions of 80 percent in impingement mortality and 60 percent in entrainment, measured from baseline conditions." *Id.* at 3. The Notice further conveyed DEC's expectation that the proposed technologies would not only meet these minimum impact reduction targets but surpass them, achieving "an estimated 90 percent reduction in impingement mortality and a 75 percent reduction in entrainment from baseline conditions." *Id.*

The Notice also communicated DEC's issuance of a "Negative Declaration" regarding the 2010 permit (the "2010 Negative Declaration"). A Negative Declaration is a determination by DEC that a proposed action will not result in any significant adverse environmental impacts such that an environmental analysis under SEQRA (specifically, an environmental impact statement; "EIS") is required. *See* 6 NYCRR 617.2(y) and 617.7(a). The 2010

Negative Declaration also referenced the intended continued use of the once-through system under the conditions set forth in the Notice. It also set forth why DEC did not select the evaporative cooling tower or closed-cycle systems, explaining that these methods were "rejected due to a combination of key [site] issues as well as high cost." AR 026.

The Notice established February 12, 2010 as the deadline for the submission of public comments on the proposed permit renewal and BTA determination. Significantly, petitioners did not submit any comments or otherwise challenge DEC's proposals.

On May 28, 2010, DEC issued the renewed permit which contained its official and final BTA determination (the "2010 Permit"), which was in accordance with the proposed BTA of the Notice. Petitioners did not comment on or challenge the 2001 or 2007 permits, the 2010 Permit (or DEC's BTA determination set forth therein), and/or the 2010 Negative Declaration.

In August 2010, Con Edison submitted a proposal for implementing the BTA as set forth in the 2010 Permit. Manning Aff., ¶ 52. In November 2010, DEC approved Con Edison's proposal with slight modifications. Manning Aff., ¶ 53.

Thereafter, and over the next three years, Con Edison completed installation of, at a cost of more than $44 million, its project to incorporate the requirements of the BTA determination. The project included the installation of Ristroph-style, dual-flow traveling waters screens and other technology to reduce

impingement and entrainment. Petitioners did not challenge or question Con Edison's actions at any point during the installation process.

In March 2012, Con Edison applied to renew its SPDES permit. Thereafter, in June 2014, DEC issued another Negative Declaration under SEQRA. In November 2014, DEC issued a renewed SPDES permit requiring Con Edison to continue adhering to the BTA imposed by the 2010 Permit. Petitioners did not challenge the 2014 permit or the 2014 Negative Declaration.

Statutory Framework and the 2014 Issuance of the Initial Permit

The New York State Water Resources Law ("WRL"), codified in Article 15 of the Environmental Conservation Law ("ECL"), was enacted in recognition of New York's sovereign power to regulate and control its water resources. *See* ECL § 15-0103(1). Before 2009, the WRL regulated only public water supply systems and did not pertain to industrial water withdrawal systems like the East River Station. But in 2009, the Legislature amended the WRL to require entities that withdraw more than 100,000 gallons of water per day (such as the East River Station) to file annual water withdrawal reports with DEC. ECL § 15-1502(14). These reports contain information on the entities' withdrawals, including their maximum daily water withdrawal capacity. DEC Memorandum of Law, pp. 3-4.

Accordingly, Con Edison submitted annual water withdrawal forms for the East River Station to DEC for 2010, 2011 and 2012. The 2011 form was due on February 1, 2012 and was timely submitted (this is highly significant for reasons

discussed below). The reports listed the maximum daily withdrawal capacity as 373.4 million gallons. Manning Aff., ¶ 67.

In 2011, the WRL was amended once more to require withdrawing entities to obtain "initial permits" from DEC to operate their systems. ECL § 15-1501(1). This amended section explicitly distinguished between "new" and "existing" (*i.e.*, pre-existing) water withdrawals.

Section 15-1501(9) governs pre-existing water withdrawals and provides the DEC "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 [DEC] . . . on or before [February 15, 2012]" (emphasis added). The legislative history of this section and the 2011 amendment expands on the word 'shall' by noting that entities which duly reported their maximum withdrawal capacity before February 15, 2012 are "entitled to an initial permit." Petition, Ex. "B" at 000007 (emphasis added).

Section 15-1501(6) defines the "appropriate terms and conditions" referenced in Section 15-1501(9). It requires the withdrawing entities to "report all information requested by the department, including but not limited to water usage and water conservation measures undertaken during the reporting period." Section 15-1501(4) further provides that DEC shall promulgate regulations to provide for monitoring and reporting, operation and construction of withdrawal systems, and standards that maintain stream flows protective of aquatic life.

To implement the statutory requirements pertaining to initial permits, DEC enacted regulations codified at 6 NYCRR 601.7, *et seq.* Tracking the language of Section 15-1501(9) of the WRL, Section 601.7(d) of the regulations provides that "an initial permit that is issued by the department under this subpart is for the withdrawal volume equal to the maximum withdrawal capacity reported to the department on or before February 15, 2012." Further, where the withdrawal system listed in an initial permit application is associated with use subject to a SPDES permit (as is the case here), DEC will review the initial permit application in coordination with the SPDES permit. 6 NYCRR 601.7(f). In addition, an initial permit may contain conditions to ensure that the water withdrawal system employs "environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies. 6 NYCRR 601.7(e).

In contrast, water withdrawal systems that did not report their maximum daily withdrawal capacities to DEC by February 15, 2012 (*i.e.*, non-preexisting users), are ineligible for an initial permit under Section 15-1501 of the WRL. Instead, they must apply under Section 15-1503. Section 15-1503 does not provide for automatic entitlement to a permit, as it gives DEC broad discretion to grant, deny or impose conditions on a new permit based on numerous factors set forth in Section 15-1503(2). These factors include whether: the quantity of the water supply will be adequate for proposed use; the project is just and equitable to all affected municipalities regarding present and future potable water needs; the need for all or part of the proposed withdrawal cannot be reasonably avoided through efficient use and conservation of existing water supplies; and the

proposed withdrawal is limited to quantities that are considered reasonable for the purposes for which the water use is proposed. But such factors are irrelevant to an application for an initial permit under Section 15-1501.

The regulations further list and discuss certain actions, known as "Type II" actions, that are not subject to environmental review on the ground that they would not have a significant impact on the environment or are otherwise precluded from environmental review under the WRL/ECL and SEQRA. *See* 6 NYCRR 617.5(a). One kind of Type II action is a "ministerial" action, which is defined as "[an] official [act] of a ministerial nature involving no exercise of discretion, including ... permits where issuance is predicated solely on the applicant's compliance or noncompliance with the relevant ... code(s)." 6 NYCRR 617.5(c)(19).

On May 30, 2013, Con Edison applied for an initial permit as a pre-existing withdrawing entity under Section 15-1501. The application stated that, if granted, the permit would allow the East River Station to continue withdrawing up to 373.4 million gallons of water per day from the East River as noted on its annual water withdrawal forms (*see* AR, 170-185).

On June 1, 2014, DEC tentatively determined that Con Edison's application triggered a "Type II" ministerial action that therefore did not require environmental review under SEQRA (AR 200). DEC explained that it had no discretion under Section 15-1501(9) but to issue the Initial Permit, since Con Edison had timely reported its withdrawal capacity for the East River Station:

> As provided by ECL § 15-1501.9 [DEC] has no discretion but to issue 'initial permits' for the amount of the water withdrawals for users that were in operation and properly reported their withdrawals to [DEC] as of February 15, 2012.
>
> Under these circumstances, the issuance of the [Initial Permit] here is covered by the Type II category for ministerial actions . . . 'Ministerial action' is defined [under the SEQRA regulations] as 'an action performed upon a given state of facts in a prescribed manner imposed by law without the exercise of any judgment or discretion as to the propriety of the act." Here, above and beyond the amount of the permitted withdrawal (which is prescribed by statute), the Legislature has restricted [DEC's] discretion to the standard form permit and the imposition of sound water conservation measures. Generally, an action may be deemed ministerial, if it could not have been approved or denied on the basis of [SEQRA's] broader environmental concerns. AR 200.

On November 21, 2014 -- the same day as it issued the renewed SPDES permit, which, as noted above, was not challenged in this matter -- DEC officially issued the Initial Permit to the East River Station in accordance with its above June 2014 tentative determination. The Initial Permit thus allowed the East River Station to continue to withdraw up to 373.4 million gallons of water from the East River per day, and incorporated the BTA requirements set forth in the 2010 Permit. Aff. of Kent P. Sanders, Deputy Chief Permit Administrator of DEC, dated August 7, 2015., ¶ 20.

The Initial Permit also imposed three conditions upon the East River Station. DEC concluded that these conditions, along with other standard requirements set forth by SPDES and in the East River Station's own policies,

satisfied the requirements of 6 NYCRR 601.7(e). The first required the submission of an annual water withdrawal report to detail approved sources of water supply, source capacities, average and maximum day water use data and water conservation, and efficiencies employed during the past calendar year. Sanders Aff., ¶ 21. The second required calibration of all water source meters or other measuring devices for accuracy at least once per year (as required by 6 NYCRR 601.20(a)(2). *Id.* The third mandated installation and maintenance of meters or other measuring devices on all sources of water supply used in the system (as required by 6 NYCRR 601.19). *Id.*

As noted above, DEC issued the Initial Permit and provided written notice to petitioners of same on November 21, 2014. Petitioners commenced the instant proceeding 121 days later, on March 23, 2015.

Discussion

Standing

The court will proceed under the assumption that petitioners have standing in this matter. Here, petitioners' concerns pertain to the quality and quantity of Con Edison's massive water withdrawals, as well as the use and observation of fish. *See Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 NY3d 297 [2009], *citing Lujan v. Defenders of Wildlife*, 504 US 555, 562-563 [1992] ("the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purpose of standing"). Petitioners have submitted the affidavit of Gilbert Hawkins (a member of both the

Sierra Club and HRFA), who has alleged sufficient harm on behalf of himself and petitioners based on issuance of the Initial Permit to establish standing.

Notwithstanding, as set forth below, the petition must be dismissed as untimely, as without merit, and under the doctrine of laches.

The Petition Is Untimely

Section 15-0905(2) of the ECL provides that "[a] special proceeding for [review of determinations made under Article 15 of the ECL] must be commenced within [60] 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." This 60-day limitation period, rather than the standard four-month limitation period set forth in CPLR 217, governs Article 78 proceedings brought under the ECL. *See Spinnenweber v. New York State Dept. of Environmental Conservation*, 120 AD2d 172 [3d Dep't 1986] (petition to vacate DEC determination that petitioner illegally filled land under the ECL denied as untimely when filed more than 60 days after DEC determination made). Further, Section 15-0902(2) applies to the issuance of permits such as the Initial Permit. *See Rochester Canoe Club v. Jorling*, 150 Misc2d 321, 325-26 [Sup Ct Monroe Cty 1991], *appeal dismissed* 179 AD2d 1097 [4th Dep't 1992].

Petitioners' contention that Section 15-0903(1) provides an exclusion to the 60 day statutory period is unavailing. This section pertains to hearing procedures (indeed, the section is entitled "Hearing procedure"), not decisions or determinations made under Article 15 of the ECL. The instant matter did not

concern any hearing before DEC. Rather, it involved a lengthy, interactive process between DEC and Con Edison, and finally, a decision on the Initial Permit. Further on this note, Section 15-0905(1) explicitly refers to "decision[s]" made pursuant to Article 15. The very next subsection of 15-0905, subsection (2), sets forth the 60-day statutory period.

Niagara Mohawk Power Corp. v. State of New York, 300 AD2d 949 [3d Dep't 2002], cited by petitioners, is distinguishable. *Niagara* did not concern a determination by DEC (contrast with *Spinnenweber*, which did). Rather, it involved a determination made by a river regulating district. In finding that the 60-day statutory period did not apply, the Third Department distinguished *Niagara* from *Spinnenweber* in this precise regard, noting that in *Spinnenweber*, "the proceedings involved were clearly before DEC; thus, the statutory language suggesting that the 60-day limitations period applies to proceedings before DEC was not at issue." *Niagara*, 300 AD2d at 951. The court then found that the statutory language was too narrow to give petitioner in *Niagara* fair notice that the 60-day limitations period applied to determinations by river regulating districts. *Id.*

Here, in a proceeding challenging a DEC determination, there is no justification to deviate from *Spinnenweber.* Further, as noted above, DEC provided written notice to petitioners of the Initial Permit on the same date it was issued. Thus, the petition, filed well after the 60-day statutory period expired, must be dismissed as untimely.

Additionally, this proceeding is time-barred to the extent it seeks to reopen and challenge the 2010 Permit and associated 2010 Negative Declaration, by which DEC concluded that an EIS was not required before allowing Con Edison to commence installation in accordance with the BTA determination. *See Young v. Bd. of Trustees of Village of Blasdell*, 89 NY2d 846 [1996]. As discussed below, it was in these determinations, and not by issuance of the Initial Permit (in this court's opinion, a non-discretionary, ministerial act), that DEC found that closed-cycle cooling was not the BTA for the East River Station.

The Petition Is Without Merit

The heart of the parties' dispute centers on the nature and extent of DEC's role and discretion in its 2014 issuance of the Initial Permit. Petitioners essentially believe that DEC's review should have been all-encompassing; because it was not, DEC violated SEQRA, the Waterfront Act, the WRL and the public trust doctrine. In contrast, respondents assert that DEC effectively had no discretion but to issue the Initial Permit in light of Con Edison's timely submission of maximum water withdrawal reports under the 2011 statutory amendment. In respondents' view, the larger issues that petitioners raise now regarding SEQRA, the Waterfront Act, etc. were evaluated and resolved years ago and were not revived by issuance of the Initial Permit.

This court agrees with respondents, finding that DEC's issuance of the Initial Permit should be evaluated in the following narrow context: whether issuance was arbitrary and capricious under the statutory scheme and/or with respect to DEC's own policies and procedures and any other similar laws.

Consequently, the court declines to re-examine the larger issues which were determined before the Initial Permit was issued (*e.g.*, the soundness of the BTA determination; the feasibility of a closed-cycle system).

Thus, "[w]here, as here, an administrative agency takes action without an evidentiary hearing, the standard of review is not whether there was substantial evidence in support of the determination, but rather, whether the determination had a rational basis, and was not "arbitrary and capricious." *Ball v. New York State Dept. of Environmental Conservation*, 35 AD3d 732, 733 [2d Dep't 2006]. Further, in a proceeding seeking judicial review of an administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination. *Id.*

Environmental Review Under SEQRA Is Not Warranted

The fundamental policy of SEQRA is to "inject environmental considerations directly into governmental decision making; thus the statute mandates that '[s]ocial, economic, and environmental factors shall be considered together in reaching decisions on proposed activities.'" *Coca-Cola Bottling Co. of New York, Inc. v. Board of Estimate of City of New York*, 72 NY2d 674, 679 [1988], *citing* ECL 8-0103[7]. Accordingly, SEQRA mandates an environmental impact statement [EIS] for any 'action' proposed or approved by a governmental agency that may have a significant effect on the environment. *See Filmways Communications of Syracuse v. Douglas*, 106 AD2d 185, 186 [4th Dep't 1985], *aff'd* 65 NY2d 878 [1985].

But expressly excluded from the definition of the word 'action' -- and thus SEQRA -- are "official acts of a ministerial nature, involving no exercise of discretion." *Filmways*, 106 AD2d at 186, *citing* ECL § 8-0105(5)(ii).[6] Discretion involves a "latitude of choice within certain legal bounds." *Id. citing* Webster's Seventh New Collegiate Dictionary, p. 238 [1970].

In determining whether an act is ministerial and involves no discretion, the court must determine whether an EIS would form the basis for a decision whether or not to undertake or approve the action. *See Incorporated Village of Atlantic Beach v. Gavalas*, 81 NY2d 322, 326 [1993]. Thus, where an agency is compelled to issue a permit: a) regardless of whether or not an EIS was issued; and/or b) without regard to the contents of an EIS if one was issued, such issuance would be deemed ministerial and exempt from SEQRA. *Id.*

Moreover, this concept applies in certain instances even where the agency retains some discretion. An action is exempt from SEQRA even when the agency retains discretion in taking the action, when the discretion is circumscribed by a narrow set of criteria that would not be influenced or informed by submission of an EIS. *See Gavalas*, *supra*.

The court finds that DEC's issuance of the Initial Permit was a 'ministerial,' Type II action exempt from environmental review under SEQRA. As noted above, Section 15-1501(9) of the ECL provides that DEC "shall issue an initial permit . . . to any person not exempt from the permitting requirements of this

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[6] Such acts are referred to as "Type II" actions by the parties and under the statutory scheme.

section, for the maximum water withdrawal capacity reported to [DEC] . . . on or before [February 15, 2012]" (emphasis added).

It is seldom easy to prove the existence of a negative. But here, this elusive feat can be achieved. The court finds that Section 15-1501(9) applies to the East River Station, given its status as a pre-existing withdrawing entity and the reference to such entities in Section 15-1501(1). Further, Section 15-1501(9) removes all discretion from DEC, upon compliance with the reporting requirements set forth therein. The word 'shall' is unequivocal; it is non-negotiable; it is a command. Further, the legislative history explains this term as referring to an "entitlement."

Thus, given that the East River Station complied with the statutory reporting requirements, the court finds that DEC had no discretion under Section 15-1501 but to issue the Initial Permit. As such, whatever information DEC could have obtained via an environmental review could not have affected its determination to issue or deny an initial permit. Succinctly stated, DEC's analysis under this section was limited to whether the East River Station timely reported its withdrawal capabilities. Since it did, DEC's issuance of the Initial Permit was a 'ministerial' action exempt from review under SEQRA.

Petitioners' argument that DEC had discretion beyond Section 15-1501 which would have been informed by an EIS is unconvincing. As noted above, DEC attached three conditions attached to the Initial Permit concerning "environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies" (6 NYCRR 601.7(e)) and other

mandatory requirements set forth in Section 15-1501(4) of the ECL (*see* p. 12, *supra*). The conditions required submission of an annual water withdrawal report, annual calibration of water measuring devices, and installation/maintenance of meters or other measuring devices. But these conditions, which were required by the regulations applicable to the WRL, are generic for this type of facility (*See* Sanders Aff., ¶¶ 18-22), and were based on information provided by the East River Station in its application for the Initial Permit. Thus, environmental review would not have added anything to the analysis that the parties did not already know, or that the parties were not already bound by.

That is not to say environmental review would have, at all times been futile. As discussed in the lengthy factual background of this matter, there was an intensive, ongoing discourse between DEC and Con Edison regarding the BTA for the cooling system. DEC made several determinations along the way, and invited the public to weigh in throughout the process. It is possible that further discussion and environmental review would have better informed the parties when DEC actually possessed meaningful discretion before and at the time it issued its BTA determination along with the 2010 Permit.

But the court's role now is not to speculate as to what could have been done differently in and prior to 2010. The court is here only to rule upon the issuance of the Initial Permit; the last, and one of the least significant and complicated steps of 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 (*see* discussion on laches, *infra*). DEC's discretion regarding the Initial Permit was minimal at best under the regulations. Accordingly, the court finds that issuance of the Initial Permit was a Type II, ministerial action exempt from environmental review under SEQRA.

Furthermore, the court finds that DEC did not interpret the ECL/WRL inconsistently vis-à-vis the New York State Oil, Gas and Solution Mining Law ("OGSML"). Petitioners point out that Section 23-0503(2) of the OGSML contains a non-discretionary mandate similar to Section 15-1501(9) of the WRL, in that DEC "shall issue a permit to drill . . . a well, if the proposed spacing unit submitted to [DEC] . . . conforms to statewide spacing." Further, they note that DEC has prepared an extensive EIS for oil drilling permits despite this language.

However, the OGSML, unlike the applicable sections of the WRL, contains numerous other provisions which empower DEC with broad discretion to evaluate applications for drilling permits. This discretion pertains to areas which would be informed by an EIS on a case-by-case basis, such as the location of proposed drilling sites, potential impacts of pollution, and other negative events such as blowouts, cavings, seepages and fires.

As noted above, this court found that an EIS would not influence or inform DEC's limited discretion in the present matter. Thus, the court finds DEC's enforcement of the WRL is not inconsistent with its enforcement of the OGSML despite the fact it has issued an EIS for oil drilling permits under a (superficially) similar statute.

Lastly, petitioners' contention that a result in respondents' favor would frustrate the statutory purpose of the WRL is unpersuasive. Petitioners fail to explain how or why an entitlement granted to pre-existing withdrawing entitles would defeat what is likely the Legislature's primary purpose in the 2009 and 2011 amendments: to create a navigable permit program for prospective users.

Environmental Review Under The Waterfront Act Is Not Warranted

The Waterfront Act (formally known as the Waterfront Revitalization of Coastal Areas and Inland Waterways Act) was enacted pursuant to the federal Coastal Zone Management Act (codified at 16 U.S.C. § 1455(d)(2)(D). Under the Waterfront Act (*see* Article 42 of the New York State Executive Law), coastal municipalities in New York are permitted to adopt and implement their own coastal policies through a mechanism known as a local waterfront revitalization plan. When a municipality adopts such a plan, state agencies such as DEC must review proposed actions to determine if they are consistent with the plan in a process known as a coastal consistency review.

However, the Waterfront Act's regulations (codified at 19 NYCRR 600) adopt SEQRA's classification of "actions." Thus, "actions" triggering application of the Waterfront Act "shall not include excluded actions as defined in [SEQRA] or actions not subject to [SEQRA] pursuant to other provisions of law." 19 NYCRR 600.2(b). Therefore, given that SEQRA is not implicated, DEC's determination is not subject to coastal consistency review under the Waterfront Act.

DEC Did Not Violate The WRL

Petitioners' contention that DEC violated the WRL by allegedly failing to consider the imposition of conditions requiring closed-cycle cooling and other water conservation measures (*see* Petition, ¶ 106) is unavailing. Issuance of the Initial Permit was mandatory irrespective of such conditions for the reasons set forth detailing SEQRA's inapplicability.

As to the implementation of "environmentally sound and economically feasible conservation measures," the court again notes DEC's attachment of three conditions in this regard to the Initial Permit: submission of an annual water withdrawal report, annual calibration of water measuring devices, and installation/maintenance of meters or other measuring devices. Such conditions were legitimate, thoroughly evaluated over the years and leading up to issuance of the 2010 Permit, and neither arbitrary nor capricious such that a further review of closed-cycle cooling was warranted before issuance of the Initial Permit.

Furthermore, this court finds that petitioners' contention improperly seeks to expand the WRL beyond its intended scope. The WRL was enacted to conserve water that is "vital to New York's residents and business, who rely on these resources for drinking water supplies, and to support agriculture, manufacturing and other industries and recreation in the State." Bill Sponsor's Memorandum in Support of Legislation, A.B. A5318A (S3798), L. 2011, ch. 401 at page 3 or 4 (Karmel Aff., Ex. "P").

The 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 of the withdrawn water, which is saltwater, back to its source.

Thus, the court declines to consider water conservation themes underlying the WRL as a basis to require further consideration of closed-cycle methods leading to vacatur of the Initial Permit. Such closed-cycle methods, as noted throughout this decision, have already been considered at length and rejected.[7]

Laches Bars the Petition

The court finds that the doctrine of laches further supports dismissal. Laches is defined "as such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. The essential element of this equitable defense is delay prejudicial to the opposing party " *Capruso v. Village of Kings Point*, 23 NY3d 631, 641 [2014], *quoting Schulz v. State of New York*, 81 NY2d 336, 348 [1993]. Prejudice can be established by a "showing of injury, change of position . . . or some other disadvantage resulting from the delay." *In re Linker*, 23 AD3d 187,189 [1st Dep't 2000], *quoting Skrodelis v. Nordbergs*, 272 AD2d 316 [2d Dep't 2000].

[7] The court need not discuss in detail the fourth argument for vacatur cited by petitioners: violation of the public trust doctrine. As DEC argued in its memorandum of law, this doctrine is a legislative function. Thus, because DEC complied with the applicable statutes, it complied with the public trust doctrine. Further, petitioners failed to address DEC's arguments in reply. Therefore, the claim is deemed abandoned. *See Ferrante v. Metropolitan Transp. Auth.*, 7 NYS3d 241 [Sup Ct New York Cty 2015].

Laches has been applied to bar an Article 78 proceeding challenging a DEC determination. *See Save The Pine Bush v. NYSDEC*, 289 AD2d 636 [3d Dep't 2001]. In *Save The Pine Bush*, the petitioners brought an Article 78 challenging DEC's decision to grant the City of Albany a variance permitting the expansion of a landfill. The application process for the variance lasted from April 1999, when the City applied for the variance, until February 2000, when it was granted by DEC. Throughout the process, DEC reviewed and held numerous environmental studies and public hearings on the proposal. Petitioners commenced their action in June 2000, well after the variance had been granted.

But by that time, the City of Albany had already spent thousands of dollars between March and June 2000 clearing the project site and beginning construction. The City had also, during this period, committed to spend millions of dollars in furtherance of other project necessities. In total, the City had already spent or committed itself to spend approximately 70% of the total costs associated with the project before the action was brought. *See Save the Pine Bush*, 289 AD2d at 639-40.

The Appellate Division found not only did laches apply regarding the already-completed construction work, but also that it applied to the uncompleted portions of the project. Given petitioners' delay in bringing the action until after such expenditures had been made, the Court found that laches applied to bar the proceeding in its entirety. *See Save the Pine Bush*, 289 AD2d at 640.

The essential facts in *Save the Pine Bush* are similar to the ones here. DEC's key determinations in our timeline were made years ago via the 2010

Permit and 2010 Negative Declaration. These determinations, made after extensive, formal exchanges between DEC and Con Edison, resolved issues relating to the aquatic impact of water withdrawal at the East River Station, the BTA to minimize such impacts and whether an EIS was required. Further, in these 2010 determinations, DEC notified the public of its BTA findings, which permitted the once-through system to persist if Ristroph screens and other fish-friendly technology were installed. Also, in the 2010 Negative Declaration, DEC notified the public that it had determined that the project was exempt from SEQRA (and thus that no EIS was required).

But irrespective of such notice, which provided the public with an opportunity to comment on and challenge the proposals, petitioners did not challenge the 2010 Permit when it was issued or, crucially, before installation was completed. Likely because they believed that the project could proceed unhampered, Con Edison commenced -- and completed -- installation of the technology DEC had approved and selected, at a cost of $44 million. Requiring Con Edison to remediate and install a different water intake system at this late juncture, following years of acquiescence by petitioners during the most important periods of the BTA evaluation process, would impose immense unjust costs on Con Edison.

Petitioner's one-paragraph opposition to Con Edison's laches arguments demonstrates a fundamental misapprehension of the doctrine. Petitioners contend solely that laches is inapplicable because they challenge only the Initial Permit, not the SPDES Permit issued in 2001 and renewed in 2007, 2010 and

2014. But this decision not to challenge the SPDES Permit -- particularly the 2010 Permit, which was probably the most crucial determination by DEC in the entire timeline -- followed by Con Edison's substantial undertaking, is precisely why laches applies to bar petitioners' challenge to the 2014 Initial Permit.

Conclusion

Accordingly, it is hereby

ORDERED and ADJUDGED that Con Edison's cross-motion to dismiss the petition is granted, and the petition is therefore denied and dismissed with prejudice.

Dated: September 1, 2016

Alice Schlesinger, J.S.C.