SUPREME COURT OF THE STATE OF NEW YORK
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 BARTHOLOMEW, its Treasurer; 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

-against-

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

Respondents.

Index No. 2017-0232
Hon. William F. Kocher

THE GREENIDGE RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE VERIFIED PETITION

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PRELIMINARY STATEMENT

Greenidge Generation, LLC and Lockwood Hills, LLC (collectively, the "Greenidge Respondents") respectfully submit this Memorandum of Law and accompanying Answer and Objections in Point of Law in opposition to the Sierra Club, Committee to Preserve the Finger Lakes ("CPFL"), Coalition to Protect New York ("CPNY") and Seneca Lake Guardian's (collectively, "Petitioners") ***second*** attempt to annul the New York State Department of Environmental Conservation's ("NYSDEC") well-reasoned and technically correct determinations to allow operations to resume at the Greenidge Generating Station located in the Town of Torrey, New York ("Greenidge Station" or "Facility"). Just as with Petitioners' prior, unsuccessful challenge of NYSDEC's environmental review under the State Environmental Quality Review Act ("SEQRA") and permit determinations that authorized the conversion and resumption of operations of the Greenidge Station, each and every one of Petitioners' claims in this action are subject to dismissal on multiple, independent grounds.[1]

At the outset, this Court should not condone Petitioners' blatant disregard of this Court's prior consideration of Petitioners' claims, which is nothing more than an improper attempt to get a second bite at the proverbial apple. Indeed, this Court has already determined that NYSDEC's June 28, 2016 Amended Negative Declaration and underlying environmental review was proper. The mere fact that Petitioners now try to characterize their claims as concerning water (as opposed to air) permits for the Facility misses the point and ignores the realities of their filings in the prior action. The end result is nothing more than a waste of judicial resources and an inexcusable burden on Respondents that should not be countenanced. Further, any challenge to

[1] As in the prior litigation, Petitioners named Lockwood Hills, LLC as a respondent in this action. The Verified Petition, however, lacks any basis for doing so. NYSDEC did not issue Lockwood Hills, LLC any approvals and it is not the applicant for any of the environmental permits challenged in the Verified Petition. Furthermore, Lockwood Hills, LLC is not involved in the operation of the Greenidge Station.

NYSDEC's Amended Negative Declaration is untimely and lacking any support in the administrative record or controlling case law.

Petitioners' challenge to NYSDEC's issuance of a State Pollution Discharge Elimination System ("SPDES") renewal permit and initial water withdrawal permit fare no better. Not only is Petitioners' challenge to the renewal of the Facility's SPDES permit unsupported by the Environmental Conservation Law ("ECL"), its implementing regulations, and NYSDEC's long-standing practice, it also is time-barred. Moreover, Petitioners' substantive challenge to the Facility's SPDES renewal permit is nothing more than a technical disagreement that disregards NYSDEC's expertise, which is entitled to substantial deference, and its longstanding experience with the Facility's decades of operations.

The same is true with respect to NYSDEC's issuance of an initial water withdrawal permit for the Greenidge Station. NYSDEC properly applied the mandates of the newly enacted Water Resources Protection Act, N.Y. Envtl. Conservation Law §§ 15-1501 *et seq.*, ("WRPA") and determined that the Facility was entitled to an initial water withdrawal permit. It then considered the potential environmental impacts as if it was a Type I action under SEQRA. Petitioners' claimed violations of the WRPA and SEQRA are therefore meritless and similarly ignore the substantial deference accorded to NYSDEC.

Finally, Petitioners once again failed to establish their standing to bring this action through member affidavits, both at the time they filed this action and again when they filed and served their supporting papers. As such, Petitioners have woefully failed to establish their standing to challenge either the Amended Negative Declaration or the related environmental permits. Moreover, Petitioners' attempt to establish standing based on "informational injury as a result of the lack of a full environmental impact statement" is wholly without basis in law or fact.

Accordingly, the Verified Petition must be dismissed in its entirety with prejudice.

FACTUAL AND PROCEDURAL BACKGROUND

The Greenidge Station is an electric generating facility located in the Town of Torrey, New York. *See* Hennessey Aff., ¶ 4. It currently consists of one 107 megawatt generating unit, known as Unit 4, which historically operated as a coal-fired power plant. *Id.*, ¶ 5. The Facility was initially constructed in the 1930s. *Id.*, ¶ 6. Unit 4 (the only remaining generating unit at Greenidge Station) was installed in 1953. *Id.* In March 2011, the Greenidge Station was put into temporary protective layup by the former owner AES Greenidge LLC. *Id.*, ¶ 7. Thereafter, on October 11, 2012, GMMM Greenidge, LLC (now known as Greenidge Generation, LLC) ("Greenidge") acquired the Facility. *Id.*, ¶ 8.

The Greenidge Project

Following its acquisition of the Facility, Greenidge sought to resume operations at the Greenidge Station. *Id.*, ¶ 20. As part of this, Greenidge proposed the Greenidge Project, which consisted of the following components:

a. In-plant construction that will allow the Unit 4 boiler to be operated on 100 percent natural gas (with up to 19 percent biomass co-firing).

b. Construction of a 4.6 mile pipeline to bring natural gas from the Empire Connector main natural gas supply line to Greenidge Station. This also includes construction of necessary auxiliary services, including a meter station, a regulation station and interconnection work.

Id.

The purpose of the Greenidge Project was to allow the Greenidge Station to produce electricity using 100 percent natural gas (with up to 19 percent biomass co-firing), and no longer burn coal as a fuel source. *Id.*, ¶ 21.

The in-plant construction and the construction of the 4.6 mile pipeline commenced on October 17, 2016 and was completed in March of 2017. *Id.*, ¶ 22. As a result, the Facility resumed operations in or around March 2017. *Id.*, ¶ 23.

NYSDEC Permitting

On December 3, 2012, Greenidge submitted a completed Application for Permit Transfer and Application for Transfer of Pending Application to NYSDEC for the transfer of the Greenidge Station's existing SPDES permit (SPDES # NY-00013235, effective 2/1/08, expiration 1/31/15) from the previous owner (AES Greenidge, LLC) to Greenidge. *See* Application for Permit Transfer (Hennessey Aff., Exh. A). On January 15, 2013, NYSDEC approved the transfer of the SPDES permit. *Id.*

In response to the newly enacted WRPA and as the holder of an existing SPDES permit, Greenidge timely applied for an initial water withdrawal permit ("WWP") from NYSDEC on May 28, 2013. Hennessey Aff., ¶ 19. The following year, in 2014, Greenidge submitted a timely permit renewal application to NYSDEC for renewal of the Greenidge Station's SPDES permit ("SPDES Renewal") and also applied to NYSDEC for the necessary Title IV and Title V air permits required for the Greenidge Project. *Id.*, ¶ 25.

Following its review of Greenidge's pending permit applications, on July 30, 2015, NYSDEC issued a Notice of Complete Application and a Negative Declaration, which provided the basis for NYSDEC's SEQRA determination that the resumption of operations at the Greenidge Station would not have a significant adverse impact on the environment. *Id.*, ¶ 26. NYSDEC published notice of its Negative Declaration in the Environmental Notice Bulletin ("ENB") on August 12, 2015. *Id.*, ¶ 27. Also on August 12, 2015, NYSDEC noticed its intention to issue the applied for Title IV and Title V air permits, SPDES Renewal and WWP to Greenidge and provided drafts of same for public comment. *Id.*, ¶ 28.

On September 11, 2015, Petitioner CPFL submitted comments to NYSDEC on the draft permits and the SEQRA Negative Declaration. *Id.*, ¶ 29. 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 or comments on the draft SPDES Renewal or WWP. *Id.*, ¶ 30. Neither Petitioner CPNY, nor Petitioner Seneca Lake Guardian submitted any comments to NYSDEC on either its Negative Declaration or draft permits. *Id.*, ¶ 31.

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. *Id.*, ¶ 32. NYSDEC also provided a copy of the Responsiveness Summary and the proposed Title V permit to Petitioners CPFL and Sierra Club. *Id.*

On December 7, 2015, USEPA issued a letter to NYSDEC that requested revisions to the draft Greenidge Station Title V air permit. *Id.*, ¶ 33. From January 2016 through June 2016, Respondent Greenidge Generation, LLC worked with NYSDEC and USEPA to modify the draft Title V air permit as requested by the USEPA. *Id.*, ¶ 34.

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 Station would not have a significant adverse impact on the environment. *Id.*, ¶ 35; Amended Negative Declaration (Hennessey Aff., Exh. D). While the Amended Negative Declaration included changes to the "Impacts on Air" section, the remainder of the Amended Negative Declaration, including the discussion on "Impacts to Surface Water," remained the same as the July 30, 2015 Negative Declaration. *See* Amended Negative Declaration (Hennessey Aff., Exh. D).

NYSDEC published notice of its Amended Negative Declaration in the June 29, 2016 ENB. Hennessey Aff., ¶ 36; June 29, 2016 ENB Notice (Hennessey Aff., Exh. E). 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. *Id.*, ¶ 37; June 29, 2016 ENB Notice (Hennessey Aff., Exh. E). On August 5, 2016, Petitioner CPFL submitted comments on the draft Title IV and Title V permits and the Amended Negative Declaration, which Petitioner Seneca Lake Guardian signed onto. *Id.*, ¶ 38. Petitioners Sierra Club and CPNY did not submit any comments to NYSDEC. *Id.*, ¶ 39. On September 8, 2016, NYSDEC issued the final Title IV and Tile 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. *Id.*, ¶ 40.

NYSDEC issued the SPDES Renewal and WWP to Greenidge on September 11, 2017, in substantially the same form as the draft permits that were noticed in July 30, 2015. *See* Hennessey Aff., ¶ 41; SPDES Renewal and WWP (Hennessey Aff., Exhs. F & G).

Prior Litigation

As this Court is aware, on October 28, 2016 and as later amended on December 6, 2016, Petitioners Sierra Club, CPFL and CPNY filed an Article 78 lawsuit challenging NYSDEC's approval of the Greenidge Project, including its SEQRA review and Amended Negative Declaration. *See* December 6, 2016 Amended Verified Petition (Hennessey Aff., Exh. I). In their Amended Verified Petition, Petitioners sought (1) annulment of NYSDEC's Amended Negative Declaration; (2) annulment of the September 8, 2016 issued Title IV and Title V air permits; (3) an injunction prohibiting NYSDEC from issuing the SPDES Renewal and WWP; and (4) an injunction prohibiting Greenidge from taking steps to resume operations at the

Greenidge Station or constructing the 4.6 mile pipeline authorized by the New York State Public Service Commission ("NYSPSC"). *Id.*

By Decision dated April 21, 2017, this Court denied Petitioners' motion for a temporary injunction, granted the Greenidge Respondents' and NYSDEC's motions to dismiss, and found that NYSDEC "followed the law and its decision was not arbitrary, capricious or an abuse of discretion." *See* Prior Decision (Hennessey Aff., Exh. K), p. 7.

Petitioners commenced the present action seeking to relitigate the SEQRA claims already decided in this Court's April 21 Decision, by filing a Verified Petition on November 8, 2017. The November 8, 2017 Verified Petition seeks (1) annulment of the September 11, 2017 SPDES Renewal and WWP; (2) reversal of NYSDEC's Type II designation of Greenidge's water withdrawal application; and (3) annulment of NYSDEC's Amended Negative Declaration. In support of their Verified Petition, Petitioners filed a Memorandum of Law and supporting Affirmation on December 22, 2017. Petitioners did not file any organization or member affidavits in support of the Verified Petition.

The Greenidge Respondents now submit this Memorandum of Law and accompanying Answer and Objections in Point of Law in response to the Verified Petition.

ARGUMENT

POINT I

PETITIONERS' CLAIMS ARE PROCEDURALLY DEFECTIVE

A. Petitioners' Claims are Barred By *Res Judicata*

As with their prior Article 78 proceeding challenging NYSDEC's review and approval of the Greenidge Project, Petitioners once again challenge NYSDEC's environmental review under SEQRA and its Amended Negative Declaration. *See* Verified Petition, Second and Fourth Causes of Action. Because Petitioners have previously litigated these claims against Respondents arising out of the very same SEQRA Amended Negative Declaration, and a final judgment was issued, Petitioners' claims arising out of the SEQRA Amended Negative Declaration issued by NYSDEC are barred.

Under the doctrine of *res judicata* (also called claim preclusion), "a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter." *In re Hunter*, 4 N.Y.3d 260, 269 (2005); *see also Matter of Reilly v. Reid*, 45 N.Y.2d 24, 31 (1978) ("[T]he essential identity of petitioner's two causes of action requires invocation of the doctrine of claim preclusion. To conclude otherwise would be to afford petitioner a second opportunity to obtain substantially the same relief he was denied in the prior proceeding.").

Courts have held that *res judicata* "will bar litigation of a claim that was either raised, or could have been raised, in a prior proceeding provided that the party to be barred had a full and fair opportunity to litigate any cause of action arising out of the same transaction and the prior disposition was a final judgment on the merits." *Matter of Feldman v. Planning Bd. of the Town of Rochester*, 99 A.D.3d 1161, 1163 (3d Dep't 2012) (omitting internal citations). Under New York's transactional analysis, "once a claim is brought to a final conclusion, all other

claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981).

Courts have specifically rejected, as Petitioners attempt here, efforts to relitigate claims alleging violations of SEQRA. *See Matter of Bd. of Fire Comm'r of the Fairview Fire Dist. v. Town of Poughkeepsie Planning Bd.*, 156 A.D.3d 624, 627 (2d Dep't 2017) ("Since the court already determined . . . that the SEQRA determination was valid, the petitioner is barred from relitigating the validity of the SEQRA determination . . . ."); *see Matter of East End Prop. Co. #1, LLC v. Town Bd. of Town of Brookhaven*, 56 A.D.3d 773, 777 (2d Dep't 2008) ("Moreover, the petitioners are foreclosed by the doctrines of res judicata and collateral estoppel from claiming that the SEQRA review conducted by LIPA was inadequate since those claims were litigated or could have been litigated in the prior hybrid proceeding and action commenced by the petitioners in the Supreme Court, Nassau County . . . .").

For example, in *Miller v. Kozakiewicz*, 300 A.D.2d 399, 399 (2d Dep't 2002), the petitioners sought review of two resolutions adopted by the town board, which had granted two special permits for the construction of a shopping center. The petitioners had previously commenced an Article 78 proceeding contesting the accuracy of the associated SEQRA review. *Id.* at 400. Later, the petitioners commenced the action before the court alleging that the town board mistakenly relied on inadequate and misleading information in the environmental impact statement that was prepared pursuant to SEQRA. *Id.* The court held that such claims were barred because the petitioners had a "full and fair opportunity to contest the accuracy of the SEQRA review" in the first action. *Id.* The court's decision took into account that "although the

present claim . . . is based on a different theory, it arises from the same transaction, i.e. the town board's resolution . . . to adopt the SEQRA findings." *Id.*

Petitioners now, again, claim that NYSDEC failed to comply with SEQRA when it determined that the issuance of Greenidge's SPDES Renewal and WWP would result in no significant adverse impacts on the environment based on the analysis included in the Amended Negative Declaration. *See* Verified Petition ¶ 112.

Here, NYSDEC issued Greenidge's SPDES Renewal and WWP on September 11, 2017 (*see* SPDES Renewal and WWP, Hennessey Aff., Exhs. F & G), supported by its previously issued Amended Negative Declaration dated June 28, 2016 (*see* Amended Negative Declaration, Hennessey Aff., Exh. D). The Amended Negative Declaration supported not only the Title IV and Title V air permits, but also the Facility's SPDES Renewal and the WWP. *Id.* In doing so, it provided an analysis of all of the environmental impacts associated with the Greenidge Project, including those potentially related to the SPDES Renewal and WWP, and the associated environmental impacts on air, water, plants and animals, historic and archeological resources, impacts on energy and solid waste management. *Id.*

Petitioners, in an amended petition (the "2016 Amended Petition") challenged this very same Amended Negative Declaration in *Sierra Club et al. v. New York State Dept. of Envtl. Conservation, et al*, Index No. 2016-12224 (Sup. Ct. Yates County Apr. 21, 2017) (the "Prior Decision"). *See* 2016 Amended Petition (Hennessey Aff., Exh. I). Specifically, in the 2016 Amended Petition, Petitioners explicitly challenged NYSDEC's SEQRA Amended Negative Declaration and, despite their post hoc re-characterization of the prior action, Petitioners' SEQRA challenge set out in the 2016 Amended Petition was predominately related to the environmental impact on Seneca Lake associated with the Greenidge Station's water discharges

and water withdrawals that are permitted by the Facility's SPDES Renewal and WWP. *See* 2016 Amended Petition (Hennessey Aff., Exh. I), ¶¶ 47-48, 62-64, 70-72. Indeed, Petitioners' prior claims also almost completely mirrors the alleged SEQRA deficiencies now urged by Petitioners; namely that the Amended Negative Declaration was an improper conditional negative declaration (*compare* 2016 Amended Petition ¶ 100, *with* Verified Petition ¶¶ 109-112), improperly segmented review (*compare* 2016 Amended Petition ¶ 97, *with* Verified Petition ¶ 111); and utilized an improper baseline (*compare* 2016 Amended Petition ¶ 90 *with* Verified Petition ¶ 111). And to the extent that they differ, such "new" SEQRA claims "could have been raised in the prior litigation." *Compare* Verified Petition ¶¶ 96-100 (challenging Type II designation for WWP), *with* Amended Negative Declaration (Hennessey Aff., Exh. D), p. 2 (listing action at Type II).

On April 21, 2017, this Court denied Petitioners' request to annul NYSDEC's SEQRA Amended Negative Declaration, and dismissed the 2016 Amended Petition. *See* Prior Decision (Hennessey Aff., Exh. K). In dismissing the 2016 Amended Petition, the Court wrote: "Petitioners' request to annul Respondent [NYS]DEC's SEQRA finding and June 28, 2016 negative declaration is also denied. A review of the findings contained in this decision find that Respondent [NYS]DEC followed the law and its decision was not arbitrary, capricious or an abuse of discretion." *See* Prior Decision (Hennessey Aff., Exh. K), p. 7. Therefore, this Court ordered that "the petition is dismissed on the merits according to the decision dated April 21, 2017." *See* June 20, 2017 Order (Hennessey Aff., Exh. L), p. 3.

Thus, as in the *Miller* case, here Petitioners' arguments regarding SEQRA were previously raised in the 2016 Amended Petition and were decided by this Court. *See* Prior Decision (Hennessey Aff., Exh. K). Petitioners' claims challenging NYSDEC's SEQRA review

are therefore barred. The fact that the SPDES Renewal and WWP were subsequently issued does not change any of the underlying issues and Petitioners' SEQRA claims in the instant action arise out of the "same transaction." *See In re Hunter*, 4 N.Y.3d at 269.

B. Petitioners' SPDES Permit Transfer and SEQRA Claims Are Time-Barred

Petitioners claim that NYSDEC violated ECL Article 17 because the ECL does not authorize transfer of SPDES permits. *See* Verified Petition ¶ 102. They also raise a number of SEQRA claims. *See* Verified Petition, Second and Fourth Causes of Action. Not only are Petitioners' claims erroneous (*see* Point III, *infra*), they are untimely.

CPLR Article 78 applies to challenges of agency actions and is limited by a four-month statute of limitations period. *See* N.Y. C.P.L.R. § 217; *see, e.g., New York City Health & Hosps. v. McBarnette*, 84 N.Y.2d 194 (1994).

On December 3, 2012, a complete Application for Permit Transfer and Application for Transfer of Pending Application was submitted to NYSDEC for the transfer of the Greenidge SPDES permit (SPDES # NY-00013235, effective 2/1/08, expiration 1/31/15) from the previous owner to Greenidge (previously known as GMMM Greenidge, LLC). *See* Application for Permit Transfer (Hennessey Aff., Exh. A). On January 15, 2013, the NYSDEC approved the transfer of the SPDES permit from the previous owner (AES Greenidge LLC) to Greenidge, effective December 27, 2012. *Id.*

Accordingly, because the SPDES permit transfer was completed, at the latest, in January 2013, the statute of limitations on any claim arising out of the SPDES permit transfer expired four months later, in April 2013. Thus, Petitioners' claims arising out of the SPDES Permit transfer are time-barred and must be dismissed.

Likewise, Petitioners' claims arising out of NYSDEC's SEQRA review are also time-barred. It is well established that an Article 78 proceeding challenging SEQRA compliance

must be commenced within four months of the final determination of the lead agency. *See* N.Y. C.P.L.R. § 217(1); *Matter of Young v. Board of Trustees*, 89 N.Y.2d 846, 868 (1996); *Metropolitan Museum Historic Dist. Coalition v. Montebello*, 20 A.D.3d 28, 34 (1st Dep't 2005). A determination is "final" when the agency arrives at a definitive position on the issue that inflicts an actual, concrete injury. *See Stop-the-Barge v. Cahill*, 1 N.Y.3d 218, 223 (2003); *Matter of Essex Cty. v. Zagata*, 91 N.Y.2d 447, 453 (1998).

Here, the Amended Negative Declaration was published by NYSDEC in the ENB on June 28, 2016, which specifically included an analysis of the environmental impacts associated with the SPDES Renewal and WWP, as well as the air permits. *See* Amended Negative Declaration (Hennessey Aff., Exh. D). Accordingly, Petitioners had four months from June 29, 2016, or from September 8, 2016 at the latest, to challenge NYSDEC's SEQRA review and its Amended Negative Declaration. As such, the time for Petitioners' challenges arising out of the NYSDEC's Amended Negative Declaration has long since passed, and now is time-barred.

C. Petitioners Lack Standing

Standing requirements are an indispensable part of any challenge to a governmental action, and each element of standing must be proven in order for the challenge to survive. *New York State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004). As Petitioners have not alleged sufficient facts to satisfy even the most basic elements of individual or organizational standing, or filed even a single affidavit, the entire Verified Petition must be dismissed.

"[T]here is a limit on those who may raise environmental challenges to governmental actions." *Turner v. County of Erie*, 136 A.D.3d 1297, 1297-98 (4th Dep't 2016). An organization or association that challenges a SEQRA determination must show that (1) at least one of its members would have standing to sue individually; (2) the interests in the matter are

germane to its purpose to show that it is the appropriate representative of those interests; and (3) neither the asserted claim nor the relief requires the participation of its individual members. *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 774 (1991).

Petitioners bear the burden of establishing that at least one individual member from each organization has suffered an "injury-in-fact" that is separate from the public at large, otherwise no standing exists. *Turner*, 136 A.D.3d at 1297-98; *see also Save the Pine Bush, Inc. v. City of Albany*, 13 N.Y.3d 297, 306 (2009) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The injury-in-fact requirement cannot be met by conclusory allegations of harm or speculation of potential harm from future events. *New York State Ass'n of Nurse Anesthetists*, 2 N.Y.3d at 214 (noting that "tenuous and ephemeral harm is insufficient to trigger judicial intervention."); *Kindred v. Monroe Cty.*, 119 A.D.3d 1347, 1348 (4th Dep't 2014) (concluding that the alleged environmentally-related injuries were too speculative and conjectural to prove an actual and specific injury-in-fact). It also is not enough that the concern or injury is of wide public concern, *Brown v. County of Erie*, 60 A.D.3d 1442, 1444 (4th Dep't 2009), as "[a] general – or even special – interest in the subject matter is insufficient to confer standing" as "interest and injury are not synonymous." *Niagara Preserv. Coal., Inc. v. New York Power Auth.*, 121 A.D.3d 1507, 1510 (4th Dep't 2014) (citing *Citizens Emergency Comm. to Preserv. v Tierney*, 70 A.D.3d 576, 576 (1st Dep't 2010), *lv. denied*, 15 N.Y.3d 710 (2010)). It is not enough that the concern or injury is of wide public concern. *Brown*, 60 A.D.3d at 1444.

Here, the Verified Petition does not present sufficient facts, let alone facts supported by the requisite sworn testimony, to establish any element of standing necessary to challenge NYSDEC's SEQRA determination or permit issuances. *See Society of Plastics Indus.*,

77 N.Y.2d at 778 (requiring that a Petitioner offer probative evidence, as allegations without evidentiary support are patently insufficient).

None of the Petitioners have asserted that a single member has standing to sue. Indeed, there is not even a single affidavit attempting to establish Petitioners' standing.[2] Instead, general unparticularized statements are offered in the Verified Petition, sworn to only by their attorney, alleging that Petitioners will be injured by "operations damaging the water quality of Seneca Lake . . . ." Verified Petition ¶¶ 6-8. And, although CPFL president, Peter Gamba, CPNY's treasurer, Kathryn Bartholomew, and Seneca Lake Guardian's co-founder Yvonne Taylor are named, not a single fact is alleged of how Mr. Gamba, Ms. Bartholomew or Ms. Taylor have suffered any injury, let alone an environmental injury. *Id.*, ¶¶ 7-9.

Further, Petitioners have not asserted or even inferred a direct injury, only that "many of CPFL's members live on or near Seneca Lake . . . ." Verified Petition ¶ 7. However, that unspecified members of just one Petitioner member organization live in the overall region of a project is patently insufficient to establish standing. *Sun-Brite Car Wash, Inc. v. Board of Zoning & Appeals*, 69 N.Y.2d 406, 414 (1987) (noting that even status as a neighbor does not provide automatic entitlement to standing).

CPFL states that its general purpose is to "preserve the natural beauty and the purity of the water in the Finger Lakes region" while CPNY asserts that it "promote[s] the health and vibrancy of [ ] land and resources." Verified Petition ¶¶ 7, 8. Likewise, Seneca Lake Guardian states that its mission "is to protect Seneca Lake from the many threats that endanger Seneca

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[2] The Uniform Rules of Trial Courts require an Article 78 petitioner to carry its burden of proof when it serves its petition. *See* 22 N.Y.C.R.R. § 202.8(c) ("[t]he moving party shall serve copies of *all* affidavits and briefs upon all other parties at the time of service of the notice of motion.") (emphasis added); *see also* 22 N.Y.C.R.R. § 202.9 ("Special proceedings shall be commenced and heard in the same manner as motions that have not yet been assigned to a judge as set forth in section 202.8 of this Part, except that they shall be governed by the time requirements of the CPLR relating to special proceedings.").

Lake's waters." Verified Petition ¶ 9. These general interests in the beauty and health of the environment do not establish an injury that is based on NYSDEC's issuance of the Amended Negative Declaration, or the subsequent issuance of the SPDES Renewal and WWP. *See Lujan*, 504 U.S. at 560; *New York State Ass'n of Nurse Anesthetists*, 2 N.Y.3d at 211; *Niagara Preserv. Coal., Inc.*, 121 A.D.3d at 1509.

Petitioners also claim that they have suffered an "informational injury" as a result of the lack of a full environmental impact statement ("EIS") finds no basis in law or fact. First, Petitioners have not provided, and the Greenidge Respondents have been unable to find, a single case in New York addressing the issue of "informational injury." The legal viability of informational injury in New York is, therefore, questionable at best. *Atlantic States Legal Found. v. Babbit*, 140 F. Supp. 2d 185, 192-93 (N.D.N.Y. 2001). Second, Petitioners do not provide any claim of informational injury to an individual member. Petitioners provide only generalized and conclusory statements in the Petition that the "members suffer informational injury." Third, standing based solely on informational injury would allow organizational plaintiffs to undermine established principles of standing, which requires the establishment of concrete particularized harm, by simply requesting that an agency prepare an EIS. *Atlantic States Legal Found.*, 140 F. Supp. 2d at 194.

In sum, Petitioners have failed to meet their burden of establishing standing to challenge NYSDEC's Amended Negative Declaration or its issuance of the SPDES Renewal and WWP. Petitioners' claims, therefore, fail and must be dismissed.

POINT II

NYSDEC IS ENTITLED TO SUBSTANTIAL DEFERENCE

Petitioners allege that NYSDEC (1) violated the WRPA in issuing a WWP to Greenidge without imposing required terms and conditions; (2) violated the SPDES law in issuing the

SPDES Renewal without imposing required terms and conditions; and (3) violated SEQRA by issuing the SPDES Renewal and WWP to Greenidge without conducting an adequate review of the impacts of the Greenidge Station's operations. *See* Verified Petition ¶¶ 2-4. Because NYSDEC is afforded substantial deference in making such determinations that are within its expertise, Petitioners' claims fail.

It is well settled that an agency's interpretation of a statute or regulation should be granted substantial deference if that agency is responsible for administering the statutory program and its decision is rationally based. *Chevron, U.S.A. v. NRDC*, 467 U.S. 837 (1984); *City Council v. Town Bd.*, 3 N.Y.3d 508, 518 (N.Y. 2004); *Carver v. State of New York*, 87 A.D.3d 25, 33 (2d Dep't 2011). This includes decisions to issue a negative declaration. *Riverkeeper, Inc. v. Town of Southeast*, 9 N.Y.3d 219, 231 (2007); *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990). Therefore, judicial review of a lead agency's decision is limited to whether the determination complied with the procedural and substantive requirements of SEQRA and was rationally based. *Chinese Staff & Workers' Ass'n v. Burden*, 19 N.Y.3d 922, 924 (2012).

"While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives.'" *Riverkeeper, Inc.*, 9 N.Y.3d at 232 (citing *Akpan v. Koch*, 75 N.Y.2d at 570); *see also Jackson v. New York State Urban Dev Corp.*, 67 N.Y.2d 400 (1986); *Village of Chestnut Ridge v. Town of Ramapo*, 99 A.D.3d 918, 925 (2d Dep't 2012); *New York Youth Club v New York City Envtl. Control Bd.*, 39 Misc. 3d 1204(A), *3 (N.Y. Sup. Ct. Queens County 2013) ("Upon judicial review, a court is not free to substitute its judgment for that of the agency on substantive matters."). Therefore, even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the NYSDEC. *Lane*

Constr. v. Cahill, 270 A.D.2d 609, 611 (3d Dep't 2000); *Westwater v. New York City Bd. of Standards & Appeals*, No. 100059/13, 2013 N.Y. Misc. LEXIS 4707, at *28 (Sup. Ct. N.Y. County 2013).

NYSDEC is the agency responsible for administering the statutory programs for the WRPA, SPDES[3] and SEQRA. *See* ECL Articles 8, 15 and 17. It is also the agency charged with promulgating regulations to implement each of these statutes, and the associated permit programs, because it has the requisite expertise. *See id.*; 6 N.Y.C.R.R. Parts 601, 617, and 750. Petitioners have not shown how NYSDEC's actions in issuing the SPDES Renewal and WWP to Greenidge, or the supporting Amended Negative Declaration, were irrational. NYSDEC is not acting irrationally simply because Petitioners' disagree with its environmental review and related permitting decisions.

Since NYSDEC's actions and decisions are afforded substantial deference, and were consistent with the applicable statutory schemes and implementing regulations, Petitioners' claims (assuming arguendo that they are not procedurally defective) must fail.

POINT III

PETITIONERS' CLAIMS LACK MERIT

A. NYSDEC's SEQRA Amended Negative Declaration Adequately Analyzed All Environmental Impacts Associated with the Resumption of Greenidge Operations

Petitioners' SEQRA claims, which seek (again) to have this Court second-guess NYSDEC's decision to issue an Amended Negative Declaration for the resumption of operations at the Greenidge Station, are misplaced and ignore NYSDEC's expertise and the substantial deference accorded to same. Such claims must therefore be rejected *in toto*.

[3] The USEPA delegated authority to New York State to implement the Clean Water Act National Pollutant Discharge Elimination System ("NPDES") permit program through the New York State SPDES program. *See* 6 N.Y.C.R.R. § 621.2(g).

1. NYSDEC's Amended Negative Declaration Is Not a Conditioned Negative Declaration

Petitioners erroneously claim that NYSDEC's Amended Negative Declaration was a "Conditioned Negative Declaration." Verified Petition ¶¶ 4, 110.[4] The basis of Petitioners' claim is that NYSDEC's modifications to the Greenidge Station's SPDES Renewal, to include Best Technology Available ("BTA") measures for fish entrainment and impingement and a dilution study, were impermissible conditions of the Amended Negative Declaration. Verified Petition ¶ 110. Not only is this claim barred and untimely (*see* Point I, *supra*), as this Court determined in the prior litigation, it lacks merit. *See* Prior Decision (Hennessey Aff., Exh. K). Modifications to the Greenidge Station SPDES permit do not make the Amended Negative Declaration a Conditioned Negative Declaration, because they are standards required by NYSDEC's SPDES permit program – not conditions that are outside of NYSDEC's authority.

A lead agency can include in a negative declaration "conditions which are explicitly-articulated standards (either numerical or narrative) within that lead agency's underlying jurisdiction, or conditions that an applicant is otherwise legally obligated to meet in order to obtain a permit or approval." *See* NYSDEC SEQRA HANDBOOK, *available at* http://www.dec.ny.gov/ permits/48068.html (also stating that under such circumstances, the lead agency may issue a negative declaration and need not issue a conditional negative declaration).[5] Here, NYSDEC was the SEQRA lead agency, and is also charged with implementing the SPDES

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[4] Petitioners failed to raise this argument before the NYSDEC as part of the multiple public comment periods. At a minimum, such failure is a factor the Court should consider in upholding the Amended Negative Declaration. *See Jackson*, 67 N.Y.2d at 442; *see also In re Michalak*, 286 A.D.2d 906, 908 (4th Dep't 2001) ("That contention is not properly before us because petitioners failed to raise it at the administrative level and thus failed to exhaust their administrative remedies with respect to it").

[5] The SEQRA Handbook has been repeatedly referenced and cited by courts interpreting SEQRA's provisions. *See, e.g., Matter of Association for Protection of Adirondacks Inc. v. Town Bd. of Town of Tupper Lake*, 17 Misc. 3d 1122(a) (Sup. Ct. Franklin County, Nov. 2, 2007) (unpublished) ("The SEQRA Handbook promulgated by the [NYS]DEC, whether in draft form or not, is a basic source material for agencies to use in interpreting SEQR[A].").

permit program, which includes BTA for cooling water intake structures requirements. 6 N.Y.C.R.R. § 704.5. The BTA and other Greenidge SPDES permit conditions complained of by Petitioners are explicitly-articulated permit standards and requirements associated with the NYSDEC's own regulations and SPDES permit program. *See* 6 N.Y.C.R.R. § 704.5; 6 N.Y.C.R.R. Part 750; *see also* 33 U.S.C. § 1326.

Accordingly, NYSDEC's Amended Negative Declaration is not a Conditioned Negative Declaration, and Petitioners' claim to the contrary must be rejected.

2. The Amended Negative Declaration Is Complete and Does Not Segment the SEQRA Review

Petitioners claim that NYSDEC segmented its SEQRA review by not including an analysis of the impacts on the Lockwood Hills landfill ("Lockwood") associated with solid waste (ash) generation. Verified Petition ¶ 111. Again, not only is this claim barred and untimely (*see* Point I, *supra*), as this Court determined in the prior litigation, it lacks merit. *See* Prior Decision (Hennessey Aff., Exh. K).

At the outset, valid SPDES and Part 360 permits (DEC Permit Nos. 8-5736-00005/00001 and 8-5736-00005/00003, respectively) are currently in place for Lockwood, which is on separate property located across Route 14 from the Greenidge Station. *See* 2017 Responsiveness Summary (Hennessey Aff., Exh. H). No changes to Lockwood's permits were necessary or have been sought as a result of the Greenidge Project, and Petitioners do not even claim as much.

Furthermore, NYSDEC's environmental review of the impacts of the Greenidge Project's waste management is evident. *See* DEC Response to Comments (Hennessey Aff., Exh. H); *see also* Amended Negative Declaration (Hennessey Aff., Exh. D). The Amended Negative Declaration includes a section titled "Solid Waste Management," which specifically discusses

the solid waste impacts associated with the Greenidge Project, including disposal of ash. *See* Amended Negative Declaration (Hennessey Aff., Exh. D), p. 4.

The Lockwood Part 360 permit allows Lockwood to accept 1,729 tons per day of ash, which equates to 631,085 tons per year. The two most recent years that Greenidge operated using coal, 88,309 and 87,311 tons per year were disposed of at Lockwood. *Id.* After the resumption of operation of the Greenidge Station on natural gas, with the ability to co-fire biomass, the Greenidge Station's operations will generate no more than 6,500 tons of ash each year. *Id.* This is well below the amount Lockwood Hills is permitted to accept, and well below the previous amount of ash disposed of at Lockwood Hills. *Id.* As such, NYSDEC correctly determined that "there are no significant adverse impacts related to solid waste management associated with [the Greenidge] project." *Id.*

That Lockwood Hills LLC landfill signed a consent order with NYSDEC, for which it is in full compliance and SEQRA is not implicated, does not change the SEQRA analysis associated with the Greenidge Project or suggest segmentation. *See* 2017 Responsiveness Summary (Hennessey Aff., Exh. H). Indeed, Petitioners have failed to cite any case law or other support for their claim to the contrary.

Accordingly, the record before NYSDEC establishes that NYSDEC adequately reviewed the potential solid waste impacts associated with the Greenidge Project and that there was no improper SEQRA segmentation.

3. Irrespective of the Type II Designation, the NYSDEC Conducted a Full and Appropriate Environmental Review of Greenidge's Water Withdrawal Permit Application

Petitioners also claim that NYSDEC improperly characterized its issuance of Greenidge's water withdrawal permit as a Type II action and assert that it should have been designated a Type I action. Even assuming it is not time-barred (*see* Point I(B), *supra*), Petitioners' SEQRA

challenge to NYSDEC's Type II designation ignores the record before the NYSDEC and the clear language of the Amended Negative Declaration.

The Amended Negative Declaration states in relevant part:

> Although the Department has classified the issuance of an initial permit under 6 NYCRR Part 601 as a Type II action under SEQR (6 NYCRR 617.5[c][19]) and, therefore not subject to SEQR, substantively, in this instance - *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.*

Amended Negative Declaration (Hennessey Aff., Exh. D), p. 2. The air permits and SPDES Renewal were, in turn, designated as Type 1 actions. *Id.*, p. 1.

Accordingly, Petitioners' assertions that the Greenidge initial water withdrawal permit should have been considered as Type I action occurred. Their SEQRA designation claim is therefore misplaced and should be rejected.

4. The SEQRA Baseline Used By NYSDEC to Evaluate the Environmental Impact of the Resumption of Operations at Greenidge Was Appropriate

Once again, and without any support whatsoever, Petitioners argue that NYSDEC's SEQRA review was inadequate because NYSDEC used the wrong baseline when it completed its environmental review of the Greenidge Project and issued its Amended Negative Declaration finding no significant adverse environmental impact. *See* Verified Petition, Fourth Cause of Action. In addition to being barred and untimely (*see* Point I, *supra*), Petitioners' argument fails and should be rejected by the Court just as it was in the prior action.

Notably, Petitioners fail to cite any case law for their improper baseline argument and suggestion that the NYSDEC should have "compare[d] the environmental impacts of the restarted operations of no operations[.]" This is because they cannot and their claim really boils down to revisionist history and disagreement with NYSDEC's SEQRA expertise.

Indeed, NYSDEC acknowledged as part of its SEQRA review that the Facility had been in protective lay-up since 2011. However, it also properly recognized that this was not a "new" generating station being permitted, but rather a facility that began operations as early as the 1930s, with Unit 4 being installed in 1953. *See* Amended Negative Declaration (Hennessey Aff., Exh. D). In other words, the baseline was a facility that operated for approximately 80 years with coal as its primary fuel source. *Id.* The mere fact that the Facility was in protective lay-up status for a few years does not alter this as Petitioners urge. Faced with these irrefutable facts, NYSDEC exercised its expertise and substantial experience implementing SEQRA to determine the baseline here. Indeed, it would have been improper to do as Petitioners suggest – which would be to ignore the Facility's long-standing operations.

Moreover, the administrative record is clear that NYSDEC took the appropriate hard look at the potential environmental impacts of the Greenidge Project in issuing its Amended Negative Declaration. *See, generally,* Amended Negative Declaration (Hennessey Aff., Exh. D) (detailing agency's environmental review and the basis for its determination). As the agency charged with administering SEQRA, NYSDEC's decisions are entitled to substantial deference. *See, e.g., Chevron, U.S.A.*, 467 U.S. 837; *City Council*, 3 N.Y.3d at 518; *Carver*, 87 A.D.3d at 33; *see* Point II, *supra.* Respectfully, neither Petitioners, nor this Court may substitute their judgment for that of NYSDEC. *See Riverkeeper, Inc.*, 9 N.Y.3d at 232 (citing *Akpan v. Koch*, 75 N.Y.2d at 570); *see also Village of Chestnut Ridge*, 99 A.D.3d at 925 ("Upon judicial review, a court is not free to substitute its judgment for that of the agency on substantive matters . . . .") (internal quotations and citations omitted). Accordingly, Petitioners' allegations that NYSDEC used an improper baseline must be rejected.

B. Greenidge's Water Withdrawal Permit Was Properly Issued in Accordance with the Water Resources Protection Act and SEQRA

Petitioners maintain that NYSDEC violated the WRPA when it failed to include required terms and conditions because (1) NYSDEC erred in treating Greenidge's WWP application as an application for an initial permit, and (2) even if entitled to an initial permit, appropriate terms and conditions were required. Verified Petition ¶ 3. On multiple, independent grounds, Petitioners' claims fail; NYSDEC's issuance of Greenidge's WWP complied in all respects with the WRPA.[6]

1. NYSDEC Properly Issued Greenidge an Initial Water Withdrawal Permit as Required by the Water Resources Protection Act

According to Petitioners, because Greenidge was in protective lay-up status at the time it submitted its WWP application, it was not entitled to an initial permit. Tellingly, Petitioners fail to cite any authority for their argument. This is because they cannot. A plain reading of the WRPA and the unequivocal legislative intent establish Greenidge's entitlement to an initial WWP.

The WRPA states in no uncertain terms:

> The department *shall issue an initial permit*, subject to appropriate terms and conditions as required under this article, to any person not exempt from the permitting requirements of this section, *for the maximum water withdrawal capacity reported to the department pursuant to the requirements of title sixteen or title thirty-three of this article* ***on or before February fifteenth, two thousand twelve.***

[6] To the extent that Petitioners claim that the Facility improperly resumed operations without an initial water withdrawal permit, their claim is belied by the statute and NYSDEC's implementing regulations which require only that the owner of a facility entitled to an initial water withdrawal permit timely file an application with NYSDEC. *See* N.Y. Envtl. Conservation Law §§ 15-1501 *et seq.*; 6 N.Y.C.R.R. § 601.7; *compare* 6 N.Y.C.R.R. § 601.6 (setting forth requirements for new (as opposed to initial) permits and stating that "*Except to the extent that it is otherwise explicitly stated in this Part*, no person shall take any of the following actions without first having obtained a water withdrawal permit") (emphasis added), *with* 6 N.Y.C.R.R. § 601.7 (setting forth requirements for initial permits).

ECL § 15-1501(9) (emphasis added); *see also* 6 N.Y.C.R.R. § 601.7 (expressly applicable to initial permits, as opposed to new permits, and applicable to facilities that operated a water withdrawal system and reported their withdrawals to NYSDEC on or before February 15, 2012).

This entitlement to an initial WWP is reiterated by the legislative intent. *See, e.g.*, Assembly Memorandum in Support (A5318-A, Sweeney, M.A.) (confirming that initial permits would be issued for water withdrawal capacities reported to NYSDEC on or before February 15, 2012) and NYSDEC Memorandum (A5318-A) (recommending approval, noting that the agency had worked extensively with stakeholders, including industry and environmental advocates, to resolve their concerns in drafting the bill, and reassuring that "all existing water withdrawals would be entitled to an initial permit."), L. 2011, ch. 401 Bill Jacket.[7]

The statutory entitlement speaks in terms of reported water withdrawal capacity on or before February 15, 2012 and not operations, as Petitioners suggest. Indeed, Greenidge complied with this requirement by reporting its water withdrawal capacities to NYSDEC, and Petitioners do not claim otherwise. As such, Petitioners' claim that NYSDEC improperly issued Greenidge an initial WWP fails.

2. The Terms and Conditions of the Greenidge Initial Water Withdrawal Permit Satisfied the Requirements of the Water Resources Protection Act

Petitioners also claim that NYSDEC failed to include appropriate terms and conditions in Greenidge's initial WWP as required by ECL § 15-1501(9). *See* Verified Petition ¶ 94. Once again, Petitioners ignore the administrative record, particularly the specific terms and conditions set forth in Greenidge's WWP.

Here, the WWP issued by NYSDEC contains the following conditions:

1. "obtain an appropriate SPDES permit that allows or the operation of a cooling water intake structure and the discharge of the [approved] amounts of water"

[7] A true and accurate copy of the Bill Jacket for the WRPA is attached to the Hennessey Affirmation as Exhibit C.

2. incorporation of the Facility's SPDES permit "measures for water conservation and the reduction of impacts to fisheries resource"

3. installation and maintenance of meters and other appropriate devices;

4. meter calibration;

5. development of a leak detection and repair program;

6. water audits;

7. reporting; and recordkeeping.

See WWP (Hennessey Aff., Exh. G). Combined, these conditions more than satisfy the WRPA. *See also* Point II, *supra* (detailing discretion afforded NYSDEC in its area of substantive expertise).

Tellingly, Petitioners not only fail to acknowledge these terms and conditions, they also glaringly fail to identify a single term or condition that NYSDEC failed to include in Greenidge's WWP. Accordingly, Petitioners' unspecified and conclusory WRPA claim must be rejected.

3. NYSDEC's Issuance of the Greenidge SPDES Permit Complied Fully With All Applicable Laws

Petitioners maintain that NYSDEC violated the Federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, and New York State's Water Pollution Control Laws, N.Y. Envtl. Conservation Law §§ 17-1501 *et seq.*, when it failed to include required terms and conditions in Greenidge's SPDES Renewal because NYSDEC allegedly erred in (1) transferring the Facility SPDES permit to Greenidge; (2) renewing the Facility's SPDES permit; and (3) not requiring closed-cycle cooling in the SPDES Renewal. Verified Petition ¶¶ 102-106. Petitioners' claims wholly lack merit and must be rejected.

(a) Transfer of the SPDES Permit to Greenidge Generation LLC Was Proper

Petitioners argue that the 2013 transfer of the Greenidge SPDES permit from AES to Greenidge Generation, LLC (f/k/a GMMM Greenidge, LLC) was improper because NYSDEC lacks the authority to transfer a SPDES permit. Verified Petition ¶ 103. Even if Petitioner's claim was not barred by the statute of limitations, which it is (*see* Point I(B), *supra*), it is simply wrong that NYSDEC may transfer SPDES permits and, as relevant here, properly transferred Greenidge's SPDES permit from the former owner to Greenidge.

Part 750 of the NYSDEC regulations govern SPDES permits. Relevant here, Section 750-1.17, entitled "Transfer of Permits," explicitly authorizes the transfer of a SPDES permit and sets for the required timing and manner in which an application to transfer a permit must be made. *See, e.g.*, 6 N.Y.C.R.R. § 750-1.17(a) ("To transfer a permit to a new owner or operator, written application for permit modification must be made to the department on the forms provided by the department for permit transfers.").

Following a timely application in accordance with Part 750-1.17, the SPDES permit for Greenidge Station was transferred in 2013, without changes, from AES Greenidge, LLC to Greenidge in accordance with the regulatory requirements. *See* Application for Permit Transfer (Hennessey Aff., Exh. A).

Given the foregoing, the Greenidge Station's SPDES permit was properly transferred in accordance with applicable laws. Petitioners' untimely claim to the contrary must be rejected.

(b) NYSDEC treated the Greenidge SPDES Renewal Application as a New Application and Subjected It to a Full Technical Review

Petitioners' claim that the Greenidge SPDES permit must be annulled because NYSDEC did not treat the Greenidge SPDES Renewal application as a new application or subject it to a full technical review. Verified Petition ¶ 105. Petitioners claim is premised on a fundamental

mischaracterization of NYSDEC's processing of Greenidge's SPDES Renewal application and is simply wrong.

Part 621.11 provides in relevant part:

> Renewal of a SPDES permit where the facility that would be or is the source of the permitted discharge, but has not operated during the term of the permit, will be treated as a new application and be subject to a full technical review.

6 N.Y.C.R.R. § 621.11(b); *see also* 6 N.Y.C.R.R. § 750-1.16(e).

As such, NYSDEC's regulations admittedly required that Greenidge's application for a SPDES Renewal be treated as "new." *See* 6 N.Y.C.R.R. § 621.11(b); 6 N.Y.C.R.R. § 750-1.16(e). This, however, does not mean that NYSDEC violated 6 N.Y.C.R.R. § 621.11(b) as Petitioners argue. As was done here, such an application for a "new" SPDES permit merely cannot be *administratively* renewed but must be subjected a full technical review. It also cannot be considered a Type II action and must be reviewed under SEQRA. *See* 6 N.Y.C.R.R. § 617.5(c)(26); *see also* 6 N.Y.C.R.R. § 750-1.16(e).

Here, the administrative record establishes that NYSDEC treated Greenidge's SPDES Renewal application as a "new" application. It, in turn, subjected Greenidge's application to a full technical review. NYSDEC also processed Greenidge's SPDES Renewal application as a Type I action under SEQRA, fully analyzed the impact of the draft renewal permit, proposed appropriate conditions, and issued the draft SPDES Renewal for public review and comment. *See* June 29, 2016 ENB Notice & SPDES Permit (Hennessey Aff., Exhs. E & F). In fact, NYSDEC's full technical review resulted in NYSDEC-initiated SPDES permit modifications, including additional BTA and dilution study requirements. *Id.*

Given that NYSDEC treated the Greenidge SPDES Renewal application as a "new" application and completed a full technical review in full compliance with 6 N.Y.C.R.R. § 621.11(b), Petitioners' claim to the contrary lacks any merit and must be rejected.

(c) The Greenidge SPDES Permit Meets All BTA Requirements

Petitioners' claim that NYSDEC's CP-52 BTA policy required NYSDEC to mandate the installation of closed-cycle cooling in the Greenidge SPDES Renewal. *See* Verified Petition ¶ 106. Their claim, however, is wholly without a basis in law and evidences a fundamental misunderstanding of BTA and the requirements of NYSDEC's CP-52 Policy. *See* NYSDEC CP-52 Policy (Treichler Aff., Exh. I).

NYSDEC biologists make facility-specific BTA determinations for each facility that is subject to BTA, which is a statistical and technical analysis based on several factors. *Id.* The CP-52 Policy is used to determine a facility's BTA and includes four performance goals, and which of the four goals apply to a particular facility depends on whether the facility is new or existing, and its location. *See* NYSDEC CP-52 Policy.

With regard to an existing facility, like Greenidge, NYSDEC's CP-52 Policy states, in relevant part:

> Wet closed-cycle cooling ***or its equivalent*** as the performance goal for existing industrial facilities that operate a [Cooling Water Intake Structure]. *Id.* at p. 2 (emphasis added).

It also defines ***equivalent*** as:

> 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. *Id.* at p. 3.

NYSDEC's CP-52 Policy goes on to state that:

> Facility owners and/or permittees of existing industrial facilities seeking to meet the ***equivalent performance goal*** set by this policy

> shall propose a suite of technologies and operational measures to the Department for consideration as BTA. *Id.* at p. 2 (emphasis added).

NYSDEC's CP-52 Policy, therefore, requires that SPDES permits for existing facilities, like Greenidge, include BTA performance goals that are ***equivalent*** to closed cycle cooling, which is defined as a reduction in impingement mortality and entrainment by 90 percent of what a closed-cycle cooling system would achieve – not closed-cycle cooling as Petitioners claim. *See* NYSDEC CP-52 Policy, p. 3. Consistent with NYSDEC's CP-52 Policy, a SPDES permit must also include the suite of technologies that will be used to meet the performance goals. *See id.*, p. 2. Closed-cycle cooling reduces impingement mortality and entrainment by 93-98 percent. *See id.*, p. 3. The NYSDEC CP-52 Policy, therefore, mandates that a SPDES permit for an existing facility include provisions that require a reduction in impingement mortality and entrainment of 90 percent of closed-cycle cooling, which equals 83-88 percent, and the suite of technologies that will be used to meet the 83-88 percent reductions. *See id.*

Consisted with NYSDEC's CP-52 Policy, NYSDEC issued Greenidge's SPDES permit with requirements to reduce impingement mortality by 95 percent and entrainment by 85 percent. *See id.*, p. 2. NYSDEC also required Greenidge to install wedgewire screens and variable speed drives on its cooling water pumps as the "suite of technologies" that will achieve 95 percent reduction in impingement and 85 percent reduction in entrainment. *See id.*; Amended Negative Declaration (Hennessey Affirmation, Exh. D), p. 2.

As such, Greenidge SPDES Renewal requires BTA consistent with NYSDEC's CP-52 Policy. *See also* Point II, *supra* (noting substantial deference to NYSDEC, particularly in its interpretation of such technical matters within its area of expertise and, also, in applying its own policy documents). Petitioners' contrary claim must, therefore, be rejected.

CONCLUSION

For all of the reasons set forth herein, the Greenidge Respondents respectfully submit that the Verified Petition should be denied *in toto* with prejudice.

Dated: March 2, 2018
Albany, New York

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