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

In the Matter of the Application of SIERRA CLUB and HUDSON RIVER FISHERMEN'S ASSOCIATION, Petitioners, For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules, -against- JOSEPH MARTENS, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. Respondents.	Index No. 100524/2015

MEMORANDUM OF LAW IN SUPPORT OF CON EDISON'S MOTION TO DISMISS

BRYAN CAVE LLP
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000

Peter P. Garam
Shira R. Rosenblatt
Consolidated Edison Company of New York, Inc.
4 Irving Place
New York, NY 10003
(212) 460-2985

Attorneys for Respondent
Consolidated Edison Company of New York, Inc.

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PRELIMINARY STATEMENT

In 2010, in a public permit proceeding under the State Pollution Discharge Elimination System ("SPDES") program, the Department of Environmental Conservation ("NYSDEC") made a final determination selecting the Best Technology Available ("BTA") for minimizing aquatic impacts at the East River Generating Station and imposed this BTA determination as a condition of the facility's SPDES permit, after finding that this technology would not result in significant adverse environmental impacts and does not warrant preparation of an Environmental Impact Statement ("EIS"). The technology approved by NYSDEC in 2010 consists of traveling intake screens with fish-protective features (known as Ristroph screens), fine mesh intake screens and a low stress fish return system. Thereafter, in a major capital project completed in 2013, Consolidated Edison Company of New York, Inc. ("Con Edison") spent $44 million to install the technology required by its 2010 SPDES permit. Petitioners sat on their hands while all of this occurred, only now bestirring themselves to assert that an EIS and alternative technology (closed-cycle cooling) are needed at this facility to protect aquatic life – the same claim that could have been raised in a challenge to the modification of the facility's SPDES permit in 2010.

This Article 78 proceeding is framed as a challenge to the initial permit (the "Initial Permit") issued to Con Edison in 2014 under the Water Resource Protection Act of 2011 (the "WRPA," codified at Article 15 of the New York Environmental Conservation Law ("ECL")) authorizing the continued withdrawal of cooling water from the East River to serve the East River Generating Station. Petitioners claim that in issuing the permit, NYSDEC violated a host of laws, including the State Environmental Quality Review Act ("SEQRA"), the WRPA, the New York State Executive Law and the public trust doctrine. Running through these claims is their allegation that closed-cycle cooling should be required at the facility to minimize the

volume of water withdrawn from the East River and the resulting harm to fish and other aquatic organisms. But NYSDEC's issuance of another permit for the facility does not re-open for challenge NYSDEC's earlier, final determination that the equipment Con Edison has now installed – and not closed-cycle cooling – is the Best Technology Available for this facility.

Accordingly, Petitioners are far too late in bringing their claims, which should be dismissed under the applicable statutes of limitations and by laches. *See* Point I and II, *infra.* In addition, Petitioners have failed to establish their standing to bring suit. *See* Point III, *infra.* If the Court reaches the merits, the issuance of the Initial Permit was a ministerial act exempt from the requirements of SEQRA. *See* Point IV, *infra.* And contrary to Petitioners' allegations, the purpose of the WRPA – to conserve water supplies – has no application to the salt water of the East River, which connects Long Island Sound and the Atlantic Ocean. The quantity of such ocean water is unlimited (and thus need not be conserved) and, in any event, the East River Generating Station returns the water it withdraws from the East River back to that waterbody after it is used as non-contact cooling water. Moreover, the issue of closed-cycle cooling has no bearing on the issuance of the Initial Permit under the WRPA, which requires that the Initial Permit allow a facility to continue to withdraw water at its previously reported maximum rate of water withdrawal. *See* Point V, *infra.*[1]

[1] To avoid burdening the Court with duplicative filings, Con Edison relies on the papers submitted by the New York Attorney General's office with respect to Petitioners' other claims.

STATEMENT OF FACTS[2]

The two generating units at the East River Generating Station that use East River water for cooling – Unit 6 (having a nominal electric output of 134 MW) and Unit 7 (having a nominal electric output of 185 MW) – are critical to the reliability of electric service in Manhattan (*i.e.*, avoiding blackouts). Catuogno Aff. ¶¶ 11-14. Moreover, the shutdown of these units, in addition to compromising reliability, would increase costs to ratepayers by between $60 million and $110 million *per year* in higher utility bills. *Id.* ¶ 9.

A. Configuration of the East River Generating Station.

The East River Generating Station has been producing electricity for New York City since 1926, and has drawn water from the East River for cooling since the facility first went into operation. Manning Aff. ¶¶ 6, 13. Currently, four electric generating units operate at the station. *Id.* ¶ 6. Units 1 and 2 are recently installed cogeneration units. *Id.* ¶ 9. Because they are gas turbines with supplemental duct firing, they do not require cooling water from the East River. *Id.* The facility's two other generating units – Units 6 and 7 – have been cooled by East River water since they were first placed into service in 1951 and 1955, respectively. *Id.* ¶¶ 8, 14.

The East River Generating Station lies within Con Edison's larger East River Complex, which, in addition to Units 1, 2, 6 and 7, includes five boilers that generate steam for the district steam system. *Id.* ¶ 10. These boilers do not use cooling water from the East River. *Id.* The East River Complex also includes a large substation, a substantial amount of electrical equipment and a fuel oil storage facility. *Id.* ¶ 11. It occupies the area bounded by Avenue C on the west, East 13th Street on the south, the FDR Drive on the east, and East 15th Street on the north. *Id.* It also includes a Con Edison office building, parking facilities, and two ballfields for

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[2] The facts are summarized in the affidavit of John Catuogno, P.E. ("Catuogno Aff.") and Paul Manning, P.E. ("Manning Aff.") submitted in support of Con Edison's motion to dismiss.

community use on the north side of East 15th Street. *Id.* The ballfields are intensively used by the community due to a shortage of active recreational facilities in the neighborhood. *Id.*

Space is extremely limited within the East River Generating Station. *Id.* ¶ 12. Likewise, the overall site of the complex is constrained, since it is bounded by multi-family housing to the south and west, and by the FDR Drive and the river to the north and east. *Id.* Just to the north of the East River Complex is John J. Murphy Park. *Id.*

B. East River Cooling Water is Necessary for the Operation of Units 6 and 7

Units 6 and 7 cannot produce electricity without cooling water from the East River. Catuogno Aff. ¶ 7. These units are "steam-electric units," which operate by heating water until it boils and turns to high pressure steam, which then passes through a turbine generator, causing it to spin and produce electricity. Manning Aff. ¶ 14. The steam then flows across thousands of tubes in a condenser, where heat is exchanged from the steam to the cooling water drawn from the East River. *Id.* The steam is thereby condensed back into water, which is sent back to the boiler to be made into high pressure steam again. *Id.* The cooling water and boiler water do not mix in the condensers. *Id.*

The water for the cooling operation is drawn from the East River through intake bays that connect to tunnels that extend beneath the FDR Drive, is delivered to the condensers for the cooling operation, and then is returned at a higher temperature back to the East River through discharge tunnels located north of the intake bays. *Id.* ¶ 17. The cooling water is highly saline because the East River connects to Upper New York Bay and thus the Atlantic Ocean. *Id.* ¶ 16.

The East River Generating Station does not consume East River water in the cooling operation, because essentially all the water withdrawn is returned to the river. But it does have an effect on marine life. *Id.* ¶ 15. Aquatic organisms (including fish, eggs and larvae)

are drawn towards the intake structures along with the flow of cooling water, and can either be impinged on the screens covering the mouth of the intakes or entrained into the cooling system. *Id.* ¶ 18.

As noted above, the continued operation of Units 6 and 7 is critical to maintaining the reliability of electric service in Manhattan, and the forced shutdown of these units would result in substance costs for ratepayers. Catuogno Aff. ¶¶ 11-14.

C. Con Edison Worked For Almost Two Decades under NYSDEC's Supervision to Study Alternative Technologies To Minimize the Effects of Cooling Water Withdrawals on Aquatic Resources.

Con Edison has worked under the direction of NYSDEC to identify and implement the best method for minimizing the losses to aquatic life associated with the cooling water operation at the East River Generating Station. It has done so in the context of the SPDES program in accordance with Section 316(b) of the Clean Water Act, which requires that "the location, design, construction, and capacity of cooling water intake structures reflect the *best technology available* for minimizing adverse environmental impact."[3]

The effort to identify the BTA for the facility began with extensive data gathering pursuant to a consent order between Con Edison and NYSDEC dated December 23, 1992 (the "Consent Order"). Manning Aff. ¶ 22; Exh. A. In accordance with the Consent Order, Con Edison prepared five separate studies over a period of eight years, examining the impacts of the cooling operation on marine life, and how to reduce such impacts. Manning Aff. ¶ 23; Exh. B at 1-2. Based on those studies, Con Edison submitted a "Final Action Report" to NYSDEC in January 2000. Manning Aff. ¶ 24. That report discussed alternative measures to mitigate impingement and entrainment impacts at the East River Station. Among the measures assessed

[3] 42 U.S.C. § 1326(b) (emphasis added). *See also* 6 N.Y.C.R.R. § 704.5 ("The location, design, construction and capacity of cooling water intake structures, in connection with point source thermal discharges, shall reflect the *best technology available* for minimizing adverse environmental impact." (emphasis added)).

were behavioral barriers (which are devices designed to stimulate fish to swim away from the intake), diversion systems (which physically divert fish from the area), passive screen systems that could be suspended from the bed of the river, various designs of other stationary and traveling screen systems, evaporative cooling towers and closed-cycle cooling. *Id.*

Thereafter, NYSDEC required closer consideration of plume-abated evaporative cooling towers and dry cooling (*i.e.*, closed-cycle cooling), as well as flow management technologies. *Id.* ¶ 26. Thereafter, Con Edison prepared another round of studies under NYSDEC's supervision, in two phases.

In the first phase, Con Edison examined in further detail the feasibility of installing technology at Units 6 and 7 to reduce the volume of water withdrawn from the East River, considering the environmental and safety implications, as well as the technical feasibility of two potential alternatives: hybrid cooling towers (which include wet and dry cooling components and are designed to minimize vapor plumes from the towers) and dry cooling towers (which do not release water vapor plumes at all). The Phase 1 work also looked further into flow management alternatives that could minimize impingement and entrainment at the facility. In October 2003, Con Edison submitted a Phase 1 Report (Exh. D) to NYSDEC recommending against the installation of hybrid cooling towers or dry cooling at this facility. Manning Aff. ¶ 30.

As to hybrid cooling towers, the Phase 1 Report indicated that for Unit 6, the array of cooling tower cells using this technology would extend 60 feet in width, 65 feet in height and 270 feet in length; and that the Unit 7 array would be of the same height and width and would extend for a length of about 325 feet. *Id.* ¶ 31. Although the structures could be sited to avoid physically displacing the adjoining ball fields and parks, the study found that because of their size they would "certainly encroach on the use and enjoyment of those facilities," and could

be inconsistent with the existing character of the adjacent high rise and densely populated Stuyvesant Town residential neighborhood. *Id.* According to the report, the structures also would affect adversely views from the Stuyvesant Town apartments, the nearby ball fields, John J. Murphy Park and Stuyvesant Cove Park (a New York City park further to the north of John J. Murphy Park). *Id.* In addition, the Phase 1 Report noted that although hybrid towers would minimize plume formation, they would not eliminate vapor plumes entirely. It estimated that plumes of 200-500 feet in length may be visible for almost 2,750 hours per year, adding to the visual impact of the structures themselves. *Id.* In addition, the noise emanating from the tower fans and splashing water were found in the report to "violate the nighttime sound limits" imposed by the New York City Noise Code at sensitive receptors in Stuyvesant Town. *Id.* The hybrid towers also were found to have air pollution impacts, because they would reduce the generating capacity and increase the heat rate penalty at the units, thereby increasing the amount of fuel consumed in generating power, resulting in a commensurate increase in emissions. *Id.* Finally, the report found that evaporative emissions from the towers would carry about 125 tons of salt into the atmosphere annually, with salt deposition causing corrosion, and the risk of shorts and accidental fires at the nearby Con Edison substation and switchyard. *Id.*

As to dry cooling, the Phase 1 Report concluded that two dry cooling towers would be needed – one to serve Unit 6 and the other for Unit 7. *Id.* ¶ 32. Those structures would be considerably larger than those that would be used in the application of hybrid cooling technology. *Id.* The tower serving Unit 6 would be 85 feet in height, 180 feet in width and 482 feet long; while the structure for Unit 7 would also be 85 feet high and 180 feet wide, but would extend for 517 feet in length. *Id.* The report found that siting such substantial structures on land would be exceedingly difficult, because: their placement on property adjacent to the East River facility would require the elimination of the heavily-used Con Edison ball-fields; due to their

size, the structures would not fit on property available within the boundaries of the Con Edison Complex; and due to their weight and bulk, they could not be accommodated on the roof of the generating station. *Id.* According to the report, siting the structures over water would affect adversely the character of Stuyvesant Cove Park, cause significant visual and neighborhood character impacts and would be vigorously opposed by the City, park proponents and community groups. *Id.* The report also noted the significant technical challenges and construction impacts that would be entailed in placing the towers on structures over the water. *Id.*

The Phase 1 report recognized that a reduction in the flow of cooling water could reduce the volume of aquatic life drawn into the system. *Id.* ¶ 33. Therefore, it examined various potential technical alternatives for managing flow, including variable speed pumps, dual speed pumps, shutdown of one of the two existing pumps serving the station and throttling of flow using existing pump discharge valves. *Id.* As a result of the analysis, the report found that some reduction in the pumping rate would be technically feasible while Units 6 and 7 are generating electricity. *Id.*

NYSDEC requested that the second phase of the studies focus on the reductions in impingement and entrainment that could result from flow reduction measures, and the use of protective intake screen technology described as "modified Ristroph or wedge wire intake screens." *Id.* ¶ 34. The results of that Phase 2 study were presented in a Phase 2 Report (Exh. E) submitted to NYSDEC in December 2004. Manning Aff. ¶ 35.

The Phase 2 Report analyzed the effectiveness of several alternative combinations of the flow management and screen technologies under review, including: (i) variable speed pumps alone; (ii) modified Ristroph screens alone; (iii) variable speed pumps combined with modified Ristroph Screens; and (iv) variable speed pumps combined with wedge wire screens.

The data presented in the report documented the effectiveness of each alternative combination in reducing losses of representative species. *Id.* ¶ 36.

Next, NYSDEC directed Con Edison to collect updated impingement and entrainment data, documenting representative species impacted by the cooling water intake operation at the facility. Those data were collected in 2005 and 2006, and reported to NYSDEC in July 2007. *Id.* ¶ 37.

Subsequently, NYSDEC required Con Edison to prepare a "Design and Construction Technology Plan" providing an analysis of "all feasible technologies and/or operational measures" presented in the Phase 2 Report. *Id.* ¶ 41. The plan was to examine: (i) the engineering feasibility of each alternative; (ii) an assessment of the benefits of each alternative in reducing impingement mortality and entrainment abundance; (iii) a breakdown of costs of each alternative, taking into account capital improvements, operation and maintenance, and construction downtime; (iv) an estimate of the time required to implement each alternative; and (v) an evaluation of adverse environmental impacts that may result from the construction, installation and use of each alternative. *Id.* In accordance with that requirement, Con Edison submitted to NYSDEC a document analyzing feasible technologies to reduce impingement and entrainment in December 2007. *Id.* ¶ 44.

D. NYSDEC Imposed the Requirements on Con Edison to Prepare the BTA Studies in an Open Public Process.

Con Edison prepared the above-described studies pursuant to requirements that were formally imposed by NYSDEC under the SPDES program, through conditions included in permit renewals issued with due public notice under the Uniform Procedures codified at 6 N.Y.C.R.R. Part 610. Thus, on March 14, 2001, NYSDEC published a public notice in the *Environmental Notice Bulletin* that Con Edison was seeking to renew its SPDES permit for the

East River Generating Station. *Id.* ¶ 27. The notice established April 13, 2001 as the deadline for receipt of public comments. *Id.* Thereafter, on May 15, 2001, NYSDEC issued the permit renewal, incorporating a provision requiring that "[t]he permittee shall comply with the provisions agreed to under Consent Order #R2-2985-90-04, which are designed to study, and if necessary, mitigate biological impacts associated with the East River Generating Station condenser cooling water use." *Id.* ¶ 28; Exh. C.

The SPDES permit for the East River Generating Station was again up for renewal in 2007. On March 28 of that year, NYSDEC published a public notice in the *Environmental Notice Bulletin* stating that Con Edison had applied for renewal and modification of its SPDES permit for the facility, and established April 27, 2007 as the deadline for submission of public comments on that application. *Id.* ¶ 40; Exh. G. As issued on August 7, 2007 the renewed permit imposed a number of conditions requiring Con Edison to undertake the studies necessary for NYSDEC to render a final BTA determination for the facility. Manning Aff. ¶ 41; Exh. H.

The 2007 SPDES permit also established performance standards for the technology to be implemented at the facility to reduce impingement and entrainment. Specifically, it required that impingement mortality be reduced by at least 80 percent and entrainment be reduced by at least 60 percent from the full-flow calculation baseline. Manning Aff. ¶ 42; Exh. H at 8.

E. In 2010, NYSDEC Made a Final BTA Determination, after Due Public Notice and Issuance of a Negative Declaration under SEQRA, and Incorporated that Determination in a SPDES Permit Modification.

After considering the extensive studies prepared by Con Edison, NYSDEC initiated a formal process pursuant to its Uniform Procedures to modify the SPDES permit for the facility to incorporate its BTA determination for the East River Generating Station. On

January 13, 2010, NYSDEC published a notice in the *Environmental Notice Bulletin* stating explicitly that the Department was proposing to modify the SPDES permit for the facility to include a BTA determination and additional requirements to reduce impingement and entrainment from that facility pursuant to Section 316(b) of the Clean Water Act and 6 N.Y.C.R.R. § 704.5. Manning Aff. ¶ 46; Exh. J. The notice stated that the modified permit would incorporate "a requirement to install traveling intake screens modified with fish protective features (aka Ristroph screens), use of fine mesh intake screen panels and a low stress fish return system." Exh. J at 2. The notice also stated that NYSDEC's BTA requirements for existing facilities with cooling water intake structures call for "minimum impact reductions of 80 percent in impingement mortality and 60 percent in entrainment, measured from baseline conditions." *Id.* at 3. Nevertheless, the notice indicated that the aforementioned technologies proposed for installation at the East River Generating Station would achieve "an estimated 90 percent reduction in impingement mortality and a 75 percent reduction in entrainment from baseline conditions." *Id.*

The public notice also announced that NYSDEC had issued a Negative Declaration (the "2010 Negative Declaration") in connection with the proposed permit modifications and BTA determination. Admin. Record ("AR") 20-27. A Negative Declaration is a determination under SEQRA that a proposed action will not result in any significant adverse environmental impacts and consequently no EIS is required. *See* 6 N.Y.C.R.R. §§ 617.2(y), 617.7(a).

The 2010 Negative Declaration again identified "traveling intake screens modified with fish protective features (aka Ristroph screens), use of fine mesh intake screen panels and a low stress fish return system" as BTA for the facility. AR24. It also expressed the Department's belief that the selected technology, combined with other measures, "will achieve

an estimated 90 percent reduction in impingement mortality and a 75 percent reduction in entrainment from baseline conditions." AR 24. NYSDEC further noted that it would require Con Edison to undertake a verification monitoring program after installation of the technology to determine whether the required reduction levels are achieved, and to implement additional measures if necessary in light of the results of the verification study. AR 26.

The 2010 Negative Declaration also explained why NYSDEC did not select evaporative cooling towers or closed-cycle cooling as BTA, stating that these measures were "rejected due to a combination of key siting issues as well as high cost." *Id.* Among the "key siting issues and environmental concerns" noted were "the loss of recreational open space, [and] proximity to high density residential areas and the FDR Highway." *Id.*

The public notice established a deadline of February 12, 2010 for the submission of public comments on the proposed permit modifications and BTA determination. Exh J.

On May 28, 2010, NYSDEC issued the modified SPDES permit (the "2010 SPDES Permit Modification") incorporating its BTA determination for the East River Generating Station. AR 1-19.

F. Petitioners Never Challenged the Permit Renewals, the 2010 Negative Declaration, the 2010 SPDES Permit Modification or NYSDEC's BTA Determination for the Facility.

As discussed above, the activities undertaken by NYSDEC and Con Edison to identify BTA for the minimization of aquatic impacts at the East River facility were conducted pursuant to the wide-open public process established under the Department's Uniform Procedures. The public notice issued pursuant to those procedures with respect to the 2010 SPDES Permit Modification that incorporated NYSDEC's final BTA determination could not have been more clear as to the technology the Department was selecting or the anticipated effectiveness of that technology in reducing aquatic impacts. Nevertheless, Petitioners did not

challenge the 2001 or 2007 SPDES permit renewals; nor did they challenge the 2010 Negative Declaration, the 2010 SPDES Pemit Modification or the final BTA determination incorporated therein. Manning Aff. ¶¶ 5, 29, 43, 51. Thus, the instant litigation, filed in 2015, is Petitioners' first effort to require the installation of the closed-cycle cooling technology that NYSDEC rejected in its 2010 SPDES Permit Modification and BTA determination for this facility.

G. Con Edison Has Completed the Capital Project for Installing the Selected BTA.

In August 2010, Con Edison submitted a "Joint Technology Installation & Operation Plan and Verification Monitoring Plan" to NYSDEC, presenting its proposal for implementing the BTA that NYSDEC had selected in its 2010 SPDES Permit Modification, and for monitoring the effectiveness of this technology. Manning Aff. ¶ 52. In November 2010, NYSDEC approved that document, which was thereafter modified slightly with NYSDEC's approval. *Id.* ¶ 53; Exh. K.

Con Edison thereupon undertook a major capital project at the East River Generating Station at a cost of more than $44 million. Manning Aff. ¶ 54. That project, which included the installation of Ristroph-type, dual flow, traveling water screens and other technology, was completed in 2013. *Id.* ¶¶ 54-55.

Accordingly, after decades of effort and at substantial cost, the East River Generating Station is now operating with the Best Technology Available for reducing impingement and entrainment, as determined by NYSDEC in the final BTA determination incorporated into the 2010 SPDES Permit Modification. *Id.* ¶ 56.

H. NYSDEC Renewed The SPDES Permit in 2014.

On March 1, 2012, Con Edison submitted an application to renew the SPDES permit for the East River Generating Station. AR 28-161. NYSDEC issued a Negative

Declaration under SEQRA with respect to that renewal in June 1, 2014, *see* AR 197-200, and published a public notice in the *Environmental Notice Bulletin* of the renewal application on June 11, 2014. AR 201-206.

On November 21, 2014, NYSDEC issued a renewed and modified SPDES permit for the East River Generating Station. AR 243-266. The new SPDES permit required that Con Edison continue to operate the same BTA imposed by the 2010 SPDES Permit Modification to minimize aquatic impacts at the East River Generating Station. AR 254. Petitioners did not bring an Article 78 challenge to this SPDES permit. Manning Aff. ¶ 65.

I. NYSDEC Issued the Water Withdrawal Permit Incorporating the BTA Requirements of the SPDES Permit by Reference.

In 2009, the State Legislature enacted a law requiring the filing of annual water withdrawal reporting forms. *See* L. 2009, ch. 59, Part CCC (codified at ECL Art. 15, Title 33, until its repeal by L. 2011, c. 401, § 8, effective Dec. 31, 2013). Pursuant to that statute, Con Edison submitted annual water withdrawal forms to NYSDEC for the East River Generating Station in 2011, 2012 and 2013. Manning Aff. ¶ 67; Exh. M. The reports stated that the facility withdraws 373.4 million gallons of water per day from the East River. Manning Aff. ¶ 67; Exh. M.

On May 30, 2013, Con Edison submitted an application for an initial permit under the WRPA for the East River Generating Station. AR 170-185. The application stated that the permit sought would allow the facility to continue to withdraw 373.4 million gallons of water per day from the East River (AR 173), the same volume reported to NYSDEC on Con Edison's annual water withdrawal forms.

On or about June 1, 2014, NYSDEC determined that Con Edison's application for a water withdrawal permit was a Type II "ministerial action" that did not require an

environmental review under SEQRA. AR 200. NYSDEC reasoned that it had no discretion but to issue the initial permit to Con Edison, citing ECL § 15-1501(9), which provides that the "department shall issue an initial permit, subject to appropriate terms and conditions as required under this article, to any person ... for the maximum water withdrawal capacity reported to the department pursuant to the requirements of ... title thirty-three of this article...." *See also* 6 N.Y.C.R.R. § 601.7(d) ("An initial permit that is issued by the Department under this subpart is for the withdrawal volume equal to the maximum withdrawal capacity reported to the Department on or before February 15, 2012.").

On November 21, 2014, NYSDEC issued the Initial Permit for the East River Generating Station under the WRPA. As required by ECL § 15-1501(9) and 6 N.Y.C.R.R. § 601.7(d), the Initial Permit allows the East River Generating Station to continue to withdraw 373.4 million gallons of water per day from the East River. AR 238. The Initial Permit also incorporates by reference the BTA requirements of the SPDES permit that reduce impacts to the East River biota. AR 239.

Having neglected to challenge any of the NYSDEC permitting actions taken over the years to require the investigation, identification and implementation of BTA to minimize the facility's aquatic impacts, Petitioners now assert that the Department acted illegally by issuing the Initial Permit without first considering whether closed cycle cooling should be imposed as a "conservation measure" under the WRPA. Petitioners' claims must be rejected.

POINT I

THE PETITION IS TIME BARRED

The claims presented in the Petition are barred by the statute of limitations, for two reasons. First, a proceeding to challenge a water withdrawal permit must be brought within 60 days. ECL § 15-0905(2). Instead, Petitioners filed this proceeding four months after the

Initial Permit was issued. Second, this case was filed approximately five years after NYSDEC made its determination as to the Best Technology Available for reducing impingement and entrainment impacts at the East River Generating Station. AR 3-27. Although Petitioners craft their claims as if they were asserting that NYSDEC violated the WRPA by failing to impose adequate water conservation measures in the permit, what they are really challenging is NYSDEC's determination to forego closed-cycle cooling and require the implementation of different technologies to minimize the facility's aquatic impacts. Thus, Petitioners were required to file their claim within 60 days after issuance of the 2010 SPDES Permit Modification. Petitioners' time-barred claims were not resuscitated by NYSDEC's subsequent actions in 2014.

A. The Petition Is Time Barred Because It Was Not Brought Within The Applicable 60-Day Statute of Limitations Period.

The Initial Permit was issued pursuant to Article 15, Title 15 of the Environmental Conservation Law. AR 236; ECL § 15-1501(9). Article 15 establishes a 60-day statute of limitations period to challenge such permits:

> 1. [A]ny person . . . which has filed a notice of appearance in the proceedings before the department and is affected *by a decision made pursuant to this article*, may review such decision under the provisions of article 78 of the Civil Practice Law and Rules.
>
> 2. A special proceeding *for such review* must b8e commenced *within sixty days after the service in person or by mail of a copy of the decision* upon the attorney of record of the applicant and of each person who has filed a notice of appearance, or to such applicant in person directly if not represented by an attorney.

ECL § 15-0905(1) and (2) (emphasis added).

This provision applies to challenges to any determination issued under Article 15 of the ECL, including the issuance of permits. *See Rochester Canoe Club v. Jorling*, 150 Misc.2d 321, 325-26 (Sup. Ct. Monroe County 1991), *aff'd*, 179 A.D.2d 1097 (4th Dep't 1992); *Spinnenweber v. NYSDEC*, 120 A.D.2d 172, 175 (3d Dep't 1986).

It is well settled that claims asserting a violation of SEQRA or other statutory prerequisites for the issuance of a permit (or other governmental approval) must be commenced within the limitations period for commencing an action to challenge the permit itself. *See, e.g.*, *Long Island Pine Barrens Soc'y, Inc. v. Planning Bd. of Town of Brookhaven*, 78 N.Y.2d 608 (1991) (SEQRA claim must be brought within the 30-day limitations period for challenging a subdivision approval under Town Law § 282, rather than the four month limitations period under Article 78); *City of Saratoga Springs v. ZBA of the Town of Wilton*, 279 A.D.2d 756, 758 (3d Dep't 2001) (SEQRA claim must be brought within the 30-day limitations period established for challenging a Zoning Board's decision under Town Law §§ 267-c [1], 274-a [11]); *Rochester Canoe Club v. Jorling*, 150 Misc.2d at 326 (SEQRA challenge must be brought within the 60-day limitations period for challenging a NYSDEC water permit under ECL § 15-0905). Thus, the SEQRA and other claims Petitioners assert to challenge the Initial Permit are subject to the 60-day limitations period imposed by ECL § 15-0905.

On August 11, 2014, Petitioner Sierra Club, along with other environmental groups, appeared in the NYSDEC proceeding for the Initial Permit by filing comments raising virtually the same objections asserted in this case. The permit thereafter was issued on November 21, 2014. AR 238. On the same day, NYSDEC provided written notice of that action to the Sierra Club and to other persons who had appeared in that proceeding. AR 236-37. The Petition was filed approximately four months later, on March 23, 2015, and thus well after the 60 day limitations period had passed. Accordingly, the Petition is time barred.

B. The Petition Is Time-Barred For the Additional Reason That NYSDEC's BTA Determination and Associated Negative Declaration Were Made In 2010; the 2014 Water Withdrawal Permit Did Not Re-Open The Time-Barred BTA and SEQRA Determinations To A New Litigation Challenge.

On May 28, 2010, after extensive analysis and public review, NYSDEC issued the 2010 SPDES Permit Modification for the East River Generating Station, incorporating the agency's determination as to the Best Technology Available for reducing the facility's impingement and entrainment of aquatic organisms. AR 3-19. On the same date, NYSDEC issued the 2010 Negative Declaration, determining that the BTA it was imposing in the modified permit would not have a significant adverse impact on the environment and did not warrant preparation of an EIS. AR 20-27. In this proceeding, Petitioners seek to upend these decisions: they ask this Court to require NYSDEC to consider requiring Con Edison to install the closed-cycle cooling technology the Department had previously rejected. Their claims are time-barred because issuance of the Initial Permit in 2014 does not re-open the statute of limitations on the decisions that NYSDEC made in 2010.

The Court of Appeals addressed the interplay among successive agency determinations, SEQRA and the running of the statute of limitations period in *Young v. Board of Tr. of the Vill. of Blasdell*, 89 N.Y.2d 846 (1996). That case involved a solid waste transfer facility proposed to be located in the Village of Blasdell. First, in December 1993, the Village Board adopted a resolution approving a lease of property for the proposed facility and executed the lease. Then, in September 1994, the Village Board issued a negative declaration under SEQRA. The petitioners thereafter challenged the Negative Declaration, claiming that it re-opened the statute of limitations to challenge the original lease determinations made in December 1993. The Court of Appeals held that the negative declaration issued in September 1994 did not re-open the earlier lease determination to a SEQRA claim, because the four month

statute of limitations period to seek review of that earlier determination had expired. 89 N.Y.2d at 849. Similarly, NYSDEC's subsequent permitting actions in 2014 do not re-open for challenge its earlier decision not to require cooling towers or closed-cycle cooling at this facility, or its earlier determination, made in the 2010 Negative Declaration, that its selection of BTA does not require preparation of an EIS.

Similarly, in *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218 (2003), the New York City Department of Environmental Protection ("NYCDEP") had issued a conditioned negative declaration ("CND") finding that a proposal to site a power generator on a barge located off the New York City coastline would not have a significant environmental impact, thereby obviating the need for an EIS. Subsequently, NYSDEC issued an air pollution control permit for the project. In an Article 78 proceeding challenging both agency actions the Court of Appeals held the challenge to the CND to be untimely, ruling that the subsequent permitting decision by NYSDEC did not re-open the limitations period to challenge NYCDEP's earlier action for the same project.

Just as NYSDEC's permitting action in *Stop the Barge v. Cahill* did not reopen the limitations period for challenging NYCDEP's negative declaration, NYSDEC's subsequent issuance of the Initial Permit did not reopen the statute of limitations for challenging the determinations it made in 2010. This is particularly so because the condition included in the Initial Permit for "water conservation and fisheries protection" simply incorporated the requirements of the SPDES permit by reference.

Petitioners present their claims as if they are challenging an alleged failure by NYSDEC to require installation of a conservation measure under the WRPA, but in actuality they are seizing upon the issuance of the Initial Permit as an opportunity to challenge the 2010 SPDES Permit Modification and 2010 Negative Declaration. Thus, Petitioners assert that "in

evaluating Con Ed's water withdrawal permit application, DEC [was] ... obligated ... to determine whether closed-cycle cooling represents an 'environmentally sound and economically feasible water conservation measure' and to impose a permit condition requiring closed cycle cooling if appropriate." Pet. ¶ 94. But NYSDEC found that technology to be *inappropriate* when it rejected closed cycle-cooling as the best technology for protecting aquatic life at the East River Generating Station. AR 26. Similarly, Petitioners claim that an EIS is needed for the continued operation of the facility using cooling water from the East River, but NYSDEC – in the 2010 Negative Declaration – found that such continued operation does not warrant an EIS. Thus, in selecting BTA for the facility and completing a SEQRA review in 2010, NYSDEC made the very determinations Petitioners assert were overlooked here. Petitioners may not now challenge NYSDEC's 2010 permitting and SEQRA determinations by asserting claims cloaked in the language of the WRPA – those determinations are protected from review by the statute of limitations and cannot be collaterally attacked in this proceeding.

This conclusion is driven home by *E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359 (1988), which addressed the consequences of successive determinations by a Planning Board for different phases of a development project. The Court ruled there that the review of a modification to a previously approved site plan "impervious to attack on SEQRA grounds because of the Statute of Limitations" is not an occasion for re-examining an earlier determination. 71 N.Y.2d at 373.

Having missed their opportunity to challenge the Department's determinations on closed-cycle cooling at the time they were made, Petitioners should not have a second crack at doing so now. The Petition should be dismissed as untimely.

POINT II

PETITIONERS' CLAIMS ARE BARRED BY LACHES

The laches doctrine applies where the plaintiff's unreasonable delay in asserting a claim would result in prejudice to the defendant if the plaintiff were accorded the relief it seeks. *See Philippine American Lace Corp. v. 236 West 40th Street Corp.*, 32 A.D.3d 782, 784 (1st Dept' 2006); *Fleming v. Giuliani*, 307 A.D.2d 886, 868 (1st Dep't 2003). Prejudice may be established by a "showing of injury, change of position . . . or some other disadvantage resulting from delay." *In re Linker*, 23 A.D.3d 186, 189 (1st Dep't 2005). Where delay may be critical to an adverse party, a delay "of even a year" has "been sufficient to establish laches." *Schulz v. State*, 81 N.Y.2d 336, 348 (1993). The doctrine applies here because Petitioners unreasonably delayed challenging NYSDEC's final determination, made in 2010, not to require closed-cycle cooling at the East River Generating Station and not to require preparation of an EIS for the alternative technology required by the 2010 SPDES Permit Modification.

In *Save The Pine Bush v. NYSDEC*, 289 A.D.2d 636, 638 (3d Dep't 2001), the Court held that "it is well settled that where neglect in promptly asserting a claim for relief causes prejudice to one's adversary, such neglect operates as a bar to a remedy and is a basis for asserting the defense of laches." The petitioners there had brought an article 78 proceeding challenging NYSDEC's decision to grant the City of Albany a variance allowing the expansion of a landfill. *Id.* After an extensive environmental review process, NYSDEC granted the variance, and the City began the project a month later. *Id.* at 637. A day before the statute of limitation was to expire, petitioners commenced the proceeding, seeking annulment of NYSDEC's determination. *Id.* The Appellate Division affirmed the lower court's dismissal of the action, finding that the petitioners' delay and respondent's expenditure of over 70 percent of the costs associated with the project warranted application of laches. *Id.* at 638-39.

Similarly, in *Birch Tree Partners, LLC v. ZBA of Town of East Hampton*, 106 A.D.3d 1083 (2nd Dep't 2013), the Appellate Division affirmed the dismissal of an article 78 proceeding due to laches. In that case, the petitioner challenged a real estate development but waited until after one of the residential buildings had been constructed before bringing suit. Under these circumstances, "the petitioner's challenge was barred by the doctrine of laches." *Id.* at 1083.

Courts also have applied laches where petitioners asserted stale claims. *See e.g.*, *Zimmerman v. Planning Bd. of Town of Schodack*, 294 A.D.2d 776, 777-78 (3d Dep't 2002) (dismissing an article 78 proceeding where the gravamen of the complaint related to a time-barred claim regarding the construction of a road and not the Planning Board's approval of an office building site plan); *Marshall v. City of Albany*, 45 A.D.3d 1064, 1065-66 (3d Dep't 2007) ("In light of the repeated failure to act promptly and the considerable prejudice to and expense incurred by the [respondent], we find laches ... appropriate").

Here, the gravamen of the Petition relates to the same issues addressed by NYSDEC in 2010: the aquatic impacts of the water withdrawal at the East River Generating Station, the best technology available to minimize such impacts and whether an EIS should be prepared. Petitioners were or should have been aware of the extensive information developed by Con Edison over the years with respect to both aquatic impacts resulting from the once-through cooling operation and the technology that could minimize them; and they certainly knew or should have known of the Department's 2010 determinations.

As noted above, the 2010 SPDES Permit Modification was issued pursuant to legally mandated public notice and hearing procedures. *See* ECL § 17-0804; 6 N.Y.C.R.R. Parts 621 and 624. Thus, in 2010, the Department duly published notice of its intention to modify Con Edison's SPDES permit to include the BTA determination pursuant to Section 316(b) of the

Clean Water Act and 6 N.Y.C.R.R. § 704.5. Exh. J. The notice stated clearly that the modified permit would incorporate "a requirement to install traveling intake screens modified with fish protective features (aka Ristroph screens), use of fine mesh intake screen panels and a low stress fish return system." *Id.* NYSDEC also gave explicit notice that it had determined that the technologies it was requiring Con Edison to install were expected to achieve "an estimated 90 percent reduction in impingement mortality and a 75 percent reduction in entrainment from baseline conditions." *Id.* The public notice further indicated that NYSDEC had issued a negative declaration under SEQRA in connection with the proposed permit modification, and established a deadline for submission of public comments on the proposal. *Id.*

Notwithstanding this notice, Petitioners did not challenge the 2010 SPDES Permit Modification. As a result, Con Edison proceeded with the procurement and installation of the technology NYSDEC had selected – and expended $44 million in doing so. Manning Aff. ¶ 54. Con Edison would be gravely injured if Petitioners, having slept on their rights while the new technology was procured and installed, are permitted to maintain their long-delayed claims.

POINT III

PETITIONERS HAVE NOT ESTABLISHED THEIR STANDING TO BRING SUIT

The bedrock principle of standing is that a plaintiff or petitioner must plead and prove that it will suffer cognizable injury from the action it seeks to challenge. *See Soc'y of the Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 773 (1991) ("injury in fact" is an "essential principle of standing"); *Mobil Oil Corp. v. Syracuse IDA*, 76 N.Y.2d 428, 433 (1990) (petitioner must "'show that the administrative action will in fact have a harmful effect on the petitioner'" (citation omitted)); *Long Island Pine Barrens Soc'y v. Planning Bd. of the Town of Brookhaven*, 213 A.D.2d 484, 485 (2d Dep't 1995) (petitioners must demonstrate that "they will suffer an environmental injury in fact"); *Schulz v. Warren Cnty. Bd. of Supervisors*, 206 A.D.2d

672, 674 (3d Dep't 1994) ("essential principle of injury in fact remains the 'touchstone' of standing" (citation omitted)); *Jackson v. City of New Rochelle*, 145 A.D.2d 484 (2d Dep't 1988) (petitioners have no "standing to raise SEQRA claims in the absence of showings that the project would have a harmful effect on them").

An organizational petitioner – such as the Petitioners in this litigation – must establish the requisite "injury in fact" by showing injuries to its members. *See Soc'y of the Plastics Indus., Inc.*, 77 N.Y.2d at 775 ("if an association or organization is the petitioner, the key determination to be made is whether one or more of its members would have standing to sue"). Here, Petitioners have failed to put forward any evidence that any of their members has been injured by NYSDEC's issuance of the Initial Permit. Accordingly, Petitioners have no standing to bring suit.

There is no record evidence of any cognizable injury to Petitioners or their members. The two electric generating units at the East River Generating Station that use East River cooling water have done so for decades. Manning Aff. ¶ 14. Thus, the anecdotal and unsubstantiated allegation that there has been a "decline" in certain fish species in recent years (*see* Hawkins Affidavit ¶¶ 19, 21, 23) bears no apparent connection to the East River Generating Station, which has been operating since the 1950s. Manning Aff. ¶ 14. Any alleged recent "decline" – if it has in fact occurred – cannot be the result of NYSDEC's issuance of the Initial Permit in 2014. The Initial Permit did not change the facility's operation, but merely incorporated as a condition the impingement and entrainment requirements of the 2010 SPDES Permit Modification. AR 239.

Petitioners' standing affidavits do not so much as mention that Con Edison recently implemented state-of-the-art technology at the East River Generating Station to meet the 90% impingement reduction and 75% entrainment reduction required by the 2010 SPDES Permit

Modification. They offer no testimony that a further marginal reduction in impingement or entrainment at the facility would have any effect on their ability to engage in recreational fishing, which is the only activity they cite as the basis for their standing. *See* Hawkins Affidavit ¶¶ 4, 12; Downs Affidavit ¶ 4. Accordingly, they have failed to establish their standing to challenge the Initial Permit.[4]

Yet even if Petitioners had established injury from the East River Generating Station's withdrawal of up to 373.4 million gallons per day of water from the East River, that injury would not constitute legally cognizable harm. The WRPA entitles Con Edison to an initial permit allowing it to continue withdrawing water at that rate, which was the amount that Con Edison had reported to NYSDEC in its water withdrawal form for 2011, 2012 and 2013. *See* Manning Affidavit ¶ 67; Exh. M; ECL § 15-1501(9) ("The department shall issue an initial permit ... for the maximum water withdrawal capacity reported to the department ... on or about February [15, 2012]."). Petitioners cannot claim harm from NYSDEC's failure to impose measures such as closed-cycle cooling to reduce the volume of water withdrawals because Con Edison had a statutory entitlement to continue to withdraw water at that rate.

Finally, Petitioners plead an alleged "informational injury" as a result of "the lack of a full environmental impact statement covering the water withdrawal permit." Pet. ¶¶ 2-3. But a litigant cannot establish standing by claiming injury from not having the information an

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[4] In addition to being insufficient to establish standing, the Petitioners' two affidavits should be stricken to the extent they make any statements about the impacts of the East River Generating Station on aquatic life. Neither Mr. Hawkins nor Mr. Downs states or provides a basis for inferring that his testimony is based upon personal knowledge. Such testimony lacks any foundation or evidentiary value. *GTF Mktg., Inc. v. Colonial Alum. Sales, Inc.*, 66 N.Y.2d 965, 967-68 (1985); *Key Bank of Maine v. Lisi*, 225 A.D.2d 669 (2d Dep't 1996). Neither of the affiants claims to be scientists, and neither has any professional scientific credentials. Accordingly, there is no adequate foundation for their opinions on the purported ecological effects of the East River Generating Station on East River biota. The fact that a person has experience fishing in the "Hudson River watershed" (Hawkins Aff. ¶ 12) or has served as a lobbyist for the Sierra Club (Downs Aff. ¶ 9) does not provide an adequate foundation for offering an opinion as to the *causes* of any purported decline in fish populations. *See Schecter v. 3320 Holding LLC*, 64 A.D.3d 446, 450 (1st Dep't 2009) (repairman with 20 years of experience maintaining elevators not qualified to offer an expert opinion on the cause of an elevator's mechanical failure).

EIS would provide, which is an injury common to everyone. *See Soc'y of the Plastics Indus., Inc.*, 77 N.Y.2d at 778 (requiring that association demonstrate "cognizable injury . . . different in kind or degree from the public at large"). If the law were otherwise, every person living on the planet would have standing to challenge an agency decision not to require an EIS, because as a result of that determination no EIS is prepared, and the information that would have been included in an EIS is not published. The standing doctrine in New York requires proof of injury-in-fact from the agency decision that is the subject of the SEQRA decision-making, not merely proof that an EIS has not been prepared.

POINT IV

NYSDEC WAS NOT REQUIRED TO CONDUCT AN ENVIRONMENTAL REVIEW UNDER SEQRA BECAUSE ITS ISSUANCE OF THE INITIAL PERMIT WAS MINISTERIAL AND THEREFORE A TYPE II ACTION EXEMPT FROM SEQRA

Petitioners claim that NYSDEC violated the requirements of SEQRA by failing to conduct an environmental review in connection with Con Edison's application for an Initial Permit. In support of this assertion they contend that the issuance of the Initial Permit was a "Type I" action under the SEQRA regulations, due to the quantity of water that the East River Generating Station draws from East River. They further assert that NYSDEC was mistaken in categorizing the action as a "Type II" ministerial act, and that the Department was obligated to consider whether to prepare an EIS prior to issuance of the Initial Permit.

Precisely the same allegations were made – and rejected – in *Sierra Club v. Martens and Trans Canada Ravenswood LLC.*, Index No. 2949/14, Memorandum Opinion (Sup. Ct. Queens County Oct. 1, 2014) ("*Ravenswood*") (Karmel Aff. Exh. O), another lawsuit brought by the Sierra Club challenging NYSDEC's determination that its issuance of an initial permit

under the WRPA for an electric generating station is a ministerial action exempt from SEQRA.[5] The Court in *Ravenswood* ruled that issuance of an initial permit under the WRPA does not require an environmental review since it does not entail the sort of decision making that would be informed by an EIS. On that basis, the court applied Court of Appeals precedent to rule that the issuance of an initial permit under the WRPA is exempt from SEQRA as an "official act[] of a ministerial nature, involving no exercise of discretion." ECL § 8-0105(5)(ii). Since the principles applied in *Ravenswood* are equally applicable here, Petitioners' SEQRA claim should be dismissed.

A. Issuance of Initial Permits for Existing Water Withdrawals Are Mandatory.

The WRPA states that "[t]he department *shall issue* an Initial Permit, subject to appropriate terms and conditions as required under this article, . . . for the maximum capacity reported to the department . . . on or before February [15, 2012]." ECL § 15-1501(9) (emphasis added). The Bill Sponsor's Memorandum in Support of the statute reinforces this mandate, emphasizing that entities with existing withdrawals would be "entitled" to an initial permit at the maximum reported capacity. Karmel Aff., Exh. P at page 1 of 4. Thus, NYSDEC had no choice but to issue the Initial Permit for the continued withdrawal for the East River Generating Station at the maximum rate that Con Edison had previously reported, and NYSDEC could not exercise its discretion to require evaporative or closed-cycle cooling to reduce the facility's use of East River water.

The only discretion NYSDEC might have exercised in the permitting proceeding was in tailoring the terms and conditions "*required* under [the] article," ECL § 15-1501(9) (emphasis added), and to include those mandatory conditions in the permit. Those mandatory

[5] That lawsuit relates to the initial permit issued under the WRPA for the Ravenswood power plant on the East River in Queens. The Sierra Club has appealed the trial court's dismissal of its case.

terms are referenced in the first sentence of Section 15-1501(4), which identifies the requirements NYSDEC "shall establish" under its regulations for water withdrawal permits. Among other things, such requirements are to include "minimum standards for operation and new construction of water withdrawal systems"; "monitoring, reporting and recordkeeping requirements"; and protection of needs for future sources of potable water supply.[6]

An entirely separate statutory provision authorizes NYSDEC to grant water withdrawal permits to persons other than those entities entitled to initial permits. ECL § 15-1503. As to these permits, the statute provides that the Department "may *grant or deny* a permit or *grant a permit with such conditions as may be necessary*" to satisfy criteria specified in the statute. ECL § 15-1503(4) (emphasis added). Under the plain language of § 15-1503 – as opposed to the entirely separate statutory directive of § 15-1501(9) that NYSDEC "shall issue" an initial permit – the Department enjoys broad discretion on whether to grant a permit at all, and if it decides to do so, how to condition that permit to achieve consistency with the listed criteria.

The language of the statutory criteria in § 15-1503 makes clear that they apply to prospective withdrawals rather than those that are covered by the entitlement for initial permits in § 15-1501(9). For example, NYSDEC is to determine whether "the *proposed* water withdrawal" takes proper consideration of other sources of supply, whether "the *proposed* withdrawal" will be implemented in a manner that incorporates conservation measures, and whether "the *proposed* water withdrawal" will result in significant environmental impacts. ECL § 15-1503(a), (f) and (g). The criteria applicable by their terms to "proposed" withdrawals have

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[6] In contrast to the conditions required by the first sentence of § 15-1501(4), the second sentence of § 15-1501(4) states that the Department "may" incorporate additional "conditions, limitations and restrictions" in its regulations, including those it deems necessary to protect the environment and public health and safety, and to properly manage water supplies. As discussed below, those discretionary regulatory provisions apply to permits for new withdrawals under § 1503(4) of the statute, not to initial permits, because the only conditions to be imposed on initial permits are those "required" under Article 15, *i.e.* the mandatory conditions specified in the first sentence of § 15-1501(4).

no bearing on the issuance of permits for withdrawals that have been underway for decades, and have been statutorily sanctioned to continue at their maximum capacity.

The regulations adopted by NYSDEC to implement the requirements of the WRPA reflect the general structure of the statute. Thus, they include separate and distinct provisions for the issuance of initial permits to qualified entities, which appear at 6 N.Y.C.R.R. § 601.7, and for determining whether to grant permits to other entities seeking to make new water withdrawals, which are set forth in 6 N.Y.C.R.R. § 601.11. Reflecting the statutory mandate, the regulation for initial permits (§ 601.7) sets forth no regulatory criteria for NYSDEC to consider in determining whether to grant initial permits. Rather, it simply indicates how applications are to be submitted by qualified entities, creates deadlines for such submittals, and describes the contents of the permits that are to be issued. Included in that description are factual recitations such as "[a]n Initial Permit issued by the Department . . . is for the volume equal to the maximum withdrawal capacity" previously reported, 6 N.Y.C.R.R. § 601.7(c); and such permits "include[] all terms and conditions of a water withdrawal permit, including environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies." *Id.* § 601.7(e).

In contrast, the separate regulatory provision appearing at 6 N.Y.C.R.R. § 601.11 allows NYSDEC, in the exercise of its discretion, to "grant or deny a permit, or grant a permit with conditions." As with the statute, this regulation calls upon the Department to exercise that discretion by considering several regulatory factors – all of which relate by their terms to "proposed" water withdrawals and not to historic operations qualifying for the statutory entitlement.

Petitioners latch onto the language appearing in § 601.7(e), which describes initial permits as including "all terms and conditions of a water withdrawal permit, including

environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies," in attempting to sweep all of the regulatory criteria applicable to permitting new withdrawals into the permitting process for initial permits. But properly interpreted, the plain language of that regulation does not impose criteria at all. Rather, it simply indicates that an initial permit "will" include those terms and conditions that pertain to the particular withdrawal – not that all terms and conditions that could be imposed under the program with respect to any withdrawal be included in an initial permit. Moreover, a statement of what NYSDEC anticipates including in an initial permit cannot import criteria from a different regulatory provision into the permitting process for initial permits, particularly when by their very terms those criteria relate to "proposed" withdrawals. Certainly, such a statement of agency expectation cannot confer upon the Department discretion it would not otherwise have under the statute to deny an initial permit or to reduce a facility's previously reported rate of water withdrawal.

In any event, NYSDEC included in the Initial Permit for the East River Generating Station a condition providing that the "[r]equired measures for water conservation and the reduction in impacts to fisheries resource contained in the . . . SPDES permit are hereby incorporated by reference into this permit." AR at 239. As required by the WRPA it also imposed terms and conditions requiring metering, meter calibration and record keeping with respect to the withdrawal operation. AR at 239-240. But any discretion exercised by NYSDEC with respect to the water conservation and fisheries condition was exercised in connection with the issuance of the 2010 SPDES Permit Modification; and any discretion involved in designing the metering and record keeping requirements was tightly circumscribed.

B. DEC's Issuance of the Initial Permit Was a Ministerial Act Under SEQRA.

Under SEQRA, "[a]ll agencies . . . shall prepare, or cause to be prepared . . . an environmental impact statement on any action they propose or approve which may have a significant effect on the environment." ECL § 8-0109(2). The term "action" is defined to include "activities involving the issuance of a . . . permit . . . or other entitlement for use or permission to act by one or more agencies." ECL § 8-0105(4). Specifically excluded from the definition are "official acts of a ministerial nature, involving no exercise of discretion." ECL § 8-0105(5). Likewise, under the SEQRA regulations, an environmental review must precede a decision by an agency to "approve" a project. 6 N.Y.C.R.R. § 617.3(a). The SEQRA regulations define "approval" as a "*discretionary decision* by an agency to *issue a permit*, certificate, license, lease or other entitlement or to otherwise authorize a proposed project or activity." *Id.* § 617.2(e) (emphasis added).

A close reading of the relevant statutory language puts to rest any argument that the environmental review requirements apply to the issuance of initial permits. Since under the WRPA the Department "shall" issue such permits for withdrawals at the maximum reported capacity, NYSDEC has no discretion over the fundamental issue of whether it will or will not grant the permits, or the volume of water to be withdrawn pursuant to the permit. Because SEQRA by its terms applies to actions an agency exercises its discretion to "approve," ECL § 8-0109(2), the analysis need go no further than the statutory language of § 8-0109(2). Since NYSDEC was duty-bound to issue initial permits for existing withdrawals at the maximum reported capacity, and wields no discretion over whether to "approve" the withdrawals, the requirements of SEQRA are not applicable.

Moreover, as explained above, the discretion NYSDEC has in designing the terms and conditions of initial permits is so limited that an environmental review would not assist the agency in its decisionmaking. The Court of Appeals addressed a similar circumstance in *Incorporated Village of Atlantic Beach v. Gavalas*, 81 N.Y.2d 322 (1993) ("*Gavalas*"). The issue raised in that case was whether the issuance of a building permit that under the relevant ordinance involved the exercise of "some discretion" by the building inspector was subject to SEQRA.[7] Examining the ordinance, the Court found that the building inspector had some discretion, but it was limited to considering consultants' reports designed to assist in determining whether the proposed construction met certain predetermined criteria. Given the limited nature of such discretion, the Court found that SEQRA did not apply. In reaching its decision, the court articulated two governing principles.

First, rejecting a "mechanical distinction" between ministerial and discretionary acts, the Court found the dispositive issue to be "whether the information contained in an EIS may form the basis for a decision whether or not to undertake or approve such action." 81 N.Y.2d at 326. Thus, the Court held that "when an agency has some discretion, but that discretion is circumscribed by a narrow set of criteria which do not bear any relationship to the environmental concerns that may be raised in an EIS, its decisions will not be considered 'actions' for purposes of SEQRA's EIS requirements . . . ." *Id.* at 326.

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[7] *Gavalas* was decided prior to the 1996 amendments to the SEQRA regulations, which added an express reference to "building and historic preservation permits" in the list of actions exempt from SEQRA. Type II actions are those that "have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review. . . ." 6 N.Y.C.R.R. § 617.5(a). Among the many Type II actions that are exempt from SEQRA are "official acts of a ministerial nature involving no exercise of discretion, including building permits and historic preservation permits where issuance is predicated solely on the applicant's compliance or noncompliance with the relevant local building or preservation code(s)." 6 N.Y.C.R.R. § 617.5(c)(19).

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

Second, the court noted that it would be illogical to require an agency to comply with SEQRA where it lacks the authority to base its approval on environmental concerns. *Id.* at 327. Thus, the Court found SEQRA not to apply where preparation of an EIS would be a "meaningless and futile act." *Id.*

The Second Department followed *Gavalas* in *Lighthouse Hill Civic Assoc. v. City of New York*, 275 A.D.2d 322 (2d Dep't 2000). The Court there held an authorization issued by the City Planning Commission ("CPC") allowing site work that facilitated subsequent construction to be a ministerial action exempt from SEQRA. Since CPC had discretion to determine whether the work would "disturb existing drainage patterns and soil conditions in the area," project opponents alleged that the authorization required review under the statute. The Appellate Division rejected that claim, ruling that, like the ordinance at issue in *Gavalas*, the Zoning Resolution circumscribed CPC's discretion to a considerably more limited set of issues than those addressed in an EIS.

Here, the discretion NYSDEC exercised in issuing the Initial Permit was limited to determining whether Con Edison was eligible for the entitlement under ECL § 15-1501(9) and 6 N.Y.C.R.R. § 601.7(a), whether its application was submitted by the deadline imposed by 6

N.Y.C.R.R. § 601.7(b)(2), and to imposing required conditions relating to such matters as metering, meter calibration and record keeping.[8] ECL § 15-1501(4) (first sentence). It is readily apparent that NYSDEC's determination with respect to such matters would not have benefited from any information that might come to light as a result of an environmental review. Nor could the information in an EIS lead NYSDEC to deny the Initial Permit or reduce the quantity of water that the East River Generating Station is permitted to withdraw from the East River. Under *Gavalas*, such narrowly channeled discretion is properly categorized as a Type II action, because preparation of an EIS would be a meaningless and futile act under the circumstances.

The Court in *Ravenswood* came to that very conclusion in a case Petitioners initiated in an attempt to annul the initial permit NYSDEC granted for the continued operation of a water withdrawal just upstream from the East River Generating Station. The Court there noted that the WRPA "did not leave DEC with the discretion to refuse [the applicant] an initial permit," citing the statutory mandate and the legislative history confirming that "'existing withdrawals would be *entitled* to an initial permit.'" Mem. Op. at 9 (quoting Bill Sponsor's Memorandum in Support of Legislation, A.B. A5318A (S3798)). The Court further rejected Petitioners' contentions concerning the scope of NYSDEC's discretion in imposing terms and conditions on permits for new withdrawals under ECL §15-1503. It did so, citing the distinction between that provision and the more specific initial permitting provision appearing at § 15-1501(9). The Court in *Ravenswood* properly concluded that the "issuance of an initial permit ... was a Type II action, not a Type I action" and "is a ministerial act not subject to review under ... SEQRA." Mem. Op. at 10. Petitioners' SEQRA claim here is meritless for the same reason.[9]

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[8] As noted above, NYSDEC also incorporated the requirements of the SPDES permit by reference, but any discretion in designing those requirements was exercised in that earlier proceeding.

[9] Petitioners argue that issuance of the Initial Permit is a Type 1 action because it involves "a project or action that would use ground or surface water in excess of 2,000,000 gallons per day." Pet. Mem. at 36.

POINT V

NYSDEC DID NOT VIOLATE THE WRPA WHEN IT ISSUED THE WATER WITHDRAWAL PERMIT TO CON EDISON

As explained in Point IV.A *supra*, the WRPA grants a statutory entitlement to an initial permit (i) for any person who reported its water withdrawal to NYSDEC pursuant to Article 15, Title 33 prior to February 15, 2012 and (ii) at the maximum water withdrawal capacity reported to NYSDEC in such filings. ECL § 15-1501(9). Petitioners do not assert that Con Edison failed to submit the reports entitling it to an initial permit; nor do they take issue with the fact that the withdrawal rate reflected in those reports was 373.4 million gallons per day. Thus, the fundamental facts triggering Con Edison's statutory authorization to continue withdrawals at that rate are not in dispute.

Nevertheless, Petitioners contend that NYSDEC violated the WRPA and was arbitrary and capricious in that it allegedly failed to consider the imposition of conditions "requiring closed-cycle cooling and other water conservation measures" at the East River Generating Station. Pet. ¶ 106. Thus, while Petitioners do not contest the fact that Con Edison is entitled by law to an initial permit allowing it to withdraw cooling water at the maximum capacity previously reported, they seek to negate that entitlement with permit conditions aimed at reducing the withdrawal. In other words, Petitioners would have NYSDEC issue the continued

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They further assert that a Type I action cannot also be a Type II action, citing 6 N.Y.C.R.R. § 617.5(b)(2), which states that actions categorized by individual agency procedures as Type II actions must "not be a Type I action as defined in section 617.4." But as noted above, ministerial acts are not "actions" subject to SEQRA at all. ECL § 8-0105(5). Moreover, the Type II category includes not only actions that are deemed by regulation to have minimal environmental impact, but also those actions that have been "precluded from environmental review under Environmental Conservation Law, article 8." 6 N.Y.C.R.R. § 617.5(a). Since the issuance of the Initial Permit was ministerial, it was precluded from environmental review under the ECL, and for that reason alone is a Type II action. The restriction on designating as Type II actions those actions meeting the criteria for Type I actions has no applicability to an action that is a Type II action as a result of a specific statutory exemption.

authorization required by the statute with one hand, and simultaneously reduce that authorization with the other. Such sleight of hand would be at odds with the letter and spirit of the WRPA.

Moreover, as explained in Point IV.A above, the criterion Petitioners fault NYSDEC for neglecting in its issuance of the Initial Permit – implementation of "environmentally sound and economically feasible conservation measures," ECL § 15-1503(1)(f) – is (like the other criteria in ECL § 15-1503) inapplicable to NYSDEC's mandatory issuance of initial permits. And even if such criteria were applicable as a legal matter, they would have no bearing on the permit for the East River Generating Station because they are aimed at the conservation and allocation of limited water supplies, *see* ECL § 15-1503, not the abundant ocean waters serving the facility. This is especially so because virtually all of the cooling water Con Edison withdraws is returned to its source.

The WRPA was enacted to conserve water that is "vital to New York's residents and businesses, who rely on these resources for drinking water supplies, and to support agriculture, manufacturing and other industries and recreation in the State." Bill Sponsor's Memorandum in Support of Legislation, A.B. A5318A (S3798), L. 2011, ch. 401 at page 3 of 4 (Karmel Aff., Exh. P). As Petitioners themselves note, the statute was passed largely to implement the Great Lakes-St. Lawrence River Basin Water Resource Compact to protect the limited fresh water of the Great Lakes-St. Lawrence River Basin. Pet. ¶ 14. The legislative debate on the WRPA sheds further light on the statutory purpose. *See* NY Assembly Debate on 2011 Chapter 401, May 2, 2011 at 157 ("I think in recognition of the fact that although we have tended in New York State to take clean, fresh water kind of for granted because it is an abundant resource in this State, we shouldn't be doing that. We should be a little bit more careful about understanding the resource . . . and preserving it . . . .") (annexed as Karmel Aff. Exh. Q); *see also id.* at 158 ("[W]e see such a broad array of support for the bill . . . [from] many others

whose bottom line concern is having a clean, fresh water source that remains abundant in this State. That is the bottom line here."); NY Senate Debate on 2011 Chapter 401, June 16, 2011 at 1 ("New York's great natural resource is water. And this legislation gives substantial protection to that resource. With our Great Lakes containing more than one-fifth of the world's freshwater, steps are necessary to prevent its depletion.") (annexed as Karmel Aff. Exh. R).

The cooling water withdrawal for the East River Generating Station gives rise to none of these concerns, since it does not consume any substantial quantity of East River water, and that water source – the salt waters of the Atlantic Ocean and Long Island sound – is unlimited. Petitioners are misapplying a statute enacted for one purpose – the protection of limited water supplies – for the entirely different purpose of requiring NYSDEC to rehash issues that were carefully considered and resolved years ago. But just as a square peg will not fit into a round hole, the water conservation criteria of the WRPA cannot compel NYSDEC to require closed cycle cooling at the East River Generating Station.

CONCLUSION

For the foregoing reasons, the Petition should be dismissed.

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Respectfully submitted,

BRYAN CAVE LLP

By: 

Philip E. Karmel
J. Kevin Healy
Daniel Lewkowicz
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000

Peter P. Garam
Shira R. Rosenblatt
Consolidated Edison Company of New York, Inc.
4 Irving Place
New York, NY 10003
(212) 460-2985

Attorneys for Respondent Consolidated Edison Company of New York, Inc.