No. 100524/15

To be argued by:
DAVID S. FRANKEL

Supreme Court, New York County

Supreme Court of the State of New York
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 Law & Rules

-against-

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

Respondents-Respondents.

BRIEF FOR STATE RESPONDENT

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Dated: September 13, 2017

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PRELIMINARY STATEMENT

This article 78 proceeding arises from Consolidated Edison Company of New York, Inc.'s (ConEd) water withdrawals from the East River. For the better part of a century, ConEd's East River Generating Station has withdrawn water to cool the steam it uses to generate electricity.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 ConEd an "initial permit" for the "maximum water withdrawal capacity" of their existing water withdrawal system, as long they properly reported that capacity to DEC by February 2012. Environmental Conservation Law (ECL) § 15-1501(9). After ConEd submitted the required report and applied for an initial permit, DEC issued that permit to ConEd 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., brought an article 78 proceeding to challenge DEC's issuance of the initial permit. As Supreme Court, New York

County (Schlesinger, J.) determined, their suit is time-barred, as it was brought months after the sixty-day limitations period set by ECL § 15-0905(2) for challenging final DEC decisions under the Water Resource Law. And in any event, as Supreme Court further held, petitioners' arguments are premised on a misunderstanding of DEC's obligations when it issues an initial permit.

Petitioners assert that DEC should have imposed substantive terms and conditions in the initial permit to reduce the amount of water ConEd withdrew, such as a requirement that the East River Station use "closed-cycle" cooling instead of its current "once-through" cooling system. But DEC had no authority to include such terms in ConEd's initial permit because the 2011 amendments to the Water Resources Law gave ConEd a statutory entitlement to an initial permit for its "maximum water withdrawal capacity." Petitioners' argument ignores ECL § 15-1501(9)'s terms and conflicts with the Legislature's intent to streamline the permitting procedure for existing water users, in order to bring those users into the new permitting system while minimizing disruptions to their business operations.

Petitioners are equally misguided in claiming that, prior to issuing ConEd's initial permit, DEC should have conducted an environmental review under the State Environmental Quality Review Act (SEQRA), to assess the impact of ConEd's water withdrawals. DEC's issuance of the initial permit was a ministerial act that is exempt from environmental impact analysis under SEQRA. ConEd satisfied the statutory prerequisite for an initial permit and an environmental analysis under SEQRA could not have changed DEC's statutory obligation to issue an initial permit for ConEd's "maximum water withdrawal capacity."

ISSUES PRESENTED

1. Was petitioners' suit, brought 122 days after DEC issued the initial permit to ConEd, time-barred under the sixty-day limitations period for challenges to DEC decisions under the Water Resources Law?

2. Does the Water Resources Law compel DEC to issue an initial permit to ConEd for its existing water withdrawal capacity, without imposing terms and conditions that would affect how much water ConEd withdraws?

3. Was DEC's action in issuing the initial permit to ConEd 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 each question.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

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

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 impact." 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—codified as ECL article 15—provides for State regulation and control of New York's water resources, separate and apart from the State's regulation of polluting activities under ECL article 17 and the Clean Water Act. Prior to 2011, only public water suppliers that withdrew water for potable uses from New York's rivers, streams, lakes, and groundwater, required permits to make withdrawals. (R. 384.) *See Matter of Ton-Da-Lay v. Diamond*, 44 A.D.2d 430, 433 (3d Dep't 1974). Water withdrawals for agricultural, commercial, or industrial use were largely unregulated. (R. 384.)

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.[1] (R. 385.) *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. 384.) *See e.g.*, Conn. Gen. Stat. § 22a-368; Mass. Gen. Laws ch. 21G, § 5.

Subsequently, the New York 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 § 15-1501(6).[2] Filers were required to disclose, among other things, the maximum capacity of the water withdrawal system, the amount of water

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[1] Petitioners overstate (Br. at 7-10) the scope of the Great Lakes Compact. The Compact does not require permits for existing water withdrawals, and ConEd is not located in the Great Lakes watershed. *See* ECL § 21-1001 (Great Lakes Compact § 4.10). Thus, New York's subsequent legislative enactments (*infra* at 6-9), created an expanded regulatory scheme that goes beyond the obligations imposed by the Compact.

[2] Originally enacted in 2009 as § 15-3301, in 2011 the Legislature repealed the section and reenacted it as § 15-1501(6).

withdrawn, and the amount of water not consumed that was 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* 34 N.Y. Reg. 1, 3-5 (Nov. 28, 2012) (describing DEC's work with stakeholders in developing legislation and reasons for initial permit scheme for existing users); Letter from Thomas M. West to Sen. Mark Grisanti, *reprinted in* Bill Jacket for ch. 401 (2001) at 45 (concerns of one stakeholder). (*See* R. 398-417.)

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, provided that the water user reported that capacity by February 2012.[3] (R. 382.) ECL § 15-1501(9); 34 N.Y. Reg. at 3-5. The inclusion of this provision was critical to the passage of the legislation, as the bill garnered crucial stakeholder support only after the Legislature amended the bill to include an initial permit entitling existing users to their maximum reported capacity. See *infra* at 31-32.

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

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[3] That provision of the amended statute, ECL § 15-1501(9), only applies to withdrawals of water for non-potable purposes; it does not apply to existing public water supplies, which were subject to the permit requirement under the pre-existing law. *See* ECL § 15-1501(2); 6 N.Y.C.R.R. § 601.7(a).

coordinate its review of water withdrawal permits with the other permit programs it administers, including the SPDES program. *See id.* § 601.7(f); 34 N.Y. Reg. at 4.

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

In contrast to its statutory obligation to grant an initial permit to existing water users, *see* ECL § 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, and (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." *Id.* § 15-1503(2).

3. The State Environmental Quality Review Act

SEQRA requires New York agencies to undertake an environmental-review process before taking certain actions that may significantly impact the environment. *See id.* § 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," *Incorporated Vil. of Atl. Beach v. Gavalas*, 81 N.Y.2d 322, 325 (1993); *see also* ECL § 8-0105(5)(ii); 6 N.Y.C.R.R. § 617.5(c)(19). Such acts may involve "some discretion" so long as "that discretion is circumscribed by a narrow set of criteria which do not bear any relationship" to the concerns that would be considered in an environmental review. *Gavalas*, 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 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. ConEd's East River Generating Station

ConEd's East River Generating Station in lower Manhattan has operated a water withdrawal system since the 1950s. The station 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 is cooled and converted back into water, and then reused to produce more electricity in a self-contained, continuous cycle. To cool the steam, the station uses a separate "once-through" cooling system that withdraws water from the East River, circulates that water through a separate system of pipes (called condensers) to absorb heat from the steam, and then discharges the used warmer water back to the East River. (R. 259, 551.) Substantially all of the water withdrawn by the plant is returned to the East River. (R. 263.)

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 sometimes pass through the intake screens and can be killed as the water travels through the facility (a problem known as entrainment). (R. 551.)

2. ConEd's SPDES permit

Because its East River Generating Station discharges heated water into the East River, ConEd has been required for decades to have a SPDES permit and is required to use the best technology available for minimizing adverse environmental impacts such as the impingement and entrainment of aquatic life. (R. 97-98, 551.) For example, DEC has required ConEd to: conduct detailed studies of the station's effect on aquatic species that inhabit the East River; use more advanced "Ristroph" screens and a "low stress fish return system" to reduce fish mortality from impingement on screens; use fine mesh panels on a seasonal basis to reduce entrainment of fish eggs and larvae; and monitor

and report to DEC on the effectiveness of such measures. (R. 97-98, 285, 340-341, 552.) DEC required that the technologies used by ConEd reduce entrainment by 75 percent and impingement by 90 percent. (R. 341.)

As part of the SPDES process—and as reflected in the SPDES permit modification issued to ConEd on May 28, 2010—DEC considered and rejected an alternative that would require ConEd to use a closed-cycle cooling system (in place of its once-through system) of the type petitioners seek here. DEC noted, among other things, that such a requirement would have required ConEd to install large cooling towers that would have been incompatible with siting constraints and would have entailed prohibitive costs. (R. 110-113, 553, 555-560.) Petitioners did not challenge ConEd's SPDES permit in 2010, nor its renewal of the permit in 2014. (R. 330.) ConEd's SPDES permit expires on November 30, 2019. (R. 330, 567.)

3. ConEd's initial water withdrawal permit

ConEd's East River Generating Station 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. 564.) ConEd has regularly reported the station's "maximum water withdrawal

capacity" to DEC on Annual Water Withdrawal Reports. (R. 564.) And ConEd filed a report by February 2012, as required to qualify for an initial water withdrawal permit under ECL § 15-1501(9). (R. 564.)

In May 2013, ConEd applied to DEC for an initial permit for its maximum water withdrawal capacity. (R. 52-86, 565.) On June 3, 2014, after ConEd provided additional information that DEC had requested, DEC issued a notice of complete application, stating that the permit was not subject to SEQRA review. (R. 288-290, 565-566.)

On November 21, 2014, DEC issued an initial permit to ConEd, "authoriz[ing] the withdrawal of a supply of water up to 373,400,000 gallons per day (GPD) from the East River for once through cooling and other processes related to electrical generation." (R. 325.) This was the "maximum water withdrawal capacity" ConEd had reported by February 2012. (R. 596.) DEC did not conduct SEQRA review for the initial permit. (R. 312, 566.)

Consistent with ECL § 15-1501(9), ConEd's initial permit contains the terms and conditions mandated by the Water Resources Law and DEC's implementing regulations. (R. 326-327.) These include the requirement to report its withdrawal capacity and water usage and

conservation measures each year. (R. 327.) *See* ECL § 15-1501(6). Also included is the requirement to measure withdrawals of water and to calibrate the measuring devices annually to ensure accuracy.[4] (R. 327.) *See* 6 N.Y.C.R.R. §§ 601.19, 601.20(a)(2).

In addition, DEC took two further steps in light of its 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), First, DEC incorporated by reference the measures set forth in ConEd's SPDES permit to minimize adverse environmental impacts. (R. 326, 568.) Second, under its authority to issue an initial water withdrawal permit for a term of up to ten years, *see* ECL § 15-1503(6); 6 N.Y.C.R.R. § 601.7(e), DEC set the expiration date of the initial permit at the date when ConEd's SPDES permit expires: November 30, 2019. (R. 325, 567.)

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[4] Other water management practices that are useful elsewhere—such as water audits, underground leakage surveys, and recycling/ reclaiming water (*see* Br. for Appellant at 15)—do not apply to this type of facility. Measures to limit water loss or encourage reuse would serve no purpose here, because the East River Generating Station has no consumptive water loss; it continuously returns substantially all of the withdrawn water back into the East River. (R. 569.) And for a facility whose pipes are almost all above ground, monitoring and addressing leaks as soon as they are detected—the practice used by ConEd—is the best practice. (R. 569.)

C. Prior Proceedings

1. Challenge to ConEd's permit

On March 23, 2015, just over four months after DEC issued the initial permit to ConEd, petitioners filed this article 78 petition. (R. 39, 45.) While acknowledging that DEC had issued an initial permit allowing water withdrawals of no more than the maximum capacity that ConEd had earlier reported, petitioners nonetheless contended that DEC should have included terms and conditions to reduce the volume of ConEd's withdrawals. (R. 69-73.) Petitioners principally asserted that DEC failed to consider whether ConEd should replace the East River Generating Station's existing once-through cooling system with a closed-cycle cooling system, thus reducing withdrawals by up to ninety-eight percent. (R. 16, 61, 70-73.) Petitioners also asserted that DEC should have conducted SEQRA review before issuing the permit. (R. 64-69.)

In opposition, DEC explained that petitioners' challenge was untimely. DEC also 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. ConEd, which had been sued as a necessary

party, moved to dismiss the petition on the grounds that petitioners lacked standing, that petitioners' challenge was untimely under the statute of limitations, that petitioners' challenge was barred by laches, and that the initial permit was issued in compliance with law. (R. 17.)

Supreme Court denied the petition and granted the motion to dismiss. (R. 43.) The court held that the petition was barred (1) by the statute of limitations, because it was filed after the sixty-day limitation period of ECL § 15-0905(2), and (2) by the doctrine of laches, because the petitioners had not challenged DEC's 2010 SPDES permit determination that led ConEd to install components of its present water intake system. (R. 30-32, 40-43.)

On the merits, the court held that DEC had acted properly in issuing the initial permit. The court observed that because the Legislature had granted an "entitlement" to "pre-existing withdrawing entit[ies]" like ConEd, DEC "had no discretion under Section 15-1501 but to issue the Initial Permit" for the maximum water withdrawal capacity that ConEd had reported. (R. 35.) For example, DEC had no discretion to impose additional requirements to force ConEd to use less water than its maximum reported capacity, particularly where such measures—like

closed-cycle cooling—had been "evaluated and resolved years ago" in prior SPDES permit decisions. (R. 32.)

The court rejected petitioners' claim that DEC violated SEQRA, noting that the Water Resources Law made granting the initial permit a ministerial act. As the court explained, because "the East River Station complied with the statutory reporting requirements," environmental review under SEQRA could not materially affect DEC's obligation to issue ConEd a permit for its maximum water withdrawal capacity. (R. 35.) The court entered judgment in October 2016. (R. 12.)

2. Petitioners' parallel challenge to the initial permit issued to Ravenswood Power Station

As they have litigated this proceeding, the same petitioners have been challenging DEC's issuance of an initial water withdrawal permit to Trans Canada Ravenswood LLC. Like ConEd's East River Generating Station, Ravenswood is a thermoelectric power plant that withdraws water from the East River. (R. 540.) And like ConEd, Ravenswood had timely reported its maximum withdrawal capacity to DEC by February 2012. On November 15, 2013, DEC issued an initial permit to Ravenswood allowing water withdrawals of up to its maximum reported

capacity of 1.39 billion gallons per day. (R. 467.) The conditions in Ravenswood's initial water withdrawal permit were the same as in ConEd's initial permit. (R. 326-327, 468.)

Within sixty days after DEC issued the initial permit to Ravenswood, the same petitioners as in this matter brought an article 78 proceeding. (R. 543). *See* Br. for Appellant ("Br.") at 5. They argued, as here, that DEC should have compelled Ravenswood to install a closed-cycle water intake system, and that DEC had to complete a SEQRA review before issuing the permit. Supreme Court, Queens County (McDonald, J.) rejected their arguments for substantially the same merits reasons as the lower court gave here. The *Ravenswood* court explained that the "statute left DEC with only one course of action": to "issu[e] a permit allowing the facility to withdraw water from the East River at existing volumes." (R. 546-547.) DEC did not have discretion under the statute "to in effect compel TC Ravenswood to switch to a closed cycle cooling system," and DEC's action in approving the permit was therefore ministerial and not subject to SEQRA review. (R. 546-547.)

The *Ravenswood* petitioners appealed to the Appellate Division, Second Department (Docket No. 2015-02317). That court heard argument on February 6, 2017, but has not yet ruled.

ARGUMENT

POINT I

THE PETITION WAS PROPERLY DISMISSED AS UNTIMELY

This article 78 proceeding, commenced 122 days after DEC's permit decision, was properly dismissed by Supreme Court as untimely under the sixty-day limitations period that has governed judicial review of water resource decisions since 1960.[5] Petitioners are incorrect that ECL § 15-0903(1)—a provision enacted in 1979 as part of a non-substantive "clean up" amendment—abrogates (or conflicts with) that sixty-day rule. By its plain language and statutory location, ECL § 15-0903(1) merely specifies which set of DEC procedures apply when the agency conducts

[5] Because ConEd relied on DEC's years-earlier SPDES determination to make costly upgrades to the East River Generating Station, Supreme Court also held that petitioners' challenge was barred by the doctrine of laches. (R. 40-43.) As the permittee who relied on DEC's decisions, ConEd is better situated than DEC to press that argument before this court.

an administrative permit hearing; it does not affect timing or any other aspect of judicial review of a final permit decision. The legislative history confirms that ECL § 15-0903(1) was intended only to conform inconsistent language addressing DEC's permit hearing procedures. And decades of unambiguous case law underscores the unreasonableness of petitioners' position.

Challenges to DEC decisions under ECL article 15—i.e., the Water Resources Law—are governed by the "Review" section within ECL article 15, title 9. Any person who appeared "before the department and is affected by a decision made pursuant to this article" may seek "review of such decision under the provisions of article 78," but a "proceeding for such review must be commenced within sixty days." ECL § 15-0905(1)-(2). Petitioners do not dispute that these provisions, on their face, would apply to DEC's issuance of an initial water withdrawal permit. *See* Br. at 51-54.

Petitioners contend, however, that ECL § 15-0903(1)—a separate provision in another section of title 9—exempts water withdrawal and other permitting decisions from the sixty-day limitations period. Br. at 51. Located in a section captioned "Hearing procedure," ECL § 15-0903(1)

specifies which set of hearing procedures govern DEC's administrative consideration of permits. The provision clarifies that the uniform permit procedures in article 70 of the ECL, rather than the public hearing procedures specific to ECL article 15, apply to agency permit reviews for three Water Resources Law programs: "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 DEC, for any such actions "that involve title 5, 15 or 27 of this article." *Id.* § 15-0903(1). *Judicial review* of a final agency permit *decision* is not a permit "application[]," a permit "request[]," nor a DEC-initiated permit "proceeding[]." *See id.* Thus, ECL § 15-0903(1), on its face, has no bearing on the methods or the timing of a judicial challenge to final agency action.

Indeed, Section 15-0903(1)'s legislative history confirms that this provision was not intended to displace the longstanding sixty-day limitations period for challenging DEC water resource decisions.[6] In

[6] The uniform sixty-day statute of limitations for water resource decisions dates back to 1960, when the Legislature consolidated an array of disparate provisions into a single article. *See* Ch. 7, § 4, sec. 432, 1960

1977, two years before enacting ECL § 15-0903(1), the Legislature enacted ECL article 70. Ch. 723, 1977 N.Y. Laws, p. 1. Article 70 established uniform procedures for various DEC permit programs, including titles 5, 15 (water withdrawal permits), and 27 of article 15. *See* ECL §§ 70-0101, 70-0103 70-0107(3)(a)-(c). For these covered regimes, the law set uniform rules dictating, *inter alia*, how DEC would evaluate the need for a hearing on a permit application, how DEC should conduct such a hearing, and the generally applicable "time periods for department action on permits." *See* ECL §§ 70-0101, 70-0103(3), 70-0119. Article 70 did not contain any provisions setting forth the time limits for challenging permit decisions or the pathway to obtaining judicial review of such challenges. Thus, the passage of article 70 in 1977 did not displace or affect existing statutes of limitations for bringing a judicial challenge, such as the sixty-day period of ECL § 15-0905(2).

N.Y. Laws 30, 41; Joint Legislative Committee on Revision of the Conservation Law, Legislative Memorandum, *reprinted in* 1960 McKinney's N.Y. Session Laws 1845, 1848 (listing various prior limitations periods and explaining that the "[n]ew law makes 60 day time limit uniform"). That provision was reenacted verbatim as ECL § 15-0905(2) when the Legislature recodified the Environmental Conservation Law in 1972; it has not been amended since. *See* Ch. 664, 1972 N.Y. Laws 2242.

That 1977 enactment of article 70 did, however, supersede many of the permit procedures set forth in other ECL titles. To rectify that issue, the Legislature, at DEC's request, passed a bill in 1979 whose sole purpose was to "conform inconsistent procedural provisions of the Environmental Conservation Law to article 70 of the Environmental Conservation Law." Ch. 223, 1979 N.Y. Laws, p. 1; Letter from Sen. Fred Eckert to Hon. Richard Brown (June 7, 1979), *reprinted in* Bill Jacket for ch. 233 (1979); Mem. in Support (Feb. 13, 1979), *reprinted in* Bill Jacket for ch. 233 (1979). The bill was purely a "'clean up' measure" that "include[d] no substantive changes to existing law." Mem. in Support (Feb. 13, 1979), *reprinted in* Bill Jacket for ch. 233 (1979). Because the bill advanced by DEC was non-substantive and uncontroversial, it passed the Senate and Assembly unanimously. *See* Legislative Roll Call (May 24, 1979), *reprinted in* Bill Jacket for ch. 233 (1979). As one of its hundreds of technical fixes, the law amended the Hearing Procedure section of the Water Resources Law by adding ECL § 15-0903(1).

In sum, the Legislature added ECL § 15-0903(1) to clarify that in title 5, 15, and 27 permit proceedings, the new uniform rules set forth in article 70 would govern, rather than article 15's pre-existing public

hearing rules. Petitioners' far broader interpretation of ECL § 15-0903(1)—that it clarified applicable permit hearing rules *and* abrogated a longstanding statute of limitations—conflicts with ECL § 15-0903(1)'s text, context, and legislative history.

Petitioners assert that even if their suit is untimely, they nonetheless lacked fair notice of the sixty-day limitations period due to a purported "conflict in the statutory wording." Br. at 54. But there is no conflict in the statute, and well settled case law confirms the straightforward application of ECL § 15-0905(2)'s sixty-day limitation. In 1986, the Third Department dismissed as untimely a challenge to a title 5 permit decision, explaining that ECL § 15-0905(2) was "intended to make the 60-day limit uniform for proceedings" to challenge Water Resources Law decisions. *Matter of Spinnenweber v. New York State Dept. of Envtl. Conservation*, 120 A.D.2d 172, 174-76 (3d Dept. 1986). Like the title 15 water withdrawal permit here, the title 5 permit in *Spinnenweber* is one of the three article 15 permits listed by ECL § 15-0903(1). Thus, the result here must be the same.

Moreover, five years after *Spinnenweber*, the exact statutory argument that petitioners now press was explicitly rejected in *Rochester*

Canoe Club v. Jorling, 150 Misc. 2d 321 (Sup. Ct. Monroe County 1991), *appeal dismissed*, 179 A.D.2d 1040 (4th Dept. 1992). The court in *Rochester Canoe* evaluated ECL § 15-0903(1)'s language, location, and legislative history, and concluded that the provision was enacted to clarify that article 70's hearing procedures applied to article 15 permit decisions, not to "carve[] out an exception to the 60-day Statute of Limitations." *Id.* at 325. *Spinnenweber* and *Rochester Canoe* are widely understood as confirming that the sixty-day limitation period covers all article 15 permit decisions. *See, e.g.*, Philip Weinberg, Practice Commentaries to ECL § 15-0903, 17½ McKinneys Cons. Laws of N.Y. 225 (2006) (explaining that sixty-day period "governs all proceedings to review DEC determinations," as "[t]he courts have ruled that" ECL § 15-0905 "refers only to actual hearing procedures before DEC, and not to the statute of limitations").

Attempting to manufacture a conflict with this well settled law, petitioners cite a single decision that purportedly reached a different result. Br. at 54 (citing *Matter of Niagara Mohawk Power Corp. v. State*, 300 A.D.2d 949 (3d Dept. 2002)). In *Niagara Mohawk*, however, the Third Department expressly reaffirmed *Spinnenweber*, noting that "the 60-day

limitation applie[s] to challenges to determinations regarding permits" under article 15. 300 A.D.2d at 951. Although the Third Department found the sixty-day period inapplicable in that case, it did so only because a river regulating district, not DEC, had issued the challenged decision. *Id.* As the Third Department explained, this aspect of the case meant that ECL § 15-0905(1)—which explicitly provides that the sixty-day period governs only article 15 decisions "before the department"—did not apply.

Here, where DEC issued a permit decision under article 15, there is no ambiguity in the statute or conflict in the case law: petitioners had to file within 60 days. They did not, and Supreme Court correctly dismissed their untimely suit.[7]

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[7] In a concluding, unsupported sentence, petitioners newly suggest that separate rules apply to their SEQRA and coastal zone law claims "because the four month statute of limitations on actions provided for Article 78 applies to these causes." Br. at 54-55. But ECL § 15-0905 governs the timing of all article 78 challenges to Water Resource Law permits; and that statute provides that although parties may seek review "under the provisions of article 78"—as petitioners have done here—such challenges "must be commenced within sixty days." ECL § 15-0905(1)-(2); *see Matter of Long Is. Pine Barrens Socy. v. Planning Bd. of Town of Brookhaven*, 78 N.Y.2d 608, 613-14 (1991) (where a statute specifies the time period for challenging a government approval, that statute controls the limitations period for bringing a SEQRA challenge).

POINT II

THE INITIAL PERMIT ISSUED BY DEC COMPLIED WITH GOVERNING LAW

A. DEC Complied with the Water Resources Law.

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

The Water Resources Law establishes different categories of water withdrawal permits, depending on whether the applicant is the operator of an existing water withdrawal system or the operator of a new system. Operators of existing systems who properly 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."[8] (R. 382.) *See* ECL § 15-1501(9); 34 N.Y. Reg. at 3-5 (describing development of legislation and differentiation of operators of existing water withdrawal systems). 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).

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[8] Existing public suppliers of potable water are not subject to the initial permit requirement. See *supra* note 3.

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 operators that failed to report maximum water withdrawal capacity by the February 2012 statutory deadline; and existing operators proposing modifications that would either raise their water usage above 100,000 gallons of water per day or that would change the use of withdrawn water over the threshold amount. *Id.* § 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 id.* § 15-1503(2); 6 N.Y.C.R.R. § 601.11(c). DEC may 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 water withdrawal in an initial permit is not discretionary under ECL § 15-1501(9). Br. at 21-22.

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 ConEd. Br. at 22, 33-36, 46-47. (*See also* R. 69-70.) Petitioners misunderstand the law.

Any conditions limiting ConEd's water withdrawals—including by reducing its water withdrawal capacity—would conflict with ConEd's statutory entitlement to an initial permit for a volume of water equal to 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. The eight factors in ECL § 15-1503(2), by their plain terms, apply only to "proposed" or "future" withdrawals, not initial permits.

For these same reasons, petitioners are mistaken in claiming (Br. at 23) 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). DEC's 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).[9] *See also* 6 N.Y.C.R.R. § 601.7(d) (reiterating that an initial permit is "for the withdrawal volume equal to the maximum withdrawal capacity reported to the Department").

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. 34 N.Y. Reg. at 5. Specifically, as a condition for entering the permitting system, existing commercial and industrial water users sought an "automatic" initial permit that would authorize

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[9] Petitioners also misread the regulations (Br. at 23-24) in stating that 6 N.Y.C.R.R. § 601.11—which governs applications for new permits and reiterates the statutory factors from ECL § 15-1503(2))—applies to initial permits. A separate section, 6 N.Y.C.R.R. § 601.7, sets the standards for initial permits. Where the same rules apply to both types of permit, the requirements appear in both sections. *Compare* 6 N.Y.C.R.R. § 601.7(e), (f), *with* 6 N.Y.C.R.R. § 601.11(b), (h).

them to withdraw water at existing volumes, in order to minimize disruptions to their business operations. *See id.*; Letter from Thomas M. West to Sen. Mark Grisanti, *reprinted in* Bill Jacket for ch. 401 (2001) at 45. And progress on the bill stalled until the Legislature added a provision giving existing users this entitlement.[10] 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 underlying the statute.

None of this is to say that existing water users like ConEd possess an "exemption" from the Water Resources Law, as petitioners assert here. Br. at 4. Rather, once such users have received the initial permit authorized by ECL § 15-1501(9), they are regulated under the same rules

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[10] *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). In 2010, the bill was introduced in the Assembly and the Senate without the "initial permits" provision. *See* A. 11436, 233rd Sess. (2010) and S. 8280, 233rd Sess. (2010). While in committee, both the Assembly and Senate Bills were amended to include the initial permits provisions. *See* S. 8280A, 233rd Sess. (2010) (passed the Senate and delivered to the Assembly on July 1, 2010), A. 11436-B, 233rd Sess. (2010). These bills were reintroduced in 2011 and passed as Senate Bill S. 3798 and Assembly Bill A. 5318 during that session.

that apply to any other permittee. *See* 6 N.Y.C.R.R. § 601.7(e). See *supra* at 8. By folding existing operators into the permit scheme, and by imposing ongoing monitoring and reporting measures, initial permits arm DEC with the necessary tools to regulate water withdrawals statewide.

Moreover, the initial permit is not the only mechanism for addressing petitioners' concerns about the environmental consequences of water withdrawals generally, and ConEd's practices in particular. For example, as petitioners acknowledge, ConEd's discharge permit under the SPDES program includes conditions to install screens, fish return systems, and mesh panels, designed to reduce the impingement and entrainment of aquatic life. Br. at 16. By installing the measures required under the SPDES permit, ConEd is obligated to reduce entrainment and impingement by at least 75 percent and 90 percent, respectively. (R. 341.) Petitioners have not challenged ConEd's SPDES permit.[11]

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[11] Petitioners address at length the background of the SPDES program and the wisdom of DEC's Best Technology Available (BTA) determination for ConEd's SPDES permit. Br. at 29-37. But petitioners

B. DEC's Issuance of an Initial Permit to ConEd Was Exempt from SEQRA Review as a Ministerial Act.

Because ECL § 15-1501(9) compelled DEC to issue an initial permit to ConEd for the maximum reported capacity of its system (see *supra* Point A), DEC was justified in concluding that the issuance of the permit for ConEd's duly reported "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. *Gavalas*, 81 N.Y.2d at 326 (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*, 78 N.Y.2d at 415 (1991).

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have not challenged ConEd's SPDES permit, and any such challenges should have been brought long ago. In addition, although petitioners attempt to compare DEC's 2010 BTA decision against a July 10, 2011 DEC policy addressing BTA for cooling water intake structures (Br. at 36), that policy explicitly states that it does not apply to "[f]acilities for which a BTA determination has been issued prior to the effective date of this policy," subject to an exception that is not present here. (R. 507.)

Petitioners are wrong to suggest that the volume of water that ConEd has been withdrawing, or the station's impingement or entrainment effects, trigger SEQRA review regardless of the ministerial act exemption. Br. at 41-42. Review is required only for a set of covered "actions," ECL § 8-0109(2), and when an agency act is ministerial, it is excluded from SEQRA's definition of that term. ECL § 8-0105(5)(ii); *Gavalas*, 81 N.Y.2d at 325-26; *see also* 6 N.Y.C.R.R. § 617.4(a)(2) (DEC cannot reclassify a ministerial act as one requiring SEQRA review).

On the scope and meaning of the ministerial act exemption, 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. 78 N.Y.2d at 411. 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.* at 415. LIPA's decision to decommission the facility thus was not subject to SEQRA because LIPA had "no choice" but to follow the Legislature's commands once the statutory criteria were met. *Id.*; *see also Matter of*

Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preserv. Commn., 306 A.D.2d 113, 114 (1st Dept. 2003) (approval of a proposal to raise building's height was ministerial act because commission's authority was limited to examining whether statutory criteria were met).

Here, ECL § 15-1501(9) required DEC to issue an initial permit to ConEd for a volume of water equal to its maximum water withdrawal capacity because ConEd was an existing operator that properly reported such capacity to DEC by the statutory deadline. See *supra* Point A. Petitioners are mistaken in arguing that DEC had authority to deny such an application or limit ConEd's water withdrawals by applying the factors under ECL 15-1503(2). Br. at 46-47. Those conditions do not apply to DEC's mandatory issuance of an initial permit (see *supra* Point A), and thus petitioners have not identified any DEC decision-making that would have been aided or modified by further information on environmental impacts. *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.

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

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 Resources Defense Council, Inc. v. New York State Dept. of Envtl. Conservation*, 25 N.Y.3d 373, 397 (2015). As long as DEC's construction of the ECL, SEQRA, and DEC's own regulations is "not irrational or unreasonable," that construction must be upheld. *Id.* (quotation marks omitted); *see also Flacke v. Onondaga Landfill Sys.*, 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 include conditions that are coextensive with the factors DEC considers in deciding whether to grant or deny a new permit. Moreover, that language must be read in conjunction with the statute's requirement that DEC issue initial permits for an existing user's maximum water withdrawal capacity. *See* ECL § 15-1501(9); *Friedman v. Connecticut Gen. Life Ins. Co.*, 9 N.Y.3d 105, 115 (2007) (a court should harmonize and give effect to all parts of a statute). Petitioners' reading would eliminate the

requirement that DEC issue initial permits for the maximum water withdrawal capacity and thus cannot be sustained. See *supra* Point A.2.

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 existing 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. 385.) And because DEC was indisputably required to issue the initial permit for ConEd's maximum water withdrawal capacity, DEC appropriately determined that an environmental review under SEQRA would have been futile. See *supra* Points A and B.

Petitioners recognize that DEC is typically entitled to deference when interpreting the statutes it implements, and their arguments for why deference should not apply here are unavailing. First, petitioners argue that DEC's interpretations are contrary to the only clear meaning

of the statute. Br. at 25-27. But as demonstrated above (see *supra* Point A), DEC's position is in fact *compelled* by the statute. Second, petitioners 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. Br. at 24, 27. 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 Dept. 1992).

D. The Initial Permit Is Not Subject to Review for Consistency with the Waterfront Act.

Petitioners are incorrect that DEC should have reviewed ConEd's initial permit for consistency with the coastal area policies applying to New York City's coastal zone. Br. at 47-49. 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. *See* Executive Law § 915; *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 47, 49), 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.[12] 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.

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[12] Petitioners note that DEC publicly stated that the Waterfront Act was inapplicable because the project was not in a coastal management area. Br. at 13. Although the ConEd Station is in a coastal management area, the menu of options on DEC's electronic notice bulletin is limited; DEC's permit staff selected the option that most closely matched its determination that Waterfront Act review was not required. (R. 567.)

CONCLUSION

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

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Respectfully submitted,

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