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

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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.

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Index No. 100524/2015

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

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PRELIMINARY STATEMENT

A few critical and undisputed facts should inform an evaluation of the arguments put forward by Petitioners in opposition to Con Edison's motion to dismiss. First, for more than two decades, NYSDEC and Con Edison have worked diligently to identify and implement the best technology available to minimize the effects of the cooling water withdrawals at the East River Generating Station on aquatic resources, and in the course of those efforts NYSDEC specifically rejected closed-cycle cooling – the technology Petitioners seek to require – as the appropriate technology at this facility. Second, under the Water Resource Protection Act of 2011 (the "WRPA"), Con Edison was entitled to an initial permit allowing it to continue withdrawing water from the East River at the maximum rate it had reported to NYSDEC prior to February 15, 2012, so NYSDEC had no authority to require any reduction in that withdrawal. Third, the water at issue in this proceeding is not consumed by the Con Edison facility, but is returned to the water body at a location near the point from which it was taken. Finally, the East River is a salt water tidal estuary connecting the Long Island Sound to New York Harbor and the Atlantic Ocean, and is not comprised of the sort of water supply the WRPA was intended to conserve.

Thus, this proceeding has nothing to do with the conservation of water under the WRPA. Rather, it is an attempt by Petitioners to reach back and overturn decisions made years ago under a statutory program designed specifically to minimize the effects of cooling water withdrawals on marine life. As such, it should be dismissed not only because it is untimely, and because Petitioners lack standing to bring it, but also because it is a misapplication to ocean water of a law intended for the conservation of water supplies.

POINT I

THE PETITION IS TIME BARRED

Con Edison's initial moving papers established that the Petition is time barred for two reasons. First, it was not filed within the 60-day statute of limitations period applicable to challenges to permitting decisions rendered by NYSDEC under Article 15 of the Environmental Conservation Law ("ECL"). Second, it seeks to re-open for challenge determinations made five years ago in connection with NYSDEC's issuance of the 2010 SPDES Permit Modification.

With respect to the first ground for dismissal, Petitioners claim they did not have "fair notice" that the 60-day statute of limitations applied to their challenge to the Initial Permit, but they do not deny that the only Appellate Division decision on point holds that the 60-day statute of limitations applies to permit challenges such as the one at issue here, and that there is no contrary caselaw authority. Accordingly, they were on notice that they were required to file this proceeding within the 60-day statute of limitations.

With respect to the second ground for dismissal, Petitioners offer no rebuttal to the points made by Con Edison in establishing that the Petition should be dismissed as an untimely challenge to the determination that NYSDEC made in 2010 that the technology it selected for the East River Generating Station would not result in adverse environmental impacts and does not warrant preparation of an Environmental Impact Statement ("EIS").

A. Petitioners Had Fair Notice of the 60-Day Statute of Limitations Period.

It is undisputed that Petitioners filed this proceeding more than 60 days after NYSDEC served notice of the issuance of the Initial Permit under Title 15 of Article 15 of the ECL. Petitioners concede that "ECL § 15-0905(2) . . . sets forth a general [60-day] statute of limitations period for actions under Article 15." Pet. Mem. at 2. According to Petitioners, however, this "general statute of limitations period" does not apply to permits issued under Titles

5, 15 or 27 of Article 15 because of an exclusion purportedly codified at ECL § 15-0903(1). Pet. Mem. at 2. But the provision cited by Petitioners relates to hearing procedures, and has nothing whatsoever to do with the statute of limitations.

Petitioners purport to quote the text of ECL § 15-0903(1), but they omit the heading of that provision, which provides the context for the text that they cite:

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

ECL § 15-0903(1) (emphasis added). Thus, when read in its statutory context, the phrase "provisions of this title" relates to the provisions of Title 9 that govern NYSDEC hearing procedures; and the section in its entirety allows permit proceedings under Titles 5, 15 or 27 of Article 15 to be governed by the uniform NYSDEC hearing procedures codified at Article 70 of the Environmental Conservation Law, rather than those codified in Title 9 of Article 15. Accordingly, this provision has nothing to do with the 60-day statute of limitations set forth in ECL § 15-0905.[1]

By citing the language of § 15-0903(1) outside of its context, Petitioners violate a fundamental principle of statutory construction—that words must be understood in the context in which they are used. *See, e.g., Yates v. United States*, 135 S. Ct. 1074, 1081-82 (2015) (the

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1 This conclusion is supported by the difference between the language of § 15-0905 and § 15-0903(1). Section 15-0905 requires that a special proceeding to challenge a permit "*decision*" made pursuant to Article 15 be filed within 60 days after NYSDEC's service of the "*decision.*" *See* ECL § 15-0905(1) ("a *decision* made pursuant to this article"); ECL § 15-0905(2) ("within sixty days after the service … of the *decision*"). By contrast, Section 15-0903(1) does not use the word "*decision*" because the subject of that provision is the "*[h]earing procedure*" for "*applications* for permits" or "*requests* for permit renewals and modification" or "permit modification, suspension or revocation *proceedings* initiated by the department." ECL § 15-0903(1). Section 15-0903(1) does not exempt a permit "decision" from the 60-day limitations period codified in § 15-0905(2).

meaning "'of statutory language is determined [not only] by reference to the language itself, [but also by] the specific context in which that language is used, and the broader context of the statute as a whole'" (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)); *Mowczan v. Bacon*, 92 N.Y.2d 281, 285 (1998) ("In matters of statutory construction, legislative intent is the great and controlling principle, and the proper judicial function is to discern and apply the will of the Legislature. Generally, inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history." (internal quotation marks and citations omitted)).

In addition to ignoring the linguistic context of § 15-0903(1), Petitioners fail to identify the legislative intent of this provision. The 60-day statute of limitations provision was enacted in 1972 (*see* L. 1972, ch. 664 § 2, adding ECL § 15-0905), while the provision relating to NYSDEC hearing procedures (ECL § 15-0903(1)) was enacted subsequently, in 1979. *See* L. 1979, ch. 233 § 4. In an explanatory memorandum prepared at the time ECL § 15-0903(1) was enacted, NYSDEC provided the following explanation for this provision:

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

1979 N.Y. Sess. Laws 1687 (McKinney) (reproducing text of NYSDEC Memorandum on L. 1979, ch. 233 § 4). This legislative history makes clear that the only purpose of the 1979 law

was to make the uniform administrative hearing procedures codified in Article 70 of the ECL applicable to Article 15 permits.

The caselaw uniformly holds that a 60-day statute of limitations applies to special proceedings to challenge permit decisions under Article 15 of the ECL. *See Rochester Canoe Club v. Jorling*, 150 Misc. 2d 321, 325-26 (Sup. Ct. Monroe Cnty. 1991), *aff'd*, 179 A.D.2d 1097 (4th Dep't 1992) ("*Rochester Canoe*"); *Spinnenweber v. N.Y. State Dep't of Envtl. Conservation*, 120 A.D.2d 172, 175 (3d Dep't 1986); *Loon Lake Estates v. Adirondack Park Agency*, 83 Misc. 2d 686 (Sup. Ct. Essex Cnty. 1975). Petitioners claim that these cases are wrongly decided, but such a claim can hardly be equated with lack of fair notice. Moreover, the court in *Rochester Canoe* specifically rejected the argument that Petitioners are now making that ECL § 15-0903(1), relating to hearing procedures, is an exemption from the 60-day limitations period codified in ECL § 15-0905.

Petitioners fault respondents for not citing *Niagara Mohawk Power Corp. v. State of New York*, 300 A.D.2d 949 (3d Dep't 2002) ("*Niagara Mohawk*"). *See* Pet. Mem. at 4. But that case did not involve a NYSDEC permit decision. The special proceeding in *Niagara Mohawk* challenged a decision made by a river regulating district. The court held that the 60-day statute of limitations applies only to permits issued by NYSDEC, and not to decisions made by other entities, because ECL § 15-0905 uses the word "department" in ECL § 15-0905(1) and ECL § 15-0905(3). *See Niagara Mohawk*, 300 A.D.2d at 951. (The ECL defines the word "department" as the "state Department of Environmental Conservation." ECL § 1-0303.) It is for this reason that the court held that the 60-day statute of limitations did not apply to suits against river regulating districts. In short, this case provides no support whatsoever to

Petitioners' contention that a four month limitations period governs challenges to the NYSDEC permit decision at issue in this case.

B. The Proceeding is Time Barred Under the Caselaw Holding That Subsequent Administrative Proceedings Do Not Re-Open An Earlier Determination Impervious to Attack Because of the Statute Of Limitations.

In 2010, NYSDEC determined that: (i) the installation of traveling intake screens with fish-protective features—and not cooling towers—is the technology to be implemented to protect aquatic resources at the East River Generating Station; and (ii) this technology does not result in significant adverse environmental impacts or warrant an EIS under SEQRA. *See* Con Edison Mem. at 11 (discussing 2010 Negative Declaration). It is these decisions that Petitioners challenge here, as they now claim that the very technology NYSDEC selected in 2010 would result in significant adverse environmental impacts that should be examined in an EIS. Their claim is time barred because it was brought years after NYSDEC made its determinations. Petitioners' opposition memorandum does not address the caselaw cited in Con Edison's initial memorandum of law, which holds that subsequent administrative determinations do not re-open for challenge an earlier administrative determination impervious to attack because of the statute of limitations. *See* Con Edison Mem. at 18-20.

POINT II

PETITIONERS' CLAIMS ARE BARRED BY LACHES

At bottom, this case is not about determinations NYSDEC made or may have failed to make in issuing the Initial Permit. It is about determinations made five years ago in issuing the 2010 SPDES Permit Modification, which Petitioners had every opportunity to challenge at the time they were made. Because they neglected to bring such timely claims and Con Edison would be severely prejudiced if they were allowed to do so now, the Petition should be dismissed on account of laches. *See* Con Edison Mem. at 21-23.

In 2010, NYSDEC made a determination identifying the best technology available ("BTA") for minimizing aquatic impacts associated with the cooling water withdrawal at the East River Generating Station, and required Con Edison to install that technology under the 2010 SPDES Permit Modification. *See* Con Edison Mem. at 11-12. At the same time, the agency adopted a negative declaration under SEQRA, which found that no significant environmental impacts would result from that action, and that no EIS was needed to examine any such impacts under SEQRA. Manning Aff. ¶ 47. NYSDEC's decisions were made in a wide-open administrative proceeding, with due notice and the opportunity to comment provided pursuant to NYSDEC's uniform procedures. *See id.* The public notice issued at the time these determinations were made announced NYSDEC's decision to require Con Edison "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" as BTA for the facility. Exh. J at 2. It also described the reductions in mortality to be required under the modified permit, which were to be achieved through the installation of the selected BTA technology and additional measures, if necessary. *Id.* at 3. The 2010 Negative Declaration explained that NYSDEC had rejected evaporative cooling towers or closed-cycle cooling as BTA "due to a combination of key siting issues as well as high cost." AR 26.

Petitioners do not dispute any of these facts, nor do they dispute that Con Edison has now completed a $44 million capital program to install the technology NYSDEC required in 2010. Moreover, Petitioners do not contend that they were somehow unaware of the determinations NYSDEC made in 2010, or that they took any steps to challenge—or even comment on—the agency's actions at the time they were taken, or at any time thereafter. Instead of taking issue with any of these critical facts, Petitioners merely state that they "have not

challenged Con Ed's SPDES permit," and for that reason "there is no basis for asserting that Petitioners committed laches in making such a challenge." Pet. Mem. at 5. But it is precisely because Petitioners slept on their rights and *failed* to timely object to the determinations NYSDEC made in issuing the 2010 SPDES Permit Modification that they *are* guilty of laches.

On the surface, the Petition may appear to challenge NYSDEC's issuance of the Initial Permit without first complying with SEQRA, and the agency's alleged failure to make findings Petitioners contend were required under the WRPA. However, what the Petition really seeks is not the conservation of the salt water of the East River under the WRPA, but the minimization of any effects on aquatic life that may result from the water withdrawals at the East River Generating Station. Thus, Petitioners assert that NYSDEC should have prepared an EIS under SEQRA because "it is apparent that there will be significant adverse environmental impacts" from the water withdrawals because the "water drawn into the plant will contain fish, fish eggs, and other aquatic life. Passage through the cooling systems will destroy most of these organisms and will damage the aquatic life of the East River, a tidal estuary . . . ." Pet. ¶ 76. Moreover, the specific relief Petitioners seek in this proceeding is that "the Con Ed water withdrawal permit issued by the DEC be annulled and that DEC be directed to evaluate permit conditions that would reduce fish impingement and entrainment and conserve water, such as closed-cycle cooling and other water conservation measures . . . ." Pet. ¶ 142. Keeping in mind that the water withdrawals at issue in this proceeding are taken from an unlimited tidal estuary and virtually all the salt water drawn into the cooling system is, in any event, returned to the East River, the reference in the Petition to "the conservation of water" does nothing more than cloak a stale claim under the SPDES program (*i.e.*, that NYSDEC failed to require closed-cycle cooling) in the garb of the WRPA.

POINT III

PETITIONERS HAVE NOT ESTABLISHED THEIR STANDING

Petitioners have presented no evidence that the permit they challenge is causing them environmental harm, and accordingly have not established their standing to bring suit.

Although standing rules are not intended to "insulate government actions from scrutiny," *Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 779 (1991) ("*Society of Plastics*"), "perfunctory allegations of harm" do not establish standing. *Save the Pine Bush, Inc. v. Common Council of the City of Albany*, 13 N.Y.3d 297, 306 (2009) ("*Save the Pine Bush*"). In *Save the Pine Bush*, the Court of Appeals stated that standing is not automatic in environmental cases and acknowledged the danger in making the "standing barriers too low." *Id.* at 306. The Court required petitioners to meet a significant burden of proof:

> Plaintiffs must not only allege, but if the issue is disputed must prove, that their injury is real and different from the injury most members of the public face. Standing requirements 'are not mere pleading requirements but rather an indispensable part of the plaintiff's case' and therefore 'each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof.'

Id. (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("*Lujan*")). The Court stated that "plaintiffs may be put to their proof on the issue of injury, and if they cannot prove injury their cases will fail." *Id.*

Here, there is no record evidence of any cognizable injury to Petitioners or their members resulting from NYSDEC's issuance of the Initial Permit in 2014. Apart from an alleged "informational injury" (discussed below), the only harm they assert is that Mr. Hawkins, a member of Sierra Club and HRFA, occasionally fishes at undisclosed locations in the Hudson

River watershed (an area comprising 13,400 square miles[2]) and claims that he has noticed declines in certain fish species at undisclosed locations in recent years. Pet. Mem. at 9-10. But anecdotal observations regarding a recent decline in certain fish species (*see* Hawkins Affidavit ¶¶ 19, 21, 23) could not have been caused by the issuance of the Initial Permit, because: (i) that permit did nothing more than allow the continuation of an operation that has been underway with the same level of water withdrawals for decades; (ii) pursuant to the 2010 SPDES Permit Modification Con Edison installed state-of-the-art technology at the East River Generating Station in 2013 to *reduce* impingement by a minimum of 90 percent and entrainment of fish by a minimum of 75 percent; and (iii) this technology is achieving reductions that go well beyond these minimum performance requirements. Manning Aff. ¶ 58. Petitioners do not offer a shred of evidence that Mr. Hawkins' recreational fishing excursions have been harmed by the permit they challenge.[3]

Petitioners present a series of discordant arguments to seek to establish their standing. Each of their arguments is addressed below in the same order in which it is presented in Petitioners' memorandum of law.

Petitioners note that the Sierra Club and HRFA are environmental preservation organizations, whose interests include the protection of water resources. *See* Pet. Mem. at 6, 8-9. While that may be so, their general mission alone does not give the organizations standing in the absence of any proof of environmental injury to them or at least one of their members. *See* Con Edison Mem. at 23-24. Such proof is wholly absent here.

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2 http://ny.water.usgs.gov/projects/hdsn/fctsht/su.html#HDR0. In light of the size of the watershed, Petitioners have not even established a geographic nexus with the East River Generating Station.

3 Even if concerns expressed by Mr. Hawkins were something more than anecdotal, his testimony would not constitute admissible evidence on the issue of causation. *See* Con Edison Mem. at 25 n.4.

Petitioners correctly assert that """the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."""" Pet. Mem. at 7 (quoting *Save the Pine Bush,* 13 N.Y.3d at 305 (quoting *Lujan*, 504 U.S. at 562-63)); *see also* Pet. Mem. at 10-11 (repeating this quotation from *Lujan*). But Mr. Hawkins' recreational interest in the use or observation of fish in the Hudson River watershed does not establish that the permit challenged here is the cause of any injury to that interest.

Petitioners rely on *Sun-Brite Car Wash v. Board of Zoning & Appeals of Town of N. Hempstead*, 69 N.Y.2d 406 (1989) ("*Sun-Brite*") to claim that "'*special* damage or in-fact injury is not required in every instance.'" Pet. Mem. at 7 (quoting *Sun-Brite*, 69 N.Y.2d at 413 (emphasis added)). But *Sun-Brite* merely held—in the context of a challenge to a zoning determination that allowed a change in land use—that it is "reasonable to assume that, when the use is changed, a person with property located in the immediate vicinity of the subject property will be adversely affected in a way different from the community at large; loss of value of individual property may be presumed from depreciation of the character of the immediate neighborhood." *Sun-Brite*, 69 N.Y.2d at 414. Thus, the court held that "an allegation of close proximity alone may give rise to an inference of damage or injury that enables a nearby owner to challenge a zoning board decision without proof of actual injury." *Id.* But a judicially-sanctioned presumption that a closely proximate neighbor would suffer harm from a development project does nothing to overturn the line of cases making proof of environmental injury a bedrock requirement for standing in SEQRA cases. *See* Con Edison Mem. at 23-24; *see also Mobil Oil Corp. v. Syracuse IDA*, 76 N.Y.2d 428, 434-35 (1990) (declining to extend *Sun-Brite* to a SEQRA challenge, even in the context of a petitioner who is a nearby property owner).

Petitioners cite *Ecumenical Task Force of Niagara Frontier v. Love Canal Area Revitalization Agency*, 179 A.D.2d 261, 265 (4th Dep't 1992), for the proposition that any litigant whose "zone of interest" is protected by a statute should have standing. Pet. Mem. at 7. But this case did not eliminate the requirement that a litigant prove injury from the administrative action it seeks to challenge. The court specifically noted that the organizational petitioners in that case had standing because they had established the agency action's "harmful effect on their members." 179 A.D.2d at 265.

Next, Petitioners cite cases holding that organizations may bring suit without joining individual members as petitioners. Pet. Mem. at 7-8. Con Edison has not argued otherwise. However, the cases they cite do not relieve Petitioners of their burden to prove that one or more of their members is suffering environmental injury from the agency action they seek to challenge.

Petitioners assert that Con Edison has made the "disingenuous argument" that no one has standing to challenge the Initial Permit because the East River Generating Station has operated for decades. Pet. Mem. at 11. But Con Edison has not argued that no one could bring such a challenge. Rather, its argument is that Mr. Hawkins' generalized concerns regarding declines in certain fish populations in recent years do not establish that he has suffered cognizable harm from the issuance of the 2014 Initial Permit, particularly because that permit does nothing more than allow a longstanding water withdrawal to continue, *see* Con Edison Mem. at 24, and requires (by reference) the operation of newly-installed technology to protect aquatic resources. Manning Aff. ¶ 72. Thus, contrary to Petitioners' assertions, Con Edison has argued that they and their member affiant have failed to satisfy a fundamental requirement for standing, not that *no one* could do so.

Next, Petitioners look to the "intervening passage" of the WRPA as the basis for challenging a permit for the continued operation of Con Edison's historic water withdrawal, citing statutory provisions relating to the conservation of water and avoidance of adverse impacts on water-dependent natural resources. Pet. Mem. at 11, 12. But the provisions they cite establish permitting criteria that do not apply to the Initial Permit that Petitioners seek to challenge. *See* Con Edison Mem. at 28-29. Such inapplicable statutory provisions cannot give rise to standing.

Petitioners then float the theory that they have standing because "alternatives and mitigating measures" might have been included in the Initial Permit to "assure the [statute's] conservation goals." Pet. Mem. at 12. But the issues of alternatives or mitigation is relevant to standing only after Petitioners have established that the Initial Permit is causing them environmental injury; in the absence of that showing, Petitioners have no standing to raise such issues. Moreover, the one measure Petitioners cite in the Petition—the use of cooling towers to reduce the volume of water withdrawn from the East River—could not even have been considered by NYSDEC, because Con Edison had a statutory entitlement to continue the water withdrawal at the "maximum capacity" reported to NYSDEC on or before February 15, 2012. *See* Manning Aff. ¶ 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' purported *belief* that "a thorough environmental review" would provide "alternatives and mitigating measures" (Pet. Mem. at 12) is no substitute for *evidence* that the action they challenge has caused them environmental harm.

Petitioners cite the provisions of ECL § 70-0101 (establishing the "uniform review procedure for major regulatory programs") and state that "[t]hese procedures are meant

'to encourage public participation in government review and decision making processes and to promote public understanding of all government activities.'" Pet. Mem. at 12 (quoting ECL § 70-0103(4)). Petitioners have not established a procedural violation. But even if they had done so, an asserted deprivation of procedural rights does not give rise to standing in the absence of a concrete environmental injury resulting from the agency action being challenged. *See Lujan*, 504 U.S. at 572-73 n.8. Members of the public do not have standing simply by alleging that NYSDEC paid insufficient heed to their comments in the course of an administrative proceeding. Petitioners do not cite any caselaw supporting the approach to standing they urge upon this Court, nor could they because their theory would vitiate the bedrock requirement of standing that a litigant prove environmental harm from the agency action that it seeks to challenge. *See* Con Edison Mem. at 25-26.

Petitioners cite *Association for a Better Long Is., Inc. v. NYSDEC*, 23 N.Y.3d 1 (2014) ("*Better Long Island*"), as purportedly supporting their "informational injury" argument, but this case is inapposite. The petitioners in *Better Long Island* challenged regulations promulgated by NYSDEC. *Id.* at 5. The regulations provided that to obtain an incidental take permit, a land owner was required to submit a plan to minimize impacts to endangered or threatened species. *Id.* The petitioners' land was the habitat of "at least two endangered or threatened species and [would] be subject to and affected by the [promulgated regulations]." *Id.* The petitioners brought an Article 78 proceeding alleging procedural violations that included "failing to refer the proposed [regulatory] amendments to the State Environmental Board, [and] failing to hold public hearings and failing to properly evaluate and analyze the potential regulatory impacts." *Id.* at 5-6. The Court of Appeals found the petitioners to have standing because they "have asserted a concrete interest in the matter the agency is regulating, and a

concrete injury from the agency's failure to follow procedure." *Id.* at 7. Any "informational injury" Petitioners may suffer here from an alleged failure to prepare an EIS falls well short of the "concrete injury" at issue in *Better Long Island*, since in that case the petitioners demonstrated that the challenged regulations would require them to comply with "a comprehensive habitat protection plan." *Id.* at 7.

Moreover, in *Better Long Island*, the court held that a petitioner could not establish standing merely by alleging that NYSDEC violated the State Administrative Procedure Act. *Id.* at 8. This holding is consistent with *Lujan*, which also rejected the contention that the deprivation of procedural rights can establish standing in the absence of proof of a concrete environmental injury from the challenged agency action. *See Lujan*, 504 U.S. at 572-73 n.7 & n.8. Petitioners' contrary contention (*see* Pet. Mem. at 14) is erroneous.[4]

Reading the Petitioner's Opposition Memorandum one would think that a host of legal issues must be sorted out to determine whether Petitioners have standing to bring this case. But in reality, the issue before the Court is quite simple: to bring this case, Petitioners must

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[4] Petitioners conclude their standing argument by string citing a number of irrelevant cases (Pet. Mem. at 15-16), none of which provides support for their standing contentions. *See Oyster Bay Assoc. L.P. v. Town of Oyster Bay*, 2013 WL 7176872 at **3-4 (Sup. Ct. Suffolk Cnty. Oct. 9, 2013) (holding that petitioner failed to establish standing to bring suit under SEQRA because it failed to establish "environmental injury"); *Comm.to Preserve Brighton Beach & Manhattan Beach v. Planning Comm. of the City of N.Y.*, 259 A.D.2d 26 (1st Dep't 1999) (holding that those living in proximity to a public park had standing to challenge a concession for a recreation center in the park that would interfere with their use and enjoyment of the park); *Albert Elia Bldg. Co. v. N.Y. State Urban Dev. Corp.*, 54 A.D.2d 337 (4th Dep't 1976) (allowing a contractor to bring suit to challenge an allegedly illegal change order that deprived the contractor of the ability to bid for the work under the State's competitive bidding statute for public works); *Roosevelt Is. Residents Ass'n v. Roosevelt Is. Operating Corp.*, No. 118270/04, 2005 WL 1306479 (Sup. Ct. N.Y. Cnty. Apr. 21, 2005) (an association of Roosevelt Island residents had standing to challenge a construction project on the island alleged to harm open space used by island residents); *Saratoga Cnty. Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 813 (2003) (citizen-taxpayers have standing under the State Finance Law because it grants standing to taxpayers "'whether or not such person is or may be affected or specially aggrieved' by the challenged action" (quoting State Finance Law § 123-b(1)); *State Communities Aid Assn. v. Regan*, 112 A.D.2d 681 (3d Dep't 1985) (granting standing under 42 U.S.C. § 1983 to a person alleging the unlawful deprivation of his public benefits and under the State Finance Law to taxpayers alleging misuse of State funds).

establish that they, or at least one of their members, has suffered environmental injury as a result of NYSDEC's issuance of the Initial Permit. Since they have failed to provide evidence of any such injury, the proceeding should be dismissed.

POINT IV

PETITIONERS FAILED TO RESPOND TO CON EDISON'S ARGUMENTS ON THE MERITS

Petitioners' SEQRA claim is founded on the misapprehension that in issuing the Initial Permit, NYSDEC took an action requiring the exercise of discretion that would have been informed by an EIS. *See* Pet. Mem at 18 ("The water withdrawal permitting decisions made by DEC ... are explicitly mandated by the statute to address the environmental concerns that may be raised in an EIS...."). On that basis, they seek to distinguish this case from the long line of precedent following *Incorporated Village of Atlantic Beach v. Gavalas*, 81 N.Y.2d 322 (1993) ("*Gavalas*"), under which the an agency action is deemed to be ministerial (and therefore exempt from SEQRA as a Type II action) where the agency's discretion is so circumscribed that the information provided in an EIS would not "form the basis for a decision whether or not to undertake or approve such action." 81 N.Y.2d at 326.

More particularly, Petitioners contend that in issuing an initial permit, NYSDEC is required under ECL § 15-1503(2)(g) to "determine whether . . . the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures," and is further required under ECL § 15-1503(2)(d) to determine "whether the need for all or part of the proposed water withdrawal cannot be reasonably avoided through the efficient use and conservation of existing water supplies." Pet. Mem. at 19. According to Petitioners, "the information contained in an EIS is exactly the type of information that would inform the determinations required to be made" under such criteria. *Id.*

The problem with Petitioners' argument is that the criteria set forth in ECL § 15-1503 are not applicable to the issuance of an initial permit under the WRPA. As NYSDEC and Con Edison pointed out in their initial briefs:

- the statute contains two entirely separate provisions relating to the issuance of permits: ECL § 15-1503(4), which governs **new** water withdrawals, and 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; and ECL § 15-1501(9), governing **existing** water withdrawals meeting specified requirements, which directs 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]."
- The only discretion NYSDEC may exercise under ECL § 15-1501(9) is to include, as appropriate under the particular circumstances, the terms and conditions "*as required* under [the] article." ECL §15-1501(4) sets forth those mandatory requirements, including "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. The Initial Permit included appropriate mandatory terms and conditions.
- By their explicit terms, the criteria cited by Petitioners apply to *prospective* withdrawals—not the existing withdrawals covered by the statutory entitlement granted by § 15-1501(9).

- Likewise, the regulations adopted by NYSDEC to implement the requirements of the WRPA include provisions for the issuance of initial permits to qualified entities, which appear at 6 N.Y.C.R.R. § 601.7; and entirely different provisions governing whether to grant or deny permits to other entities seeking to make new water withdrawals, which are set forth in § 601.11. Unlike the permitting provision for new withdrawals (§ 601.11), the provision for existing withdrawals (§ 601.7) includes no regulatory criteria for NYSDEC to consider in taking its actions.

Petitioners offer no different statutory or regulatory interpretation. Indeed, they do not so much as mention the analyses provided to the Court by Con Edison and NYSDEC. But ignoring the relevant statutory and regulatory provisions will not make them go away: the fact remains that NYSDEC had no choice but to issue the Initial Permit for the continued water withdrawal for the East River Generating Station at the maximum rate Con Edison had previously reported. Accordingly, in issuing that permit the Department could not exercise the sort of discretion that would be informed by an EIS, and that action was a Type II ministerial action under the long line of cases applying the Court of Appeals' reasoning in *Gavalas*.[5] It is for this reason that the court in *Sierra Club v. Martens and Trans Canada Ravenswood LLC*, Index No. 2949/14, Memorandum Opinion (Sup. Ct. Queens Cnty. Oct. 1, 2014)

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[5] Petitioners also ignore provisions of the SEQRA regulations fatal to their case. As Con Edison's memorandum of law points out, an environmental review is required before an agency "approve[s]" a project. 6 N.Y.C.R.R. § 617.3(a). An "approval" is defined as a "discretionary decision by an agency to issue a permit . . . or to otherwise authorize a proposed project or activity." *Id.* § 617.2(e). Since under the WRPA NYSDEC has no discretion over the fundamental issue of whether to issue a permit—or the quantity of water to be withdrawn under such permit—the Department has no discretion to "approve" the water withdrawal. SEQRA does not apply for this additional reason, even if NYSDEC were to enjoy some discretion in connection with the terms and conditions of the permits it is duty-bound to issue.

(*"Ravenswood"*) (Karmel Aff. Exh. O) dismissed strikingly similar claims asserted by Petitioners in challenging the issuance of an initial permit for the water withdrawal at the Ravenswood facility. Likewise, Petitioners' SEQRA claims should be dismissed here.[6]

Attempting to breathe life into their meritless case, Petitioners mischaracterize the New York State Oil, Gas and Solution Mining Law (the "OGSML"), codified at Article 23 of the ECL, as imposing upon NYSDEC a non-discretionary mandate similar to the WRPA's directive to issue initial permits. Pet. Mem. at 21. Petitioners note that NYSDEC "*shall issue* a permit to drill . . . a well, if the proposed spacing unit submitted to the Department . . . conforms to statewide spacing . . . ." ECL § 23-0503(2) (emphasis added). Petitioners further note that NYSDEC "prepared an extensive generic EIS for oil drilling permits," and "a supplemental draft EIS with respect to hydrofracking, a technique not covered in the original GEIS." Pet. Mem. at 22. Thus, Petitioners call into question the position taken by the Department in the instant case as being inconsistent with its "longstanding interpretation" of the OGSML. Pet. Mem. at 21.

What Petitioners fail to mention, however, is that there are provisions in the OGSML that they do not cite which empower NYSDEC with broad discretion in the issuance of drilling permits under the statute. *See, e.g.,* ECL § 23-0305(8) ("the department shall have the power to . . . require the drilling . . . of wells . . . in such manner as to prevent or remedy . . . the escape of oil, gas, brine or water out of one stratum into another; the introduction of water into

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[6] In dismissing Petitioners' claims, the court in *Ravenswood* squarely considered—and rejected—Petitioners' contention that NYSDEC must exercise discretion in applying the ECL § 15-1503 criteria to the issuance of all permits under the WRPA, reasoning that "ECL § 15-1501(9) is the more specific and applicable statute, and it is a rule of statutory construction that a general provision yields to specific provision." *Ravenswood*, Mem. Op. at 9. Petitioners criticize the court for giving deference to NYSDEC's statutory interpretation, but they make no mention of the court's own statutory construction. Moreover, Petitioners' critique of *Ravenswood* does not account for the fact that the statute and regulations, when read as a whole, unambiguously mandate the issuance of initial permits authorizing the continuation of existing withdrawals at the maximum reported rate. No deference need be given to conclude that such actions do not involve the exercise of discretion that would be informed by an EIS.

oil or gas strata other than during enhanced recovery operations; the pollution of fresh water supplies by oil, gas, salt water or other contaminants; and blowouts, cavings, seepages and fires"); 6 N.Y.C.R.R. § 554.1 ("Prior to the issuance of a well-drilling permit for any operation in which the probability exists that brine, salt water or other polluting fluids will be produced or obtained during drilling operations in sufficient quantities to be deleterious to the surrounding environment, the operator must submit and receive approval for a plan for the environmentally safe and proper ultimate disposal of such fluids.").

It is pursuant to statutory and regulatory provisions such as these that NYSDEC exercises discretion in the issuance of drilling permits under the OGSML, and it is these provisions that NYSDEC cited as the source of its regulatory power over hydrofracturing operations in the draft supplemental EIS Petitioners reference in their opposition memorandum. Pet. Mem. at 22. It is patently clear that NYSDEC would benefit in the exercise of such power from the information contained in an EIS on hydrofracturing. Because NYSDEC exercises discretion under the OGSML that is far broader than any discretion it may have in complying with the statutory directive to issue initial permits under the WRPA, Petitioners' attempt to equate the two statutes is unwarranted.

With no basis in the law or regulations to support their theories, Petitioners raise the specter that the interpretation put forward by NYSDEC and Con Edison would "overturn the new water withdrawal law" and frustrate the statutory purpose. Pet. Mem. at 23. But Petitioners do not explain why an entitlement explicitly granted by the statute to grandfather existing withdrawals would defeat the purposes of the legislature in its enactment of a prospective permit program. Finally, and most importantly, they do not explain how those legislative purposes—which Petitioners describe as being aimed at conserving New York's water supplies

in accordance with the Great Lakes-St. Lawrence River Basin Water Resources Compact—would be served by reducing historic water withdrawals from the East River—a salt waterbody connecting Long Island Sound and the Atlantic Ocean.

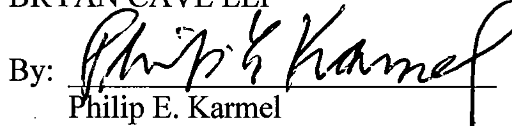
CONCLUSION

The Petition should be dismissed.

Dated: New York, New York
September 18, 2015

Respectfully submitted,

BRYAN CAVE LLP

By: 
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