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April 11, 2002

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Via Federal Express

Office of the Secretary
Janet H. Deixler, Secretary to the Commission
3 Empire State Plaza
Albany, New York 12223-1350

Re: Application of Ramapo Energy Limited Partnership for a Certificate of Environmental Compatibility and Public Need to construct and operate a 1,100-megawatt natural gas-fired combined cycle combustion turbine electric generating plant in the Town of Ramapo, Rockland County, NY
Case 98-F-1968

Dear Ms. Deixler:

Enclosed for filing please find an original and twenty-five copies of the County of Rockland's Motion to Dismiss.

A copy is also being provided to the All Parties Service List.

Very truly yours,

DEVORSETZ STINZIANO GILBERTI HEINTZ & SMITH, P.C.


John F. Klucsik

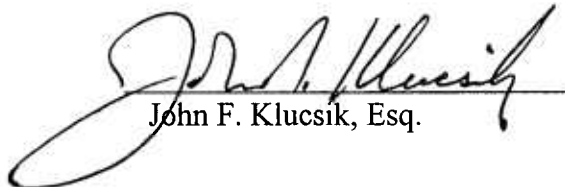
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Enclosures

cc: Hon. Robert R. Garlin
Hon. Susan DuBois
All Parties Service List

Certificate of Service

This is to certify that a true and complete copy of the foregoing was served via E-mail (as available) and U.S. Mail on the All Parties Service List on April 11, 2002.



John F. Klucsik, Esq.

NEW YORK STATE BOARD
ON ELECTRIC GENERATION SITING
AND THE ENVIRONMENT

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In the Matter of the Application of

RAMAPO ENERGY LIMITED PARTNERSHIP,

MOTION TO DISMISS

Case No.: 98-F-1968

For a Certificate of Environmental Compatibility
and Public Need to Construct and Operate an
1,100 Megawatt Generating Facility in the
Town of Ramapo, County of Rockland.

Dated: April 11, 2002

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NEW YORK STATE BOARD
ON ELECTRIC GENERATION SITING
AND THE ENVIRONMENT

In the Matter of the Application of

RAMAPO ENERGY, L.P.

MOTION TO DISMISS

PSC Case No. 98-F-1968

For a Certificate of Environmental
Compatibility and Public Need to
Construct and Operate a
1,100 Megawatt Generating Facility
in the Town of Ramapo, Rockland County

PRELIMINARY STATEMENT

The County of Rockland (the "County"), pursuant to 16 NYCRR Section 1000.13, hereby moves to dismiss the above-captioned proceedings.

The siting board's rules provide that:

Whenever it shall appear in the absence of any genuine issue as to any material fact that the statutory requirements for a certificate cannot be met, the board may dismiss the application seeking such a certificate and terminate the proceeding in question upon the motion of any party or upon its own motion.

(N.Y. COMP. CODES R. & REGS. tit. 16 § 1000.13). Dismissal is warranted based on the applicant's demonstrated inability to meet the statutory requirements set forth in sections 165 and 168 of article X of the Public Service Law, as well as the applicant's failure to proceed with the case in an expeditious manner (N.Y. PUB. SERV. LAW § 165[3]), and in accord with the examiner's April 30, 2001 Order Specifying Article X Issues and the examiner's July 31, 2001 Procedural Ruling.

ARGUMENT

POINT I

THE STATUTORY DEADLINE FOR A DECISION ON THE APPLICATION HAS PASSED AND THE SITING BOARD IS WITHOUT JURISDICTION TO CONDUCT FURTHER PROCEEDINGS ON THIS MATTER.

The siting board's jurisdiction over Ramapo Energy's application lapsed on March 29, 2002, and this matter must perforce be dismissed with prejudice.

Pursuant to section 165[4] of the Public Service Law:

Proceedings on an application *shall* be completed in all respects, including a final decision by the board, within twelve months from the date of a determination by the chairman that an application complies with section one hundred sixty-four of this article . . . [t]he board *must* render a final decision on the application by the aforementioned deadline unless such deadlines are waived by the applicant.

(N.Y. PUB. SERV. LAW § 165[4] [emphasis supplied]). In the case of a facility over two hundred thousand kilowatts, the board "may extend the deadline in extraordinary circumstances by no more than six months" unless such deadline is waived by the applicant (N.Y. PUB. SERV. LAW § 165[4]).

The Ramapo Energy project application was filed on November 29, 1999. On January 2, 2001, the chairman determined that the application met the minimum requirements for compliance with PSL section 164[1]. Pursuant to PSL section 165[4], the board would have had until January 1, 2002 to render a final decision on the application. By letter dated July 23, 2001, Ramapo Energy proposed a revised schedule with a stipulated extended deadline of March 29, 2002. Pursuant to a procedural ruling issued July 31, 2001, the presiding examiner approved the schedule proposed by

Ramapo Energy, and established March 29, 2002 as the deadline for the siting board's decision. That deadline was never extended or altered by any subsequent ruling or order.

On September 5, 2001, Ramapo Energy wrote to the examiners to request that issues related to visual/cultural/recreational and terrestrial biology "be postponed without date" despite the fact that testimony had been filed by all parties, hearing dates had been set and witnesses had been scheduled on each of those issues. Since that time, Ramapo Energy has provided two proposals, representing an entirely new plan for mitigating impacts to timber rattlesnakes, and a new visual mitigation proposal. Intervenors have been substantially prejudiced, incurring duplicative costs for scientific and technical review of such amendments, preparation of additional testimony and revision of their direct cases owing to this delay. Intervenors have already exhausted limited intervenor and other funding to prepare their cases on an application that has drastically and repeatedly changed. Now, the March 29, 2002 deadline has passed and the applicant has failed to proceed expeditiously, or even to proceed at all. Pursuant to PSL section 165[4], the siting board's jurisdiction over this application has lapsed. As a result, the siting board is without jurisdiction to further consider the application, and it must dismiss this application with prejudice and terminate these proceedings.

POINT II

THE STATUTORY DEADLINE FOR A DECISION ON THIS APPLICATION HAS PASSED AND THE SITING BOARD CANNOT MAKE THE FINDINGS AND DETERMINATIONS REQUIRED BY STATUTE FOR ISSUANCE OF A CERTIFICATE BASED ON THE RECORD AS IT NOW STANDS.

The statutory deadline having passed, the board is, in a real sense, without jurisdiction to further consider the application. Nevertheless, should the siting board elect at this time to consider the application and render a decision on it, the board has no choice but to deny the application

because it cannot make the statutorily-mandated findings and determinations required for certificate issuance. As outlined above, the applicant requested that adjudication of visual/cultural/recreational issues and terrestrial biology issues be postponed without date to allow the applicant additional time to address concerns raised in these areas. Thereafter, the applicant supplemented its third proposal for mitigating impacts to timber rattlesnakes on November 20, 2001, revised for the fifth time its visual impact mitigation proposal on December 11, 2001, and filed its fourth additional packet of “supplemental information” regarding proposed timber rattlesnake mitigation dated February 12, 2002.

It is precisely the applicant’s inability to go forward on issues of terrestrial biology and visual/cultural/recreational issues that has prevented the siting board from completing the Article X process within one year as prescribed by Public Service Law section 165[4], or by the March 29, 2002 extended deadline established by the procedural ruling of July 31, 2001. The applicant cannot proceed because it cannot meet the statutory requirements for a certificate with regard to the proposed project’s impacts on threatened timber rattlesnakes in the Torne Valley. The project will result in a prohibited taking of threatened timber rattlesnakes in violation of New York’s Endangered and Threatened Species Law. (N.Y. ENVTL. CONSERV. LAW §11-0535). Moreover, present circumstances warranting the declaration of a Stage IV drought emergency in Rockland County and years of water shortages leading up to that event establish beyond any doubt or dispute that the Ramapo Energy facility will have a significant adverse effect on already scarce water resources and applicant has failed to identify and mitigate adverse environmental impacts associated with the facility. These adverse impacts simply cannot be minimized.

New York State Public Service Law mandates that the siting board find and determine, among other things, the nature of the probable environmental impacts of the proposed facility (N.Y. PUB. SERV. LAW § 168[2][b]); that the facility minimizes adverse environmental impacts (N.Y. PUB. SERV. LAW § 168[2][c][i]); that the facility is compatible with public health and safety (N.Y. PUB. SERV. LAW § 168[2][c][ii]); that the construction and operation of the facility is in the public interest, considering its environmental impacts (N.Y. PUB. SERV. LAW § 168[2][e]); and that the facility is designed to operate in compliance with applicable state environmental laws and regulations. (N.Y. PUB. SERV. LAW § 168[2][d]). There is no genuine issue as to any material fact that Ramapo Energy cannot meet the foregoing statutory requirements for a certificate on the record as it stands today. Consequently, the siting board must dismiss this application with prejudice and terminate this proceeding or deny the certificate.

1. The Construction and Operation of the Facility Will Result in an Illegal Taking of Threatened Timber Rattlesnakes.

As stated above, the siting board may not grant a certificate for the construction or operation of a major electric generating facility unless it both evaluates the predictable adverse and beneficial impacts on the environment, ecology and wildlife (N.Y. PUB. SERV. LAW § 168[2][b]) and determines that the facility minimizes adverse environmental impacts (N.Y. PUB. SERV. LAW § 168[2][c][i]).

There is no dispute that the destruction of the habitat of the timber rattlesnake (*Crotalus horridus*), a threatened species, and the destruction of the timber rattlesnake itself, will occur as a result of the construction and operation of the proposed Ramapo Energy facility. The timber rattlesnake has been designated by DEC as a threatened species since 1983 (N.Y. COMP. CODES R.

& REGS. tit. 6 § 182.6[b][5]), pursuant to New York's Endangered and Threatened Species Law, N.Y. ENVTL. CONSERV. LAW §11-0535, popularly known as the Harris Law. The taking of any threatened species is prohibited, except under license or permit from DEC. The statute defines "taking" and "take" to include:

pursuing, shooting, hunting, killing, capturing, trapping, snaring and netting fish, wildlife, game, shellfish, crustacea and protected insects, and all lesser acts such a [sic] disturbing, harrying or worrying, or placing, setting, drawing or using any net or other device commonly used to take any such animal.

(N.Y. ENVTL. CONSERV. LAW § 11-0103[13]).

The project site is timber rattlesnake habitat, which will be destroyed, degraded and modified. The applicant also anticipates incidental timber rattlesnake mortality as an impact of the operation of the facility. As a result, therefore, the construction and operation constitutes a taking of a threatened species which is an act prohibited by statute. Consequently, the siting board simply cannot make the required finding that the facility is designed to operate in compliance with applicable state environmental laws and regulations. (N.Y. PUB. SERV. LAW § 168[2][d]).

New York courts have determined that the modification or degradation of the habitat of a threatened species constitutes an illegal "taking" of that species in violation of ECL section 11-0535. (*See State v. State v. Sour Mountain Realty, Inc.* (276 A.D.2d 8 [2nd Dept. 2000])). The Ramapo Energy project, however, goes far beyond modification or degradation of habitat, and would result in the total destruction of a timber rattlesnake basking area and foraging habitat as well as incidental timber rattlesnake mortality. The project would also modify and degrade Torne Valley timber rattlesnake habitat by creating an obstacle of snake-proof fencing, the erection of which was found to be an illegal taking in *Sour Mountain*.

DEC witness Dr. Brown explains that the proposed location of the Ramapo Energy facility is essentially centered on a major rattlesnake demographic unit and metapopulation (den complex), and that the facility itself would be located on the site of a known basking area (BA-13), which would be destroyed to accommodate the facility, and which is located within an optimal rattlesnake migration distance from surrounding dens which comprise a significant den complex.¹ Ramapo Energy does not dispute that the Torne Valley functions as a den complex.²

The Torne Valley den complex is among the largest in the State and is a high priority for long-term management and protection.³ Basking areas constitute extremely critical habitat for the timber rattlesnake,⁴ and the Torne Valley constitutes a critical summer range habitat for the timber rattlesnake den complex.⁵ The project site is currently being used by timber rattlesnakes for foraging, basking, shedding and mating.⁶ Ramapo Energy does not dispute that basking area BA-13 is within the summer activity range of the eight timber rattlesnake dens in the Torne Valley,⁷ or that

¹ July 19, 2001 *Prepared Testimony* of DEC Witness Dr. William S. Brown, Ph.D. (Page 28, Lines 1 through 5); *see also* July 19, 2001 *Prepared Testimony* of DEC Witness Alvin Breisch (Page 16, Lines 6 through 7); July 19, 2001 *Prepared Testimony* of DEC Witness Theodore H. Kerpez, Ph.D. (Page 5, Lines 3 through 7).

² August 16, 2001 Ramapo Energy Limited Partnership *Rebuttal Testimony* of John Hecklau, Howard Reinert, Sarada Sangameswaran and Robert Zappalorti (Page 3, Lines 17 through 20).

³ July 19, 2001 *Prepared Testimony* of DEC Witness Edwin McGowan (Page 14, Line 17 through 19).

⁴ July 19, 2001 *Prepared Testimony* of DEC Witness Alvin Breisch (Page 24, Line 19 through 20).

⁵ July 19, 2001 *Prepared Testimony* of DEC Witness Dr. William S. Brown, Ph.D. (Page 22 Line 12 through 15).

⁶ July 19, 2001 *Prepared Testimony* of DEC Witness Dr. Theodore H. Kerpez, Ph.D. (Page 16, Line 18 through 21).

⁷ August 16, 2001 Ramapo Energy Limited Partnership *Rebuttal Testimony* of John Hecklau, Howard Reinert, Sarada Sangameswaran and Robert Zappalorti (Page 4, Lines 17 through 19).

basking area BA-13 is part of the summer habitat of the timber rattlesnakes.⁸ Nor does Ramapo Energy dispute that basking area BA-13 will be lost if the project is constructed.⁹

Aside from resulting in the destruction, degradation and modification of habitat, there is a high probability that the proposed project will result in mortality of threatened timber rattlesnakes.¹⁰ Assuming losses of timber rattlesnakes in proportion to habitat loss, DPS witness de Waal Malefyt conservatively estimates that about five rattlesnakes could be lost due to the overall impact on 40 acres of habitat.¹¹ Ramapo Energy does not dispute that the operational impacts of the facility will include human disturbance and incidental snake mortality.¹²

The destruction of habitat and even the construction of snake-proof fencing, such as the applicant has proposed, constitutes a taking of a threatened species and is a violation of the Harris Law. This proposition is confirmed by *State v. Sour Mountain Realty, Inc.* (276 A.D.2d 8 [2nd Dept. 2000]). There, defendant Sour Mountain Realty sought a mining permit from DEC and proposed to construct a four-foot high snake-proof fence along 3500 feet of its property line following the discovery of a timber rattlesnake den 260 feet beyond their property line in Hudson Highlands State Park. DEC responded to Sour Mountain Realty's plans by advising them that:

⁸ August 16, 2001 Ramapo Energy Limited Partnership *Rebuttal Testimony* of John Hecklau, Howard Reinert, Sarada Sangameswaran and Robert Zappalorti (Page 14, Lines 2 through 3).

⁹ August 16, 2001 Ramapo Energy Limited Partnership *Rebuttal Testimony* of John Hecklau, Howard Reinert, Sarada Sangameswaran and Robert Zappalorti (Page 21, Lines 13 through 14).

¹⁰ July 19, 2001 *Prepared Testimony* of DEC Witness Dr. Theodore J. Kerpez (Page 15, Line 17 through 19),

¹¹ July 20, 2001 *Pre-filed Direct Testimony* of DPS Witness James J. de Waal Malefyt (Page 11, Line 20 through Page 12, Line 1).

¹² July 31, 2001 Ramapo Energy Limited Partnership *Direct Testimony* of John Hecklau, Howard Reinert, Sarada Sangameswaran and Robert Zappalorti (Page 47, Lines 6 through 7).

[S]hould the placement and nature of the fencing or other activity unilaterally undertaken by [you] harass or harm or significantly modify, degrade, or limit the habitat of the identified [snakes], the Department would consider such an activity to be violative of ECL § 11-0535 and 6 NYCRR part 182.

(*Id.* at 10). After being informed of the construction of the fence, DEC commenced an action to permanently enjoin Sour Mountain Realty from using the fence. (*Id.*).

DEC claimed that Sour Mountain Realty was disturbing, harrying and/or worrying timber rattlesnakes in violation of ECL § 11-0535. DEC maintained that the snake fence would disrupt the annual cycle of timber rattlesnake activities that include hibernation in the winter, emergence from the den site in spring, migration from the den site to summer home ranges, and migration back to the den site in the fall. (*See id.* at 319).

The trial court agreed with DEC that such modification or degradation of habitat actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering. (*See id.* at 320, quoting *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 [1995]). Accordingly, the trial court in found that “a modification of rattlesnake habitat constitutes a taking under Environmental Conservation Law § 11-0103[13].” (*Sour Mountain*, 183 Misc.2d at 321) and granted DEC a permanent injunction. Sour Mountain was enjoined to remove the snake-proof fence and barred from interfering with the normal disbursal, migration or movement of timber rattlesnakes, or from otherwise modifying timber rattlesnake habitat on its property. (*See id.* at 326). The Second Department affirmed. (*See Sour Mountain*, 276 A.D.2d 8 at 15).

The Ramapo Energy project, which includes temporary and permanent snake fencing, will have similar as well as more severe impacts on far more timber rattlesnakes in the Torme Valley than

those at issue in *Sour Mountain*. Ramapo Energy concedes that some portion of the Torne Valley rattlesnake population may lose access to a portion of their suitable summer habitat.¹³ Moreover, it is undisputed that the footprint of the facility will eliminate timber rattlesnake foraging and basking area habitat, that the facility is proposed to be located in the midst of a den complex, and that rattlesnake mortality will result from the operation of the facility.

In *Sour Mountain*, the modification of the habitat adjacent to a single den by the construction of a snake fence was found to violate the Harris Law. Application of the Harris Law to Ramapo Energy leads to the inescapable conclusion that the construction and operation of the facility will constitute a taking under New York's Endangered and Threatened Species Act. (N.Y. ENVTL. CONSERV. LAW §11-0535[1]). This taking will be of greater magnitude than that prohibited by the Second Department in *Sour Mountain*.

There is nothing in the record to refute that a taking of threatened timber rattlesnakes will occur as a result of the construction and operation of the proposed Ramapo Energy project. No expert testimony or supplemental submission can change that simple indisputable fact. Ramapo Energy concedes that a portion of foraging habitat and a rattlesnake basking area (BA-13) will be lost as a result of the project.¹⁴ Ramapo Energy's plans definitely include both temporary and permanent snake exclusion fencing.¹⁵ Ramapo Energy does not dispute that the operational impacts

¹³ August 16, 2001 Ramapo Energy Limited Partnership *Rebuttal Testimony* of John Hecklau, Howard Reinert, Sarada Sangameswaran and Robert Zappalorti (Page 46, Lines 13 through 16).

¹⁴ July 31, 2001 Ramapo Energy Limited Partnership *Direct Testimony* of John Hecklau, Howard Reinert, Sarada Sangameswaran and Robert Zappalorti (Page 42, Lines 6 through 16).

¹⁵ July 31, 2001 Ramapo Energy Limited Partnership *Direct Testimony* of John Hecklau, Howard Reinert, Sarada Sangameswaran and Robert Zappalorti (Page 43, Lines 14 through 19).

of the facility will include human disturbance and incidental rattlesnake mortality.¹⁶ Accordingly, the siting board cannot find that the facility is designed to operate in compliance with applicable state environmental laws and regulations. (N.Y. PUB. SERV. LAW § 168[2][d]). Ramapo Energy cannot meet the statutory criteria for a certificate, and the siting board should, in consideration of the Harris Law, dismiss or deny this application with prejudice and terminate this proceeding.

2. The Operation of the Facility Will Result in Increased Material Adverse Impacts to the Regional Water Supply that Cannot be Mitigated.

An application for an Article X certificate must contain information regarding the source and volume of water required for plant operation and appropriate water supply data. (N.Y. PUB. SERV. LAW § 164[1][a]). This information must include a discussion of the environmental setting of all relevant resources for an area of sufficient size to enable a comparison of the present environment to the environment that will likely exist following the construction and operation of the proposed facility. (N.Y. COMP. CODES R. & REGS. tit. 16 § 1001.1[a]). The application must address significant ecosystems and evaluate the impact of the facility on potable water supplies and wells. (N.Y. COMP. CODES R. & REGS. tit. 16 § 1001.3[b][1][ii]).

Article X further requires an evaluation of such resources in relation to reasonably related short-term and long-term effects, adverse impacts on the environment, public health and safety that cannot be avoided if the facility is built, and any irreversible commitment of resources that would be involved in the operation of the facility, along with mitigation measures proposed to minimize such impacts. (N.Y. COMP. CODES R. & REGS. tit. 16 § 1001.3[b][2][i]-[iv]). The siting board may not grant a certificate unless it finds that the predictable adverse impacts on the environment have

¹⁶ July 31, 2001 Ramapo Energy Limited Partnership *Direct Testimony* of John Hecklau, Howard Reinert, Sarada Sangameswaran and Robert Zappalorti (Page 47, Lines 6 through 7).

been minimized considering the state of available technology and the viability of reasonable alternative locations, and that the construction and operation of the facility is compatible with public safety and is in the public interest. (N.Y. PUB. SERV. LAW §§ 168[2][b], 168[2][c][i], 168[2][c][ii] & 168[2][e]). On the record that exists, the siting board simply cannot make such a determination with respect to the Ramapo Energy project and, accordingly, cannot grant a certificate.

The applicant cannot possibly meet the statutory requirements for a certificate. The applicant's proposed mitigation measures cannot minimize the proposed facility's environmental impacts on an already strained water supply, as water shortage conditions in the county undeniably illustrate. The Ramapo Energy facility will exacerbate water supply problems in the region. Consequently, its construction and operation is not in the public interest. With regard to water supply resources in the county and the impact the Ramapo Energy facility would have on such scarce resources, there is no genuine issue as to any material fact that the statutory requirements for a certificate cannot be met, and the siting board should dismiss the application and terminate this proceeding.

On March 6, 2002, the Rockland County Department of Health ("RCDOH") issued a Stage III Drought Warning Declaration, imposing the most stringent water restrictions ever declared in the county. In terms of rainfall, Rockland County actually reached Stage III drought status on November 1, 2001, and the county reached Stage IV (Drought Emergency) status in January of 2002. DeForest Lake Reservoir storage has fallen below the DEC Rule Curve¹⁷ for the first time since it was established in 1982. (See United Water New York Rockland County Drought Status Report, attached

¹⁷ The DEC Rule Curve measures the water level of Lake DeForest. The Rule Curve was established to control releases of water from Lake DeForest to New Jersey via the Hackensack River, and provides for a maximum release of 7.75 mgd to New Jersey when the level of Lake DeForest falls below the Rule Curve

hereto as **Exhibit 1**). The United Water New York (UWNY) February 2002 Fact Sheet (attached hereto as **Exhibit 2**) reports Deforest Lake's reservoir level at only 46.1 percent of storage capacity. From November 7, 2001 through April 1, 2002, United States Geological Survey (USGS) data¹⁸ reports that the passing flow in the Ramapo River has been below 8 mgd for at least 28 days, or more than 18% of that period. When passing flow is below 8 mgd, the Ramapo Valley Well Field, the principal source of water for Ramapo Energy, must be shut down.

Donald Distanto, Manager of Engineering at United Water New York, provided expert testimony on behalf of United Water and Ramapo Energy in this matter. He did not believe the Ramapo Energy project would have an adverse impact on the ability of United Water to supply water to its customers in Rockland County.¹⁹ As a basis for that conclusion, Mr. Distanto opined that:

Considering the fact that UWNY has ample water supply capability, except for short periods during very dry summers, it is my conclusion that the Project will not have an adverse impact on the region's potable water supply.²⁰

In response to DEC's conclusion that the water supply needs of the Ramapo Energy project will exacerbate the water supply problem in the county, Mr. Distanto also claimed that "UWNY has ample supply to meet the demand of its customers from October through April."²¹

¹⁸ The USGS data is available at <http://waterdata.usgs.gov/ny/nwis/>, and is a matter of public record. Presiding Examiner Garlin has ruled elsewhere that public records are properly the subject of judicial notice and need not be included in the record of this proceeding. (See In the Matter of the Application of Consolidated Edison, Case 99-F-1314 (East River) *Procedural Ruling*, February 15, 2002). Pursuant to 16 NYCRR § 1000.11, the County moves that the USGS Ramapo River Streamflow data be incorporated by reference as such data is determinative regarding the inability of the Applicant to meet the statutory requirements.

¹⁹ Tr. 3321

²⁰ Tr. 2980

²¹ Tr. 2993

The current Stage III drought, UWNY's own Fact Sheet and the Rockland County Drought Status Report demonstrate, however, that UWNY lacks ample supply and cannot meet the demands of its customers from October through April. Accordingly, Mr. Distante's opinion that the Ramapo Energy project will not have an adverse impact on the region's water supply and will not exacerbate the region's water supply problems is without basis and is contradicted by UWNY's own documents. If demand must be reduced by regulatory mechanisms such as county drought restrictions, it cannot reasonably be claimed that supply is meeting demand, but rather, that lack of supply necessitates a regulatory restraint on demand so that critically scarce water is appropriately rationed.

Mr. Distante's testimony explains that 30 percent of UWNY's supply comes from Lake DeForest.²² Notably, the current drought conditions are occurring during the season when the reservoir would normally be at its highest water levels of the year and would be refilling to supply the next summer's use. The current state of DeForest Lake disproves Mr. Distante's assertion that UWNY has ample supply except during short periods in dry summers. Moreover, the fact that DeForest Lake constitutes one-third of UWNY's supply and is already at less than half of its storage capacity indicates that the upcoming summer need not be a dry one for United Water's supply to fall short. More to the point, the level of DeForest Lake proves that UWNY lacks ample supply. It is beyond question that there is a serious water shortage in Rockland County and that Ramapo Energy's water demand would aggravate an already critical winter and summer water shortage.

This water shortage is not an isolated or short term condition. United Water's February 2002 Fact Sheet demonstrates a clear downward trend in replenishing precipitation. The forty-four year average precipitation from 1957 through 2001 was 42.90 inches. Precipitation for the year 2000 was

²² Tr. 2977

84 percent of that average, while 2001 precipitation was only 66.1 percent of that average, and 2002 precipitation as of February was a mere 45 percent. In terms of two-month totals over a 20-year average, UWNY's Drought Status Report indicates that 2002 precipitation of 2.49 inches as of February is 55.4 percent below the 20-year average of 5.58 inches. This is not an aberration or a single, particularly dry year. As county geologist Dr. Dan Miller explains, a downward trend of below average rainfall for three years has depleted groundwater levels.²³

Groundwater is critical to the operation of the Ramapo Valley Well Field (RVWF). Mr. Distanto testified that the RVWF will supply most of the water to the proposed Ramapo Energy facility, and also supplies 30 percent of the total water supply to Rockland County.²⁴ Pursuant to its DEC permit, UWNY cannot operate the RVWF unless there is at least 8 million gallons per day (mgd) passing flow in the Ramapo River as measured at the Suffern weir.²⁵ Prior to Mr. Distanto's taking the stand on November 7, 2001, USGS data showed that the passing flow in the Ramapo River was below 8 mgd for six days in September, nineteen days in October, and three days in November. USGS data also shows that the flow in the Ramapo River was below 8 mgd for 18 days from November 7, 2001 through November 30, 2001, or 78 percent of the time during that period. Mr. Distanto claimed that in the spring or in the winter, flows would be high and there is "no issue

²³ See THE JOURNAL NEWS, *Dry wells a new reality in Rockland*, April 7, 2002. Private wells are drying up in Rockland County, and County residents are enduring hardships including but not limited to drilling deeper wells or being forced to connect to UWNY's public water system for a price of up to \$26,000 (*see id.*). Ramapo Energy's additional 9 million gallons of off-season demand would only serve to exacerbate the problems for UWNY's existing customers as well as the 10 percent of Rockland County residents who are supplied by private wells. Notably, the presentations of UWNY and Ramapo Energy in this proceeding have failed to identify or minimize the impacts of the project's additional demand on County residents whose water is supplied by private wells.

²⁴ Tr. 2980

²⁵ Tr. 2981

of 8 mgd.”²⁶ USGS data on actual flows in the Ramapo River since that time refute Mr. Distant’s contention. Flows in the Ramapo River were below 8 mgd for seven days in December of 2001 and three days in January of 2002. On January 5, 2002, the flow was 5.68 mgd, and an equipment failure precluded flow recordings from January 6, 2002 through January 29, 2002.

The USGS data shows that the flow in the Ramapo River was below 8 mgd for 28 days from November 7, 2001 through January 5, 2002 (a period of roughly two months). Consequently, the principal supply source for the proposed facility—and 30% of UWNY’s overall supply to Rockland County—could not produce water approximately 46 percent of the time when flows in the Ramapo River should have been at their highest.

Ramapo Energy proposes to mitigate its impacts on the region’s water supply by providing nine million gallons of on-site water storage for process water and firefighting.²⁷ The essential precondition to the implementation of such a mitigation strategy is that the tanks be refilled each year. The year-round shortage of potable water in Rockland County establishes that Ramapo Energy’s demand for nine million gallons of stored water to later minimize the facility’s impacts on water supply in the summer months will result in a separate increased material adverse impact on that resource in the late fall, winter and early spring, which impact cannot be minimized.

Actual conditions in Rockland County have shown conclusively that such proposed mitigation measures are incapable of minimizing the project’s adverse environmental impacts, because the mitigation measures, if viable at all, would themselves result in additional material adverse environmental impacts. Rockland County has been in a Stage III drought for over a

²⁶ Tr. 3105

²⁷ Tr. 3395.

month.²⁸ Since Ramapo Energy has committed to cease withdrawals from UWNY during a Stage III drought, the facility could not refill its storage tanks until the Stage III alert was lifted. Consequently, it could not prepare for coinciding peak electricity and potable water demands and the predictable water supply shortage of the summer. Under the conditions of last fall, winter, and this spring, the facility could not refill its tanks without producing adverse environmental impacts which the applicant has neither recognized nor proposed to minimize, and which in fact cannot be minimized due to the scarce and finite nature of the resource at issue.

Ramapo Energy denies that there will be adverse impacts from its proposed “off-season” nine million gallon demand. Ramapo Energy claims that by committing to cease withdrawals from UWNY during a Stage III or greater alert, it will not exacerbate low flows in the Ramapo River, based on the erroneous assumption that low flows in the Ramapo River coincide with the declaration of a Stage III drought.²⁹ This is clearly not the case. USGS data and United Water’s Drought Status Report demonstrate the contrary. The passing flow in the Ramapo River fell below 8 mgd 28 times between November 7, 2001 and March 6, 2002 before the County called a Stage III Drought. A Stage III drought could have been declared November 1, 2001, but the Ramapo River flow was below 8 mgd for 25 days in September and October of 2001 before the Stage III rainfall criterion was reached. The Ramapo River flow was also below 8 mgd 18 times after October 1, 2001, when river augmentation supply reached an “adequate” (relieved) level relative to the Stage III Ramapo River augmentation supply criterion for drought declaration.

²⁸ Of note and of interest is the fact that the criteria for this Stage III drought were met on November 1, 2001, and based on existing County criteria the Stage III declaration could have been upgraded to a Stage IV emergency in January of 2002.

²⁹ Tr. 3375-76, Tr. 3393, Tr. 3400

Under conditions as they exist in Rockland County, Ramapo Energy's additional 9 million gallon tank refill demand would result in droughts being called earlier, more severe restrictions being imposed, the RVWF being shut down more often, and private wells going dry as the water table gets progressively lower. During 2001, the RVWF was shut down for lack of augmentation supply.³⁰ When the RVWF is shut down, UWNYP proposes to back-flow water from the Ramapo High district into the RVWF service area.³¹ That water would have to come from DeForest Lake,³² which is 54 percent below its storage capacity (a record low, and 40 percent below the twelve-year average). An additional "off-season" 9 million gallon demand would only exacerbate an existing, long term water crisis, and cause increased and unmitigable material adverse impacts.

The current condition of potable water resources in Rockland County provides absolute proof that the mitigation measures proposed by Ramapo Energy will be ineffective to address the facility's impacts on the region's water supply. Consequently, there is no genuine issue as to any material fact that the statutory requirements for a certificate cannot be met, and the siting board should dismiss or deny the application and terminate this proceeding.

CONCLUSION

The siting board's jurisdiction over Ramapo Energy's application has lapsed. Accordingly, the siting board should dismiss the application of Ramapo Energy seeking such a certificate with prejudice and terminate this proceeding. Moreover, on the record that has been developed, there is

³⁰ Tr. 3108-09

³¹ Tr. 3113-3114.

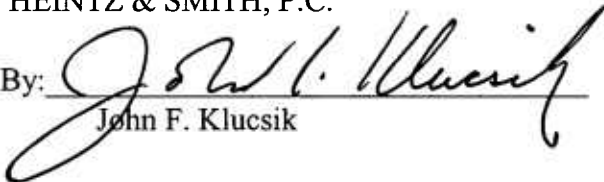
³² Tr. 3112

no genuine issue as to any material fact that the statutory requirements of sections 165 and 168 of the Public Service Law for a certificate of environmental compatibility and public need have not and cannot be met. For this reason as well, the siting board should dismiss or deny the application with prejudice.

Dated: April 11, 2002

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ROCKLAND COUNTY DROUGHT STATUS REPORT



Rainfall Totals by Drought Stage

Inches	20 Year Avg	Current	% Below Avg	Trigger - %
2 Month Total (Stage I)	5.58	2.49	55.4	> 40
3 Month Total (Stage II)	9.05	4.87	46.2	> 40
4 Month Total (Stage III)	12.71	6.04	52.5	> 40
6 Month Total (Stage IV)	19.95	9.34	53.2	> 40
12 Month Total (Stage V)	41.90	27.39	34.6	> 35

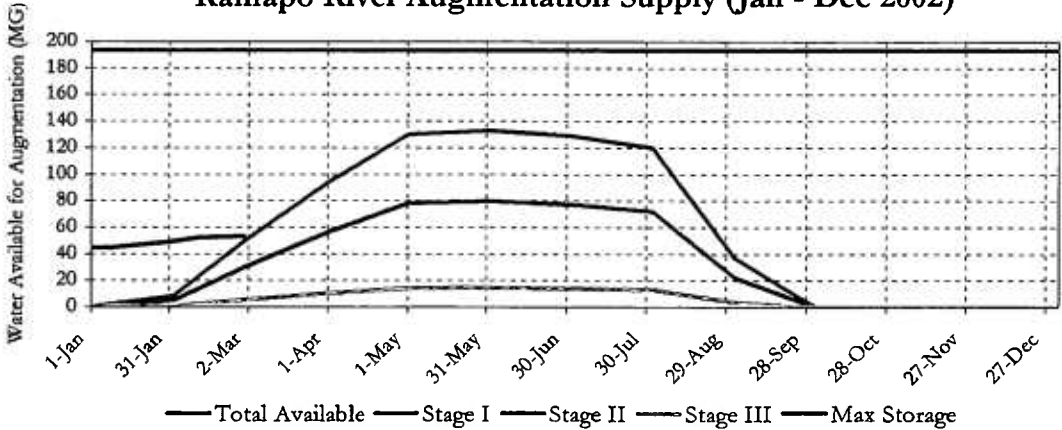
Drought Status Criteria Reached/Relieved

	Rainfall		Ramapo Augmentation		DeForest Lake	
	Reached	Relieved	Reached	Relieved	Reached	Relieved
Stage I (Watch)	1-Sep-01		20-Aug-01	1-Oct-01		
Stage II (Alert)	1-Oct-01		8-Sep-01	1-Oct-01		
Stage III (Warning)	1-Nov-01		12-Sep-01	1-Oct-01		
Stage IV (Emergency)	1-Jan-02					
Stage V (Severe Emgy)						

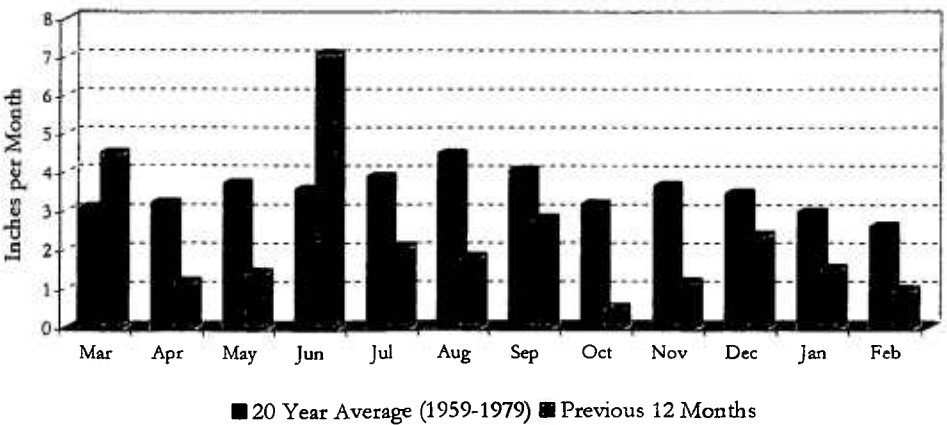
Rainfall

DeForest Lake Inches/Month	Average 1959-1979	2000		2001		2002	
		Actual	% of Avg.	Actual	% of Avg.	Actual	% of Avg.
January	2.98	2.42	81.2	2.01	67.4	1.52	51.0
February	2.60	1.68	64.6	1.45	55.8	0.97	37.3
March	3.08	2.87	93.2	4.49	145.8		
April	3.20	2.19	68.4	1.18	36.9		
May	3.71	2.74	73.9	1.41	38.0		
June	3.56	4.11	115.4	7.08	198.9		
July	3.90	5.42	139.0	2.08	53.3		
August	4.50	2.94	65.3	1.81	40.2		
September	4.06	6.03	148.5	2.80	69.0		
October	3.18	0.27	8.5	0.50	15.7		
November	3.66	2.24	61.2	1.17	32.0		
December	3.47	3.12	89.9	2.38	68.6		
TOTAL	41.90	36.03	86.0	28.36	67.7	2.49	44.6

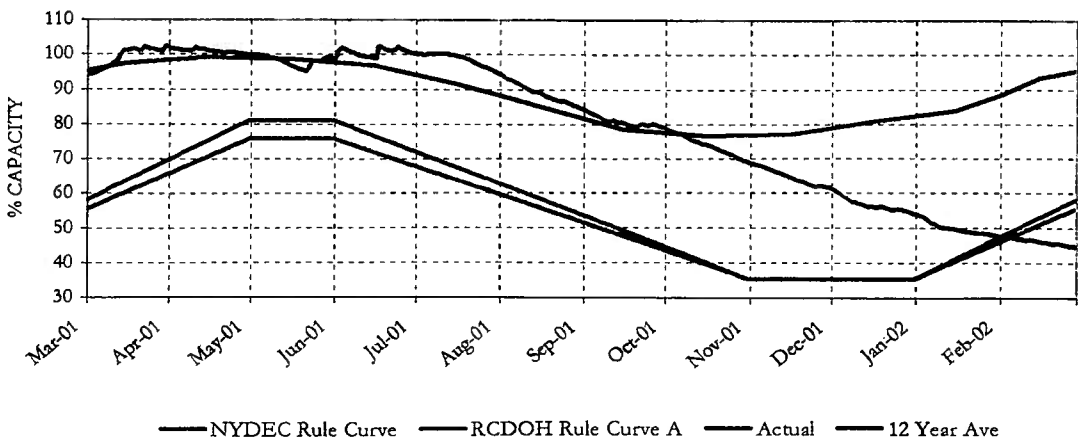
Ramapo River Augmentation Supply (Jan - Dec 2002)



12 Month Precipitation @ DeForest Lake Plant



DeForest Lake Reservoir Storage



WATER SUPPLY FACT SHEET

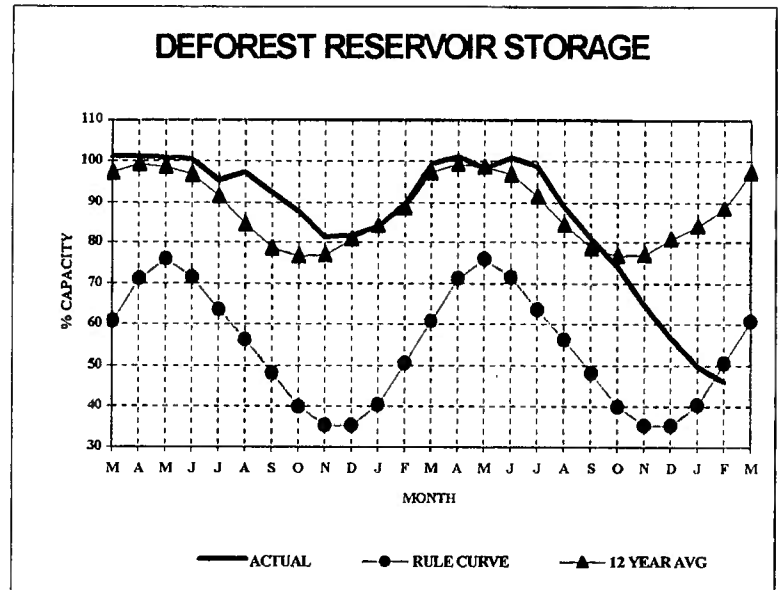
RAINFALL:		Average		2000		2001		2002	
DeForest Lake	1957-2001	Actual	% of Avg.	Actual	% of Avg.	Actual	% of Avg.	Actual	% of Avg.
January	2.97	2.42	81.5	2.01	67.7	1.52	51.2		
February	2.57	1.68	65.4	1.45	56.4	0.97	37.7		
March	3.58	2.87	80.1	4.49	125.2		0.0		
April	3.64	2.19	60.2	1.18	32.5		0.0		
May	4.00	2.74	68.5	1.41	35.3		0.0		
June	3.83	4.11	107.2	7.08	184.6		0.0		
July	4.00	5.42	135.6	2.08	52.0		0.0		
August	4.02	2.94	73.2	1.81	45.0		0.0		
September	4.02	6.03	149.8	2.80	69.6		0.0		
October	3.28	0.27	8.2	0.50	15.3		0.0		
November	3.74	2.24	60.0	1.17	31.3		0.0		
December	3.26	3.12	95.7	2.38	73.0		0.0		
TOTAL	42.90	36.03	84.0	28.36	66.1	2.49	45.0		

RESERVOIR STORAGE (MG):

DeForest Lake:	Storage	% Cap.
February 1997	5724.05	101.0
February 1998	5327.10	94.0
February 1999	3861.05	68.1
February 2000	5650.11	99.6
February 2001	5090.39	89.8
February 2002	2614.61	46.1
Six Year Average	4711.22	83.1

SUPPLY SOURCES (Year to Date):

	MGD	%
Ramapo Valley Well Field	5.81	22.5
DeForest Plant	6.98	27.1
System Wells	12.99	50.4
Total	25.77	



SYSTEM DRAFT (MGD):

	1997	1998	1999	2000	2001	2002	2002 Plan	Year	Peak Day	Yearly Avg
January	25.04	25.69	27.13	26.94	27.36	26.32	27.86			
February	24.62	25.70	25.87	28.00	26.42	25.18	27.87	1997	39.22	27.53
March	24.22	25.98	26.06	27.52	26.51		27.69			
April	25.36	26.26	26.24	27.04	26.88		27.94	1998	42.85	28.90
May	27.00	28.45	29.79	29.69	32.84		30.66			
June	32.43	31.39	38.17	32.07	32.88		34.80	1999	44.58	28.78
July	33.31	35.54	37.38	32.75	34.20		35.38			
August	31.11	36.30	28.16	29.84	36.23		34.18	2000	39.07	28.55
September	28.68	31.59	27.07	28.74	31.18		30.56			
October	26.76	28.18	26.91	27.00	28.32		28.25	2001	46.48	29.70
November	25.83	26.06	26.28	26.30	26.77		27.34			
December	25.75	25.41	26.14	26.62	26.46		27.25	2002	27.57	25.78

NEW YORK STATE BOARD
ON ELECTRIC GENERATION SITING
AND THE ENVIRONMENT

RECEIVED
PUBLIC SERVICE
COMMISSION
OSEC-FILES-ALBANY

2002 APR 12 AM 9:40

In the Matter of the Application of

RAMAPO ENERGY LIMITED PARTNERSHIP,

AFFIDAVIT OF SERVICE

For a Certificate of Environmental Compatibility
and Public Need to Construct and Operate a
1,100 Megawatt Generating Facility in the
Town of Ramapo, County of Rockland.

Case No.: 98-F-1968
DEC #3-3926-00377/00001

STATE OF NEW YORK)
COUNTY OF ONONDAGA) s.s.:

Donna J. Herring, being duly sworn deposes and says that deponent is over the age of 18 years of age and not party to this action; that she resides in Onondaga County, New York; that on the 11th day of April, 2002, she served the County of Rockland's Motion to Dismiss on:

Hon. Robert R. Garlin, Presiding Examiner
Administrative Law Judge
New York State Department of Public Service
Three Empire State Plaza, 3rd Floor
Albany, New York 12223-1350 **via Federal Express**

Hon. Susan DuBois, Associate Examiner
Administrative Law Judge
New York State Department of Environmental Conservation
625 Broadway, 1st Floor
Albany, New York 12233-1550 **via Federal Express,**

Thomas S. West, Esq.
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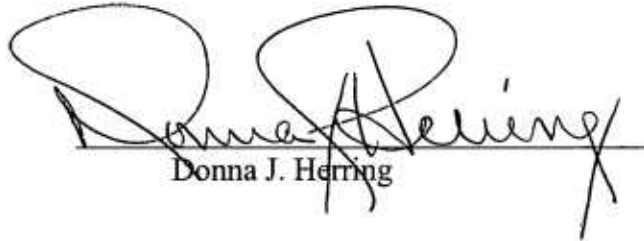
and filed original and 25 copies with:

Office of the Secretary
Janet H. Deixler, Secretary to the Commission
3 Empire State Plaza
Albany, New York 12223-1350 **via Federal Express,**

and served a copy on:

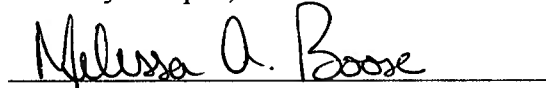
All Parties Service List **via e-mail and U.S. mail**

by depositing same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.



Donna J. Herring

Sworn to before me this
11th day of April, 2002.


Notary Public

MELISSA A BOOSE
Notary Public, State of New York
No 01B05046907
Qualified in Onondaga County
Commission Expires July 24, 2005

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