To be argued by:
BETHANY DAVIS NOLL
15 minutes requested

Supreme Court, Queens County – Index No. 2949/14

Supreme Court of the State of New York
Appellate Division – Second Department

In the Matter of the Application of

SIERRA CLUB and the HUDSON RIVER FISHERMEN'S ASSOCIATION NEW JERSEY CHAPTER, INC.,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules

Docket No. 2015-02317

-against-

JOSEPH MARTENS, Commissioner, New York State Department of Environmental Conservation,

Respondents-Respondents,

-and-

TRANS CANADA RAVENSWOOD LLC,

Non-Party Respondent.

BRIEF FOR RESPONDENTS

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Dated: December 2, 2015

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PRELIMINARY STATEMENT

This article 78 proceeding arises from Ravenswood Generating Station's water withdrawals from the East River. For decades, Ravenswood has withdrawn water to cool the steam it uses to generate electricity. In 2011, the Legislature amended the Water Resources Law to require existing and new water users to obtain a permit from New York State's Department of Environmental Conservation (DEC) in order to continue withdrawing water. The Legislature further provided, however, that DEC "shall issue" existing users like Ravenswood an "initial permit" for the "maximum water withdrawal capacity" of their existing water withdrawal system, as long they reported that capacity to DEC by February 2012. Environmental Conservation Law (ECL) § 15-1501(9). After Ravenswood submitted the required report and applied for an initial permit, DEC issued the initial permit to Ravenswood for its "maximum water withdrawal capacity," as required by the Water Resources Law. *Id.*

Petitioners Sierra Club and Hudson River Fishermen's Association, New Jersey Chapter, Inc., challenge DEC's issuance

of an initial permit to Ravenswood. They assert that DEC should have imposed terms and conditions on the amount of water Ravenswood withdrew, such as a requirement that Ravenswood use "closed-cycle" cooling instead of its current "once-through" cooling system.

But DEC had no authority to force Ravenswood to limit its water withdrawals in the initial permit, because the 2011 amendments to the Water Resources Law gave Ravenswood a statutory entitlement to an initial permit for its "maximum water withdrawal capacity." Petitioners' argument ignores ECL § 15-1501(9)'s terms and would subvert the Legislature's intent to streamline the permitting procedure for existing water users, in order to minimize disruptions to their business operations.

Petitioners are equally misguided in claiming that—prior to issuing the Ravenswood initial permit—DEC should have conducted an environmental review under the State Environmental Quality Review Act (SEQRA), to assess the impact of Ravenswood's water withdrawals. DEC's issuance of the initial permit was a ministerial act that is exempt from environmental

impact analysis under SEQRA. Ravenswood satisfied the statutory prerequisite for an initial permit and an environmental analysis under SEQRA could not have changed DEC's statutory obligation to issue the initial permit for the "maximum water withdrawal capacity."

QUESTIONS PRESENTED

1. Do amendments to the Water Resources Law and DEC's implementing regulations compel DEC to issue an initial permit to Ravenswood for its existing water withdrawal capacity, without imposing terms and conditions relevant to how much water Ravenswood withdraws?

2. Was DEC's action in issuing the initial permit to Ravenswood for the existing "maximum water withdrawal capacity" a ministerial act exempt from SEQRA because an environmental review could not have materially affected DEC's issuance of the initial permit?

Supreme Court answered yes to both questions.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. New York State's Pollutant Discharge Elimination System (SPDES)

As part of a comprehensive pollution-control framework, the federal Clean Water Act prohibits the "discharge of any pollutant" from a "point source" into navigable waters except as authorized by a permit. *See* 33 U.S.C. §§ 1311(a), 1342. A "point source" is a "discernible, confined and discrete conveyance," including "any pipe, ditch, channel, [or] tunnel." *Id.* § 1362(14). The permit requirement covers a broad range of pollutants, including heat. *Id.* § 1362(6).

New York State issues permits for the discharge of pollutants from point sources under the State Pollutant Discharge Elimination System (SPDES), a program approved by the EPA. *See* 33 U.S.C. § 1342(b), (c); ECL § 17-0801 *et seq.* Obtaining a SPDES permit for the discharge of heat to a water body requires, among other things, that a facility's "cooling water intake structures . . . shall reflect the best technology available for

minimizing adverse environmental impacts.'" 6 N.Y.C.R.R. § 704.5; *see* 33 U.S.C. § 1326(b).

2. New York's Water Resources Law and Water-Withdrawal Permitting Scheme

New York's Water Resources Law provides for State regulation and control of New York's water resources, separate and apart from the State's regulation of polluting activities under the Clean Water Act. *See* ECL § 15-0103(1) *et seq*. Prior to 2011, the Water Resources Law required permits only for public water suppliers that withdrew water for potable uses from New York's rivers, streams, lakes, and groundwater. (R. 338.) *See Matter of Ton-Da-Lay, Ltd. v. Diamond*, 44 A.D.2d 430, 433 (3d Dep't 1974). Water withdrawals for agricultural, commercial, or industrial use were largely unregulated. (R. 338.)

In 2008, New York joined the Great Lakes-St. Lawrence River Basin Water Resources Compact (Great Lakes Compact), which requires signatories to regulate new water withdrawals in the Great Lakes watershed as part of a comprehensive plan for preserving water in the Great Lakes. (R. 339.) *See* ECL § 21-1001

(Great Lakes Compact § 4.10). At that time, several States bordering New York—although not New York itself—had longstanding programs to regulate new industrial and commercial water withdrawals. (R. 338.) *See e.g.*, Conn. Gen. Stat. § 22a-368; Mass. Ann. Laws GL ch. 21G, § 5.

Subsequently, the Legislature sought to introduce a system for regulating industrial and commercial water withdrawals in New York. In 2009, the Legislature amended the Water Resources Law to require Annual Water Withdrawal Reports to be filed with DEC by all water users (including commercial and industrial users) withdrawing more than 100,000 gallons of water per day from state waters. ECL § 15-3301 (repealed and reenacted as § 15-1501(6) (2011)). Filers were required to disclose, among other things, the amount of water withdrawn and returned to the waterways. *Id.*

In 2011, the Legislature further amended the Water Resources Law to impose a permit requirement on all commercial and industrial operators of water withdrawal systems with a water withdrawal system that can withdraw 100,000 gallons or

more per day. *Id.* §§ 15-1501(1), 15-1502(14), 15-1504. Permittees were required to continue reporting water usage and conservation measures. *Id.* § 15-1501(6).

To mitigate concerns that introducing a permit requirement would disrupt the business operations of the hundreds of entities who were already withdrawing water for industrial or commercial uses, the Legislature created a special, "simpler administrative process" to incorporate existing water users into the permitting program. (*See* R. 308-329, 374, 528.) The statutory provision creating that scheme requires DEC to issue existing water users an "initial permit, subject to appropriate terms and conditions as required under [the Water Resources Law,]" for the "maximum water withdrawal capacity" of their systems, providing the water user reported that capacity by February 2012. (R. 336, 527-528.) *See* ECL § 15-1501(9).

Consistent with the statute, DEC's implementing regulations require it to issue initial permits "for the withdrawal volume equal to the maximum withdrawal capacity reported to the Department on or before February 15, 2012." 6 N.Y.C.R.R.

§ 601.7(d). To address stakeholder concerns about duplicative obligations, DEC has undertaken to coordinate its review of water withdrawal permits with the other permit programs it administers, including the SPDES program. *See* (R. 528); 6 N.Y.C.R.R. § 601.7(f).

Upon expiration of an initial permit, users may seek a renewal but are subject to all of the usual DEC rules and regulations that apply to any renewed permits and—depending on the circumstances—could result in the permit's modification, revocation, suspension, relinquishment, transfer or termination. *See e.g.*, 6 N.Y.C.R.R. §§ 601.10, 601.15, 601.16, 621.11, 621.13.

In contrast with its obligation to grant an initial permit to existing water users, *see id.* § 15-1501(9), DEC must consider the eight factors set forth in ECL § 15-1503(2) when reviewing water-withdrawal permit applications from (i) those proposing to construct new water withdrawal systems designed to withdraw 100,000 gallons or more per day of water or (ii) existing water users that have the capacity to withdraw that amount but failed to submit a water withdrawal report to DEC by the statutory

deadline of February 2012. *Id.* §§ 15-1501(1), 15-1502(14). DEC may grant, deny, or impose conditions on a new permit based on its review of eight factors listed in ECL § 15-1503(2). Those factors include whether "the proposed water withdrawal takes proper consideration of other sources of supply that are or may become available," and whether "the need for all or part of the proposed water withdrawal [can] be reasonably avoided through the efficient use and conservation of existing water supplies." ECL § 15-1503(2).

3. The State Environmental Quality Review Act

SEQRA requires New York agencies to undertake an environmental-review process before taking certain administrative actions that may have a significant effect on the environment. *See* ECL § 8-0109(2); 6 N.Y.C.R.R. § 617.5(a). The issuance of a permit ordinarily falls into this category, *see* ECL § 8-0105(4)(i), except when the relevant regulatory scheme makes issuance of the permit "a SEQRA-exempt ministerial act," *Inc. Vill. of Atl. Beach v. Gavalas*, 81 N.Y.2d 322, 326 (1993); *see also*

ECL § 8-0105(5)(ii); 6 N.Y.C.R.R. § 617.5(c)(19). Such acts may involve "some discretion, but that discretion is circumscribed by a narrow set of criteria which do not bear any relationship" to the concerns raised in an environmental review. *Inc. Vill. of Atl. Beach*, 81 N.Y.2d at 326.

Thus, even if there are "inherent environmental consequences" to an action, an agency's action is "ministerial" and therefore exempt from SEQRA review if the agency has "no choice" about whether to issue a permit once certain statutory criteria have been met. *Matter of Citizens for an Orderly Energy Policy, Inc. v. Cuomo*, 78 N.Y.2d 398, 415 (1991); *see also* 6 N.Y.C.R.R. § 617.2(w) (defining "ministerial act").

B. Factual Background

1. Ravenswood Generating Station

The Ravenswood Generating Station, in Long Island City, has operated a water withdrawal system since 1963. Ravenswood is a thermoelectric plant that boils water to create steam, which then spins turbines to generate electricity. Once the steam has passed through a turbine, it must be cooled and converted back into water before it can be reused to produce more electricity. Ravenswood uses a "once-through" cooling system that withdraws water from the East River, circulates it through pipes to absorb heat from the steam in systems called condensers, and then discharges the warmer water back to the East River. (R. 442.) Substantially all of the water withdrawn by the plant is returned to the East River. (R. 72, 459.)

The pipes that draw in water for cooling have screens, which are designed to keep debris in the river from entering the plant. When water is drawn into the pipes, fish and other aquatic life may be killed when they are caught on the intake screens (a problem known as impingement). Fish that are in the early stages

of life, such as eggs and larvae as well as other small aquatic life also sometimes pass through the intake screens and can be killed as the water travels through the facility (a problem known as entrainment). (R. 442.)

2. Ravenswood's SPDES permit

Because it discharges heated water into the East River, Ravenswood has been required for decades to obtain a SPDES permit and is required to use the best available technology for minimizing adverse environmental impacts such as impingement and entrainment of aquatic life. (R. 176-177, 442, 457.) For example, DEC has required Ravenswood to (i) install variable speed pumps, which allow the plant to reduce the volume of cooling water withdrawn; (ii) schedule outages of the cooling water pumps, to reduce the impact on aquatic life; (iii) upgrade intake screens so that the screens work continuously; and (iv) use "low stress fish returns" to increase survival of the larger fish that are impinged on the screens. (R. 444.) Ravenswood's efforts under the SPDES permit have decreased Ravenswood's water withdrawals

by approximately twenty-six percent between July 2012 and April 2013. (R. 60, 68, 444, 457.)

During the SPDES permit process, DEC considered and rejected proposals to require Ravenswood's use of a closed-cycle cooling system, of the type petitioners seek here. DEC noted, among other things, that this would have required Ravenswood to install large cooling towers and that there was no room on site for such towers. (R. 156, 444.) Petitioners have never challenged Ravenswood's current SPDES permit, which expires on October 31, 2017. (R. 167, 566.)

3. Ravenswood's initial water withdrawal permit

Ravenswood is subject to the reporting and permitting requirements of the Water Resources Law because it has the capacity to withdraw over 100,000 gallons of water per day. (R. 454.) It has annually reported its "maximum water withdrawal capacity" to DEC on DEC's Water Withdrawal Reporting Form. (R. 454.) And it filed a report by February 2012, as required to

qualify for an initial water withdrawal permit under ECL § 15-1501(9). (R. 454.)

In May 2013, Ravenswood applied to DEC for an initial permit for its "maximum water withdrawal capacity." (R. 52-86, 455.) In August 2013, DEC issued a notice of complete application to Ravenswood, stating that the permit was not subject to SEQRA review. (R. 87, 455.)

In November 2013, DEC issued an initial permit to Ravenswood, "authoriz[ing] the withdrawal of a supply of water up to 1,390,000,000 gallons per day from the East River for once through cooling and other processes related to electrical generation." (R. 104.) This was the "maximum water withdrawal capacity" Ravenswood had reported by February 2012. (R. 102.) DEC did not conduct SEQRA review for the initial permit. (R. 109, 456.)

After the initial permit was issued, Ravenswood submitted a corrected Withdrawal Reporting Form stating that its actual capacity had always been 1,527,840,000 gallons per day. (R. 203-204, 460.) Ravenswood explained that it had inadvertently

omitted the capacity of its existing low pressure saltwater cooling system, which it uses to provide increased electric generation during natural disasters or other emergencies. (R. 188-89.) For example, during Superstorm Sandy and the storm's aftermath, Ravenswood supplied approximately fifty percent of New York City's electricity, requiring all units to generate at maximum capacity. (R. 188.) DEC accepted the corrected water withdrawal report and issued a corrected initial permit to Ravenswood. (R. 205.)

Consistent with ECL § 15-1501(9), Ravenswood's initial permit contains the terms and conditions mandated by the Water Resources Law and DEC's implementing regulations. (R. 105.) These include the requirement to report its withdrawal capacity and water usage and conservation measures each year. (R. 207.) *See* ECL § 15-1501(6). Also included is the requirement to install meters or other measuring devices on all sources of water supply and to calibrate those meters or other devices annually to ensure accuracy. (R. 207); *See* 6 N.Y.C.R.R. §§ 601.19, 601.20(a)(2).

In addition, consistent with DEC's obligation to coordinate the review of an initial permit application with other existing permits that concern water withdrawals, *see* 6 N.Y.C.R.R. § 601.7(f), DEC has incorporated by reference the measures for water conservation and fish protection set forth in Ravenswood's SPDES permit. (R. 105, 457-458.) Pursuant to its authority to issue an initial water withdrawal permit for a term of up to ten years, ECL § 15-1503(6); 6 N.Y.C.R.R. § 601.7(e), DEC also set the expiration date of the initial permit at the date when Ravenswood's SPDES permit expires: October 31, 2017. (R. 105, 456-458.)

C. **Proceedings Below**

In February 2014, petitioners filed this article 78 petition challenging DEC's issuance of an initial permit to Ravenswood. (R. 39, 44.) Petitioners acknowledged that the Water Resources Law created an "expedited permitting process for existing water users" and that DEC does not have discretion to limit the maximum water withdrawal capacity designated in an initial permit. (R. 224-225.) But they asserted that DEC should have

included terms and conditions in the initial permit that would reduce the volume of water required by Ravenswood. (R. 225, 227, 558-559.) For example, petitioners assert that DEC failed to consider whether Ravenswood should replace its existing once-through cooling system with a closed-cycle cooling system, thus reducing withdrawals by up to ninety-eight percent. (R. 216, 569, 558.) Petitioners also assert that DEC should have conducted SEQRA review before issuing the permit.

DEC's opposition explained that the Water Resources Law does not grant DEC discretion to impose the conditions petitioners sought and that issuance of the initial permit was a ministerial act that did not trigger SEQRA review. (*See* R. 395-411.) Ravenswood, sued as a necessary party, moved to dismiss the petition on the grounds that petitioners lacked standing, petitioners' challenge was an improper collateral attack, and DEC did not violate SEQRA when it issued the initial permit. (R. 475-481.)

Supreme Court denied the petition. (R. 21.) The court stated that Ravenswood was "entitled" to an initial permit for its existing

water withdrawal system and that DEC had no ability to limit the "maximum water withdrawal capacity" in the initial permit, including by requiring Ravenswood to reduce the amount of water it needed by installing a closed-cycle cooling system. (R. 19-20.) The court also rejected petitioners' claim that DEC violated SEQRA. It held that DEC properly considered issuing the initial permit a ministerial act, because an environmental review under SEQRA would not have materially affected DEC's obligation to issue an initial permit to Ravenswood for its "maximum water withdrawal capacity." (R. 19-20.) The court further stated that to the extent the statute was ambiguous, DEC's interpretation of the statute was entitled to deference. (R. 21.) The court entered judgment in December 2014. (R. 7.)

ARGUMENT

DEC COMPLIED WITH GOVERNING LAW IN ISSUING RAVENSWOOD'S INITIAL PERMIT

A. DEC Complied with the Water Resources Law.

1. The Water Resources Law compelled DEC to issue the initial permit to Ravenswood.

The Water Resources Law establishes different categories of water withdrawal permits, depending on whether the applicant is an existing user or a new user. Existing water users that reported their maximum water withdrawal capacity to DEC by February 15, 2012, are "entitled to an initial permit based on their maximum water withdrawal capacity." (R. 336, 526.) ECL § 15-1501(9). DEC's regulations accordingly require it to issue an initial permit "for the withdrawal volume equal to the maximum withdrawal capacity reported to the Department on or before February 15, 2012." 6 N.Y.C.R.R. § 601.7(d).

All other applicants for new and modified withdrawals must submit an application for a water withdrawal permit under procedures that grant DEC discretion to deny the application or grant a permit with conditions. ECL §§ 15-1501(1), 15-1503(2).

Such applicants include persons proposing new water withdrawal systems, existing users that failed to report their maximum water withdrawal capacity by the February 2012 statutory deadline, and existing users proposing modifications that would raise their water usage to or above 100,000 gallons of water per day. ECL § 15-1501. In reviewing those applications, DEC must consider eight statutorily-enumerated factors, including whether the quantity of water supply will be adequate for the proposed use and whether the need for the water withdrawal can be avoided. *See* ECL § 15-1503(2); 6 N.Y.C.R.R. § 601.11(c). DEC may also impose conditions in the permit to address those factors. ECL § 15-1503(4).

2. The Water Resources Law does not authorize imposition of petitioners' proposed conditions.

Petitioners recognize that the size of the "maximum water withdrawal capacity" in an initial permit is not discretionary under § 15-1501(9). App. Br. at 41. They nonetheless argue that § 15-1501(9)'s reference to "appropriate terms and conditions" required DEC to consider the factors set forth in ECL § 15-1503(2)

and to impose conditions—such as the obligation to install a closed-cycle cooling system—to reduce the amount of water needed by Ravenswood.[1] App. Br. at 27, 56-57. (*See also* R. 227.) Petitioners misunderstand the law.

Any conditions limiting Ravenswood's water withdrawals—including by changing its water withdrawal capacity—would conflict with Ravenswood's statutory entitlement to an initial permit for its "maximum water withdrawal capacity." *See* ECL § 15-1501(9), 6 N.Y.C.R.R. § 601.7(d). Moreover, petitioners' reading is inconsistent with the plain text of the statute. By their terms, the eight factors in section 15-1503(2) do not apply to initial permits because they expressly apply to "proposed" or "future" withdrawals instead.

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[1] Petitioners also argue for the first time on appeal (Br. at 57-58) that it would be contrary to the State's responsibility under the Great Lakes Compact for DEC to grant initial permits to existing users in the Great Lakes watershed without reviewing the conditions in section 15-1503(2). But the Great Lakes Compact does not require permits for existing water withdrawals. *See* ECL § 21-1001 (Great Lakes Compact § 4.10). And, in any event, Ravenswood is not located in the Great Lakes watershed.

For this same reason, petitioners are mistaken in claiming (Br. at 7, 30) that their position finds support in DEC regulations providing for an initial permit to include water conservation and efficiency measures. *See* 6 N.Y.C.R.R. § 601.7(e). Those regulations cannot be the basis for imposing an obligation that would be inconsistent with the contours of the permit scheme created by ECL § 15-1501(9).

Indeed, Petitioners' proposed interpretation of the Water Resources Law and DEC's implementing regulations would eliminate the distinction between initial and new permits in a manner at odds with the Legislature's purpose in creating the initial permit scheme. *See Riley v. County of Broome*, 95 N.Y.2d 455, 463 (2000) (even where a statute's text is clear, the legislative history is relevant to interpreting its terms). The "more efficient and less costly 'initial permits' process" at ECL § 15-1501(9) was included to address particular concerns raised by the regulated community. (R. 528.) Specifically, existing commercial and industrial water users sought an "automatic" initial permit authorizing them to withdraw water at existing volumes, in order

to minimize disruptions to their business operations. (*See* R. 474, 528). And progress on the bill stalled until the Legislature added a provision giving existing users this entitlement.[2] Requiring those users to submit to conditions that would limit their ability to withdraw water at existing volumes, as petitioners seek, is inconsistent with the legislative intent in passing the statute.[3]

None of this is to say that existing water users like Ravenswood are "exempt" from the Water Resources Law, as Petitioners assert (Br. at 4). Instead, the law requires them to obtain an initial permit and, once they have received the initial

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[2] See, e.g., Peter Mantius, "Local N.Y. Environmentalists Fight Fast Tracking of Water Bill," *Natural Resources News Service* (April 18, 2011) (reporting that the Business Council reversed course to support the water withdrawal permit scheme after Legislature added the provision for initial permits).

[3] In 2010, the bill was introduced in the Assembly and the Senate without the "initial permits" provision. *See* Assembly Bill A11436 (June 14, 2010) and Senate Bill 8280 (June 19, 2010). While in committee, both the Assembly and Senate Bills were amended to include the initial permits provisions. *See* Senate Bill S8280A (June 19, 2010) (passed the Senate and delivered to the Assembly on July 1, 2010), Assembly Bill 11436-B (August 4, 2010). These bills were reintroduced in 2011 and passed as Senate Bill S3798 and Assembly Bill A5318 during that session.

permit authorized by § 15-1501(9), such users are regulated under the same rules that apply to any other permittee. *See* 6 N.Y.C.R.R. § 601.7(e). See *supra* at 8.

Moreover, the initial permit is not the only mechanism for addressing petitioners' concerns about water conservation practices generally, and Ravenswood's practices in particular (*see* Br. at 7, 29-30). As petitioners acknowledge, Ravenswood's discharge permit under the SPDES program includes conditions governing the plant's water pumps and screens, as well as other measures designed to reduce fish impingement and entrainment and to reduce the amount of water that Ravenswood withdraws. App. Br. at 31. And those conditions reduced Ravenswood's water use by twenty-six percent in the period between July 2012 and April 2013. (R. 60, 68, 444, 457.) Petitioners do not challenge Ravenswood's SPDES permit here. (R. 566.)

B. Ravenswood's Initial Permit Was Exempt from SEQRA Review.

1. DEC's issuance of the initial permit was a ministerial act.

Because ECL § 15-1501(9) compelled DEC to issue an initial permit to Ravenswood, see *supra* Point A, DEC was justified in concluding that the issuance of the permit for Ravenswood's "maximum water withdrawal capacity" was a ministerial act exempt from SEQRA review. Under the ministerial-act exemption, "the pivotal inquiry . . . is whether the information contained in an [environmental review] may form the basis" of the agency's approval decision. *Inc. Vill. of Atl. Beach v. Gavalas*, 81 N.Y.2d 322, 326 (1993) (quotation marks omitted). SEQRA thus does not apply where the Legislature has directed an agency to act based on certain statutory criteria and has otherwise removed its discretion in making the decision, because an environmental review cannot change the agency's action. *Matter of Citizens for an Orderly Energy Policy, Inc. v. Cuomo*, 78 N.Y.2d 398, 415 (1991).

The Court of Appeals' decision in *Matter of Citizens for an Orderly Energy Policy* is instructive. There, the Legislature, in the

Long Island Power Authority Act, directed the closure of a nuclear power plant upon the Long Island Power Authority's acquisition of the plant. *Id.* The Legislature was "inescapably aware of the inherent environmental consequences of [the] shutdown" and "necessarily judged for itself the propriety of closure and decommissioning and mandated such action." *Id*. Thus, LIPA's decision to decommission the facility was not subject to SEQRA because it had "no choice" but to follow the Legislature's commands once the statutory criteria were met. *Id*; *accord Matter of Lighthouse Hill Civic Ass'n v. City of N.Y.*, 275 A.D.2d 322, 323 (2d Dep't 2000) (approval of an application to modify topography and remove trees was ministerial act because the agency's authority was limited to examining whether defined criteria were met); *see also* Br. for Resp.-Resp. at 10, *Matter of Lighthouse Hill*, 275 A.D. 2d 322, 2000 WL 35595934, at *5-6, *10.

Here, ECL § 15-1501(9) required DEC to issue an initial permit for maximum water withdrawal capacity to an existing user that, like Ravenswood, reported such capacity to DEC by the statutory deadline. See *supra* Point A. DEC had no authority to

deny such an application based on environmental concerns—such as the amount of water being withdrawn (*see* App. Br. at 38-39)[4]—and thus its decision-making process would not have been aided or modified by environmental interests. *See Gavalas*, 81 N.Y.2d at 327-28. Conducting a SEQRA review under such circumstances would serve no purpose. Accordingly, no environmental review was required to issue the initial permit. *Id.* at 326.

Petitioners are mistaken in arguing that, even if DEC lacked discretion to prescribe terms and conditions for Ravenswood's initial permit under section 15-1503(2), DEC did exercise discretion in other ways that would trigger SEQRA review. The actions they identify do not demonstrate that SEQRA review was required. For example, in determining that the Water Resources Law did not permit it to impose conditions under § 15-1503(2) on Ravenswood's initial permit (*see* Br. at 50), DEC was undertaking

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[4] Petitioners argue that the sheer amount of water that Ravenswood withdraws triggers SEQRA review, but, even if the amount of water is high, a ministerial action cannot be reclassified by DEC as an action that requires SEQRA review. 6 N.Y.C.R.R. § 617.4(a)(2).

legal analysis, which is not an agency "action" subject to SEQRA review. *See* 6 N.Y.C.R.R. § 617.5(c)(31) (exempting interpretations of rules and codes). Indeed, to hold that SEQRA applies where DEC is simply analyzing whether an action is ministerial would necessarily nullify SEQRA's exception for ministerial acts.

Petitioners are similarly incorrect in asserting that DEC exercised discretion, for purposes of SEQRA, in prescribing a four-year term for the initial permit. App. Br. at 51. To be sure, the statute and DEC's implementing regulations allow DEC to issue an initial water withdrawal permit for a term of up to ten years. ECL § 15-1503(6); 6 N.Y.C.R.R. § 601.7(e). But DEC's regulations require it to coordinate the issuance of water withdrawal permits with other water permits, *see* 6 N.Y.C.R.R. § 601.7(f), to create a more streamlined process for the regulated community and any interested parties. DEC therefore set Ravenswood's initial permit term at four years to ensure that the initial permit would expire at the same time as Ravenswood's SPDES permit, and that any renewal would be considered in tandem with Ravenswood's SPDES permit renewal. (R. 456.) Because that decision was

required by DEC's regulations, environmental review would not have affected DEC's decision.

Finally, petitioners are not helped by their argument—raised for the first time on appeal—that DEC exercised discretion for purposes of SEQRA when it issued a corrected initial permit reflecting Ravenswood's submission of a corrected water withdrawal report. *See* App. Br. at 42-43, 51; *Matter of Fernandez v. City of N.Y.*, 131 A.D.3d 532, 533-34 (2d Dep't 2015) (declining to address contentions "improperly raised for the first time on appeal"). The decision to accept the correction did not change the actual capacity of Ravenswood's facility as of February 15, 2012; it simply corrected an inadvertent omission that resulted in a mistaken number. This was a routine administrative act that could not have been informed by an environmental review. *See, e.g.*, 6 N.Y.C.R.R. § 617.5(c)(20) (exempting from SEQRA "routine . . . administration and management").

2. DEC's Interpretations of the Water Resources Law and SEQRA Are Entitled to Deference.

As Supreme Court correctly observed (R. 21), even if the 2011 amendments to the Water Resources Law were not clear, DEC's interpretation of the initial permits provision and SEQRA merit deference from a reviewing court. *See Matter of Natural Res. Def. Council, Inc. v. DEC*, 25 N.Y.3d 373, 397 (2015). As long as DEC's construction of the ECL, SEQRA, and its own regulations is "not irrational or unreasonable" it must be upheld. *Id.* (quotation marks omitted); *see also Flacke v. Onondaga Landfill Sys., Inc.*, 69 N.Y.2d 355, 363 (1987).

ECL § 15-1501(9) states that initial permits must be subject to "appropriate" terms and conditions, not that they must be subject to the *same* terms and conditions as new permits. Moreover, that term must be read in conjunction with the statute's requirement that DEC issue initial permits for an existing user's maximum water withdrawal capacity. *Id.*; *Friedman v. Conn. Gen. Life Ins. Co.*, 9 N.Y.3d 105, 115 (2007) (a court should harmonize and give effect to all parts of a statute). As

noted earlier, see *supra* Point A.2, petitioners' reading would eliminate the requirement that DEC issue initial permits for the maximum water withdrawal capacity and thus cannot be sustained.

DEC's construction of the Water Resources Law reasonably implements the Legislature's direction to treat existing water withdrawals differently from proposed new or modified water withdrawals by issuing initial permits that allow such facilities to withdraw water at existing volumes with their existing systems. *Compare* ECL § 15-1501(9) *with* ECL § 15-1503(2). This approach has enabled DEC to incorporate hundreds of existing users into the new water withdrawal permit program using a streamlined process, as the Legislature envisioned. (*See* R. 339.) And because DEC was indisputably required to issue the initial permit for Ravenswood's maximum water withdrawal capacity, DEC appropriately determined that an environmental review under SEQRA would have been futile. See *supra* Point A and Point B.1.

Petitioners' arguments to the contrary are unavailing. Petitioners first argue that the Court should not defer to DEC

because DEC's responses to public comments, prepared when DEC promulgated its regulations, suggested that DEC might apply similar standards to new and initial permits. App. Br. at 48-50, 56. But that was a generalized statement that was issued outside the context of any concrete agency action. DEC's position in this permit action must be evaluated for consistency with governing statutes and regulations not an early generalized statement. *See* State Administrative Procedure Act § 102(2)(b)(iv); *Matter of Henn v. Perales*, 186 A.D.2d 740, 741 (2d Dep't 1992). Here, as demonstrated above, DEC's position is consistent with the statute and regulations.

Petitioners also argue—for the first time on appeal—that DEC's interpretations of the 2011 amendments and of SEQRA are not entitled to deference because DEC purportedly took a contrary position in construing a totally separate statute: the Oil, Gas and Solution Mining Law. App. Br. at 52-53. That statute requires DEC to "issue a permit to drill . . . a well, if the proposed spacing unit submitted to [DEC] . . . conforms to statewide spacing." ECL § 23-0503(2). As petitioners note, DEC did not find its discretion

constrained by the statute when issuing permits and conducting SEQRA review for them.

Because petitioners did not raise this argument below, the Court should disregard it. *Matter of Fernandez*, 131 A.D.3d at 533-34. In any event, the argument is meritless. Unlike the Water Resources Law, the Oil, Gas and Solution Mining Law expressly grants DEC discretion to require the drilling contemplated by section 23-0503(2) to be conducted in a manner that prevents pollution of fresh water supplies or prevents movement of oil and gas underground. ECL § 23-0305(8)(d); 6 N.Y.C.R.R. § 554.1.

C. Petitioners' Remaining Arguments Are Without Merit.

Petitioners assert two final arguments, both of which fail. First, petitioners argue that DEC should have reviewed Ravenswood's initial permit to determine whether it was "consistent with the coastal area policies" applying to New York City's coastal zone. App. Br. at 60-62. The state Waterfront Revitalization of Coastal Areas and Inland Waterways Act ("Waterfront Act") was enacted to encourage and support local

governments seeking to revitalize their waterfronts. Executive Law § 915(l). *See also* 16 U.S.C. § 1455(d)(2)(D). Under the Waterfront Act, coastal municipalities in New York State can adopt and implement local management coastal plans. Executive Law § 915. Once a municipality adopts such a plan, state agencies must review their proposed "actions" to ensure that they are consistent with the local waterfront plan. *Id.* § 916(1)(b).

As petitioners acknowledge (Br. at 62), however, a state "action" that is not subject to review under SEQRA, including a ministerial act, is also not subject to consistency review under the Waterfront Act. 19 N.Y.C.R.R. § 600.2(b). Thus, because the initial permit was not subject to SEQRA, DEC was correct to determine that consistency review was not required.

Petitioners next invoke DEC's "public trust obligations" as a reason why the permit should be annulled. App. Br. at 67. The State has the duty to "control and conserve its water resources for the benefit of all the inhabitants of the State." *Matter of City of Syracuse v. Gibbs*, 283 N.Y. 275, 283 (1940). To exercise this function, the State acts through the Legislature to pass statutes

that protect and conserve water. *See Suffolk County v. Water Power & Control Comm'n.*, 245 A.D. 62, 64 (3d Dep't 1935), *modified and aff'd*, 269 N.Y. 158 (1935) ("conservation or diversion of waters is a legislative function"). And here the State satisfied its public trust obligations by enacting the Water Resources Law and SEQRA.

For its part, DEC complied with the Water Resources Law and SEQRA in issuing the initial permit. See *supra* Points A and B. Petitioners cite no provision of law that imposes a separate set of "public trust obligations" on DEC, on top of existing laws.

CONCLUSION

For the foregoing reasons, the Court should affirm Supreme Court's judgment.

Dated: New York, NY
December 2, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 670.10.3(f)

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