SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF ALBANY

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In the Matter of the Application of
RIVERKEEPER, INC.,

Petitioner/Plaintiff,

-against-

Index No.

R.J.I No.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE, HELIOS POWER CAPITAL, LLC, DANSKAMMER ENERGY, LLC and MERCURIA ENERGY AMERICA, INC.

Respondents/Defendants,

for a Judgment and Order Pursuant to Article 78 and Section 3001 of the Civil Practice Law and Rules.

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PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

Currently before this Court in connection with Riverkeeper, Inc.'s ("Riverkeeper" or "Petitioner") accompanying combined Verified Petition/Complaint is Riverkeeper's application for a preliminary injunction pursuant to CPLR §§ 6301, 6311, and 6313 to maintain the *status quo* during the pendency of this proceeding and action. For the reasons set forth herein, the Court should grant Riverkeeper's motion for preliminary injunctive relief.

I. PETITIONER IS ENTITLED TO A PRELIMINARY INJUNCTION

A preliminary injunction is appropriate and should be granted when three elements are shown: (1) a likelihood of success on the merits; (2) irreparable injury to the movant unless the provisional relief is granted; and (3) the balancing of equities lies in the movant's favor (CPLR §

6301; *Aetna Insurance Company v. Capasso,* 75 N.Y.2d 860, 918 [1990]; *Doe v Axelrod*, 73 N.Y.2d 748 [1988]; *Emerald Green Property Owners Ass'n v. Jada Developers, LLC,* 882 N.Y.S.2d 328, 329 [3d Dep't 2009]). For the following reasons and as stated more fully in the accompanying Verified Petition/Complaint, Petitioner meets each of these elements and therefore should be granted preliminary injunction.

As set forth more fully herein, this Court should further exercise its discretion to require only a nominal undertaking in connection with Riverkeeper's requested preliminary injunction under CPLR § 6312[b].

A. Riverkeeper Is Likely to Succeed on the Merits of Each of Their Claims for Relief

The "merits" prong does not require a showing of conclusive proof of ultimate success; a showing of a likelihood of success may suffice for a preliminary injunction (*see e.g., Ying Fung Moy v Hohi Umeki,* 781 NYS2d 684 [2d Dep't 2004]). Petitioner "need only establish a prima facie case showing [their] right to relief, not a certainty of success" (*Lowe v. Reynolds*, 428 N.Y.S.2d 358, 361 [3d Dep't 1980] [citation omitted]). Petitioner herein has established a high likelihood of success by making a *prima facie* showing that Respondents New York State Public Service Commission ("PSC") and the New York State Department of Public Service ("DPS") (collectively, "Agency Respondents") failed to undertake complete and adequate environmental review in strict compliance with the State Environmental Quality Review Act ("SEQRA") and its regulations.

The purpose of SEQRA is to "inject environmental considerations into governmental decision-making" (*N.Y. City Coalition to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 348 [2003], *citing Coca-Cola Bottling Co. v. Board of Estimate*, 72 N.Y.2d 674, 679 [1988]); *see also* ECL § 1-0101[1]) "as early as possible" (ECL § 8-0109[4]; 6 NYCRR § 617.1[c]). A

reviewing court must ask whether the agency "thoroughly investigate[d] the problems involved and reasonably conclude[d]" that there is no possibility of a potentially significant environmental impact or combination of impacts from the proposed action (*see Desmond-Americana v. Jorling*, 153 A.D.2d 4, 10 [3d Dep't 1989]).

SEQRA sets forth procedures for an agency to use to make initial determinations as to the degree of scrutiny that the action must receive in the course of SEQRA review (*i.e.*, the "hard look"), and whether an environmental impact statement ("EIS") must be prepared (6 NYCRR § 617.6). To determine that an EIS will not be required for an action, the lead agency must determine either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant (6 NYCRR § 617.7) The determination of significance must be set forth in a written form containing a reasoned elaboration and providing reference to any supporting documentation, and if the action "may include a potential for at least one significant adverse environmental impact," an EIS must be prepared (6 NYCRR §§ 617.7[a][1], [b][4]).

Any determination that an EIS is not necessary must be based on the analysis of the specific mandated criteria of 6 NYCRR §617.7, and cannot be based on conclusory statements or be unsupported by empirical or experimental data or scientific authorities (*see Bd. of Co-op. Educ. Servs. Of Albany-Schoharie-Schenectady-Saratoga Counties v. Town of Colonie*, 268 A.D.2d 838, 840 [3d Dep't 2000]; *Tonery v. Planning Bd. of Town of Hamlin*, 256 A.D.2d 1097 [4th Dep't 1998], *opinion amended on reargument sub nom.*, 703 N.Y.S.2d 762 [1999]).

Accordingly, where an agency fails to identify areas of environmental concern, to take the requisite "hard look," or to provide a "reasoned elaboration" as to why there could be no significant environmental impact, or where the agency's decision was not rational, or is arbitrary

and capricious or not supported by substantial evidence, the agency's determination must be annulled (*Matter of WEOK Broadcasting Corp. v Planning Bd. of Lloyd,* 79 N.Y.2d 373, 383 [1992]; *see also Chinese Staff and Workers Assn. v. City of New York*, 68 N.Y.2d 359, 368-369 [1986]; *Segal v. Thompson*, 182 A.D.2d 1043, 1047 [3d Dep't 1992]; NY CPLR 7803[3]). "Literal compliance with both the letter and spirit of SEQRA is required and substantial compliance will not suffice" (*Board of Coop. Educ. Servs. v. Town of Colonie*, 268 A.D.2d 838, 840-841 [3d Dep't 2000], *quoting Inland Vale Farm Co. v. Stergianopoulos*, 104 A.D.2d 395 [2d Dep't 1984], 396, *aff'd* 65 N.Y.2d 718 [1985]).

Here, the Agency Respondents issued their respective negative declarations under SEQRA on June 25, 2014 (DPS) and on June 27, 2014 (PSC), (collectively, the "Negative Declarations")[1] with respect to PSC's approval of the lease, sale, and reactivation of the Danskammer Generating Station ("Danskammer" or the "Station"). The Negative Declarations issued for Danskammer do not strictly and literally comply with SEQRA; the Negative Declarations are arbitrary and capricious, not supported by substantial evidence, are affected by errors of law, are an abuse of discretion, and are in violation of SEQRA.

As is set forth more fully in the Verified Petition/Complaint, there are various adverse air, water, and wildlife impacts that will result from the proposed action which Agency Respondents failed to identify and/or thoroughly analyze, and for which an EIS should have been prepared. The Hudson River estuary is one of the major estuarine systems on the east coast of the United States. The New York State Legislature declared the estuary "of statewide and national importance as a habitat for marine, anadromous, catadromous, riverine and freshwater fish

[1] *See* Verified Petition/Complaint, at ¶¶ 1-3.

species" (ECL § 11-0306).[2] The river's biological populations are "of vital importance to the ecology and the economy of the state and to the recreational and commercial needs of the people of New York State and neighboring states," and the fishery provides "outstanding commercial and recreational value" (*id).*

Danskammer is located in an area of the Hudson River that is just south of a designated Significant Coastal Fish and Wildlife Habitat which provides well-known and critical habitat for a number of aquatic organisms, including endangered shortnose and Atlantic sturgeon.[3] A number of fish species, including those (American shad and river herring) whose populations are in steady decline,[4] are found in the vicinity of the Station.[5] Moreover, the Station is a known to impinge and entrain significant numbers of fish each year which results in the injury or death of those aquatic organisms,[6] including endangered sturgeon species.[7]

Yet the respective Negative Declarations completely fail to identify these unique and significant environmental considerations and fail to thoroughly analyze whether the reactivation of Danskammer would result in the following significant water quality and aquatic wildlife adverse impacts as consequence of the Station's cooling water intake and/or thermal discharge:

(1) impacts on a significant habitat area(s) (*see* 6 NYCRR § 617.7[c][1][ii]);[8]

(2) substantial endangered Atlantic sturgeon mortalities (*see* 6 NYCRR § 617.7[c][1][ii]);[9]

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[2] Anadromous fish live in the sea and migrate to fresh water to breed; an example is the American shad. Catadromous fish spend most of their lives in fresh water, then migrate to the sea to breed; the most well-known example is the American eel.

[3] Verified Petition/Complaint, at ¶¶ 59-61.

[4] Mylod Aff., at ¶ 18.

[5] Verified Petition/Complaint, at ¶ 41; *see also* Mylod Aff., at ¶ 15.

[6] Verified Petition/Complaint, at ¶¶ 36, 37, 39. "Entrainment" occurs when early life-stage aquatic organisms such as eggs, larvae and juvenile are carried into and through the cooling system as water is withdrawn for use in the Station's "once-through" cooling system (*see id.* at ¶ 33). "Impingement" occurs when larger aquatic life forms are caught against racks or screens at the Station's intakes, where they may be trapped by the force of the water, suffocate or be otherwise injured (*see id.* at ¶ 34).

[7] Verified Petition/Complaint, at ¶¶ 67-68.

[8] *Id.*, at ¶ 62.

(3) substantial adverse impacts on endangered Hudson River sturgeon species (*see* 6 NYCRR § 617.7[c][1][ii]);[10]

(4) substantial interference with the movement of endangered Hudson River sturgeon species (*see* 6 NYCRR § 617.7[c][1][ii]);[11]

(5) destruction of large quantities of aquatic organisms (*see* 6 NYCRR § 617.7[c][1][ii]);[12]

(6) substantial adverse change in existing surface water quality of the Hudson River (*see* 6 NYCRR § 617.7[c][1][i]);[13]

(7) substantial interference with the movement of any resident or migratory fish or wildlife species (*see* 6 NYCRR § 617.7[c][1][ii]);[14] and

(8) impairment of the character or quality of important Hudson River historical commercial fishing resources and community character (*see* 6 NYCRR § 617.7[c][1][v]).[15]

Agency Respondents failed to identify or thoroughly analyze whether any of the foregoing significant adverse environmental impacts would occur as a result of allowing the reactivation of the Station.

Additionally, the New York State Department of Environmental Conservation ("DEC") identified Danskammer as a priority for State Pollutant Discharge Elimination System ("SPDES") permit modification pursuant to ECL § 17-0817[6] for reasons including the need to establish a "mixing zone" in order to assure that the Station's thermal discharge was in compliance with water quality criteria.[16] Danskammer was one of the top-ranked SPDES permits on DEC's Environmental Benefit Permit Strategy list, meaning that the Station has one of the greatest potentials for causing significant environmental harms. Yet Agency Respondents also failed to identify or analyze the adverse environmental impacts of the identified and

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[9] *Id.* at ¶ 69.
[10] *Id.* at ¶ 70.
[11] *Id.* at ¶ 71.
[12] *Id.* at ¶ 54.
[13] *Id.* at ¶ 55.
[14] *Id.* at ¶ 56.
[15] *Id.* at ¶ 57.
[16] *Id.*, at ¶ 31.

significant (65 acres, 100°F permitted discharge)[17] thermal mixing zone which kills fish[18] and causes deleterious impacts to fish populations (*see Matter of Riverkeeper v. Crotty*, 28 A.D.3d 957 [3d Dep't 2006], *citing* 33 USC §§ 1326[b] and 1362[6]).[19] Agency Respondents consequently failed to take a hard look at the potential adverse environmental impacts raised by Petitioner and others in their respective comments,[20] and also failed to provide a reasoned elaboration for its determination that there would be no potential significant environmental impact.

The Negative Declarations are premised entirely upon presumed but incorrectly assessed air quality benefits of reactivating the Station with a fuel switch in whole or in part from coal to natural gas, without any consideration of the reactivated Station's aquatic resource impacts.[21] But, the Agency Respondents did not comply with SEQRA because they did not use a correct baseline regarding air quality impacts in violation of SEQRA (*see* 6 NYCRR § 617.7[c][1][i])[22] and failed to consider the predicted potential emissions of regulated air pollutants, including particulate matter, sulfur dioxide, carbon monoxide, nitrogen oxides, and volatile organic compounds.[23]

Danskammer has been shut down and non-operational since October 29, 2012, when Superstorm Sandy substantially damaged the Station.[24] In January 2013, given the substantial damage to the Station and the very high costs to rebuild the facility, the then-owner of Danskammer filed a notice of intent to retire to the PSC in which the company stated its unequivocal intent to sell the Station, at a reduced price, to a salvage company to dismantle the

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[17] *Id.*, at ¶¶ 67 and 30.
[18] *See* Mylod Aff., at ¶ 17.
[19] *See also* Verified Petition/Complaint, at ¶ 49.
[20] *See, e.g., id.* at ¶¶ 31, 49.
[21] *See id.*, at ¶ 53.
[22] *Id.* at ¶¶ 74-75, 80.
[23] *Id.* at ¶ 72.
[24] *Id.* at ¶¶ 19-21.

facility.[25] Yet despite the fact that the Station has not been operating for almost two years – and consequently has not been producing any adverse impacts to air quality, water quality, or aquatic organisms and habitat during that entire time, *i.e.,* the existing circumstances – compared "the effect of the plans for operating the facility in the future as compared to the effects of its prior operation" rather than comparing the impacts that may be reasonably expected to result from the proposed action to the then-existing (*i.e.,* Station non-operational) conditions relating to air quality, water quality, habitat functions and values, endangered species, and historical and cultural resources as required by 6 NYCRR § 617.7[c][1][i]-[xii].[26]

Again, the Agency Respondents consequently failed to take a hard look at the potential adverse environmental impacts raised by Petitioner and others in their respective comments,[27] and also failed to provide a reasoned elaboration for their determination that there would be no potential significant environmental impact. Thus, the Agency Respondents, in making their determinations of non-significance did not strictly comply with SEQRA.

Because the proposed reactivation of Danskammer may include a potential for at least one significant adverse environmental impact, the Agency Respondents violated SEQRA by issuing the Negative Declarations (*see* 6 NYCRR §§ 617.7[a][1], [b][4]). Because these potentially significant adverse environmental impacts were either not considered at all or premised on an erroneous baseline, and because the Agency Respondents failed to take the requisite hard look or provide a reasoned elaboration for their determinations of non-significance in violation of SEQRA (for which strict and literal compliance is required), the Negative Determinations are arbitrary and capricious, not rational, not supported by substantial evidence, and are contrary to the law.

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[25] *Id.* at ¶ 18.
[26] *Id.*, at ¶ 81.
[27] *See, e.g., id.* at ¶¶ 31, 73, 80.

B. Riverkeeper Will Suffer Irreparable Injury Absent a Preliminary Injunction

"Irreparable injury, for purposes of equity, has been held to mean any injury for which monetary damages are insufficient" (*see McLaughlin, Piven, Vogel v. W.J. Nolan & Co., Inc.*, 498 N.Y.S.2d 146, 152 [2d Dep't 1986]). Moreover, the injury need not be permanent in order to be irreparable (*see Thruway Authority v. Dufel*, 129 A.D.2d 44 [3d Dep't 1987]).

The stated purpose of SEQRA is "to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources" (ECL § 8-0101). As discussed above, literal compliance with both the letter and spirit of SEQRA is required (*Board of Coop. Educ. Servs. v. Town of Colonie*, 268 A.D.2d 838, 840-841 [3d Dep't 2000]). "At a minimum, the [lead agency] should identify those areas of environmental concern, along with any other relevant areas of concern, take a 'hard look' at them and provide a reasoned elaboration for its determination before issuing negative declarations" (*Segal v. Thompson*, 182 A.D.2d 1043, 1047 [3d Dep't 1992]). But SEQRA "cannot be construed as merely procedural or informational" since it requires that the lead agency must actually consider and formulate a decision, as well as act affirmatively to require any alternatives or mitigation, based upon any adverse environmental impacts disclosed through the SEQRA process (*see Henrietta v. Department of Environmental Conservation*, 76 A.D.2d 215, 221-222 [4th Dep't 1980]).

"In other words, [SEQRA] is an "alarm bell" whose purpose is to alert responsible public officials to environmental changes before they have reached ecological points of no return" (*Rye Town/King Civic Asso. v. Rye*, 82 A.D.2d 474, 482 [2d Dep't 1981]; *Schenectady Chemicals, Inc. v. Flacke*, 83 A.D.2d 460, 462-463 [3d Dep't 1981], *citing Matter of Town of Henrietta v. NYSDEC*, 76 A.D.2d 215, 220 [4th Dep't 1980] ["By enacting SEQRA, the Legislature created a procedural framework which was specifically designed to protect the environment by requiring

parties to identify possible environmental changes 'before they have reached ecological points of no return'."]).

At the federal level, courts have held that "the failure to comply with NEPA's requirements causes harm itself, specifically the risk that 'real environmental harm will occur through inadequate foresight and deliberation'" (*Sierra Club v. US Army Corps of Eng'rs*, 645 F.3d 978, 994-995 [8th Cir. 2011], *quoting Sierra Club v. Marsh*, 872 F.2d 497, 504 [1st Cir. 1989]). SEQRA is based on the National Environmental Policy Act ("NEPA") (*see Fourth Branch Assoc. v. Dep't of Envtl. Conservation*, 146 Misc. 2d 334, 345 [Sup. Ct. Albany Co. 1989]), and the Court of Appeals has instructed that it is appropriate for state courts to consider as persuasive authority federal court NEPA decisions (*All Seasons Resorts, Inc. v Abrams,* 68 NY2d 81, 87 [1986]; *see also Queens County Builders & Contractors Ass'n, Inc. v. City of New York*, N.Y.L.J., June 8, 1988, at 24, col. 4 [Sup. Ct. N.Y. Co.] ["both federal and state courts have generally relied upon the judicial construction of NEPA in interpreting the state acts"]).

Due to Agency Respondents' failure to strictly comply with SEQRA, an irreparable harm to Riverkeeper's "specific environmental interests" will occur if a preliminary injunction is not granted (*see Davis v Mineta,* 302 F3d 1104, 1105 [10th Cir 2002]; *see also Stand Together against Neighborhood Decay, Inc. v. Board of Estimate*, 690 F. Supp. 1192, 1196 [E.D.N.Y. 1988] ["When courts have granted injunctions in NEPA cases, they have generally enjoined actions that would immediately have caused the very environmental effects that were alleged to be inadequately studied, such as bridge construction (*Steubing*), dam construction (*Environmental Defense Fund*), or landfilling operations (*ART II*)".]). As discussed in detail above, the reactivation of the Station will result in adverse environmental impacts that were not

identified and/or thoroughly analyzed (and consequently cannot be mitigated to the maximum extent practicable) pursuant to SEQRA (*see* ECL § 8-0109[1]).

As is set forth more fully in the Affidavit of John Mylod (October 21, 2014) ("Mylod Aff."), Riverkeeper's mission includes restoring and maintaining the commercial and recreational Hudson River fisheries and protection of the Hudson River and its tributaries from adverse environmental impacts.[28] By way of example and not limitation, the reactivation of the Station in once-through cooling mode would result in the discharge of heated thermal pollution which would substantially and adversely change the existing Hudson River water quality, substantially interfere with the movement the migratory fish species and habitat of the Hudson River, and also create conditions in an area of up to 65 acres in the Hudson River at the Station which would be fatal to American Shad and river herring (of which both populations have been in steady decline over the past 30 years[29]), and fish and aquatic organisms.[30] Moreover, the Station's thermal discharge is of the type which, in addition to killing fish, deleteriously impacts fish populations and falls within the definition of water pollution regulated by the Clean Water Act and stricter state law (*see Matter of Riverkeeper v. Crotty*, 28 A.D.3d 957 [3d Dep't 2006], *citing* 33 USC §§ 1326[b] and 1362[6]). And as the Verified Petition/Complaint more fully explains, Danskammer is just south of a Significant Coastal Fish and Wildlife Habitat, which is critical habitat for a number of aquatic species, including the endangered shortnose and Atlantic sturgeon.[31] Moreover, a number of aquatic species, including those whose populations are in steady decline, are known to be found in the vicinity of the Station.[32]

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[28] Mylod Aff., at ¶ 6.
[29] *Id.* at ¶ 18.
[30] *Id.* at ¶ 17.
[31] *See* Verified Petition/Complaint, at ¶¶ 59-61.
[32] *Id.* at ¶ 41; Mylod Aff., at ¶ 18.

And, as detailed above, the reactivation of Danskammer will result in significant adverse effects of the Hudson River that will harm the river's ecology, in-turn harming the recreational and commercial needs of the people of the State. Monetary damages are insufficient to remedy these environmental harms (*see McLaughlin, Piven, Vogel v. W.J. Nolan & Co., Inc.*, 498 N.Y.S.2d 146, 152 [2d Dep't 1986]). Thus, Petitioner will suffer irreparable environmental harm to its specific environmental interests if its motion for preliminary injunctive relief is not granted.

In addition to irreparable harm to Riverkeeper's specific environmental interests, irreparable injury occurs when an agency fails to comply with the environmental review statute, for example, by failing to issue a required EIS (*see Sierra Club v United States Army Corps of Eng'rs,* 645 F3d 978, 995 [8th Cir 2011]). Thus, "harm to the environment may be presumed when an agency fails to comply with the required NEPA procedure" (*Davis v. Mineta*, 302 F.3d 1104, 1115 [10th Cir. 2002]; *see also Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 152 [D.D.C. 1993] [noting that the public has an interest in compliance with the law as expressed by Congress]).

To be sure, failure to comply with environmental review statutes and regulations is not merely a procedural harm; "the harm at stake is a harm to the environment, but the harm consists of the added risk to the environment that takes place when governmental decision makers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment" (*Sierra Club v. Marsh*, 872 F.2d 497, 500 [1st Cir. 1989] [emphasis in original]).

Thus, federal courts have found irreparable harm to exist when agencies become entrenched in a decision uninformed by the proper NEPA process because they have made commitments or taken action to implement the uninformed decision" (*Conservation Law Found.*

v. Busey, 79 F.3d 1250, 1271 [1st Cir. 1996], *citing Massachusetts v. Watt*, 716 F.2d 946, 951-53 [1st Cir. 1983]; *Sierra Club v. Marsh*, 872 F.2d 497, 499-503 [1st Cir. 1989]).

Therefore, even in the absence of the undisputable concrete and irreparable environmental injuries, detailed above, which would result from reactivating the Station, Agency Respondents' failure to strictly and literally comply with SEQRA in issuing the Negative Declarations results in immediate and irreparable environmental harm. Notably, SEQRA goes further than NEPA and requires that agencies act affirmatively to require any alternatives or mitigation, based upon any adverse environmental impacts disclosed through the SEQRA process (*see Henrietta v. Department of Environmental Conservation*, 76 A.D.2d 215, 221-222 [4th Dep't 1980]), thereby acting as an "alarm bell" whose purpose is to alert responsible public officials to environmental changes "before they have reached ecological points of no return" (*see Schenectady Chemicals, Inc. v. Flacke*, 83 A.D.2d 460, 462-463 [3d Dep't 1981]).

Because the Agency Respondents failed to identify and/or analyze any of the numerous adverse environmental issues detailed above or use an improper baseline upon which to make a significance determination, Agency Respondents substantially added risk to the environment that occurs when governmental decision makers make up their minds without having undertaken a hard look (*see Sierra Club v. Marsh*, 872 F.2d 497, 500 [1st Cir. 1989]). This oversight is the result of the Agency Respondents' failure to conduct coordinated SEQRA review pursuant to ECL § 8-0109[4] and 6 NYCRR § 617.6[b].

Moreover, any determination as to a beneficial effect reactivation of Danskammer might have[33] without the use of an EIS fails to comply with the regulations (*see* 6 NYCRR § 617.11[d][2]) and was done without the proper level of public comment and involvement and without a sufficient basis in analytical facts. Furthermore, by issuing the Negative Declarations,

[33] *See* Verified Petition/Complaint, at ¶¶ 75-76, 80.

the Agency Respondents could not appropriately consider or require any alternatives or mitigation that would avoid or minimize adverse environmental impacts to the maximum extent practicable (ECL § 8-0901[1]). All of this highlights how the failure of Agency Respondents to strictly comply with the spirit and letter of SEQRA ultimately results in real environmental harm through inadequate agency foresight and deliberation. Petitioner will consequently suffer irreparable environmental harm if its motion for preliminary injunctive relief is not granted.

C. The Balance of Equities Favor the Issuance of a Preliminary Injunction

Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent (such as the death of aquatic organisms) or at least of long duration, *i.e.,* irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment (*Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 [1987]). Where "the irreparable injury to be sustained by the plaintiffs is more burdensome to it than the harm caused to the defendant through imposition of the injunction," the balance of equities favors the plaintiff (*see Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.*, 418 N.Y.S.2d 216 (3d Dep't 1979).

Consequently, economic losses or financial hardships have consistently been held to not outweigh potential irreversible harm to the environment (*see, e.g., Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1125 [9th Cir. 2005] [affirming preliminary injunction in NEPA case in part because, while developer "may suffer financial harm" if injunction issued, balance of harms favored issuance of injunction where irreparable harm was likely if development was allowed to proceed without proper review]; *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 [9th Cir. 2001] [economic harm to tour operator if injunction issued does not outweigh potential irreparable damage to environment]; *Northern Alaska Envtl. Ctr. v. Hode*l, 803 F.2d

466, 471 [9th Cir. 1986] [more than pecuniary harm must be shown to outweigh environmental harm]; *Earth Island Inst. v. United States Forest Serv.*, 442 F.3d 1147, 1177 [9th Cir. 2006] [economic losses suffered as a result of enjoined timber sales does not outweigh potential irreparable environmental harm and the public's interest in preserving the environment]; *Idaho Sporting Congress Inc. v. Alexander*, 222 F.3d 562, 569 [9th Cir. 2000] [injunction proper where environmental harm was sufficiently likely, despite fact that it "could present financial hardship" to government agency]; *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 [9th Cir. 2001] ["loss of anticipated revenue. . . does not outweigh the potential irreparable harm to the environment"]; *Western Radio Servs. Co. v. Espy*, 79 F.3d 896, 902-03 [9th Cir. 1996]). Here, the balance of equities clearly tips in favor of Petitioner and requires that a preliminary injunction be granted.

As explained above, without a preliminary injunction, Riverkeeper faces the risk of substantial and irreparable environmental injury from the reactivation of Danskammer including adverse impacts to existing air and water quality and the injury, death, or other significant adverse impacts to aquatic organisms (including the endangered Atlantic sturgeon) and to the habitat in the Hudson River.

If a preliminary injunction is not granted, the reactivation of the Station and resulting increase in air pollutant emissions and the operation of the antiquated once-through cooling technology will degrade the quality of the environment, resulting in long-lasting and irreparable harm to the Hudson River, for which monetary damages will be insufficient (*see McLaughlin, Piven, Vogel v. W.J. Nolan & Co., Inc.*, 498 N.Y.S.2d 146, 152 [2d Dep't 1986]).

Even if the merits of the declaratory judgment action and Article 78 proceeding are ultimately decided in Petitioner's favor, Petitioner will not be compensated fully for the

environmental injury that will ensue in the absence of preliminary injunctive relief – that is, for example, the injury or death to aquatic organisms that will occur if Danskammer is allowed to reactive during the pendency of this proceeding and action is a permanent and irreversible harm.

The issuance of the preliminary injunction will preserve the status quo and protect Petitioner's rights, without damaging Respondents' ability to transform the property and reactivate the Station at a later time should they prevail at trial (*Bass Bldg. Corp. v. Village of Pomona,* 142 A.D.2d 657, 659 [2d Dep't 1988]).[34] Thus, under these circumstances, the balance of equities favors the Petitioner in this case: the irreparable environmental injuries that cannot be remedied by money damages suffered by Riverkeeper outweighs any potential or purely economic injury to that may occur.

II. SHOULD RIVERKEEPER'S MOTION FOR A PRELIMINARY INJUNCTION BE GRANTED, THE COURT SHOULD REQUIRE ONLY A NOMINAL UNDERTAKING

If Petitioner's motion for a preliminary injunction is granted, the Court should require only a nominal undertaking under CPLR § 6312[b]. Requiring a substantial undertaking would effectively bar Petitioner from access to the courts and discourage litigation brought by nonprofits and individuals in the public interest.

Prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction (CPRL § 6312[b]). The undertaking is to secure the opposing party for actual losses and costs, not theoretical losses, if it is later finally determined that the preliminary injunction was erroneously granted (*see Margolies v. Encounter, Inc.*, 42

[34] However, "the mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction" (Egan v New York Care Plus Ins. Co., 697 N.Y.S.2d 776, 777 [1999], *citing* CPLR § 6312 [c]).

N.Y.2d 475 [1977]). The court's discretion in setting the amount of the undertaking must be "rationally related" to the potential damages and costs that the enjoined entity may suffer (*Lelekakis v. Kamamis*, 303 A.D.2d 380 [2d Dep't 2003]). Mere conclusory assertions of potential monetary loss are insufficient to justify anything more than a minimal or nominal bond (*7th Sense, Inc. v. Liu*, 220 A.D.2d 215 [1st Dep't 1995]).

The court has wide discretion in determining the amount for an undertaking in a motion for a preliminary injunction, and may consider the financial ability and status of the movant in assessing the appropriate amount (*see Livas v. Mitzner,* 303 A.D.2d 381, 383 [2d Dep't 2003]; *Clover Street Associates v. Nilsson,* 244 A.D.2d 312, 313 [2d Dept 1997]; *Lelekakis v. Kamamis,* 303 A.D.2d 380 [2d Dep't 2003]).

Factors courts have considered when deciding an appropriate undertaking are: the financial ability of the moving party to post the undertaking, the party's not-for-profit status, the public interest nature of the action, and the damages that the respondent might incur if it is later determined that the preliminary injunction was issued in error (s*ee Daytop Village, Inc. v Consolidated Edison Co. of New York, Inc.,* 61 A.D.2d 933 [1st Dep't 1978]; *Broadway Triangle Cmty. Coal. v Bloomberg*, 35 Misc. 3d 167 [Super Ct, New York Cnty. 2011]; *Raritan Baykeeper, Inc. v City of New York*, 42 Misc. 3d 1208[A] [Super Ct. Kings Cnty. 2013]). By weighing these factors, a court may ensure that a plaintiff entitled to a preliminary injunction is not left without a remedy simply because he or she cannot afford to post an undertaking, and that any public purpose of the lawsuit is not lost merely because the plaintiff's means are limited. The court may consider any public interest objective or public purpose the injunction may serve. State law recognizes that individuals and organizations should be provided with access to the

courts even if they lack the resources to post a substantial undertaking (*Daytop Village, Inc. v Consolidated Edison Co. of New York, Inc.*, 61 A.D.2d 933, 935 [1st Dep't 1978])

In the instant case, Riverkeeper is a member-supported, not-for-profit watchdog organization dedicated to defending and restoring the Hudson River and its tributaries, and is a leading advocate for protection of the Hudson River and the unique resources of the Hudson River Valley. As a member-supported not-for-profit, Riverkeeper cannot reasonably be expected to make immediately a lump sum payment of a substantial amount (*see Daytop Village, Inc. v Consolidated Edison Co. of New York, Inc.*, 61 A.D.2d 933, 935 [1st Dep't 1978]). Riverkeeper and its individual members are acting in furtherance of the public interest.[35] The public interest nature of Riverkeeper's mission and the public purpose of the injunction sought are clear: to prevent the reactivation of an outdated and environmentally harmful power plant that will have significant adverse effects on the environment without appropriate compliance with the state's environmental laws. Riverkeeper's status as a non-profit organization and its unique public interest and environmental objectives are critical in assessing the appropriate amount for an undertaking. A requirement of a substantial undertaking would bar Riverkeeper from seeking redress for violations of their rights and the public interest at issue here.

Therefore, should this Court grant Petitioner's motion for a preliminary injunction, any undertaking imposed under CPLR § 6312[b] should be nominal.

III. CONCLUSION

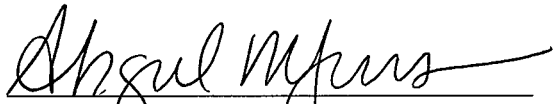
For the foregoing reasons and for the reasons set for in the Petitioner's Verified Petition/Complaint and accompanying Affidavit of John Mylod, this Court should grant Petitioners' application for a preliminary injunction maintaining the *status quo* during the pendency of this proceeding and action. This relief should be continued until this Court enters a

[35] *See* Mylod Aff., at ¶ 6.

declaratory judgment and judgment and order pursuant to CPLR Article 78 granting the relief requested in Petitioners' Verified Petition/Complaint.

Dated: October 23, 2014
Ossining, New York

Respectfully submitted,



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