STATE OF NEW YORK
SUPREME COURT : COUNTY OF YATES

In the Matter of the Application of

SIERRA CLUB, COMMITTEE TO PRESERVE THE FINGER LAKES by and in the name of PETER GAMBA, its President; COALITION TO PROTECT NEW YORK by and in the name of KATHRYN BARTHOMEW, its Treasurer; and SENECA LAKE GUARDIAN, A WATERKEEPER AFFILIATE by and in the name of YVONNE TAYLOR, its Vice President,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

Index No. 2017-0232

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, BASIL SEGGOS, COMMISSIONER, GREENIDGE GENERATION, LLC and LOCKWOOD HILLS, LLC,

Respondents.

STATE RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE PETITION

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Dated: March 2, 2018

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PRELIMINARY STATEMENT

The New York State Department of Environmental Conservation (DEC) rationally issued two permits—an initial water withdrawal permit and a State Pollutant Elimination System Discharge (SPDES) permit (the 2017 SPDES permit)—for Greenidge Station, a power plant owned by respondent Greenidge Generation, LLC.

First, petitioners lack standing because they fail to name their members and show that issuance of the permits harms them. Second, in issuing these permits, DEC followed all of its procedures, reviewed the entire project under SEQRA, and imposed appropriate conditions on the permits. The initial water withdrawal permit imposes conditions for water conservation and incorporates conditions in the 2017 SPDES permit, which requires measures to reduce fish mortality. The 2017 SPDES permit conditions are equivalent to requiring closed-cycle cooling. Moreover, DEC reviewed the entire project under SEQRA, including both the initial water withdrawal permit and the 2017 SPDES permit, and properly determined that there were no potentially significant adverse environmental impacts. DEC did not act in an arbitrary or capricious manner in issuing the permits, and the Court should dismiss the petition.

STATUTORY FRAMEWORK

A. Water Resources Law

The Water Resources Law declares that New York state has "[t]he sovereign power to regulate and control the water resources of this state" (ECL 15-0103[1]). The statute acknowledges that suitable water for agricultural, commercial, and industrial uses, including the production of power, is essential to the economic growth and prosperity of the State (*id.* 15-0103[3]).

Before amendments to the Water Resources Law in 2011, it did not require industrial entities, like Greenidge Station, to obtain a water withdrawal permit because it focused on permitting public water supplies. However, the Water Resources Law required industrial entities with large withdrawals to report water withdrawals annually, and they must continue to report their withdrawals each year. With the 2011 amendments, industrial entities with large water withdrawals needed to apply for a water withdrawal permit (*see id.* 15-1501[1], [9]).

The Water Resources Law requires a permit to operate certain high-volume systems that withdraw water from the waters of the State (*id.* 15-1501[1]; 15-1502[16]). A water withdrawal system is "any equipment or infrastructure operated or maintained for the provision or withdrawal of water including, but not limited to, collection, pumping, treatment, transportation, transmission, storage, and distribution" (*id.* 15-1502[15]). Systems with a withdrawal capacity equal to or greater than a specified threshold volume must obtain permits (*id.* 15-1501[1]). The threshold volume for non-agricultural water withdrawal systems is 100,000 gallons per day (*id.* 15-1502[14]).

The Water Resources Law distinguishes between existing and new water withdrawals (*id.* 15-1501[1]), and the type of permit that DEC issues to authorize those withdrawals. DEC issues two types of water withdrawal permits for water withdrawal systems that did not need permits before the 2011 amendments: initial permits for most systems that existed as of February 2012 and reported their maximum capacity to DEC, and new permits for all other systems.

As amended, the Water Resources Law mandates that DEC "shall issue" an initial permit to operators of water withdrawal systems that reported the systems' maximum water withdrawal capacity to DEC by February 15, 2012 (*id.* 15-1501[9]). An initial permit shall be "subject to appropriate terms and conditions as required under" Article 15 (*id.*). Permittees must report

information requested by DEC, including information on water usage and conservation (*see* ECL 15-1501[6]).

To implement the initial permit requirements, DEC promulgated 6 NYCRR § 601.7, which set the dates by which existing water withdrawal systems had to apply for an initial permit (6 NYCRR § 601.7[b]; *see also* ECL 15-1501[4] [authorizing DEC to promulgate regulations for water withdrawal permits]). Existing electric generating facilities, like Greenidge Station, had to apply for an initial water withdrawal permit by June 1, 2013 (*see* 6 NYCRR § 601.7[b][3]).

The regulations require DEC to issue an initial permit "for the withdrawal volume equal to the maximum withdrawal capacity reported to [DEC] on or before February 15, 2012" (*id.* § 601.7[d]). An initial water withdrawal permit must also contain conditions to ensure that the water withdrawal system employs "environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies" (*id.* § 601.7[e]). Those conditions include installing meters on all sources of water supply (*id.* § 601.19), calibrating meters annually (*id.* § 601.20[a][2]), and filing an annual report with DEC (*id.* § 601.5). When a water withdrawal system is subject to a SPDES permit, as is Greenidge Station, DEC coordinates the review of the initial water withdrawal permit application with the SPDES permit (6 NYCRR § 601.7[f]).

B. The State Pollutant Discharge Elimination Systems

The National Pollutant Discharge Elimination System (NPDES) permit program controls water pollution by regulating industrial and other sources that discharge pollutants into waters of the United States. Under the Clean Water Act, states may develop and administer their own permitting programs, as long as the U.S. Environmental Protection Agency (EPA) finds such programs to be at least as stringent as the federal program (*see* 33 USC § 1342[b], [c]).

In 1975, EPA approved New York's SPDES program (*see* ECL 17-0701 *et seq.*; 6 NYCRR Part 750 [implementing regulations]). Like the Clean Water Act, New York's SPDES program requires a permit to discharge pollutants into the waters of the state (ECL 17-0803; 6 NYCRR § 750-1.4[a]). SPDES permits must comply with several standards (6 NYCRR § 750-1.11) and include reasonable monitoring by DEC to determine compliance (*id.* § 750-1.13[a]). DEC can only issue SPDES permits that "ensure compliance with the applicable water quality requirements" (6 NYCRR § 750-1.3[f]).

Because the definition of pollutant under federal and state law includes heat (33 USC § 1362[6]; ECL 17-0105[17]), the SPDES program regulates thermal discharges (*see* 6 NYCRR Part 704). In connection with thermal discharges, a facility's cooling water intake structures "shall reflect the best technology available for minimizing the adverse environmental impacts" (6 NYCRR § 704.5; *see* 33 USC § 1326[b]).

A permittee may transfer a SPDES permit under 6 NYCRR § 750-1.17. As part of the transfer, the new owner must apply to DEC for approval (6 NYCRR § 750-1.17[a], [c]). The uniform procedures regulations also impose requirements for transfer of a SPDES permit (6 NYCRR § 621.11[c]). A transferred permit cannot impose significant changes, the new permittee must satisfy financial requirements, and any past noncompliance in the existing permit must be resolved (*id.*). Although DEC normally treats permit modifications, such as transfers, as new applications, it need not do so for minor modifications (*id.* § 621.11[i][3]). Minor modifications include changes of ownership with "no other change" (40 CFR 123.63[d]). Thus, if the new owner satisfies DEC's regulations, it may obtain a transferred SPDES permit without triggering new permit review.

C. The State Environmental Quality Review Act

SEQRA requires an environmental impact statement for any action proposed or approved

by a government agency that may have a significant effect on the environment (ECL 8-0109[2]). Actions include "projects or activities directly undertaken by any agency" and projects 'involving the issuance to a person of a. . . permit" (ECL 8-0105[4][i]). Actions do not include "official acts of a ministerial nature, involving no exercise of discretion" (ECL 8-0105[5][ii]).

There are three types of actions under SEQRA—Type I, Type II and Unlisted. Type I actions are those that are more likely to have significant environmental impacts (6 NYCRR § 617.4[a]). In 6 NYCRR § 617.4, DEC defines Type I by numeric thresholds or location. Type II actions are listed in 6 NYCRR § 617.5, which DEC has determined have no significant environmental impacts. Unlisted actions do not fall in the definitions for Type I or Type II actions.

If the lead agency classifies the action as Type I or Unlisted, it completes an environmental assessment form and determines whether there are potentially significant adverse environmental impacts, which would require preparation of an environmental impact statement. The lead agency is the agency "principally responsible for undertaking, funding or approving an action." (*Id.* §§ 617.2[u], 617.6[a][2],[3] & [b]; *see also* ECL 8-0111[6] [specifying that a lead agency has responsibility for determining if an action will have significant environmental effect]).

Type II actions include those that require no environmental impact statement because they are precluded from environmental review (*id.* § 617.5[a]). Ministerial acts are Type II actions (*id.* § 617.5[c][19]).

D. Standard of Review

In an Article 78 proceeding challenging an agency determination, petitioners must show that the "determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]). Thus, the Court's

review is limited to whether the agency "determination has a rational basis and is not arbitrary and capricious" (*Matter of Elam Sand & Gravel Corp. v Town of W. Bloomfield Zoning Bd. of Appeals*, 137 AD3d 1732, 1733 [4th Dept 2016]). Moreover, DEC is entitled to deference in its interpretation of a statute that it administers and its own regulations (*Matter of New York State Superfund Coalition, Inc. v New York State Dept. of Envtl. Conservation*, 18 NY3d 289, 296 [2011]).

STATEMENT OF FACTS

A. Procedural History

Greenidge Station is a power plant on Seneca Lake, which operated from the 1930s to 2011 (Affidavit of Scott Sheeley, dated February 28, 2018, ¶¶ 8-9). It withdraws water from Seneca Lake, which it then uses for cooling and returns to the Lake. In the early 2010s, Greenidge Generation, LLC, and its predecessors, bought Greenidge Station, and sought to convert it to use natural gas and biomass as fuels instead of coal (Sheeley Aff. ¶ 10). As part of the conversion, Greenidge Generation applied for permits under the Clean Air Act, an initial water withdrawal permit, and a renewed SPDES permit (R 833-835, 873-878; Sheeley Aff. ¶¶ 10, 17, 27). On September 11, 2017, DEC issued Greenidge Generation an initial water withdrawal permit and a SPDES permit (the 2017 SPDES permit) for Greenidge Station. On November 8, 2017, petitioners brought this proceeding challenging the initial water withdrawal permit and the 2017 SPDES permit (Petition ¶¶ 92-112).

B. Issuance of the Initial Water Withdrawal Permit

Greenidge Generation and its predecessors took timely steps to apply for an initial water withdrawal application, and DEC later granted that application. As the first step, on January 16, 2012, a prior owner of Greenidge Station reported its water withdrawals to DEC (R 732; Sheeley

Aff. ¶ 16). Greenidge Generation timely submitted an application, dated May 28, 2013, for an initial water withdrawal permit (R 832-842; Sheeley Aff. ¶ 17).

DEC then evaluated the initial water withdrawal application. On August 12, 2015, after it had determined that the application was complete, DEC published notice of the complete application in the *Environmental Notice Bulletin* (R 1018; Sheeley Aff. ¶ 18). DEC described the project and set a comment deadline of September 11, 2015, (R 1018; Sheeley Aff. ¶ 18), after which DEC reviewed and responded to comments (*see* R 1166-1251; Sheeley Aff. ¶ 19).

On September 11, 2017, DEC issued Greenidge Generation an initial water withdrawal permit for Greenidge Station (R 1412-1417). The initial water withdrawal permit allows Greenidge Station to withdraw up to 139,248,000 gallons per day (R 1413). The initial water withdrawal permit incorporates conditions in the 2017 SPDES permit (R 1414). It further imposes required several water conservation measures, including metering requirements, water audits, annual water withdrawal reporting to DEC, and leak detection and repair (R 1414).

C. Issuance of the 2017 SPDES Permit

During the same period that Greenidge Generation applied for an initial water withdrawal permit, it sought to renew the SPDES permit for Greenidge Station. On January 29, 2010, DEC issued a SPDES permit (the 2010 SPDES permit) for Greenidge Station, with effective dates of February 1, 2010 until January 31, 2015 (R 467; Sheeley Aff. ¶ 22). Among other things, the 2010 SPDES permit allowed Greenidge Station to discharge its cooling water into Seneca Lake (R 465-494).

On December 5, 2012, DEC received a request to transfer the 2010 SPDES permit from a prior owner, AES Eastern Energy, LP, to GMMM Greenidge LLC (R 736; Sheeley Aff. ¶ 25). Following 6 NYCRR § 750-1.17, DEC advised AES Eastern and GMMM Greenidge of its intent to allow the transfer (R 746) and, on January 13, 2013, DEC transferred the 2010 SPDES permit

to GMMM Greenidge (R 749; Sheeley Aff. ¶ 25). On April 22, 2014, DEC received a request to change the name of the owner of Greenidge Station to Greenidge Generation (R 865; Sheeley Aff. ¶ 26). Following DEC policy, DEC updated its records to list Greenidge Generation as the owner (R 4; Sheeley Aff. ¶ 26).

On August 4, 2014, DEC received a timely and sufficient application to renew the 2010 SPDES permit (R 873-878; Sheeley Aff. ¶ 27). Under the State Administrative Procedure Act § 401, receipt of this application extended the 2010 SPDES permit until DEC issued a new permit (*see* Affidavit of Michael Caseiras, dated February 28, 2018, ¶ 9).

DEC evaluated the renewal application as a new application (Sheeley Aff. ¶ 28), conducting a full technical review, which involved review of the application materials and data on past discharges from Greenidge Station (Caseiras Aff. ¶¶ 15-35). DEC evaluated this data and set appropriate limits for the effluent discharges and thermal discharges (Caseiras Aff. ¶¶ 16-31; Affidavit of Colleen Kimble, dated February 28, 2018, ¶¶ 4-18). DEC also drafted biological and industrial factsheets that described the limitations and the ecological resources (R 916-920, 954-971; Caseiras Aff. ¶¶ 18, 22-26, 31; *see* Kimble Aff. ¶ 14).

On August 12, 2015, DEC published notice of the complete application for a new SPDES permit in the *Environmental Notice Bulletin*, along with the availability of a draft SPDES permit and associated biological and industrial fact sheets, with a comment deadline of September 11, 2015 (R 1017; Sheeley Aff. ¶ 30). Greenidge Generation also published notice in a local newspaper (R 1000-1004; Sheeley Aff. ¶ 30).

On September 11, 2017, DEC issued the 2017 SPDES permit (R 1417; Sheeley Aff. ¶ 33) and final biological and industrial factsheets (R 1445-1478). Along with the 2017 SPDES permit, DEC issued a responsiveness summary that responded to public comments (R 1166-1251).

The 2017 SPDES permit imposed several conditions that differed from those in the 2010 SPDES permit. For instance, DEC required Greenidge Generation to install the best technology available to minimize fish mortality, in accordance with Commissioner's Policy 52. DEC imposed the equivalent of closed-cycle cooling after concluding that closed-cycle cooling itself was infeasible (R 1474-1478; Kimble Aff. ¶ 14). DEC determined that Greenidge Generation would have to install narrow wedgewire screens and variable speed pumps, which would reduce mortality by at least 85 percent (Kimble Aff. ¶ 14). DEC also set strict limits on effluent discharges and thermal discharges (R 1420-1425; Caseiras Aff. ¶¶ 18-30). It further required a study of the discharges to give DEC additional data (R 1427-1428; Caseiras Aff. ¶ 28). Based on the study, DEC will modify the 2017 SPDES permit to impose even more stringent conditions, as appropriate (Caseiras Aff. ¶ 29).

D. The SEQRA Review Process

As part of issuing both the initial water withdrawal permit and the 2017 SPDES permit, DEC reviewed the possible environmental impacts of reopening Greenidge Station under SEQRA. On June 16, 2015, DEC defined the action as its approvals associated with resumption of operation of Greenidge Station (R 889; Sheeley Aff. ¶ 44). DEC sent out letters to other involved agencies indicating that DEC intended to designate itself lead agency (R 887-888; Sheeley Aff. ¶ 47). As part of that letter, DEC included part 1 of the full environmental assessment form for the SPDES permit application (*see* R 903-915; Sheeley Aff. ¶ 47). Among other things, the part 1 form indicated that DEC intended to modify the 2010 SPDES permit to include a best technology available determination (*see* R 903-915; Sheeley Aff. ¶ 47). DEC received no objections and declared itself lead agency (Sheeley Aff. ¶ 47).

At the start of the SEQRA review process, DEC determined that the entire action was a Type I action because Greenidge Station is near a historic district listed on the National Register

of Historic Places—the Crooked Lake Outlet Historic District (Sheeley Aff. ¶ 45). DEC therefore reviewed all of the permit applications, including the air permits, the initial water withdrawal permit, and the SPDES renewal permit (*see* Sheeley Aff. ¶ 45).

On July 30, 2015, DEC completed the full environmental assessment form parts 2 and 3 and issued a negative declaration, which stated that there were no potentially significant adverse environmental impacts (R 983-997; Sheeley Aff. ¶ 49). DEC reviewed all relevant potential environmental impacts (R 983-997; Sheeley Aff. ¶ 49). The review included an evaluation of potential impacts from Greenidge Station to air, fisheries, solid waste, and surface waters (R 983-997; Sheeley Aff. ¶ 49). In the negative declaration, DEC explained its reasoning in narrative form, discussing the potential impacts from both the SPDES permit and the initial water withdrawal permit (R 993-997; Sheeley Aff. ¶ 49).

On July 31, 2015, DEC provided a copy of the negative declaration to all other involved agencies (R 998; Sheeley Aff. ¶ 50). On August 12, 2015, DEC published notice of the negative declaration in the *Environmental Notice Bulletin* (R 1022; Sheeley Aff. ¶ 51).

As part of the SEQRA review, DEC considered potential solid waste impacts from Greenidge Station, including those at the Lockwood Hills Ash Landfill (the Landfill), because Greenidge Station would send less waste to the Landfill than when it used coal (Sheeley Aff. ¶¶ 63-66). The Landfill is a separate facility with its own solid waste and SPDES permits (R 804-824; Sheeley Aff. ¶¶ 63-66).

On June 28, 2016, DEC prepared an amended negative declaration (R 1040-1057; Sheeley Aff. ¶ 52), which addressed new information about the air permit applications (Sheeley Aff. ¶ 52). DEC's analysis of potential impacts to other areas did not change (R 1042-1057; Sheeley Aff. ¶ 52). On June 29, 2016, DEC published notice of the amended negative declaration

in the *Environmental Notice Bulletin* (R 1059; Sheeley Aff. ¶ 52). Issuance of the amended negative declaration completed DEC's SEQRA review.

ARGUMENT

POINT I

PETITIONERS LACK STANDING

A. Petitioners Fail to Plead Sufficient Facts to Show Standing

Petitioners lack standing because they have not named their members and cannot show harm. For standing, "an organizational plaintiff must demonstrate a harmful effect on at least one of its members; it must show that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests; and it must establish that the case would not require the participation of individual members" (*Rudder v Pataki*, 93 NY2d 273, 278 [1999] [internal alterations omitted]). In showing harm, "Petitioner has the burden of establishing both an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated" (*Matter of Assn. for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation*, 23 NY3d 1, 6 [2014]).

Showing organizational standing depends on the standing of the named members (*Socy. of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 776 [1991] [noting "Plaintiffs' standing therefore depends wholly on [a named member]—the only named party with a presence in" the area]). For an individual to have standing to sue on behalf of an organization for an environmental harm, the petition must show that "[o]ne of the petitioners owned property near the project site and [must] allege[] that his property would suffer noneconomic harm from the environmental impacts of the project" (*LaDelfa v Vil. of Mt. Morris*, 213 AD2d 1024, 1024 [4th Dept 1995]). No petitioner has established that it has organizational standing.

The petition identifies no members of the Sierra Club and only one member each of the Coalition, the Committee, and Seneca Lake Guardian (Petition ¶¶ 6-9). The Sierra Club's failure to identify a single local member dooms any claim to standing, and it should be dismissed as a petitioner.

Nor have the named individual petitioners who are members of the other organizations pleaded facts showing their standing (*see, e.g.*, *Matter of Clean Water Advocates of N.Y., Inc. v New York State Dept. of Envtl. Conservation*, 103 AD3d 1006, 1007-08 [3d Dept 2013]) [dismissing petition for lack of standing where petitioner submitted an affidavit of only one member]; *Matter of Finger Lakes Zero Waste Coalition, Inc. v Martens*, 95 AD3d 1420, 1420-21 [3d Dept 2012] [dismissing petition where affidavit failed to carry burden of showing individual had standing and therefore organization lacked standing]). Absent allegations that specific individual members of each organization have standing, and proof to support those allegations, petitioners have failed to carry their burden to establish their entitlement to sue (*see Matter of Kindred v Monroe County*, 119 AD3d 1347, 1348 [4th Dept 2014]).

Even if petitioners had individual members who had standing, the organizations have failed to plead or prove specific allegations of environmental harm attributable to the permits. Petitioners challenge DEC's amended negative declaration under SEQRA, but they make no attempt to show that the Greenidge project will harm them. Petitioners do not even attempt to plead harm, relying instead on a general desire to protect the environment (Petition ¶ 6) and the water of the region (*id.* ¶ 7) and their opposition to the unspecified harms of "gas drilling, gas drilling wastes and fossil fuel infrastructure" (*Id.* ¶ 8). "[P]erfunctory allegations of harm[,]" are insufficient to satisfy the standing requirements. (*Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 306 [2009]; *see also Matter of Tuxedo Land Trust Inc.*

v Town of Tuxedo, 34 Misc 3d 1235[A], *1 [Sup Ct, Orange County 2012] [denying standing for perfunctory allegations of harm]). This failure, too, dooms the petition.

The petition also fails to show that the proceeding does not require the participation of petitioners' individual members (*see Rudder*, 93 NY2d at 278). Because the petition contains little description of the organizations' members or any putative harm, some members may suffer disproportionate harm and may be necessary parties (*see Matter of Citizens Organized to Protect the Envt. v Planning Bd. of Town of Irondequoit*, 50 AD3d 1460, 1460-61 [4th Dept 2008] [holding that an organization lacked standing because "the petition [was] primarily concerned with the environmental effects on property owned by" two members]). The Court should dismiss the entire petition because petitioners failed to show standing when they filed their petition.[1]

B. New York Courts Do Not Recognize Informational Standing and, Even if They Did, Petitioners Fail to Show an Informational Injury

The Court should not allow petitioners to gain standing through their assertion of novel claims of an informational injury. Petitioners allege that they suffer an informational injury because DEC did not prepare an environmental impact statement (Petition ¶¶ 6-9). "The concept of informational standing originates from a footnote in a 1973 opinion from [the] Court of Appeals for the District of Columbia." (*Atl. States Legal Found. v Babbitt*, 140 F Supp 2d 185, 193 [NDNY 2001] [citing *Scientists' Inst. For Pub. Info. v Atomic Energy Commn.*, 481 F.2d 1079, 1086–87, n 29 (DC Cir 1973)].) No New York State court has found standing on the basis

[1] A party filing a motion "shall serve copies of all affidavits and briefs upon all other parties at the time of service of the notice of motion[.]" (22 NYCRR § 202.8[c]). Special proceedings are motions (22 NYCRR § 202.9). Thus, it was improper for petitioners to include additional materials after filing their petition, and the Court should not consider those materials or any future evidentiary materials offered by petitioners.

of an informational injury. The Court should not recognize this novel theory of standing based on petitioners' bare assertion, which fails even to describe the alleged injury.

Even if the Court recognized lack of information as an injury, petitioners have failed to meet the requirements for informational standing. Standing from an informational injury occurs "only in very specific circumstances where a statutory provision explicitly creates a right to information" (*id.* at 192). The courts that have considered the issue have concluded that there is no entitlement to an environmental impact statement.

The D.C. Circuit considered a case where petitioners alleged an informational injury based on not receiving an environmental impact statement under the National Environmental Policy Act (NEPA) (*see Found. on Economic Trends v Lyng*, 943 F2d 79, 85 [DC Cir 1991]; *see also Aldrich v Pattison*, 107 AD2d 258, 267 [2d Dept 1985] [noting that New York courts apply "[a]n analogous standard" under SEQRA as the federal courts under NEPA]). It criticized the idea of an organization obtaining standing by alleging an entitlement to an environmental impact statement because "[i]t would potentially eliminate any standing requirement in NEPA cases" (*see Lyng*, 943 F2d at 84). "If such injury alone were sufficient, a prospective plaintiff could bestow standing upon itself in every case merely by requesting the agency to prepare the detailed statement NEPA contemplates" (*id.* at 85).

Petitioners neither show standing based on an informational injury nor plead a specific injury from the absence of an environmental impact statement. Their desire for the information does not set them apart from the public at large. Without more, they cannot be harmed by their desire for information (*see Lyng*, 943 F2d at 84-85; *Atl. States Legal Found.*, 140 F Supp 2d at 194). Recognizing informational standing on these facts would effectively eliminate standing

requirements for SEQRA cases. The purported informational injury does not confer standing on petitioners.

POINT II

DEC ISSUED THE WATER WITHDRAWAL PERMIT AS AN INITIAL PERMIT WITH APPROPRIATE CONDITIONS

A. DEC Imposed Appropriate Conditions in an Initial Permit

Contrary to petitioners' first cause of action, DEC imposed appropriate conditions on the initial water withdrawal permit. Petitioners' argument fails to account for the statutory directive that DEC issue a permit to existing users, such as Greenidge Generation, and DEC imposed conditions in the permit to ensure conservation measures and minimal impacts to the environment (*see* ECL 15-1501[9]; Sheeley Aff. ¶ 20, 27, 37).

1. Greenidge Station Qualified as an Existing User

DEC must issue initial permits to applicants. The statute requires DEC to "issue an initial permit, subject to appropriate terms and conditions. . . for the maximum water withdrawal capacity reported to the department" (ECL 15-1501[9]). For those receiving initial permits, ECL 15-1501(6) and the regulations specify the appropriate conditions, which include measuring and reporting information concerning water uses. DEC also has limited discretion under 6 NYCRR § 601.7(e) to impose conditions ensuring "environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies[.]" Environmentally sound and economically feasible measures, in turn, mean "measures, methods, technologies or practices for efficient water use and for reduction of water loss and waste or for reducing a withdrawal" (ECL 15-1502[9]).

Because ECL 15-1501(9) defines existing users as users that reported their water withdrawals before February 15, 2012, and Greenidge Generation's predecessor made those

reports, (R 732; Sheeley Aff. ¶ 16), DEC was required to issue an initial water withdrawal permit for Greenidge Station.

Petitioners assert that Greenidge Station did not operate from 2011 until 2017; however, they incorrectly argue that this gap means that Greenidge Generation is not entitled to an initial permit. Petitioners point to nothing in the statute or regulations that considers the operational status of a facility in determining whether DEC was obligated to grant it an initial permit. Instead, the only relevant statutory consideration is whether the facility had submitted its annual reports before February 15, 2012 (*see* ECL 15-1501[9]). Petitioners do not dispute that Greenidge Generation's predecessor filed the water withdrawal reports before February 15, 2012 or that the facility's permit never lapsed; DEC properly issued an initial permit, and the Court should decline petitioners' invitation to read additional requirements into the statute.

2. The Initial Permit Conditions Were Rational

As an existing user, Greenidge Generation was entitled to an initial water withdrawal permit, and the permit contains appropriate conditions. It requires water metering, meter calibration, leak detection and repair, water audits, keeping records of leaks, and reporting water withdrawals to DEC (*see* R 1414; Sheeley Aff. ¶ 20). These conditions address the requirements of ECL 15-1501(6), 15-1501(4) and 6 NYCRR Part 601.

Moreover, the initial water withdrawal permit also incorporates conditions in the 2017 SPDES permit for Greenidge Station (*see* 6 NYCRR § 601.7[f] [requiring coordination]; R 1414). Specifically, the 2017 SPDES permit requires Greenidge Generation to install cylindrical wedgewire screens and variable speed drive pumps to reduce aquatic impacts and fish mortality (*see* R 1429; Kimble Aff. ¶ 14). The SPDES permit further capped the discharge temperatures and required Greenidge Generation to study the effectiveness of the cooling (R 1420, 1427; Caseiras Aff. ¶¶ 28-29). The conditions in the 2017 SPDES permit, and the conservation

conditions in the initial water withdrawal permit, are reasonable conditions for ensuring the reduction of waste and for avoiding negative impacts on fish.[2]

B. DEC Satisfied the Standards in ECL 15-1503

Contrary to petitioners' allegations, although DEC did not have to satisfy ECL 15-1503, which requires consideration of cumulative impacts and imposition of water conservation measures, it did so. (R 1414; Sheeley Aff. ¶¶ 20, 27, 37). It is immaterial whether DEC stated that ECL 15-1503 applies to both initial permits and new permits because DEC satisfied ECL 15-1503 in this case.

First, "the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures") (ECL 15-1503[2][g]) which is a nearly identical standard to that set in 6 NYCRR § 601.7(e). As explained above, water conservation requirements apply to initial water withdrawal permits and DEC imposed them in this permit (*see supra* Point II(A); R 1414; Sheeley Aff. ¶ 20).

Second, "the proposed water withdrawal will be implemented in a manner to ensure it will result in no significant individual or cumulative adverse impacts on the quantity or quality of the water source and water dependent natural resources" (ECL 15-1503[2][f]). The regulations implementing ECL 15-1503 explain that DEC may consider "whether all withdrawn water that is not lost to reasonable consumptive use will be returned to its source New York major drainage basin" (6 NYCRR 601.11[c][6]).

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[2] Petitioners also argue that Greenidge Station operated during the Spring of 2017 without an initial water withdrawal permit, in violation of ECL 15-1501(1) (*see* Petitioner's Memo at 6-7). Any claim based on facts that occurred in the Spring of 2017 are outside of the four-month statute of limitations in CPLR 217. Even if Greenidge Generation operated without a withdrawal permit, petitioners do not assert that claim as a cause of action in the petition, nor could they (*see New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005] [holding that petitioners cannot bring a mandamus action for a discretionary act]).

DEC considered the potential adverse environmental impacts of the water withdrawal and imposed appropriate conditions. Quantitatively, Greenidge Station uses once through cooling and returns nearly all of the water it withdraws to Keuka Outlet (Sheeley Aff. ¶ 11). Returning the water means that there is minimal impact to the overall water supply from the withdrawal (*see* 6 NYCRR 601.11[c][6]). Because ECL 15-1501(9) required DEC to issue Greenidge Generation an initial water withdrawal permit, DEC could not have imposed a lower water withdrawal cap to reduce cumulative impacts. Given this requirement, it would have been futile for DEC to determine if a lower water withdrawal cap was appropriate.

To address water quality, DEC coordinated its review of the initial water withdrawal permit with the issuance of the SPDES permit and incorporated the 2017 SPDES permit into the initial water withdrawal permit (*see* 6 NYCRR § 601.7[f] [requiring coordination between water withdrawal and SPDES permits]; R 1414; Sheeley Aff. ¶ 21). The conditions in the SPDES permit require Greenidge Generation to install screens and pumps to minimize aquatic impacts and fish mortality, and set limits on pollutant discharges (R 1429; Kimble Aff. ¶ 14; Caseiras Aff. ¶¶ 21-27, 30).

As part of the coordinated process, DEC also prepared biological and industrial factsheets (R 1445-1478). The biological fact sheet discusses the ecological resources around Greenidge Station, showing that DEC considered potential impacts to both the water quality and nearby natural resources (*see* R 1474-1478).

Additionally, as explained below in the point on DEC's compliance with SEQRA, DEC also analyzed the potential environmental impacts of repowering Greenidge Station as part of its SEQRA review (*see infra* Point III; R 1042-1057). Among other things, DEC considered potential adverse environmental impacts to surface waters, ground water, and plants and animals.

(R 1043-1045; Sheeley Aff. ¶¶ 54, 61, 67). DEC also discussed potential impacts to surface waters, including potential impacts from the initial water withdrawal permit, explaining that the "impact of any change in withdrawal has been considered alongside the impacts of the air and SPDES permits" (R 1055).

The record shows that DEC acted reasonably in imposing appropriate conditions in the initial water withdrawal permit. These conditions included water conservation measures and measures to protect plants and animals. The Court should dismiss petitioners' claim that DEC failed to include appropriate conditions in the initial water withdrawal permit.

POINT III

DEC REVIEWED THE IMPACTS OF THE RESTART OF GREENIDGE STATION UNDER SEQRA

DEC properly issued an initial water withdrawal permit to Greenidge Generation without requiring an environmental impact statement because it determined that restarting Greenidge Station would not have any potentially significant adverse environmental impacts. DEC treated the whole project as a Type I action and properly issued a negative declaration. DEC also properly classified issuance of the initial water withdrawal permit as a Type II action because it is ministerial.

A. DEC Properly Reviewed the Entire Action as a Type I Action and Issued a Negative Declaration

Petitioners claim that DEC failed to conduct an analysis of the proposed initial water withdrawal permit because DEC treated the action as a Type II action.[3] Petitioners' allegations are incorrect. Although DEC determined that issuance of the initial water withdrawal permit

[3] To the extent petitioners challenge the June 28, 2016 Amended Negative Declaration, as opposed to the initial water withdrawal permit or 2017 SPDES permit, they are outside of the four-month statute of limitations in CPLR 217.

standing alone would be a Type II ministerial action, it nonetheless reviewed the entire project as a Type I action under SEQRA. DEC then took a hard look at the potential for significant adverse environmental impacts and issued a negative declaration with a reasoned elaboration of its decision.

At the start of the SEQRA review process, DEC defined the action in this proceeding as the collective approvals associated with resumption of operation of Greenidge Station (R 889 ["The applicant proposes to reactivate the Greenidge Power Station."]; Sheeley Aff. ¶ 44). DEC then determined that the entire action was a Type I action because Greenidge Station is near the Crooked Lake Outlet Historic District, which is listed on the National Register of Historic Places (Sheeley Aff. ¶ 45; *see* 6 NYCRR §§ 617.4[b][9]; 617.6[a][1]).

DEC next coordinated the SEQRA review process (6 NYCRR § 617.6[a][2]; Sheeley Aff. ¶¶ 46-47). On June 16, 2015, DEC sent a letter to other potentially involved agencies indicating its intent to serve as the lead agency (R 887; Sheeley Aff. ¶ 47). With that letter, it included copies of part 1 of the full environmental assessment form for the SPDES permit (*see* 6 NYCRR § 617.6[a][2]; R 903-915; Sheeley Aff. ¶ 47). It also included Greenidge Generation's applications for an initial water withdrawal permit (R 832-861) and a renewed SPDES permit (R 873-878). On June 29, 2015, after receiving no objections, DEC designated itself lead agency (Sheeley Aff. ¶ 47).

The record establishes that DEC then took a hard look at potentially significant adverse environmental impacts. In the amended negative declaration, DEC evaluated the impacts from the water withdrawal and return discharge to air, fisheries, surface water, solid waste, and plants and animals (R 1042-1057; Sheeley Aff. ¶¶ 27, 37, 47, 49, 52, 54, 61, 63-69). The amended negative declaration also included a narrative that provided a reasoned elaboration for its

determination (R 1054-1057). It noted that Greenidge Generation would have to include wedgewire screens and variable speed pumps, and found that "no impacts to surface waters are anticipated as a result of intake modification" (R 1054). DEC further discussed the potential impacts from the water withdrawal, including the requirement that DEC issue a permit for the volume of water previously withdrawn and the conservation measures included in the permit (R 1054). DEC acknowledged that initial water withdrawal permits were Type II actions, but "because the initial water withdrawal permit is proposed to be issued along with permits that are subject to SEQR - the impact or impact of any change in withdrawal has been considered alongside the impacts of the air and SPDES permits" (R 1055).

Although DEC described issuance of the initial water withdrawal permit as a Type II ministerial action, it nonetheless reviewed the impacts of the water withdrawal alongside other impacts and met the procedural requirements for a Type I action (*see Matter of Steele v Town of Salem Planning Bd.*, 200 AD2d 870, 872 [3d Dept 1994]). In *Steele*, petitioners challenged an agency's classification of an action under SEQRA (*id.* at 872). Although the agency stated the action was Type II, it treated the action as Type I, designated itself lead agency, prepared parts 2 and 3 of the full environmental assessment form, and issued a negative declaration (*id.* at 870-871). The court held: "[i]nsofar as the procedural requirements for a type I action were in fact complied with, the initial designation as a type II action was at most harmless error" (*id.* at 872; *see also Matter of Golden Triangle Assoc. v Town Bd. of Town of Amherst*, 185 AD2d 617, 618 [4th Dept 1992] [recognizing that procedural errors in a SEQRA review that the agency corrects are harmless]). The Court also upheld the issuance of the negative declaration, finding it was a rational decision (*Steele*, 200 AD2d at 873).

DEC reviewed the entire project allowing resumption of operations at Greenidge Station as a Type I action and reasonably issued a negative declaration. It does not matter that DEC classified issuance of the initial water withdrawal permit as a Type II action because DEC followed the steps for a Type I action and substantively reviewed the water withdrawal impacts alongside other identified impacts. The amended negative declaration shows that DEC considered potentially adverse environmental impacts in making its determination (R 1042-1057). If there was an error in classification, it was harmless and the Court should reject petitioners' claims that DEC did not complete a SEQRA review (*see Steele*, 200 AD2d at 872).

B. Issuance of the Initial Water Withdrawal Permit Was Ministerial and Not Subject to SEQRA

Although DEC reviewed the entire project as a Type I action, it did not have to do so. Issuance of the initial water withdrawal permit was a ministerial action that was exempt from SEQRA because DEC lacked discretion in issuing the permit. By law, ministerial acts, as to which an agency lacks discretion, are Type II actions that do not require SEQRA review (ECL 8-0105[5][ii]; 6 NYCRR § 617.5[c][19]; *see also Matter of Settco, LLC v New York State Urban Dev. Corp.*, 305 AD2d 1026, 1026 [4th Dept 2003] [holding that projects involving ministerial acts without discretion are exempt from SEQRA]).

"[T]he pivotal inquiry" in determining whether an agency decision is ministerial and thus outside SEQRA's purview "is whether the information contained in an [environmental impact statement] may 'form the basis for a decision whether or not to undertake or approve such action'" (*Inc. Vill. of Atl. Beach v Gavalas*, 81 NY2d 322, 326 [1993] [quoting *Matter of Filmways Communications of Syracuse, Inc. v Douglas,* 106 AD2d 185, 187 (4th Dept 1985)]). When an agency vested with discretion in only a limited area cannot "deny a permit on the basis of SEQRA's broader environmental concerns," "preparation of an [environmental impact

statement] would be a meaningless and futile act" (*id.* at 327). Even when an agency has some discretion to impose conditions when it takes ministerial actions, its decisions are not actions within the meaning of SEQRA if "that discretion is circumscribed by a narrow set of criteria which do not bear any relationship to the environmental concerns that may be raised in an" environmental impact statement (*id.* at 326).

Here, an environmental review could not have formed the basis for DEC to deny Greenidge Generation its initial water withdrawal permit because ECL 15-1501(9) required DEC to issue the permit for a withdrawal capacity that DEC lacked discretion to set. ECL 15-1501(9) states that DEC "shall issue an Initial permit. . . for the maximum water withdrawal capacity reported to the department." Greenidge Generation's predecessor timely reported its water withdrawals (R 732-734). DEC therefore had no discretion to deny an initial water withdrawal permit to Greenidge Generation or to issue a permit for less than the maximum reported capacity (*see* Caseiras Aff. ¶ 33). As such, granting the permit was a Type II action.

In arguing that DEC should have treated issuance of the initial water withdrawal permit as a Type I action, petitioners may note that courts have split on the question of whether granting an initial permit is a ministerial act (*compare Matter of Sierra Club v Martens*, 2018 NY Slip Op 00153, 2018 WL 343744 [2d Dept Jan. 10, 2018], *with Matter of Sierra Club v Martens*, 2016 NY Slip Op. 51391[U], 53 Misc.3d 1204(A), [Sup Ct, NY County Sept. 29, 2016], *aff'd on other grounds*, 156 AD3d 454 [1st Dept 2017]). No contrary authority is binding on this Court, and for the reasons above, granting the permit was a ministerial act that entailed no exercise of discretion. In any event, this Court need not reach that question here as DEC did treat the application under review as a Type I action.

POINT IV

DEC FOLLOWED THE WATER POLLUTION CONTROL LAW

A. DEC Properly Evaluated the Renewed SPDES Permit Application and Issued a SPDES Permit with Appropriate Conditions

DEC received an application for a renewed SPDES permit, and DEC reviewed that permit following all of its procedures and issued a new SPDES permit. Petitioners argue that DEC failed to treat the SPDES permit as a new application, but this assertion is incorrect (*see* Petition ¶ 105; Petitioners' Memo at 16-17). DEC treated the renewal as a new permit by conducting a full technical review of the application and imposing appropriate conditions.

DEC must treat a renewed SPDES permit as a new application (ECL 70-0115[2][c]; 6 NYCRR § 621.11[i]). In evaluating a new application, DEC conducts a full technical review. DEC then reviews the permit in accordance with 6 NYCRR § 621.6, and prepares a draft permit and fact sheets (6 NYCRR §§ 621.6[b][7], [8]; Sheeley Aff. ¶ 28).

The record demonstrates that DEC followed the procedures for issuing a renewed SPDES permit. On August 4, 2014, Greenidge Generation applied for a renewed SPDES permit for Greenidge Station (R 873-878). In early 2015, DEC began the full technical review process. Greenidge Station had not generated power since 2011, so DEC looked to data from the previous SPDES permit application (Caseiras Aff. ¶¶ 15-19), which included information from priority pollutant scans (R 15-464), Discharge Monitoring Report summaries between February 1, 2010 and March 31, 2011 (R 710-723), a short-term monitoring program report (R 495-689), a Thermal Discharge Study Workplan (R 690-707), and a letter granting approval to delay submission of a thermal study report (R 709).

DEC reviewed this material to determine whether to seek additional sampling from Greenidge Generation for particular effluent parameters (Caseiras Aff. ¶¶ 16-31). In developing

the 2017 SPDES permit, DEC followed its Technical & Operational Guidance Series (Caseiras Aff. ¶¶ 20, 23-25, 27), reviewing all parameters and making calculations to ensure that a permit would meet the applicable water quality standards (Caseiras Aff. ¶ 16-31). It also recorded all of the water quality-based effluent limitations in the industrial factsheet (R 1445-1473; Caseiras Aff. ¶ 25). Based on this review, the 2017 SPDES permit includes effluent limitations, including thermal discharges (R 1420-1425). As discussed below, the 2017 SPDES permit also incorporates requirements that Greenidge Generation install best technology available, as required by federal and state law, including wedgewire screens and variable speed pumps, to minimize aquatic impacts and fish mortality (*see infra* Point IV[B]; Caseiras Aff. ¶ 30; Kimble Aff. ¶¶ 2, 14, 17-18; R 1429).

In the 2017 SPDES permit, DEC further required Greenidge Generation to complete additional short-term high intensity monitoring (Caseiras Aff. ¶ 27). Greenidge Generation must also submit a thermal discharge study workplan and a thermal criteria study report (R 1427-1428; Caseiras Aff. ¶ 28). Upon receiving the additional data in the thermal criteria study report, DEC will evaluate that data and, if necessary, propose modification to the SPDES permit (Caseiras Aff. ¶ 29).

DEC also complied with state law and its own procedural regulations. In the Summer of 2015, DEC generated a draft permit and draft biological and industrial fact sheets (R 916-921, 954-982; Sheeley Aff. ¶ 28). On July 30, 2015, DEC issued a notice of complete application (R 952-953). On August 12, 2015, DEC published notice of the SPDES permit application in the *Environmental Notice Bulletin* (R 1015-1017). And, Greenidge Generation published notice in a local newspaper. (R 1000-1004; *see* 6 NYCRR § 621.7[c]). DEC received comments and

responded to those comments in a responsiveness summary (R 1166-1251). DEC issued the 2017 SPDES permit along with the final biological and industrial fact sheets (R 1417-1478).

The record demonstrates that DEC treated the SPDES permit renewal application as a new permit. DEC conducted a full technical review and followed all of its procedures in issuing the 2017 SPDES permit (Caseiras Aff. ¶¶ 15-31; Sheeley Aff. ¶¶ 22-38). Apart from conclusory allegations, petitioners point to nothing arbitrary or capricious in DEC's issuance of the 2017 SPDES permit. The Court should uphold the 2017 SPDES permit.

B. DEC Set Best Technology Available Conditions in the 2017 SPDES Permit

The 2017 SPDES permit also requires installation of the best technology available. Under § 316(b) of the Clean Water Act, 33 USC § 1326, and 6 NYCRR § 704.5, DEC must issue permits that reflect for minimizing adverse environmental impacts from cooling water intake structures (*see* Kimble Aff. ¶¶ 2, 17-18). To assist with meeting this obligation, DEC promulgated Commissioner's Policy 52 to inform the regulated community how DEC intended to implement Clean Water Act § 316(b) and 6 NYCRR §704.5 to reduce fish mortality from impingement (getting trapped on screens) and entrainment (flowing through the cooling structure) (Kimble Aff. ¶¶ 2, 5-7, 17-18). Commissioner's Policy 52 applies to all industrial facilities that "withdraw twenty (20) million gallons per day (MGD) or more of water from the waters of New York State, where at least twenty five (25) percent is used for contact or non-contact cooling" if they are subject to 6 NYCRR § 704.5 (R 724).

Commissioner's Policy 52 "identifies closed-cycle cooling or the equivalent as the performance goal for the best technology available" (R 724). Closed-cycle cooling can reduce fish mortality by about 95 percent (Kimble Aff. ¶ 11). Equivalent means "reductions in impingement mortality and entrainment from calculation baseline that are 90 percent or greater of that which would be achieved by a wet closed-cycle cooling system" (R 726). Accordingly,

under Commissioner's Policy 52, equivalence to closed-cycle cooling requires overall reduction in fish mortality by about 85 percent (Kimble Aff. ¶ 11).

For existing facilities, such as Greenidge Station, DEC can either require retrofitting the facility with closed cycle cooling or impose other measures to reduce fish mortality (Kimble Aff. ¶ 13). In making the determination, DEC also considers feasibility and cost to ensure that the costs of implementation are not "wholly disproportionate to the environmental benefits to be gained from the technology" (R 729). DEC does not do a formal cost-benefit analysis but ensures that the benefits are proportional to the costs (R 724, 729).

DEC selected narrow slot-width cylindrical wedgewire screens and variable speed pumps as the equivalent of closed-cycle cooling (R 1429; Kimble Aff. ¶ 14). These conditions will reduce impingement mortality by at least 95% and entrainment mortality by at least 85 percent (Kimble Aff. ¶ 14). The best technology available conditions in the 2017 SPDES permit meet the standard in Commissioner's Policy 52 for entrainment mortality and exceed the standard for impingement mortality (*see* Kimble Aff. ¶ 14).

DEC evaluated and rationally rejected requiring retrofitting of Greenidge Station with closed cycle cooling (R 1429, 1474-1478; Kimble Aff. ¶ 15). DEC found that the costs of closed-cycle cooling would account for 8.4% of Greenidge Station's annual revenue before it closed and that there were feasibility uncertainties in year-round operation of a closed-cycle cooling system (R 1476). After a fact-intensive analysis, DEC concluded that wedgewire screens and variable speed pumps constituted the best technology available for Greenidge Station (R 1429, 1475-1476; Kimble Aff. ¶ 14).

C. DEC Reasonably Allowed Greenidge Generation to Receive a Transferred SPDES Permit

DEC acted neither arbitrarily nor capriciously in transferring the 2010 SPDES permit to Greenidge Generation, and then allowing renewal of that permit. Petitioners assert that DEC should not have allowed Greenidge Generation to renew the permit because DEC cannot allow owners to transfer SPDES permits (Petition ¶¶ 102-103). They further appear to argue that because Greenidge Station was in protective layup[4] for approximately six years that a transfer was not appropriate. Petitioners are incorrect. It is too late to challenge the transfer of the 2010 SPDES permit, Greenidge Generation and its predecessors maintained the 2010 SPDES permit during the layup, and DEC's regulations allow transfer of a SPDES permit without treating it as a new permit.

Under CPLR 217(1), petitioners must file an article 78 proceeding challenging an administrative action within four months of that action. Petitioners cannot use a 2017 petition attacking a permit renewal to challenge a transfer that occurred in 2013—they are years too late (*see Matter of Young v Bd. of Trustees of the Vil. of Blasdell*, 89 NY2d 846, 849 [1996] [holding that CPLR 217 barred a claim under SEQRA where an agency had previously approved the lease that allowed the facility to operate without a SEQRA review]).

Even if the Court entertains petitioners' untimely arguments, they are meritless. A permittee may transfer a SPDES permit (*see* 6 NYCRR § 750-1.17; Sheeley Aff. ¶¶ 24-26, 38, 56). Ordinarily, a modification of a permit, including a renewal or transfer of that permit, requires DEC to treat the application as an application for a new permit (*see* ECL 70-0115[2][c]). However, under 6 NYCRR § 750-1.17 a new owner may apply for approval to transfer the permit without treating it as a new application if the volume of discharge does not change. 6

[4] Protective layup means that the owners of Greenidge Station stopped running it, but they continued to perform maintenance so that generation could resume.

NYCRR § 621.11(c) imposes additional procedural requirements on the transfer of a SPDES permit, and 6 NYCRR § 621.11(i)(3) specifies that DEC need not treat the transfer application as a new permit application if there is only a change in ownership.

In this instance, Greenidge Station had a valid SPDES permit before and during its period of protective layup (R 465-494; Sheeley Aff. ¶¶ 38, 56). In 2013, AES Eastern Energy transferred the still-valid 2010 SPDES permit to Greenidge Generation (R 736-745, 749; Sheeley Aff. ¶ 25). In applying to transfer the 2010 SPDES permit Greenidge Generation satisfied 6 NYCRR §§ 621.11, 750-1.17 and DEC properly allowed transfer of the SPDES permit for Greenidge Station without changes (R 749; Sheeley Aff. ¶¶ 24-26, 38, 56). DEC also treated the renewal application as a new application and issued the 2017 SPDES permit in accordance with law. Petitioners' claims are without merit.

POINT V

DEC COMPLIED WITH SEQRA IN ISSUING THE 2017 SPDES PERMIT

Finally, petitioners allege that DEC violated SEQRA in issuing Greenidge Generation the 2017 SPDES permit because DEC did not require an environmental impact statement. DEC rationally determined that issuing the 2017 SPDES permit would not have significant adverse environmental impacts, and thus issued a negative declaration. Greenidge Station had an existing SPDES permit, and the 2017 SPDES permit imposed more stringent conditions than the existing permit. Moreover, DEC considered impacts to the Landfill from solid waste generated by Greenidge Station.

A. DEC Properly Treated Greenidge Generation's SPDES Permit Application as a New Application by an Existing Facility

As described above, Greenidge Station was an existing facility that had a SPDES permit. DEC also properly transferred the 2010 SPDES permit under the terms of 6 NYCRR §§ 621.11,

750-1.17 (*see supra* Point IV[A], [C]; Sheeley Aff. ¶¶ 24-26, 38, 56). It is immaterial that Greenidge Station was in protective layup for a few years, and petitioners cite no authority for their position that protective layup makes a difference. As described above, DEC received a SPDES renewal application, treated it as a new application, conducted a full technical review, and rationally issued the 2017 SPDES permit (*see supra* Point III[A]).

Petitioners make a conclusory allegation that DEC failed to take a hard look in conducting the SEQRA review (Petition ¶ 105). Their argument appears to focus on the impacts to surface waters, plants, and animals (Petitioners' Memo at 21-22). Nevertheless, the record contradicts petitioners' position.

"Judicial review of SEQRA findings is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (*Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 30 NY3d 416, 430 [2017] [internal quotation marks omitted]). "This review is deferential for it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively" (*id.* [internal quotation marks omitted]). Courts "review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (*id.*).

In *Matter of Sabad v Houle* (283 AD2d 851, 853-54 [3d Dept 2001]), the court considered a challenge to a negative declaration based on alleged failure to take a hard look at surface water impacts. The agency allowed for public comment, evaluated all potential impacts, and found that there would be little change to water quality (*id.* at 853). The agency

acknowledged the site had previous industrial activity, which limited the impact of any construction and operation (*id.*). Based on this process, the court held that the agency took a hard look, and the court dismissed the petition (*id.* at 854).

In this case, DEC considered all potentially significant adverse environmental impacts and then rationally issued the amended negative declaration. DEC filled out part 2 of the environmental assessment form for surface waters and noted that the SPDES permit would potentially affect surface water bodies (R 1043). DEC then responded to the remainder of the questions, noting a small impact to adjoining freshwater and referring to part 3 (R 1043-1044). In part 3, DEC discussed impacts to surface waters, including the best technology available determination and the requirement for a dilution study (R 1055). The thermal discharge study will allow DEC to assess whether it needs to propose modifications to the permit (Caseiras Aff. ¶¶ 28-29). Further, DEC set "effluent limits and conditions which ensure that the existing beneficial uses of Seneca Lake will be maintained" (R 1055).

As explained above, DEC also determined best technology available to ensure no significant adverse impacts on aquatic organisms and fish (*see supra* Point IV[C]). DEC determined that narrow wedgewire screens and variable speed pumps were the equivalent of closed-cycle cooling, which it determined was not feasible for Greenidge Station (Kimble Aff. ¶ 15). DEC explained that it determined that the narrow wedgewire screens and variable speed pumps satisfied Commissioner's Policy 52, and would "achieve an 85% reduction in the entrainment of all fish life stages and a 95% reduction in impingement mortality of all fish life stages" (R 1055). Based on consideration of all of these factors, DEC rationally concluded that "there are no significant adverse impacts associated with the Department's renewal and modification of the facility['s] SPDES permit" (R 1055).

Additionally, DEC gave petitioners an opportunity to comment on the proposed SPDES permit, including by publishing notice in the *Environmental Notice Bulletin* (R 1015-1017). The Committee commented (R 1196-1204), and DEC responded to public comments (R 1167-1174; Caseiras Aff. ¶ 32).

As in *Sabad*, DEC did everything that it was required to do both procedurally and substantively (*see* 283 AD2d at 853-54). DEC reviewed the SPDES renewal application, conducted a full technical review, modified the 2017 SPDES permit to include additional conditions to be more environmentally protective, completed the full environmental assessment forms, notified the public, and responded to comments. Also as in *Sabad*, the facility at issue is already on industrial land (*see id.*). The facts in this case are even more compelling than in *Sabad* because Greenidge Station is an existing facility (*see id.*). DEC took a hard look during the SEQRA review process, and the Court should not substitute its judgment for that of DEC (*see Matter of Friends of P.S. 163*, 30 NY3d 416). DEC acted rationally, and the Court should dismiss petitioners' fourth cause of action.

B. DEC Did Not Issue a Conditioned Negative Declaration

Contrary to petitioners' assertions, DEC did not violate the prohibition against issuing a conditioned negative declaration for a Type I action because DEC imposed no conditions in its amended negative declaration. Instead, DEC issued an amended negative declaration for a project that involved modifying a SPDES permit to impose more stringent conditions. Petitioners' argument relies again on their mistaken assertion that DEC should have considered a baseline of zero—no operation—in assessing the potential environmental impacts. As an existing permittee, Greenidge Generation was entitled to consideration of its renewal application based on its previous operations.

A conditioned negative declaration is a negative declaration for "an Unlisted action, involving an applicant, in which the action as initially proposed may result in one or more significant adverse environmental impacts[,]" but mitigation measures required by a lead agency "will modify the proposed action so that no significant adverse environmental impacts will result" (6 NYCRR § 617.2[h]). DEC may issue "a conditioned negative declaration only for 'unlisted actions[,]'" not for actions that are Type I (*Matter of Merson v McNally*, 90 NY2d 742, 752 [1997]).

In determining whether an agency issued a conditioned negative declaration, the Court of Appeals defined a two-pronged inquiry (*id.* at 752-53). First, the court considers "whether the project, as initially proposed, might result in the identification of one or more 'significant adverse environmental effects" (*id.* at 752). Second, "whether the proposed mitigating measures incorporated into Part 3 of the [environmental assessment form] were identified and required by the lead agency as a condition precedent to the issuance of the negative declaration" (*id.* at 753 [internal quotation marks omitted]). A project may be modified to avoid potentially significant adverse environmental impacts without creating a conditioned negative declaration (*id.* at 755).

In this instance, petitioners satisfy neither prong of the *Merson* test (*see id.* at 752). "[I]f all areas of concern involve a minimal risk to the environment, no further inquiry is necessary and modifications in these areas would not impermissibly condition or invalidate an otherwise proper negative declaration" (*id.* at 753). The 2017 SPDES permit involved minimal risk to the environment because it imposed new conditions that made it more protective to the environment (R 1417-1444; Sheeley Aff. ¶¶ 60-62). Modifying a SPDES permit to be more environmentally protective cannot endanger the environment (*see Merson*, 90 NY2d at 753, 755).

In the second part of the inquiry, DEC did not identify the measures in the 2017 SPDES permit as a condition to issuing the amended negative declaration (*see id.* at 753). Instead, DEC checked the box on the environmental assessment form for having no significant impacts (R 1053; Sheeley Aff. ¶ 60). Nothing in the amended negative declaration indicates that DEC set conditions on the amended negative declaration.

The explanation section of the negative declaration describes what DEC proposed to do about the permits, but it does not impose conditions (*see* R 1054-1057; Sheeley Aff. ¶¶ 60-62). DEC describes its best technology available determination (R 1054-1057). But, again, this description does not impose any conditions on the amended negative declaration. Instead, it explains how DEC modified the SPDES permit to be more environmentally protective than the 2010 SPDES permit (*see* R 1054-1057; Sheeley Aff. ¶¶ 60-62). DEC completes part 3 of the full environmental assessment forms to give its reasoned elaboration, not to impose conditions. DEC did not impose a conditioned negative declaration.

C. DEC Reasonably Evaluated Greenidge Station Separately from the Landfill

Finally, without any support, petitioners assert that DEC did not consider the impacts to solid waste because it improperly "segmented" its review of the initial water withdrawal and SPDES permits for Greenidge Station from the potential environmental impacts at the Landfill. The Landfill is a separate disposal site, which has its own SPDES permit (R 814-824; Sheeley Aff. ¶¶ 63-65). DEC did not segment its environmental review (R 1042-1057).

Segmentation is "the division of the environmental review of an action such that various activities or stages are addressed under this part as though they were independent, unrelated activities, needing individual determinations of significance" (6 NYCRR § 617.2[ag]). Courts disfavor segmentation for two reasons: (1) "in considering related actions separately, a decision involving review of an earlier action may be practically determinative of a subsequent action[;]"

and (2) when a "project that would have a significant effect on the environment is broken up into two or more component parts that, individually, would not have as significant an environmental impact as the entire project" (*Matter of Forman v Trustees of State Univ. of New York*, 303 AD2d 1019, 1019 [4th Dept 2003] [internal quotation marks omitted]).

Petitioners' attempt to frame this as a segmentation claim fails. The Landfill holds a SPDES permit that is not at issue in this proceeding (*see* R 814-824). Both the Landfill and Greenidge Station already exist; neither is proposed, and neither is a component of the other.

To the extent this is simply a claim that DEC overlooked adverse environmental impacts of solid waste, it is baseless. The amended negative declaration notes that Greenidge Station will generate less waste than under earlier SPDES permits because Greenidge Station will no longer burn coal (R 1057; Sheeley Aff. ¶ 63). Moreover, part 1 of the full environmental assessment form indicates that Greenidge Station will produce approximately 6,500 tons of ash per year (R 1032; Sheeley Aff. ¶ 65). In contrast, the Landfill has a separate permit to receive 1,729 tons of ash per day (R 812), meaning that it can handle the solid waste generated by Greenidge Station (Sheeley Aff. ¶ 65). The amended negative declaration and the permits in this case show that DEC considered solid waste impacts, including any impacts from sending waste to the Landfill (R 812, 1041-1057).

Additionally, any segmentation claim fails because the Landfill is a separate facility. The Landfill has its own solid waste permit (R 804-813) and SPDES permit (R 814-824). DEC evaluated those permit applications before issuing them, and it is too late for petitioners to challenge them. Furthermore, the Landfill and Greenidge Station are at separate locations and operate independently of each other (R 804-824; Sheeley Aff. ¶ 64). As in *Forman*, it is unimportant that DEC issued multiple permits for facilities that are near each other (*see* 303

AD2d at 1020). The Court should reject petitioners' naked assertion that DEC failed to evaluate solid waste impacts or improperly segmented its review.

CONCLUSION

For the reasons stated above, respondents request that the Court dismiss the petition.

Dated: March 2, 2018
Albany, New York

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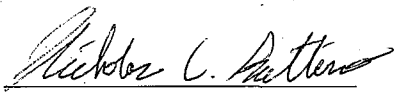
By: 

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