

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,

Index No. 2017-0232

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

**AFFIRMATION OF NICHOLAS
BUTTINO IN SUPPORT OF THE
STATE'S MOTION TO STRIKE**

-against-

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

Respondents.

NICHOLAS C. BUTTINO, an attorney admitted to practice in the State of New York,
affirms, under penalties of perjury under CPLR 2106, as follows:

1. I am an Assistant Attorney General employed by the New York State Department
of Law. In that capacity, I represent the New York State Department of Environmental
Conservation (DEC) and its Commissioner, Basil Seggos, (collectively, the Department) in this
proceeding.

2. I make this affirmation based on personal knowledge, my review of documents
maintained in the ordinary course of business by DEC, and my representation of the Department.

3. I submit this affirmation in support of the Department's motion to strike portions of affidavits submitted by petitioners as part of a reply.

4. On April 21, 2017, this Court issued a decision in an earlier proceeding concerning Greenidge Station. A true and accurate copy of that decision is attached as Exhibit A. In the Court's April 21, 2017 decision, the Court rejected the affidavits submitted by petitioner because "[t]hose affidavits contain additional evidence which as submitted violate 22 NYCRR 202.2(c) and 202.9" (Exhibit A at 6).

5. On November 8, 2017, petitioners filed this petition. With that petition, petitioners did not include any affidavits or a memorandum of law.

6. On December 22, 2017, petitioners served their memorandum of law in support of their petition. With that memorandum of law, petitioners included an attorney affirmation with exhibits.

7. On March 2, 2018, the State answered the petition and served its administrative return, affidavits, and a memorandum of law opposing the petition. On page 13 of its memorandum of law, the State objected to petitioners including evidentiary material after submitting their petition because those submissions violate 22 NYCRR §§ 202.8(c), 202.9. In its answer, the State also objected that petitioners had failed to plead facts showing standing.

8. On April 28, 2018, petitioners submitted a reply memorandum of law in support of their petition and eleven affidavits, including exhibits.

9. The State moves to strike portions of those affidavits, and their accompanying exhibits. The State does not seek to strike the portions of the affidavits necessary to establish standing, and withdraws its objection that petitioners failed to plead facts showing standing. The State does object to, and moves to strike, new evidence submitted in reply that is not related to

the petitioners' standing. Under 22 NYCRR §§ 202.8(c), 202.9, petitioners cannot submit affidavits offering new evidence as part of a reply brief. To the contrary, petitioners must submit all of their evidence at the time they file their petition. In addition, petitioners may not submit evidence that was not before the Department at the time it made the challenged determination. In the alternative, the State requests that the Court only consider the affidavits to establish standing, and not for any of the evidentiary statements in the affidavits.

10. The affidavit of Dr. Gregory Boyer should be stricken in its entirety because it is an untimely quasi-expert affidavit.

11. The portions of the affidavit of Kathryn Bartholomew that introduce new evidence should be stricken. Specifically, the State requests that the Court strike ¶¶ 10-11 because they do not relate to the organizational structure of the Sierra Club and seek to introduce new evidence.

12. The portions of the affidavit of Linda Bracht that introduce new evidence should be stricken. Specifically, the State requests that the Court strike ¶¶ 9-36 because they do not relate to the harm that Ms. Bracht allegedly suffers that is distinct from the public at large and seek to introduce new evidence.

13. The portions of the affidavit of Abi and Winton Buddington that introduce new evidence should be stricken. Specifically, the State requests that the Court strike ¶¶ 7-34 because they do not relate to the harm that Mr. and Ms. Buddington allegedly suffer that is distinct from the public at large and seek to introduce new evidence.

14. The portions of the affidavit of Jane Crumlish that introduce new evidence should be stricken. Specifically, the State requests that the Court strike ¶¶ 9-35 because they do not

relate to the harm that Dr. Crumlish allegedly suffers that is distinct from the public at large and seek to introduce new evidence.

15. The portions of the affidavit of Linda Downs that introduce new evidence should be stricken. Specifically, the State requests that the Court strike ¶¶ 9-44 because they do not relate to the harm that Ms. Downs allegedly suffers that is distinct from the public at large and seek to introduce new evidence. The State also requests that the Court strike Exhibits D-F to the Linda Downs affidavit because they are untimely attempts to offer new evidence that was not before the Department at the time it made the challenged determination.

16. The portions of the affidavit of Roger Downs that introduce new evidence should likewise be stricken. Specifically, the State requests that the Court strike ¶¶ 6-21 because they do not relate to the organizational structure of the Sierra Club. The State also requests that the Court strike Exhibit G to the Roger Downs affidavit because it is an untimely attempt to offer new evidence that was not before the Department at the time it made the challenged determination.

17. The portions of the affidavit of Peter Gamba that introduce new evidence should be stricken. Specifically, the State requests that the Court strike ¶¶ 14-30 because they do not relate to the organizational structure of the Sierra Club.

18. The portions of the affidavit of Mary Anne Kowalski that introduce new evidence should be stricken. Specifically, the State requests that the Court strike ¶¶ 4, 6-27 because they do not relate to the harm that Ms. Kowalksi allegedly suffers that is distinct from the public at large and seek to introduce new evidence.

19. The portions of the affidavit of Carolyn McAllister that introduce new evidence should be stricken. Specifically, the State requests that the Court strike ¶¶ 7-39 because they do not relate to the harm that Ms. McAllister allegedly suffers that is distinct from the public at

large and seek to introduce new evidence. The State also requests that the Court strike Exhibit B to the McAllister affidavit because it is an untimely attempt to offer new evidence that was not before the Department at the time it made the challenged determination.

20. The portions of the affidavit of Eileen and John Moreland that introduce new evidence should be stricken. Specifically, the State requests that the Court strike ¶¶ 9-36 because they do not relate to the harm that Mr. and Ms. Moreland allegedly suffer that is distinct from the public at large and seek to introduce new evidence. The State also requests that the Court strike Exhibit B to the Moreland affidavit because it is an untimely attempt to offer new evidence that was not before the Department at the time it made the challenged determination.

Dated: May 11, 2018
Albany, New York



Nicholas C. Buttino

EXHIBIT A

STATE OF NEW YORK
SUPREME COURT COUNTY OF YATES

NYS OFFICE OF THE ATTORNEY GENERAL
RECEIVED

APR 26 2017

ENVIRONMENTAL PROTECTION BUREAU
ALBANY

SIERRA CLUB, COMMITTEE TO PRESERVE
FINGER LAKES by and in the name of PETER GAMBA,
its President, and COALITION TO PROTECT NEW YORK
by and in the name of KATHRYN BARTHOLOMEW,
its Treasurer,

Plaintiffs,

DECISION
Index No. 2016-0165

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, BASIL SECCOS, COMMISSIONER,
GREENIDGE GENERATION, LLC, GREENIDGE PIPELINE,
LLC, GREENIDGE PIPELINE PROPERTIES CORPORATION,
and LOCKWOOD HILLS, LLC,

Defendants.

Petitioners brought this application by way of an Order to Show Cause and Amended Petition alleging the New York State Department of Environmental Conservation (“DEC”) failed to conduct an adequate environmental review under the State Environmental Quality Review Act (“SEQRA”) of the impacts of the project of Respondents Greenidge Generation Corporation (“GPPC”) to repower the Greenidge Generating Station in Dresden, New York including construction of a 4.6 mile gas pipeline to the station (the “Greenidge Repowering Project”) before issuing air permits to GLLC for the plant on September 8, 2016. The amended verified petition seeks annulment of air permits issued to GLLC and the negative declaration issued by DEC as lead agency on the ground that they violate the requirements of SEQRA.

Respondents made motions to dismiss. In their applications Respondents raised the issue that Petitioners lacked standing. This Court previously ruled that Petitioners do have standing and any application to dismiss the petition on the bases of standing is denied.

FINDINGS OF FACT

The Greenidge Station is an electric generating facility located in the Town of Torrey, New York. It currently consists of one 107 megawatt generating unit, known as Unit 4, which historically operated as a coal-fired power plant. The Facility was initially constructed in the 1930s. Unit 4 (the only remaining generating unit at Greenidge Station) was installed in 1953. In 2011, the Greenidge Station went into temporary protective layup status. In 2014, Respondent Greenidge Generation, LLC, purchased the Greenidge Station and sought to resume Facility operations.

The Greenidge Project will allow the Greenidge Station to produce electricity using natural gas and biomass, and no longer burn coal as a fuel source. The Greenidge Project consists of two main components, namely: (1) in-plant construction to modify the Greenidge Station to run on natural gas and biomass; and (2) construction of a natural gas pipeline and auxiliary services to fuel the facility. In furtherance of the Greenidge Project, in 2014, Respondent Greenidge Generation, LLC submitted applications to NYSDEC for Title IV and Title V air permits, a renewal of its State Pollutant Discharge Elimination System (“SPDES”) permit and initial water withdrawal permit for Greenidge Station.

NYSDEC initially issued a Notice of Complete Application (“NOCA”) and Negative Declaration on July 30, 2015, which provided the basis for NYSDEC’s State Environmental Quality Review Act (“SEQRA”) determination that the resumption of operations at the Greenidge Station would not have a significant adverse impact on the environment.

NYSDEC published notice of its NOCA and Negative Declaration in the Environmental Notice Bulletin (“ENB”) on August 12, 2015. On August 12, 2015, NYSDEC also issued the following draft permits for public notice and comment: Title V and Title V air permits, a SPDES renewal permit and an initial water withdrawal permit.

On September 11, 2015, Petitioner CPFL submitted comments to NYSDEC on the draft permits and the SEQRA Negative Declaration. Also on September 11, 2015, Petitioner Sierra Club submitted comments to NYSDEC on the draft air permits only, it did not submit any SEQRA related comments.

Petitioner Coalition to Protect New York (“CPNY”) did not submit any comments to NYSDEC on either the Negative Declaration or draft permits.

On October 26, 2015, NYSDEC submitted the proposed Title V air permit and a public comment responsiveness summary (“Responsiveness summary”) to the United States Environmental Protection Agency (“USEPA”) for review, as required by Section 505(a) of the Clean Air Act. NYSDEC also provided a copy of the Responsiveness Summary and the proposed Title V permit to Petitioners CPFL and Sierra Club.

On December 7, 2015, USEPA issued a letter to NYSDEC that requested revisions to the draft Greenidge Station Title V air permit.

From January 2016 through June 2016, Reposndent Greenidge Generation, LLC worked with NYSDEC and USEPA to modify the draft Title V air permit as requested by the USEPA.

On June 28, 2016, NYSDEC issued an Amended Negative Declaration based on revisions made to the draft Title V air permit, which concluded once again that the resumption of operations at the Greenidge State would not have a significant adverse impact on the environment.

NYSDEC published notice of its Amended Negative Declaration in the June 29, 2016 ENB. Also on June 29, 2016, NYSDEC published notice in the ENB of the availability of revised draft Title IV and Title V air permits for the Greenidge Station for public review and comment.

On August 5, 2016, Petitioner CPFL submitted comments on the draft Title IV and Title V permits and the Amended Negative Declaration. Petitioners Sierra Club and CPNY did not submit any comments to NYSDEC.

On September 8, 2016, NYSDEC issued the final Title IV and Title V air permits which authorized the in-plant construction work necessary to convert the Greenidge Station to natural gas and the subsequent operation of the Greenidge Station.

Regarding the Greenidge pipeline, on October 2, 2015, Greenidge Pipeline LLC and Greenidge Pipeline Properties Corporation (the "Pipeline Entities") submitted an application to the NYSPSC seeking issuance pursuant to Article VII of the Public Service Law of a Certificate of Environmental Compatibility and Public Need for construction of a 4.6 mile natural gas pipeline to supply natural gas to the Greenidge Station (the "Greenidge Pipeline"), which application was docketed by the Commission as Case 15-T-0586 (the "Article VII Proceeding").

Petitioner CPFL submitted comments to NYSPSC on November 9, 2015 and November 23, 2015 and requested that the NYSPSC grant it party status in, among other things, the Article VII proceeding.

On December 28, 2015, ALJ Phillips issued a Ruling Concerning Process and Party Status in the Article VII Proceeding, wherein she ruled that Petitioner CPFL failed to identify any specific, disputed factual issues that would necessitate evidentiary hearings in order to develop an adequate record with respect to the Pipeline Entities' request for an Article VII certificate and also concluded that in the absence of any such contested issues of material fact, there was no need to rule on CPFL's request for party status at that time.

Petitioner CPFL did not appeal ALJ Phillips ruling denying it party status in the Article VII Proceeding, nor did it renew its requests for party status in that proceeding.

On September 16, 2016, NYSPSC issued among other things, the Article VII Certificate for the Greenidge Pipeline. In the Certificate Order, the NYSPSC found that the Greenidge Pipeline was needed and that the adverse environmental impacts would be largely temporary in nature due to

construction and would be minimized by the requirements of the Article VII certificate approved by the NYSPSC.

The Certificate Order further provided that construction of the Greenidge Pipeline could not commence until a Notice to Proceed with Construction was issued by the NYSPSC for the Greenidge Pipeline and related facilities.

On October 17, 2016, the NYSPSC issued the requisite Notice to Proceed with Construction.

As provided by NYSPSC in the Certificate Order, it was the intention of the Pipeline Entities to commence construction soon after the NYSPSC approval and permissions were obtained.

None of the Petitioners sought rehearing by NYSPSC of the Certificate Order.

On October 17, 2016, the last day a rehearing could be requested from the NYSPSC based on Section 22 of the New York Public Service Law, Petitioner CPFL filed a petition for rehearing with NYSPSC only with respect to the NYSPSC's separate Order in Cases 15-E-0516 and 15-G-0571, issued on September 16, 2016 wherein the NYSPSC authorized Greenidge Generation to operate the Greenidge Station, authorized the Pipeline Entities to exercise the rights granted to them under certain municipal road crossing agreements, and granted lightened and/or incidental regulations under Part IV of the Public Service Law to Greenidge Generation and the Pipeline Entities.

On December 15, 2016, the NYSPSC denied CPFL's rehearing request in cases 15-E-0516 and 15-G-057, finding that CPFL failed to state an error of law or fact or new circumstance warranting a different determination than that already made by NYSPSC.

In-plant construction work on the Greenidge Station and construction on the Greenidge Pipeline commenced on October 17, 2016. As of November 3, 2016, when the Greenidge Respondents were served in the underlying action, the following construction activities had already been completed; all materials for the in-plant work had been purchased; over 30 percent of the in-plant construction work

had been completed; all necessary materials for the construction of the Greenidge Project had been purchased; 50 percent of site clearing activities (including tree removal) had been completed, and 20% of the Greenidge Pipeline construction had been completed (trenched, welded, piping laid into the trench, and soil backfilled over the piping). The cost associated with the work that had been completed by November 3, 2016 was \$3,020,866. As of December 23, 2016, when Petitioners filed their motion, approximately 80% of the Greenidge Project had been completed at a cost of \$7,688,467. On January 6, 2017, 94% of the Greenidge Project construction had been completed at a cost of \$11,418,24.

DECISION

During the course of this proceeding the Petitioners filed with this Court a series of affidavits by various individuals that were sworn to between January 13, 2017 and January 16, 2017. Those affidavits established that the Petitioners do have standing to commence this proceeding. However, this Court will not consider the technical aspects of those affidavit including but not limited to the affidavit of Gregory Boyer. Those affidavits were never previously submitted to DEC nor were they included in either the petition or the amended petition. Those affidavits contain additional evidence which as submitted violate 22 NYCRR 202.8(c) and 202.9.

As for Petitioners' request for a preliminary injunction to establish a preliminary injunction, a party must show (1) a likelihood of success on the merits; (2) irreparable injury in the absence of injunctive relief or (3) a balance of equities in their favor. This is a drastic remedy that is not routinely granted and should be awarded sparingly. In the present case, based upon the facts presented, this Court finds that petitioners have failed to meet their burden on any of these three conditions and accordingly, the request for a preliminary injunction is denied.

Regarding Petitioners' request to annul the Title IV and Title V air permits which were issued on September 8, 2016 to Respondent GLLC by Respondent DEC, upon a review of the papers submitted

and the findings of facts contained herein, this Court finds that Respondent DEC did not in any way act in a manner that was a violation of any law, arbitrary or capricious or an abuse of discretion.

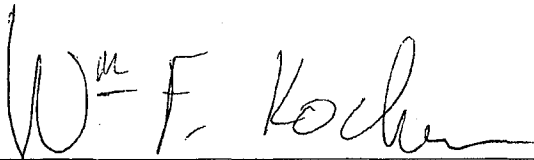
Petitioners' request is denied.

Petitioners' request to annul Respondent DEC's SEQRA finding and June 28, 2016 negative declaration is also denied. A review of the findings contained in this decision finds that Respondent DEC followed the law and its decision was not arbitrary, capricious or an abuse of discretion.

Any further application by Petitioners is likewise denied.

Therefore, Petitioners amended petition is dismissed. This shall constitute the Decision of the Court.

Dated: 4/21/17
Canandaigua, New York.



Hon. William F. Kocher
Acting Supreme Court Justice