

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,

**VERIFIED**  
**PETITION/COMPLAINT**

-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,

**ORAL ARGUMENT  
REQUESTED**

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

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Petitioner/Plaintiff Riverkeeper Inc. (“Riverkeeper”) as and for its verified petition for judgment and an order pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”) and complaint for declaratory judgment pursuant to CPLR § 3001, by and through its attorneys, respectfully alleges as follows:

**Nature of the Combined Proceeding and Action**

1. This proceeding and action challenges the Public Service Commission’s (“NYSPSC”) June 27, 2014 Order Approving Transfer and Making Other Findings in the Matter of *Helios Power Capital, LLC, Danskammer Energy, LLC and Mercuria Energy America, Inc. - Joint Petition for Expedited Approval for the Lease, Sale and Operation of the Danskammer*

*Joint Petition for Expedited Approval for the Lease, Sale and Operation of the Danskammer Generating Facility Under Lightened Regulation and for Related Relief* (PSC Case 14-E-0117) (hereinafter the “NYSPSC Approval Order”) and attached Negative Declaration (hereinafter the “NYSPSC Negative Declaration”). A true and complete copy of the NYSPSC Approval Order and attached Negative Declaration is attached hereto as **Exhibit A**.

2. As is set forth more fully herein, the NYSPSC Approval Order and attached Negative Declaration failed to comply with the State Environmental Quality Review Act (“SEQRA”) (*see* ECL § 8-0101 *et seq.*; 6 NYCRR § 617.1 *et seq.*).

3. On the same grounds, this proceeding and action also challenges the June 25, 2014 Department of Public Service (“NYSDPS”) Revised SEQRA Negative Declaration (hereinafter the “NYSDPS Negative Declaration,” a true complete copy of which is attached as **Exhibit B** hereto) which NYSDPS filed in connection with PSC Case 14-E-0117.

4. Petitioner respectfully brings this proceeding and action seeking a judgment and order and injunctive relief pursuant to Sections 7803[3], 7806, 3001 and 6301-6303 of the CPLR, vacating and annulling the respective NYSPSC and NYSDPS Negative Declarations on the ground that said respective Negative Declarations were issued in violation of lawful procedure, were affected by an error of law, were arbitrary and capricious, and an abuse of discretion based on the failure of Respondents NYSPSC and NYSDPS:

- (a) to conduct coordinated SEQRA review and designate a lead agency pursuant (ECL § 8-0109[4] and 6 NYCRR § 617.6[b]);
- (b) to identify and thoroughly analyze the areas of environmental concern to assess whether said Respondents’ respective actions may have a significant adverse impact on the environment (6 NYCRR § 617.7[b][3]; 6 NYCRR § 617.7[c][1]), and;
- (c) to provide a reasoned elaboration for their respective Negative Declarations (6 NYCRR § 617.7[b][4]).

### **Jurisdiction and Venue**

5. This court has jurisdiction over the claims brought pursuant to CPLR Article 78, under CPLR § 7804[b]. This court has jurisdiction over the claims for declaratory relief pursuant to CPLR § 3001.

6. Pursuant to CPLR §§ 503 and 506[a] and [b] this proceeding is brought in Albany County where Respondents NYSPSC and NYSDPS principal offices are located and where Defendants NYSDPS and NYSPSC reside.

### **Parties**

7. Petitioner/Plaintiff Riverkeeper is a 501(c)(3) not-for-profit corporation with its offices located at 20 Secor Road, Ossining, New York 10562. Riverkeeper is a member-supported watchdog environmental organization with approximately 4,000 active members, many of whom reside in the Hudson Valley. Riverkeeper is dedicated to defending the Hudson River and its tributaries and protecting the drinking water supply of nine million New York City and Hudson Valley residents.

8. Riverkeeper has standing to sue to enforce the respective SEQRA obligations of NYSPSC and NYSDPS on behalf of itself and/or its members. Members of Riverkeeper reside and/or fish and/or recreate in close proximity to the Station and would be directly affected by the adverse environmental impacts of the agency actions at issue herein (*see, e.g.*, the accompanying Affidavit of Riverkeeper member John Mylod, sworn to on October 21, 2014).

9. Riverkeeper's members regularly enjoy the Hudson River immediately adjacent to or nearby the Station for various recreational, commercial, educational, and scientific research purposes and can be expected to continue to use such areas of the river for such purposes in the future.

10. Respondent/Defendant NYSPSC is an executive commission of the State of New York with the powers and duties set forth in both the New York Public Service Law and SEQRA.

11. Respondent/Defendant NYSDPS is an executive agency of the State of New York with the powers and duties set forth in both the New York Public Service Law and SEQRA.

12. Upon information and belief, Helios Power Capital, LLC (“Helios”) is a limited liability company formed under the laws of the State of Texas (*see* April 1, 2014 *Verified Joint Application of Helios Power Capital LLC, Danskammer Energy, LLC and Mercuria Energy America, Inc. for the Lease, Sale and Operation of Danskammer Generating Facility Under Lightened Regulation and for Related Relief*, [hereinafter “Joint Application”] a true and complete copy of which is attached as **Exhibit C** hereto, at 5).

13. Upon information and belief, Mercuria Energy America, Inc. (“Mercuria”) is a foreign corporation and an indirect, wholly-owned subsidiary of Mercuria Energy Group Limited, a global trading and investment company operating in 50 countries around the world (Joint Application, **Exhibit C** hereto, at 5).

14. Upon information and belief, Danskammer Energy, LLC (“Danskammer Energy”) is a special purpose entity and limited liability company formed under the laws of the State of Delaware for the sole purpose of acquiring and returning the Danskammer Electric Generating Station to service (Joint Application, **Exhibit C** hereto, at 6).

#### **Facts**

15. Riverkeeper repeats and realleges the allegations set forth in paragraphs 1 through 14 of this Petition/Complaint as if fully stated herein.

16. The Danskammer Electric Generating Station (the “Station”) is located on the western shore of the Hudson River, in the Town of Newburgh, Orange County, New York,

approximately 66 river miles north of New York City.

17. The total maximum net generating capacity of the Station's four steam turbines is 491 megawatts (*see* NYSDEC – Bureau of Habitat, Steam Electric Unit, *Danskammer Point Generating Station Biological Fact Sheet*, [Aug. 18, 2014], a true and complete copy of which is attached hereto as **Exhibit D**, at 1).

18. On or about January 3, 2013, Dynegy Danskammer, LLC (“Dynegy Danskammer”) filed a notice (the “Retirement Notice”) with the NYSPSC as debtor-in-possession of the Station (a true and complete copy of which is attached as **Exhibit E** hereto) which expressed an intent to discontinue operating the Station for reasons which included the poor economics of operating the Station and the need for substantial additional investment to safely and reliably maintain and operate the Station as well as to continue to conform to current and future environmental regulations (Retirement Notice, **Exhibit E** hereto, at 2).

19. According to the Retirement Notice, as of January 3, 2013, the Station had been inoperable since October 29, 2012, when the Station was flooded by Superstorm Sandy (Retirement Notice, **Exhibit E** hereto, at 2).

20. Upon information and belief, the Station has not operated from October 29, 2012 to date.

21. According to the Retirement Notice, repairing the “catastrophic” damage to the Station resulting from Superstorm Sandy would involve substantial costs, as it was estimated that the flooding had damaged approximately 90% of the motors and 60% of the switchgear at the Station (Retirement Notice, **Exhibit E** hereto, at 2).

22. According to the Retirement Notice, Dynegy Danskammer would transfer the Station to a salvage company to dismantle the Station after the Station was retired (Retirement

Notice, **Exhibit E** hereto, at 1).

23. By Order dated April 23, 2013, the NYSPSC authorized Dynegy Danskammer to retire the Station forthwith (*Order Approving Transfer and Authorizing A Retirement Prior to the Expiration of the Notice Period*, Case 13-E-0012 - Dynegy Danskammer LLC - Petition For Waiver of the Generation Facility Retirement Notice Period and Requesting Other Related Relief, a true and complete copy of which is attached hereto as **Exhibit F**).

24. By subsequent Order dated October 28, 2013, the NYSPSC found that the Federal Energy Regulatory Commission (“FERC”) had recently established of a new capacity zone in the Hudson Valley region of the wholesale electric market, which would result in price increases to electric customers, and that such price increases would be ameliorated by the continued operation of the Station (*see* October 28, 2013 *Order Modifying Prior Order and Establishing Other Procedures*, Case 13-E-0012 - Dynegy Danskammer LLC - Petition For Waiver of the Generation Facility Retirement Notice Period and Requesting Other Related Relief, a true and complete copy of which is attached hereto as **Exhibit G**, at 2-3).

25. The NYSPSC October 28, 2013 Order modified the prior NYSPSC April 23, 2013 Order by re-opening the possibility of returning the Station to operation for the purpose of ameliorating electric customer price increases resulting from FERC’s creation of a new capacity zone (*see* October 28, 2013 Order, **Exhibit G** hereto, at 6-7).

26. On or about April 1, 2014, Danskammer Energy, Helios, and Mercuria petitioned the NYSPSC to authorize Danskammer Energy to repair, retrofit and operate the Station (Joint Application, **Exhibit C** hereto).

27. By Order dated June 27, 2014, the NYSPSC approved the lease, sale and reactivation of the Station (NYSPSC Approval Order, **Exhibit A** hereto, at 38-39), and also issued

the NYSPSC Negative Declaration as an attachment to the NYSPSC Approval Order.

28. The deactivated Station consists of four fossil fueled generating units. Units 1 and 2 can burn natural gas and oil, and began their respective commercial operations in 1951 and 1954. Units 3 and 4 burn natural gas, and began their respective commercial operations in 1959 and 1967 (*see* NYSDEC Region 3, August 20, 2014 Environmental Notice Bulletin, Combined Notice of Complete Applications, Danskammer Generating Station, a true and complete copy of which is attached hereto as **Exhibit H**, at [1]-[2]).

29. The reactivated, retrofitted and repaired Station would continue to utilize an antiquated “once-through” cooling system to withdraw approximately 455 million gallons per day (“mgd”) of water from the Hudson River, which would be returned to the river in roughly the same amount as waste heat in the form of a thermal discharge (*see* NYSDEC Danskammer Generating Station Biological Fact Sheet, **Exhibit D** hereto, at [1]).

30. The Station’s “once-through” cooling system would pump Hudson River water into the Station’s cooling system, where it would be circulated past condenser coils to absorb waste heat from operation of the Station’s electric generation equipment before being discharged back to the Hudson River with a maximum permitted discharge temperature of 100°F (*see* NYSDEC Danskammer Point Generating Station Biological Fact Sheet, **Exhibit D** hereto, at [1]).

31. Riverkeeper’s comments to the NYSPSC on the Joint Petition included publicly available documentation that the New York State Department of Environmental Conservation (“NYSDEC”) had identified the Station as a priority for SPDES permit modification pursuant to ECL § 17-0817[6] for reasons including establishing a “mixing zone” in order to assure that the Station’s thermal discharge was in compliance with water quality criteria (*see* Riverkeeper and Scenic Hudson June 9, 2014 Comments on Helios LLC *et al.* Petition for Expedited Approval for

the Lease, Sale and Operation of Danskammer Station, a true and complete copy of which is attached hereto as **Exhibit I**, at 9, n.41, *citing* and *attaching* NYSDEC's 2013-2014 Environmental Benefit Permit Strategy List, a true and complete copy of which is attached hereto as **Exhibit J**, at [3]).

32. NYSDEC is in fact required to review all existing SPDES permits at least once every five years for conformance with new federal treatment technology and state water quality standards (*see* ECL § 17-0817[3]; *see also* *Matter of Riverkeeper, Inc. v. Crotty*, 28 A.D.3d 957 [3d Dep't 2006]).

33. "Entrainment" occurs when early life-stage aquatic organisms such as eggs, larvae and juvenile fish are carried into and through the cooling system as water is withdrawn for use in the Station's "once-through" cooling system.

34. "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 and suffocate or be otherwise injured.

35. NYSDEC has previously determined that, for purposes of meeting Section 316[b] of the federal Clean Water Act (33 U.S.C. § 1326[b]), technological and operational measures employed at the Station can reduce the Station's entrainment and impingement of aquatic organisms by roughly 90%, representing the "Best Technology Available" to minimize such adverse environmental impacts within the meaning of 33 U.S.C. § 1326[b] and 6 NYCRR § 704.5 (*see Riverkeeper, Inc. v. Johnson*, 52 A.D.3d 1072 [3d Dep't 2008]).

36. Upon information and belief, absent the technological and operational measures required by NYSDEC via the Station's SPDES Permit pursuant to 33 U.S.C. § 1326[b] and 6 NYCRR § 704.5, the Station's reactivated operation would result in the annual entrainment and



mortality of between 200 million and 375 million total early life stage aquatic organisms (eggs, larvae, and juvenile fish) (*see* October 14, 2005 Prefiled Direct Testimony of Dr. Peter A. Henderson, *In re Dynegy Northeast Generation Inc., on Behalf of Dynegy Danskammer, LLC (Danskammer Generating Station) Application for Renewal and Modification of a State Pollutant Discharge Elimination System (“SPDES”) Permit Pursuant to Article 17 of the Environmental Conservation Law and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York Parts 704 and 750 t seq.* [DEC Case No. 3-3346-00011/00002; SPDES No. NY -0006262], Tr. 002443, a true and complete copy of which is attached hereto as **Exhibit K**, at 20 [Transcript Page 002457]).

37. Upon information and belief, if the technological and operational measures required by NYSDEC via the Station’s SPDES Permit pursuant to 33 U.S.C. § 1326[b] and 6 NYCRR § 704.5 did in fact reduce the Station’s entrainment by 90%, the reactivated Station would still annually entrain and kill roughly 2 million to 3 million early life stage aquatic organisms per year.

38. The annual entrainment and mortality of 2 million to 3 million early life stage aquatic organisms by the Station would constitute the destruction of large quantities of aquatic organisms and a significant adverse environmental impact under SEQRA (6 NYCRR § 617.7[c][1][ii]).

39. Upon information and belief, absent the technological and operational measures required by NYSDEC via the Station’s SPDES Permit pursuant to 33 U.S.C. § 1326[b] and 6 NYCRR 704.5, the Station’s reactivated operation would also result in the annual average impingement of roughly 140,000 to 190,000 adult fish (*see* October 14, 2005 Prefiled Direct Testimony of Dr. Peter A. Henderson, **Exhibit K** hereto., at 20 [Transcript Page 002457]).

40. The Station's thermal discharge causes significant adverse environmental impacts which are related and in addition to but different from entrainment and impingement.

41. Fish species found in the vicinity of the Station include: striped bass, white perch, alewife, blueback herring, American shad, tessellated darter, bay anchovy, gizzard shad, pumpkinseed, spottail shiner, channel catfish and brown bullhead. Blue crabs also inhabit the area of the Station (*see* NYSDEC Danskammer Point Generating Station Biological Fact Sheet, **Exhibit D** hereto, at [1]).

42. On or about August 20, 2014, NYSDEC issued a draft modified State Pollutant Discharge Elimination System ("SPDES") permit for the Station pursuant in part to 6 NYCRR § 750-1.18 which proposes to authorize a sixty-five acre mixing zone of heated thermal effluent of at least ninety degrees Fahrenheit (90°F) in connection with the re-activation of the Station (*see* NYSDEC Region 3, August 20, 2014 Environmental Notice Bulletin, **Exhibit H** hereto, at [2]).

43. On or about August 20, 2014, and subsequent to the respective NYSPSC and NYSDPS Negative Declarations at issue herein, NYSDEC likewise determined that the proposed modifications to the Station's NYSDEC-issued permits (including the Station's Title V Air Permit and SPDES Permit) will not have a significant impact on the environment (*see* NYSDEC Region 3, August 20, 2014 Environmental Notice Bulletin, **Exhibit H** hereto, at [6]).

44. Upon information and belief, the entirety of NYSDEC's elaboration with respect to its August 20, 2014 Negative Declaration with respect to modification of the Station's Title V Air Permit and SPDES Permit modifications is contained in an two-page document, a true and complete copy of which is attached hereto as **Exhibit L**.

45. Upon information and belief, as of the date of this Verified Petition, NYSDEC has not yet issued a modified Title V Air Permit and/or a modified SPDES Permit for the reactivation

of the Station.

46. Riverkeeper accordingly brings this timely proceeding and action separately and independently against NYSPSC and NYSDPS but without prejudice to its rights to bring a timely separate action and/or proceeding against NYSDEC and/or to move this Court pursuant to CPLR § 602 to consolidate any such separate action and/or proceeding against NYSDEC with the above-captioned action and proceeding against NYSPSC and NYSDPS, in conformance with SEQRA's mandate that state agencies conduct coordinated environmental review and designate a lead agency for actions such as the reactivation of the Station (*see* ECL § 8-0109[4] and 6 NYCRR § 617.6[b]).

47. Upon information and belief, raising the existing temperature of the Hudson River in the vicinity of the Station to a temperature of 90°F. or higher would significantly impact the existing physical, chemical and biological parameters of Hudson River water quality, resulting in both long-term (chronic) and more immediate (acute) adverse environmental impacts, including the death of all life stages of fish species such as American shad (*Alosa sapidissima*) and river herring (alewife, *Alosa pseudoharengus*) (*see* Riverkeeper October 4, 2014 Comments on NYSDEC Draft Air Pollution and SPDES Permits, a true and complete copy of which is attached hereto as **Exhibit M**, at 21-23).

48. The Station's thermal effluent also creates a type of discharge which (in addition to and in part as a result of killing individual fish) deleteriously impacts fish populations (*see Matter of Riverkeeper, Inc. v. Crotty*, 28 A.D.3d 957 [3d Dep't 2006], *citing* 33 USC § 1326[b]; § 1362[6]).

49. As the Office of the New York State Attorney General commented to the NYSPSC: "Once-through cooling may be environmentally damaging because it can impinge and entrain

aquatic biota, including fish, and discharges hot water back into the source river. If unmitigated, a once-through cooling system can pose a risk of harm to the Hudson River environment” (New York State Office of the Attorney General, June 9, 2014 Motion to Intervene and for Leave to Serve Discovery, a true and complete copy of which is attached **Exhibit N** hereto, at 3-4).

50. As of the time of the respective NYSPSC and NYSDPS Negative Declarations, neither Joint Petitioners (together, Helios, Mercuria, and Danskammer Energy) nor any state agency had thoroughly analyzed and/or identified the adverse environmental impacts of the Station’s thermal discharge for purposes of SEQRA.

51. Upon information and belief, to date, neither Joint Petitioners nor any state agency has thoroughly analyzed and/or identified the adverse environmental impacts of the Station’s thermal discharge for purposes of SEQRA.

52. The NYSPSC Approval Order and Negative Declaration failed to identify and/or thoroughly analyze the significant adverse water quality impacts of reactivating the Station (*see* Riverkeeper’s June 9, 2014 Comments to NYSPSC on the Joint Petition, **Exhibit I** hereto; NYSDEC’s 2013-2014 Environmental Benefit Permit Strategy List, **Exhibit J** hereto, at [3]).

53. Instead, the NYSPSC Approval Order and Negative Declaration is premised entirely upon certain presumed (but incorrectly and incompletely assessed) air quality benefits of reactivating the Station with a fuel switch (in whole or in part) from coal to natural gas (NYSPSC Approval Order, **Exhibit A** hereto, at 35), without any consideration of the reactivated Station’s adverse impacts on the aquatic resources of the Hudson River.

54. In violation of SEQRA, the respective Negative Declarations failed to thoroughly analyze and/or identify whether the reactivation of the Station would result in the destruction of large quantities of aquatic organisms as a consequence of the Station’s cooling water intake and/or

thermal discharge (6 NYCRR § 617.7[c][1][ii]).

55. In violation of SEQRA, the respective Negative Declarations also failed to thoroughly analyze and/or identify whether the reactivation of the Station would result in a substantial adverse change in existing surface water quality of the Hudson River as a consequence of the Station's cooling water intake and/or thermal discharge (6 NYCRR § 617.7[c][1][i]).

56. In violation of SEQRA, the respective Negative Declarations likewise failed to thoroughly analyze and/or identify whether the reactivation of the Station would result in substantial interference with the movement of any resident or migratory fish or wildlife species as a consequence of the Station's cooling water intake and/or thermal discharge (6 NYCRR § 617.7[c][1][ii]).

57. In violation of SEQRA, the respective Negative Declarations further failed to thoroughly analyze and/or identify whether the reactivation of the Station would result in the impairment of the character or quality of important Hudson River historical commercial fishing resources and community character as a consequence of the Station's cooling water intake and/or thermal discharge (6 NYCRR 617.7[c][1][v].; *see* accompanying Affidavit of Riverkeeper member John Mylod dated October 21, 2014).

58. Upon information and belief, two different species of endangered sturgeon (shortnose and Atlantic) inhabit the Hudson River in the vicinity of the Station.

59. The Station is adjacent to the New York Department of State-designated Kingston-Poughkeepsie Deepwater Significant Coastal Fish and Wildlife Habitat which consists of 6,350 acres of Hudson River deepwater habitat running from just north of the Station upriver to Kingston, New York (New York State Department of State, Coastal Fish and Wildlife Habitat Rating Form – Kingston-Poughkeepsie Deepwater [Aug. 15, 2012], a true and complete copy of

which is attached hereto as **Exhibit O**, at 2).

60. The Kingston-Poughkeepsie Deepwater Significant Coastal Fish and Wildlife Habitat provides one of the largest and most well-known spawning areas for Atlantic sturgeon and overwintering areas for shortnose sturgeon in the Hudson River (New York State Department of State, Coastal Fish and Wildlife Habitat Rating Form – Kingston-Poughkeepsie Deepwater, **Exhibit O** hereto, at 2).

61. The Kingston-Poughkeepsie Deepwater Significant Coastal Fish and Wildlife Habitat is also critical habitat for most other estuarine-dependent fisheries originating from the Hudson River, including two species of river herring (alewife [*Alosa pseudoharengus*] and blueback herring [*Alosa aestivalis*]) and American shad (*Alosa sapidissima*), as well as habitat for blue crab (*Callinectes sapidus*) (New York State Department of State, Coastal Fish and Wildlife Habitat Rating Form – Kingston-Poughkeepsie Deepwater **Exhibit O** hereto, at 2).

62. In violation of SEQRA, the respective Negative Declarations fail to thoroughly analyze and/or identify whether the reactivation of the Station would result in impacts on a significant habitat area as a consequence of the Station's cooling water intake and/or thermal discharge (6 NYCRR § 617.7[1][c][ii]) (*see Exhibit E* hereto, New York State Department of State Coastal Fish and Wildlife Habitat Rating Form – Hudson Highlands [Aug. 15, 2012] at 2).

63. Several Hudson River power plants, including the Station, are located on a stretch of the river which overlaps with known nursery grounds for endangered Atlantic sturgeon larvae and early juveniles (*see* NMFS Proposed Listing Determinations for Three Distinct Population Segments of Atlantic Sturgeon in the Northeast Region [Proposed Rule], 75 Fed. Reg. 61872, 61890 [October 6, 2010]).

64. The Station is among the Hudson River power plants which pose the greatest risk to

Atlantic sturgeon (*see* NMFS Proposed Listing Determinations for Three Distinct Population Segments of Atlantic Sturgeon in the Northeast Region [Proposed Rule], 75 Fed. Reg. 61872, 61890 [October 6, 2010]).

65. In February 2012, the National Marine Fisheries Service (“NMFS”) listed the Atlantic sturgeon (*Acipenser oxyrinchus*) in the Hudson River as an endangered species under the federal Endangered Species Act (“ESA”) (*see* 16 U.S.C. § 1531 *et. seq.*; NMFS, Final Rule - Endangered and Threatened Wildlife and Plants; Threatened and Endangered Status for Distinct Population Segments of Atlantic Sturgeon in the Northeast Region, 77 Fed. Reg. 5880 [Feb. 6, 2012]).

66. The shortnose sturgeon (*Acipenser brevirostrum*) has been federally listed as an endangered species since 1967 under the Endangered Species Preservation Act of 1966, a predecessor to the ESA of 1973 (16 U.S.C. § 1531 *et. seq.*) (*see* Fish and Wildlife Services, Endangered Species, 32 Fed. Reg. 4001 [Mar. 11, 1967]).

67. On or about December 20, 2000, NMFS issued the Station an Incidental Take Permit pursuant to the federal ESA authorizing the Station to take ESA-listed endangered shortnose sturgeon incidental to the Station’s operations (*see* NMFS Issuance of Incidental Take Permit No. 1269, 65 Fed. Reg. 79808 [Dec. 20, 2000]).

68. In connection with shortnose sturgeon, NMFS determined that the operation of the Station requires the withdrawal of large quantities of cooling water from, and the subsequent discharge of a heated plume of thermal effluent back to, the Hudson River, which could in turn cause the mortality of endangered shortnose sturgeon from entrainment and impingement or from the effects of the Station’s thermal discharge (*see* NMFS, Availability of an Environmental Assessment and Receipt of an Application for Incidental Take Permits for the Roseton and

Danskammer Point Generating Stations Conservation Plan, Hudson River, New York, 65 Fed. Reg. 48677 [August 9, 2000]).

69. In violation of SEQRA, the respective Negative Declarations fail to thoroughly analyze and/or identify whether the reactivation of the Station would result in substantial endangered Atlantic sturgeon mortalities as a consequence of the Station's cooling water intake and/or thermal discharge (6 NYCRR § 617.7[c][1][ii]).

70. In violation of SEQRA, the respective Negative Declarations fail to thoroughly analyze and/or identify whether the reactivation of the Station would result in substantial adverse impacts on endangered Hudson River sturgeon species or their habitat as a consequence of the Station's cooling water intake and/or thermal discharge (6 NYCRR § 617.7[c][1][ii]).

71. In violation of SEQRA, the respective Negative Declarations further fail to thoroughly analyze and/or identify whether the reactivation of the Station would result in substantial interference with the movement of endangered Hudson River sturgeon species as a consequence of the Station's cooling water intake and/or thermal discharge (6 NYCRR § 617.7[c][1][ii]).

72. Significant adverse impacts on the environment associated with reactivating the Station would also include predicted potential emissions of greater than or equal to 250 tons per year (but less than 75,000 tons per year) of the following regulated air pollutants: particulate matter, sulfur dioxide, carbon monoxide, nitrogen oxides and volatile organic compounds (*see* NYSDEC Air Pollution Permit Review Report [August 18, 2014], a true and complete copy of which is attached hereto as **Exhibit P**, at 6-7 of 22).

73. The reactivation of the Station would require the resolution of outstanding regulatory issues with respect to adverse air quality impacts of such an action, including the



identification of an appropriate baseline for measuring air quality impacts in such circumstances (See New York State Office of the Attorney General June 9, 2014 Motion to Intervene and for Leave to Serve Discovery, **Exhibit N** hereto, at 21-22; see also Riverkeeper October 4, 2014 Comments on NYSDEC Draft Air Pollution and SPDES Permits, **Exhibit M** hereto, at 33-37).

74. In violation of SEQRA, the respective Negative Declarations also failed to thoroughly analyze and/or identify whether the reactivation of the Station would result in a substantial adverse change in existing baseline air quality conditions in the area of the Station (see 6 NYCRR § 617.7[c][1][i]).

75. The NYSPSC Approval Order and Negative Declaration is premised upon presumptive air quality benefits of Mercuria's proposal to switch in whole or in part from coal to natural gas as the fuel for generating electricity at the Station (see NYSDEC Approval Order, **Exhibit A** hereto, at 35), and includes a determination as to a *beneficial* effect on air quality as a result of reactivating the Station.

76. NYSPSC's findings as to the air quality benefits of reactivating the Station set forth in the NYSPSC Approval Order and Negative Declaration were made in violation of lawful procedure based on NYSPSC's failure to conduct coordinated SEQRA review and designate a lead agency pursuant (ECL § 8-0109[4] and 6 NYCRR § 617.6[b]).

77. SEQRA obligates state agencies to determine the significance of their proposed actions in the light of the criteria and factors of 6 NYCRR § 617.7 as a threshold matter.

78. SEQRA nowhere authorizes a state agency to unilaterally engage in an evaluation of a proposed action's benefits, or to weigh and balance environmental impacts absent the preparation of a sufficient Environmental Impact Statement pursuant to 6 NYCRR § 617.9[b], which is required in order for an agency to make findings on a project-specific basis as to the

environmental benefit (if any) of a project (*see* 6 NYCRR § 617.11[d][2]).

79. The NYSPSC Approval Order and Negative Declaration's findings as to the beneficial air quality impacts of reactivating the Station were consequently and manifestly an abuse of discretion, arbitrary and capricious, made in violation of lawful procedure and affected by an error of law.

80. The NYSPSC Approval Order and Negative Declaration's finding as to the beneficial air quality impacts of reactivating the inoperable Station was further arbitrary and capricious and contrary to law because it failed to address or consider federal or state regulations for estimating baseline emission increases in cases involving reactivated air contamination sources (*see* New York State Office of the Attorney General June 9, 2014 Motion to Intervene and for Leave to Serve Discovery, **Exhibit N** hereto, at 21-22; *see also* Riverkeeper October 4, 2014 Comments on NYSDEC Draft Air Pollution and SPDES Permits, **Exhibit M** hereto, at 33-37).

81. The NYSPSC Approval Order and Negative Declaration are furthermore arbitrary and capricious and not in accordance with applicable law insofar as the NYSPSC's Negative Declaration was premised upon a comparison of "the effect of the plans for operating the facility in the future as compared to the effects of its prior operation" (NYSPSC Approval Order, **Exhibit A** hereto, at 34) rather than a comparison of the impacts that may be reasonably expected to result from reactivating the Station to existing conditions relating to air quality, water quality, habitat functions and values, endangered species, and historical and cultural resources (6 NYCRR § 617.7[c][1][i]-[xii]).

82. The foregoing examples of significant water quality, air quality, aquatic habitat and aquatic organism adverse impacts are offered by way of example and not of limitation, given that disclosure is an essential component of the SEQRA process.

83. By a notice letter dated September 29, 2014 (a true and complete copy of which is attached hereto as **Exhibit Q**), Danskammer Energy advised the New York State Independent System Operator that repairs to the Station were underway and that Danskammer Energy LLC intends to return the Station to operation by the end of 2014.

**As and for First Cause of Action (CPLR § 7803)**

84. Riverkeeper repeats and realleges the allegations set forth in paragraphs 1 through 83 of this Petition/Complaint as if fully stated herein.

85. The respective NYSPSC and NYSDPS Negative Declarations unlawfully failed to conduct coordinated SEQRA review and designate a lead agency pursuant ECL § 8-0109[4] and 6 NYCRR § 617.6[b].

86. In issuing the respective Negative Declarations, NYSPSC and NYSDPS also unlawfully failed to identify all areas of relevant concern, take a hard look at them, and provide a reasoned elaboration of the basis for their respective determinations of non-significance (6 NYCRR § 617.7[b]).

87. The respective NYSPSC and NYSDPS Negative Declarations were made in violation of lawful procedure, were affected by errors of law, were arbitrary and capricious, and tacitly represent respective and a collective abuse(s) of NYSPSC and NYSDPS discretion (CPLR § 7803[3]).

**As and for a Second Cause of Action (CPLR § 3001)**

88. Riverkeeper repeats and realleges the allegations set forth in paragraphs 1 through 87 of this Petition/Complaint as if fully stated herein.

89. By reason of the foregoing, Petitioner/Plaintiff is furthermore or in the alternative entitled to a judgment pursuant to CPLR § 3001 declaring that the respective Negative

Declarations and the NYSPSC Approval Order were all issued in violation of SEQRA, and annulling the respective Negative Declarations and the NYSPSC Approval Order.

**As and for a Third Cause of Action (CPLR § 6301)**

90. Riverkeeper repeats and realleges the allegations set forth in paragraphs 1 through 89 of this Petition/Complaint as if fully stated herein.

91. By reason of the foregoing, the respective Negative Declarations are arbitrary and capricious, inconsistent with applicable law, and represent an abuse of discretion. Consequently, the merits militate in favor of injunctive relief.

92. As a result of the of the respective NYSPSC and NYSDPS Negative Declarations, Plaintiff/Petitioner and its members have sustained great and irreparable injury insofar as the strict dictates of SEQRA, including for coordinated agency review and public disclosure, have not been followed.

93. As a result of the of the respective NYSPSC and NYSDPS Negative Declarations, Plaintiff/Petitioner and its members will moreover sustain great and irreparable injury given that real environmental harm will follow as a consequence of inadequate agency foresight, coordination, and deliberation resulting from the respective and collective failure(s) of NYSPSC and NYSDPS to follow the dictates of SEQRA for coordinated agency review, and identification and thorough analysis of adverse environmental impacts, with full public disclosure and a process for public comment.

94. As a result of the of the respective NYSPSC and NYSDPS Negative Declarations, Plaintiff/Petitioner and its members will sustain great and irreparable injury as a result of the significant and adverse impacts to air quality, water quality, and aquatic biota and habitat which would occur as a result of the reactivation of the Station.

95. Damages to natural resources (air quality, water quality, and the aquatic biota and habitat of the Hudson River) and to Petitioner/Plaintiff's interest and the interests of its members cannot be adequately remedied by money damages and are often permanent (such as the death of aquatic organisms) or at least of long duration, and are consequently irreparable.

96. Accordingly, Petitioner/Plaintiff lacks any adequate remedy at law.

97. Riverkeeper in conclusion further respectfully submits that the equities as set forth herein and as described more particularly in Riverkeeper's accompanying application for a preliminary injunction pursuant to CPLR § 6311 not only weigh in favor of, but necessitate, the issuance of the requested equitable relief.

**WHEREFORE,** Riverkeeper respectfully requests that this Court enter a Judgment and Order against Respondents/Defendants pursuant to CPLR Sections 7803[3], 3001, and 6301:

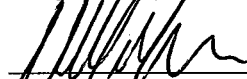
- A. ANNULING the respective NYSPSC and NYSDPS Negative Declarations pursuant to CPLR §§ 7803[3] and 7806 on the basis that such determinations were made in violation of lawful procedure, were affected by an error of law, and were arbitrary and capricious and an abuse of discretion;
- B. ANNULING the NYSPSC June 27, 2014 Approval Order pursuant to CPLR §§ 7803[3] and 7806 as an arbitrary and capricious abuse of discretion, undertaken in violation of lawful procedure and affected by an error of law;
- C. ADJUDGING and DECLARING pursuant to CPLR § 3001 that the respective NYSPSC and NYSDPS Negative Declarations are affected by errors of law, are arbitrary and capricious, and are each an abuse of discretion and invalid and void for having been made in violation of lawful procedure;
- D. ADJUDGING and DECLARING pursuant to CPLR 3001 that the NYSPSC June 27,

2014 Approval Order is invalid and void as an arbitrary and capricious abuse of discretion issued in violation of lawful procedure and affected by an error of law;

- E. REMANDING this matter to NYSPSC and ORDERING the NYSPSC and NYSDPS to (i) conduct coordinated SEQRA review including all involved agencies, (ii) establish a lead agency, and (iii) determine whether an Environmental Impact Statement should be prepared pursuant to ECL 8-0109 and applicable 6 NYCRR Part 617 regulations;
- F. Preliminarily ENJOINING Respondents Helios Power Capital LLC, Mercuria Energy America, Inc., and Danskammer Energy, LLC from taking any further actions to operate and/or reactivate the Station pending further NYSPSC and NYSDPS action on remand;
- G. GRANTING Petitioner/Plaintiff Riverkeeper the costs and disbursement of this action; and,
- H. GRANTING such other and further relief in Petitioner/Plaintiff's favor as to the Court seems just, proper and equitable.

Dated: Ossining, New York  
October 24, 2014

Respectfully submitted,



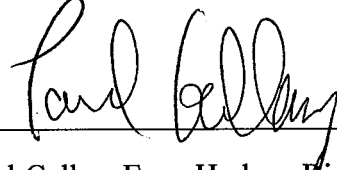
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20 Secor Road  
Ossining, New York 10562  
802-595-5213  
mlucas@riverkeeper.org

STATE OF NEW YORK            )  
  ) ss.:  
COUNTY OF WESTCHESTER    )

VERIFICATION

Paul Gallay, Esq., being duly sworn, deposes and says, he is the Hudson Riverkeeper and

President of Petitioner/Plaintiff Riverkeeper Inc., that he has read the foregoing Verified Petition, and knows its contents to be true to his own knowledge, except where stated to be on information and belief, and as to those matters he believes to them to be true; that the grounds of his belief and as to those matters not stated upon his knowledge are documents and files maintained by the New York State Department of Environmental Conservation (NYSDEC) and Riverkeeper Inc., including documents prepared by Riverkeeper's expert consultants and filed with NYSDEC.



Paul Gallay, Esq., Hudson Riverkeeper  
and President of Riverkeeper, Inc.

Sworn to before me

this 23<sup>rd</sup> day of October, 2014



NOTARY PUBLIC

My Commission expires: Nov. 25, 2015

ALLISON NOBLE CHAMBERLAIN  
Notary Public, State of New York  
No. 01CH6102162  
Qualified in Westchester County  
Commission Expires Nov. 24, 2015