SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FOURTH DEPARTMENT

In the Matter of

SIERRA CLUB, COMMITTEE TO PRESERVE THE 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

Petitioners-Appellants,

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

Docket No. CA 18-00648

-against-

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

Respondents-Respondents.

STATE RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS-APPELLANTS' MOTION FOR TEMPORARY INJUNCTIVE RELIEF AND IN REPLY TO PETITIONERS-APPELLANTS' OPPOSITION TO THE MOTION TO DISMISS THE APPEAL

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Dated: July 12, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATE STATUTES

FEDERAL STATUTES

STATE REGULATIONS

RULES

PRELIMINARY STATEMENT

Petitioners, a coalition of environmental groups and their individual officers, commenced this article 78 proceeding ("*Greenidge I*") to challenge a construction project undertaken by Respondents Greenidge Generation, LLC, Greenidge Pipeline, LLC, Greenidge Pipeline Properties Corporation and Lockwood Hills, LLC ("Greenidge") for the purpose of repowering an electric generating facility ("Greenidge Station"). Among other claims, Petitioners contend that Respondents Department of Environmental Conservation and Commissioner Basil Seggos (together "DEC" or "State Respondents") acted irrationally when DEC determined that the project would have no adverse environmental impacts and accordingly issued Greenidge certain Clean Air Act permits to complete the construction. DEC and Greenidge each moved to dismiss the petition on various grounds, including mootness. In a judgment entered in Yates County on June 20, 2017, Supreme Court (Kocher, A.S.C.J.) dismissed the petition, holding that DEC's determination was not arbitrary or capricious (Record ["R"] 7-9). Petitioners filed a notice of appeal on June 19, 2017, but waited a full nine months until April 17, 2018 to perfect their appeal.

Prior to commencement of this proceeding, Greenidge substantially completed work to repower the Greenidge Station, and since May 2017—over a year ago—all construction work authorized under the challenged air permits, including a natural gas pipeline to fuel the facility, has been completed at significant expense, and the facility has been operating and providing power to the electric grid. At no time until now since losing their motion for preliminary injunctive relief in Supreme Court in

June 2017 have Petitioners sought injunctive relief from this Court, nor from Supreme Court, Yates County in related litigation over the water permits for the Greenidge Station, which has been fully briefed and argued and is awaiting decision, *Matter of Sierra Club v. N.Y. State Dep't of Envtl. Conservation*, Index No. 2017-0232 (Sup Ct, Yates County Nov. 8, 2017) ("*Greenidge II*").

Petitioners' motion for temporary injunctive relief should be denied and Greenidge's motion to dismiss granted. Petitioners effectively concede that all construction work necessary to "repower" the Greenidge Station under the air permits has been completed at significant expense, and therefore this *Greenidge I* proceeding challenging only the air permits is moot. Petitioners' attempt to seek injunctive relief related to a State Pollutant Discharge Elimination System ("SPDES") permit issued by State Respondents is wholly improper, as the actions sought to be enjoined are unrelated to the air permits challenged in this proceeding, and such relief would be available, if at all, only in *Greenidge II*, in which Petitioners never moved for injunctive relief.

Furthermore, the injunctive relief Petitioners seek is legally unavailable and improper. The actions Petitioners seek to enjoin are required by Greenidge's valid SPDES permit, and are conditions on that permit which the State Respondents imposed to ensure compliance with the Environmental Conservation Law, DEC regulations, and the federal Clean Water Act. Petitioners seek to have this Court order Greenidge to choose between violating the Court's order and violating DEC's SPDES permit.

Finally, Petitioners motion fails to demonstrate its entitlement to the relief sought because they have not met the test for preliminary injunctive relief: likelihood of success on the merits of the appeal, irreparable harm, and a balancing of the equities in their favor. The only "harm" Petitioners have identified is the dismissal of their case on mootness grounds, but this is not a sufficient grounds for the drastic remedy sought here. Accordingly, the Court should deny Petitioners' motion for injunctive relief and grant Greenidge's motion to dismiss the appeal on the grounds it is moot.

STATEMENT OF FACTS

A. The Greenidge Project

The Greenidge Generating Station (the "plant" or "Greenidge Station") is an electric generating facility located in the Town of Torrey, New York in Yates County, which was initially constructed in the 1930s and historically operated using coal as a fuel (R 215). In 2011, the plant was idled, and in 2014 Respondent Greenidge purchased the plant seeking to resume operations using 100 percent natural gas, with up to 19 percent bio-mass co-firing (and to no longer burn coal) (R 215-216). Resuming operations required in-plant construction to permit the change in fuel and construction of a 4.6-mile natural gas pipeline to fuel the plant, along with auxiliary services, including a regulation station, metering station, and interconnection (the "Greenidge Project") (R 216).

In 2014, Greenidge applied to DEC for permits under Title IV and Title V of the Clean Air Act to resume generating electricity at the plant. Greenidge also applied to DEC for renewal of an existing SPDES permit and for a permit to withdraw

cooling water from Seneca Lake (R 132). For environmental review of the Greenidge Project, DEC declared itself lead agency under the State Environmental Quality Review Act (Environmental Conservation Law ["ECL"] Art. 8 and 6 N.Y.C.R.R. § 617) ("SEQRA"), determined that the applications constituted a Type I action for SEQRA purposes, announced that a coordinated environmental review had occurred, and after taking a "hard look" at all areas of potential environmental concern, concluded that the project would have no significant adverse impacts on the environment.

After revising the draft air permits to address issues raised by the United States Environmental Protection Agency, in June 2016, DEC issued an amended SEQRA negative declaration, which identified six areas of environmental concern: surface water, air, plants and animals, historic and archeological resources, energy, and solid waste management (R 103-106). For each area of concern, the amended negative declaration discussed why no potentially significant adverse environmental impacts would result from the proposed action (*id.*).

In September 2016, DEC issued Greenidge two air permits for the project (R 145-148). After commencement of this Article 78 proceeding, DEC in September 2017 issued the SPDES renewal permit and water withdrawal permits. Petitioners have challenged the SPDES and water withdrawal permits in *Greenidge II,* a separate article 78 proceeding currently pending in Supreme Court, Yates County. Petitioners represented to Supreme Court in *Greenidge II,* however, that "[they] could not have raised their claims regarding DEC's issuance of [Greenidge's] water withdrawal and modified SPDES permits in *Greenidge I*" (Affirmation of Claiborne E. Walthall in

Opposition to Petitioners-Appellants' Motion for Temporary Injunctive Relief and In Reply to Petitioners-Appellants Opposition to the Motion to Dismiss the Appeal, dated July 12, 2018 ["Walthall Affirm."], ¶ 43).

In September and October 2015, Greenidge applied to the New York State Public Service Commission ("PSC") for several certificates necessary for construction and operation of the repowered Greenidge Station. In September 2016, PSC issued orders granting these certificates (R 149-210, 323-356). In October 2016, PSC issued a notice authorizing Greenidge to begin construction for the pipeline (R 211). The PSC proceedings and resulting certificates are not challenged in this action.

Greenidge began in-plant and pipeline construction in October 2016, seeking to complete pipeline construction expeditiously and begin recouping a return on its substantial investments in the project. (R 216-217). The SPDES and water withdrawal permits, which were granted in September 2017, were not necessary before resuming plant operations because Greenidge timely applied for renewal of its existing SPDES permit and was entitled to continue operations thereunder while its applications were pending. The SPDES permit contained conditions imposed by DEC under its authority to implement the federal Clean Water Act requiring Greenidge to implement best technology available or "BTA" to reduce fish mortality by installing certain pumps and screens to the water intake system using for cooling the plant machinery during the term of SPDES permit.

B. This Proceeding

On October 28, 2016, Petitioners commenced this *Greenidge I* proceeding (R 48), challenging the air permits (R 48). Petitioners did not seek any provisional relief.

Before responses were due by agreement, Petitioners filed and served an amended petition brought by notice of petition, which added the Sierra Club as an additional petitioner (R 52-53, 54-80). On December 23, 2016, Petitioners moved for a preliminary injunction (R 82-110, 115). This motion did not seek any relief from the State Respondents, but sought to prohibit Greenidge from taking steps to "repower" the plant, including pipeline construction, until further environmental review was completed.

C. Substantial Completion of the Greenidge Project

By early-November 2016, when Greenidge was served with the petition in this proceeding, Greenidge had purchased all the necessary materials and completed 30 percent of the in-plant construction work (R 121, 130). By early November 2016, Greenidge had purchased all necessary materials for the pipeline and completed significant work on the pipeline and auxiliary facilities (R 123-124, 130, 217). Total expenditures on the project between September 8, 2016 and November 3, 2016 were $3,020,866, representing approximately 25 percent of the project construction (R 124, 130, 218).

By December 23, 2016, when Petitioners moved for a preliminary injunction to prevent Greenidge from taking any steps to "repower" the Greenidge Station, approximately $7,688,467—or 60 percent of the project costs—had been incurred and 91 percent of the in-plant construction work authorized under the air permits was complete (R 19, 124, 130). As of January 6, 2017, when Respondents moved to dismiss the petition, Greenidge had incurred $11,418,624, or 94 percent, of total project costs (R 124, 130). This included the purchase of all necessary materials, 98 percent of the

in-plant construction work completed at a cost of $1,724,053 and over 90 percent of pipeline and related construction completed at a cost of $9,694,570 (R 219, 130). Work necessary to repower the Greenidge Station, including pipeline construction, was completed in March 2017. Unit 4 resumed operations during the week ending March 31, 2017 (R 393), and since May 2017, the Greenidge Station has been operating and regularly providing power to the electric grid.

D. Respondents' Motions to Dismiss

The State Respondents and Greenidge separately moved to dismiss the petition in January 2017. The State Respondents sought dismissal on the grounds of lack of standing and mootness, though they later withdrew their standing objection after Petitioners submitted additional affidavits (R 112-116, 238-284, 313-320, 362). Greenidge moved to dismiss (R 117-118, 213-237), and opposed Petitioners' motion for a preliminary injunction (R 119-212).

While these motions were pending, by letter dated March 31, 2017, Greenidge informed Supreme Court that "construction of the Greenidge pipeline and all in-plant construction to repower the Greenidge Station has been completed and, following extensive and costly testing, the Greenidge Station resumed operations this week" (R 393-394).

E. Supreme Court Dismisses the Petition

On April 21, 2017, Supreme Court, Yates County (Kocher, A.S.C.J.) issued a decision denying Petitioners a preliminary injunction and dismissing the petition (R 14-20). Finding that the papers submitted did not demonstrate that DEC had acted in an arbitrary and capricious manner, Supreme Court denied Petitioners' requests

to annul the air permits or DEC's SEQRA negative declaration. Supreme Court dismissed the petition in an order and judgment entered June 20, 2017 (R 7-9, 20).

Petitioners took this appeal in mid-July 2017 (R 3), and then waited a full nine months before perfecting their appeal in April 2018. Though more than a year has elapsed since their motion for a preliminary injunction was denied, Petitioners did not seek a stay or injunctive relief from this Court until this present motion filed July 6, 2018, nearly a year after taking this appeal and more than two months after perfecting.

F. Greenidge's Motion to Dismiss the Appeal

In June 2018, Greenidge moved to dismiss the appeal as moot, demonstrating that it had completed all work necessary to repower the Greenidge Station, including construction of the natural gas pipeline, and that the facility had been generating electricity for more than a year (*see* Affidavit of Dale Irwin in Support of the Greenidge Respondents' Motion to Dismiss, sworn to June 21, 2018 [Irwin Aff,] at ¶¶ 42-51 & Ex. B). The State Respondents have supported Greenidge's motion to dismiss the appeal as moot. (*See* Affirmation of Claiborne E. Walthall in Support of Greenidge Respondents' Motion to Dismiss Appeal, dated June 27, 2018, at ¶¶ 22-35).

G. Petitioners' Motion for Temporary Injunctive Relief

On July 6, 2018, Petitioners opposed the motion to dismiss and cross-moved for "temporary injunctive relief" seeking an order for the first time "enjoining [Greenidge] from taking any further steps to construct and install equipment to prevent fish impingement and entrainment at Greenidge Generating Station pending the resolution of this proceeding or further order of this Court, and . . . until [DEC]

has completed the environmental review required by SEQRA. . ." *See* Petitioners' Notice of Motion for Temporary Injunctive Relief, dated July 6, 2018 (Notice of Motion), at 1-2.

ARGUMENT

POINT I

PETITIONERS' REQUESTED INJUNCTIVE RELIEF IS UNRELATED TO AND WHOLLY IMPROPER IN THIS PROCEEDING.

Petitioners' motion effectively concedes that this *Greenidge I* proceeding is moot. Petitioners do not dispute that all in-plant renovations and pipeline construction authorized under the air permits has been completed and that the Greenidge Station has been operating and generating electricity for more than a year. Nor do Petitioners address, much less justify, their complete failure to seek any injunctive relief from this Court until now during the year-long pendency of this appeal. *See Matter of Weeks Woodlands Ass'n, Inc. v. Dormitory Auth. of State*, 95 A.D.3d 747 (1st Dep't 2012), *aff'd* 20 N.Y.3d 919 (2012) (appeal dismissed as moot where substantial project work completed and petitioners failed to seek injunctive relief from the appellate court pending appeal from Supreme Court's denial of their motion for a preliminary injunction). Instead, facing nearly certain mootness, Petitioners have searched in vain for something that they could try to enjoin in an effort to resuscitate this moribund action. But even apart from the patent insufficiency of Petitioners' showing on their motion, Petitioners have improperly moved in the wrong action for relief they never pleaded.

A. The Amended Petition Did Not Seek the Injunctive Relief Sought in Petitioners' Motion.

Preliminary injunctive relief from the Appellate Division must rest on claims pleaded in the underlying petition. *See* C.P.L.R. §§ 5518; 6301 (preliminary injunction only available "where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff"). It is "well established that absent the assertion of a claim that provides a jurisdictional predicate for the issuance of injunctive relief under C.P.L.R. § 6301, the court is without the power to grant preliminary injunctive relief to a moving party." *Huntington Vill. Dental, PC v. Rathbauer*, 38 Misc. 3d 1213(A), at *4 (Sup. Ct., Suffolk County Jan. 18, 2013); *see BSI, LLC v. Toscano*, 70 A.D.3d 741, 741 (2d Dep't 2010) ("Supreme Court properly denied that branch of the defendant's motion which was for a preliminary injunction since the defendant did not interpose a counterclaim which would provide a jurisdictional predicate for the preliminary injunction."). Here, Petitioners did not include any claim in their amended verified petition in this *Greenidge I* action seeking to enjoin the SPDES permit conditions named in their motion. Rather, Petitioners expressly stated in the amended verified petition that this proceeding was limited to challenging the "Title IV and Title V *air permits* issued by [DEC]" (R 54) (emphasis added). Petitioners'

claim for preliminary injunctive relief actually pleaded in the amended verified petition only sought to prohibit Greenidge "from taking steps to repower the Greenidge Station or construct a gas pipeline" (R 78). Therefore, neither Supreme Court, nor the Court here would have a jurisdictional predicate for issuing the injunctive relief related to the SPDES permit that Petitioners seek.

B. Petitioners Are Seeking Injunctive Relief in the Wrong Proceeding.

Having failed to preserve the status quo related to the air permits, Petitioners now seek something to enjoin to save their challenge. But there is nothing in *Greenidge I* left to enjoin, and Petitioners' motion is a frantic, last-ditch effort to find something, anything relating to the Greenidge Station that could save this proceeding from mootness. Petitioners represented to Supreme Court in *Greenidge II*, however, that "[they] could not have raised their claims regarding DEC's issuance of [Greenidge's] water withdrawal and modified SPDES permits in *Greenidge I*" (Walthall Affirm. ¶ 43) because this first proceeding concerned only the air permits. Indeed, Petitioners apparently recognize the relief they are seeking is beyond the scope of *Greenidge I* because they rely on documents bearing the Bates number stamp of the administrative record in *Greenidge II*—and which are outside the record on appeal—in support of their motion. *See, e.g.*, Exhibit A to Affirmation of Rachel Treichler in Support of Petitioners' Motion for Temporary Injunctive Relief, dated July 6, 2018 ("Treichler Affirm."). Petitioners have thus conceded that their challenge to the air permits and challenge to the water permits are separate and distinct proceedings, and limited their claims accordingly. Petitioners have never sought to consolidate the proceedings in Supreme Court or otherwise amend their pleadings to

bring claims concerning the SPDES permit conditions into *Greenidge I*. Therefore, this Court should not permit Petitioners to bring unrelated claims from *Greenidge II* into this *Greenidge I* proceeding.

POINT II

PETITIONERS' REQUESTED INJUNCTIVE RELIEF WOULD VIOLATE STATE AND FEDERAL LAW.

Petitioners' request for temporary injunctive relief is further improper because it asks the Court to order Greenidge not to comply with a valid SPDES permit. Petitioners seek to have the Court order Greenidge not to install narrow wedge-wire screens and variable speed pumps, as required by the SPDES permit. However, Petitioners cannot ask the Court to grant them relief that would violate statutes and regulations, and they cannot seek to prevent DEC from conducting its statutory duties. *See Oliver v. Donovan*, 293 F. Supp. 958, 969 (E.D.N.Y. 1968); *Deane v. City of New York Dept. of Bldgs.*, 177 Misc. 2d 687, 696 (Sup. Ct., New York County 1998). DEC issued Greenidge the SPDES permit, which requires Greenidge to take steps to protect the environment, as required by state and federal law. *See* 33 U.S.C. §§ 1326(a); 6 N.Y.C.R.R. § 704.5. The Court should deny Petitioners' request for temporary injunctive relief because an injunction would violate state and federal law and circumvent DEC's statutory authority.

DEC issued Greenidge a renewed SPDES permit with conditions required by law. The National Pollutant Discharge Elimination System permit program regulates discharges of pollutants into waters of the United States. Under the Clean Water Act, the Environmental Protection Agency ("EPA") may delegate administration of the

permitting programs to the states. *See* 33 U.S.C. § 1342(b), (c). In 1975, EPA approved New York's SPDES program, allowing New York to implement its own permitting program. *See* ECL § 17-0701 *et seq.*; 6 N.Y.C.R.R. Part 750 (implementing regulations). New York issues SPDES permits that "ensure compliance with the applicable water quality requirements[.]" 6 N.Y.C.R.R. § 750-1.3(f). As part of these water quality requirements, DEC must issue permits "that reflect the best technology available for minimizing the adverse environmental impacts[.]" 6 N.Y.C.R.R. § 704.5; *see* 33 U.S.C. § 1326(b).

DEC followed all of its statutory duties in evaluating Greenidge's renewal application for a SPDES permit, and then issued a SPDES permit with appropriate conditions. As it relates to this motion, DEC made a best technology available determination, requiring Greenidge to install narrow wedge-wire screens and variable speed pumps. *See* Treichler Affirm. Ex. A (SPDES permit), at 13-15. These measures will protect the environment by limiting fish mortality. The merits of DEC's decision to impose conditions on the SPDES permit, including a full record and answer to Petitioners' separate Article 78 petition actually challenging the SPDES permit, are pending before the Yates County Supreme Court. These materials are outside of the record on appeal and the State discusses them only to show that DEC followed a process required by law.

The Court should deny Petitioners' motion for temporary injunctive relief because enjoining Greenidge from installing the narrow wedge-wire screens and variable speed pumps would prevent Greenidge from complying with a permit

condition required by statute and regulation. Granting the motion would create an order that contradicts not only the SPDES permit but also DEC's regulations and the Clean Water Act. *See* 33 U.S.C. § 1326(b); 6 N.Y.C.R.R. § 704.5. The Court should not issue an order that would require a party to violate statutes and regulations. *See Oliver*, 293 F. Supp. at 969 (denying injunctive relief because it "would require this Court to order the [State Respondent] to take actions which would be illegal under" state law).

Petitioners' motion is also an improper attempt to enjoin DEC from issuing a permit with appropriate conditions as required by statute. Petitioners cannot enjoin DEC from complying with its statutory duties. *See Deane*, 177 Misc. 2d at 696 ("No injunction lies under CPLR Article 78 to prevent an agency from performing any duty imposed on it by law."); *see also Vil. of Port Chester v. Indus. Commr.*, 32 Misc. 2d 64, 68 (N.Y. Sup. Ct. 1961) ("A petitioner may not obtain an order in the nature of an injunction to restrain the respondent from conducting proceedings pursuant to duty imposed by law[.]"). Petitioners' request to enjoin Greenidge from complying with the SPDES permit would have the same effect as enjoining DEC from issuing the permit. Instead, petitioners should wait for a ruling from Yates County Supreme Court on the merits of the SPDES permit. Moreover, if Petitioners prevail on this motion, then they would create an untenable situation where Greenidge would have to choose between violating a court order and violating a SPDES permit.

The requested relief from the injunction would illegally interfere with DEC's statutory duties. Accordingly, the State requests that, even if the Court determines

that this is the proper proceeding in which to seek an injunction on the SPDES permit, the Court deny that injunction.

POINT III

PETITIONERS HAVE NOT DEMONSTRATED THEIR ENTITLEMENT TO A PRELIMINARY INJUNCTION PENDING APPEAL.

The Appellate Division may only grant the drastic remedy of a preliminary injunction where the moving party establishes: (1) a likelihood of success on the merits of the appeal, (2) irreparable injury if the relief is not granted, and (3) that respondents will not be prejudiced if an injunction is granted. *See Aetna Ins. Co. v. Capasso,* 75 N.Y.2d 860, 862 (1990). Even were the Court to reach the merits of Petitioners' flawed motion, Petitioners have utterly failed to make the showing required to obtain the drastic remedy of a preliminary injunction, particularly where they never sought the relief they are requesting in either proceeding in Supreme Court and instead inexplicably waited nearly a year since taking this appeal to seek such relief from this Court.

A. Petitioners Have Not Demonstrated a Likelihood of Success On Their Appeal, Nor That Success Would Entitle Them to the Relief Sought.

Despite seeking injunctive relief related solely to the SPDES permit challenged in *Greenidge II*, Petitioners frame the test for likelihood of success in their motion papers as relating to the "revised air permits" (Petitioners' Memorandum of Law, dated July 6, 2018, at 11), asserting that they will be successful in arguing that Supreme Court erred in ruling on the merits of the amended verified petition prior to respondents answering (*id.* at 12). Notably absent, however, is any discussion in this section of the clear mootness of the entire proceeding, which leaves nothing to

properly enjoin. *See L-3 Commc'ns Corp. v. Kelly*, 36 A.D.3d 762, 763 (2d Dep't 2007) (dismissing portion of appeal where preliminary injunctive relief sought had been rendered academic).

Nor do Petitioners even attempt to claim that they are likely to succeed on their appeal with respect to the SPDES permit conditions they seek to enjoin in their motion—an omission that is inevitable given that the *Greenidge I* petition does not challenge these SPDES permit conditions at all. Rather it is patently obvious that Petitioners are simply changing their theory of the relief needed as a litigation strategy. This Court has squarely rejected a similar attempt to re-characterize the injunctive relief sought from earlier stages of a project to later operations in an attempt to avoid mootness. *Matter of Graf v. Town of Livonia*, 120 A.D.3d 944, 944 (4th Dep't 2014) (proceeding moot where petitioner failed to preserve status quo and project was complete); *see also Matter of Many v. Vill. of Sharon Springs Bd. of Trustees*, 234 A.D.2d 643, 644 (3d Dep't 1996), *lv. denied* 89 N.Y.2d 811 (1997) (concluding that the proceeding was moot, the court rejected petitioner's assertion that "it is the operation of the facility, not its construction per se, that poses a risk to the environment"). Moreover, Petitioners' requested relief appears disingenuous as it would actually delay installation of equipment designed to make the ongoing operation of the Greenidge Station *more environmentally protective*, something Petitioners claim to be seeking. Petitioners have utterly failed to demonstrate a likelihood of success on the merits of their appeal, much less that such success would entitle them to the preliminary injunctive relief sought here.

B. Petitioners Have Not Demonstrated Any Irreparable Injury.

It is well-settled that "[t]he issuance of a preliminary injunction will not prevent irreparable injury where the relief sought has already become moot, and a preliminary injunction will be denied where the relief sought has become academic." *See Perez v. Wei Li*, 37 Misc.3d 1213(A) at *2 (Sup Ct., Queens County Oct. 24, 2012). The only injury Petitioners claim will result from a failure to enjoin installation of the fish protection equipment is that this proceeding will become moot. But this Article 78 proceeding is already moot, as Petitioners concede by seeking injunctive relief outside the scope of amended verified petition. And mootness itself, or the danger of mootness, is simply not injury.

To the extent Petitioners suggest they or the public may sustain informational injury from alleged inadequate environmental review, this is not a recognized injury in New York and should not be adopted here. "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 (N.D.N.Y. 2001), citing *Scientists' Inst. For Pub. Info. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086-87, n. 29 (D.C. Cir. 1973). No New York State court has found standing on the basis of an informational injury much less recognized it as irreparable harm supporting an award of preliminary injunctive relief. The Court should not recognize this novel theory based on petitioners' bare assertions, which fail even to describe the alleged harm.

C. The Balancing of the Equities Strongly Favors Denying Petitioners' Motion for an Injunction.

Courts considering a motion for preliminary injunction have consistently found that a party's unreasonable delay in seeking injunctive relief to the prejudice of another party strongly disfavors granting a preliminary injunction, including on the basis of laches. *See Mercury Serv. Sys. v. Schmidt*, 50 A.D.2d 533, 533 (1st Dep't 1975) (denying preliminary injunction because movant's delay of over three months was unreasonable); *see Bailey v. Chernoff*, 45 A.D.3d 1113, 1115 (3d Dep't 2007) (denying preliminary injunction "[b]ecause the effect of delay on the adverse party may be crucial, delays of even under a year [may be] sufficient to establish laches") (internal citations omitted). Here, Petitioners waited over a year-and-a-half since commencing this action to seek the specific injunctive relief in their motion, and even then in the wrong action. Moreover, even *Greenidge II* is nearly a year old, and Petitioners have never sought this relief in that action. As discussed above, the amended verified petition in this *Greenidge I* proceeding sought to prohibit Greenidge from "taking steps to repower Greenidge Generating Station or construct a gas pipeline to the generating station" (R 56). Thus, Petitioners have never sought to enjoin Greenidge's compliance with the SPDES permit conditions—in this action or in *Greenidge II*. Petitioners never sought any relief from this Court in the more than nine months it took them to perfect their appeal, nor the three more months since perfecting, and then only after Greenidge moved to dismiss the appeal for its obvious mootness.

Meanwhile, DEC has renewed the SPDES permit including the conditions Petitioners now belatedly seek to enjoin, and Greenidge has spent substantial sums

completing all of the repowering construction and operating the plant. As explained above, enjoining Greenidge's compliance with the SPDES permit would not only result in less environmental protection, but would interfere with DEC's statutory and regulatory responsibilities and would force Greenidge to make a choice between complying with the Court's order and violating its SPDES permit. This untenable situation would result in substantial prejudice to both DEC and Greenidge, and interfere with DEC's enforcement of New York State statutes, DEC's regulations and the federal Clean Water Act.

POINT IV

PETITIONERS CANNOT SEEK INJUNCTIVE RELIEF TO PREVENT THE STATE FROM PERFORMING STATUTORY DUTIES.

The precise nature of injunctive relief sought by Petitioners in their motion is unclear, as their motion appears to seek either a temporary restraining order ("TRO") or a preliminary injunction. Petitioners do not clearly seek injunctive relief against the State Respondents, instead appearing to only ask the Court to enjoin Greenidge from taking certain steps. *See* Notice of Motion, at 1. But, as explained above, to the extent Petitioners seek to enjoin the State Respondents from undertaking statutory duties, such relief is unavailable in an Article 78 proceeding. *Deane*, 177 Misc. 2d at 696; *see Vil. of Port Chester*, 32 Misc. 2d at 68. To the extent Petitioners seek a TRO to enjoin the State Respondents from undertaking their statutory duties to issue a properly supported negative declaration under SEQRA or to prevent DEC from enforcing the SPDES permit conditions requiring Greenidge to install the cooling system equipment, this relief is unavailable. *See* C.P.L.R. § 6313(a).

CONCLUSION

For the reasons set forth above, the Court should deny Petitioners' motion for temporary injunctive relief and grant the Greenidge Respondents' motion to dismiss the appeal as moot, and any such further relief as the Court deems just and proper.

Dated: Albany, New York
July 12, 2018

Respectfully submitted,

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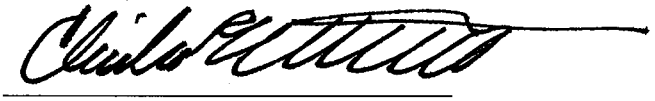
By: 

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