To be Argued by:
YVONNE E. HENNESSEY
(Time Requested: 15 Minutes)

Docket No. CA 18-00648
Yates County Clerk's Index No. 2016-0165

New York Supreme Court
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

– 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.

BRIEF FOR RESPONDENTS-RESPONDENTS GREENIDGE GENERATION, LLC, GREENIDGE PIPELINE, LLC, GREENIDGE PIPELINE PROPERTIES CORPORATION, and LOCKWOOD HILLS, LLC

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PRELIMINARY STATEMENT

The Yates County Supreme Court's ("Supreme Court") order granting Greenidge Generation, LLC, Greenidge Pipeline, LLC, Greenidge Pipeline Properties Corporation and Lockwood Hills, LLC's (collectively, the "Greenidge Respondents") Motion to Dismiss Sierra Club, the Committee to Preserve the Finger Lakes ("CPFL") and the Coalition to Protect New York ("CPNY") (collectively, "Petitioners-Appellants") claims and denying Petitioners-Appellants' motion for preliminary injunctive relief was properly decided. [Record on Appeal ("R.") 8-10].

Petitioners-Appellants challenged: (1) the New York State Department of Environmental Conservation's ("NYSDEC") June 28, 2016 Amended Negative Declaration that supported conversion and operation of the Greenidge Station, and (2) the issuance or anticipated issuance of environmental permits by NYSDEC. They also sought to halt not only the in-plant construction of the Greenidge Generating Station located in the Town of Torrey, New York ("Greenidge Station" or "Facility"), but also the construction of the 46 mile natural gas pipeline to the Greenidge Station ("Greenidge Pipeline") (collectively, the "Greenidge Project").

Petitioners-Appellants, however, waited far too long to bring their claims. Despite their active involvement in NYSDEC's review of the Greenidge Project, as well as that of the New York Public Service Commission ("NYSPSC"), and full notice of the Greenidge Respondents' intention to immediately move forward with construction once all approvals were in place, Petitioners-Appellants waited four months from the issuance of NYSDEC's Amended Negative Declaration – the sole determination at issue in this action – and after construction commenced to file their Verified Petition and then delayed another week before actually serving the Greenidge Respondents. They then waited almost another two months to move for a preliminary injunction, during which time construction of the Greenidge Project continued in

good faith and under authority of law. Such delay, where construction of the Greenidge Project was substantially complete at a cost of $7,688,467, renders Petitioners-Appellants' claims moot.

Even assuming that Petitioners-Appellants claims were ripe, Petitioners-Appellants failed to state cognizable claims under the State Environmental Quality Review Act ("SEQRA"). Taking the allegations in the Amended Verified Petition as true, by its own terms, the Amended Negative Declaration could not have been a conditioned negative declaration. Similarly, Petitioners-Appellants did not state a cognizable claim that NYSDEC segmented review from the Lockwood Ash Landfill – a nearby facility for which no "action" under SEQRA was or is pending. Further, on its face, the Amended Negative Declaration establishes that NYSDEC considered the correct baseline. Petitioners-Appellants' attempt to ignore the facility's long-standing operations does not override NYSDEC's substantial deference, and neither does the United States Environmental Protection Agency's ("USEPA") comments under a different regulatory program.

Finally, Supreme Court correctly denied Petitioners-Appellants' belatedly filed Motion for Temporary Injunctive Relief. Petitioners-Appellants failed to demonstrate any likelihood of success on the merits of their underlying claims, given: (1) Petitioners-Appellants' excessive delay in bringing their claims, coupled with their failure to immediately seek to preserve the status quo until their claims could be heard, which rendered Petitioners-Appellants' claims moot; and, (2) because the papers submitted by Petitioners-Appellants on their motion and documentary evidence before Supreme Court demonstrated that NYSDEC's environmental review was proper.

Petitioners-Appellants also failed to show that any immediate and irreparable harm would occur if the requested injunctive relief was not granted. Indeed, not a single, concrete harm was

specified in Petitioners-Appellants' motion. And, the balancing of equities tips substantially against the granting of injunctive relief, particularly given the significant harm that would inure to the Greenidge Respondents, in the form of lost revenues and potential penalties associated with the stop and start of construction, and to third parties and the public at large, in the form of lost wages and negative impacts on energy reliability and pricing. In short, Petitioners-Appellants outright failed to meet their burden of proving entitlement to a preliminary injunction.

For the foregoing reasons, the Greenidge Respondents respectfully request that Supreme Court's Order and Judgment granting the Greenidge Respondents' Motion to Dismiss and denying Petitioners-Appellants' Motion for Temporary Injunctive Relief be affirmed.

COUNTER QUESTIONS PRESENTED

1. By waiting until construction had already commenced to file this action, and then even longer to seek to preserve the status quo, are Petitioners-Appellants' claims moot given that significant construction had already taken place and $7,688,467 had been spent by the Greenidge Respondents as of the time Petitioners-Appellants filed their Motion for Temporary Injunctive Relief?

   Supreme Court correctly answered yes.

2. Did Petitioners-Appellants state *prima facie* claims that NYSDEC's environmental review of the Greenidge Project under SEQRA was in error of law, arbitrary, capricious or an abuse of discretion?

   Supreme Court correctly answered no.

3. On their Motion for Temporary Injunctive Relief, did Petitioners-Appellants meet their burden and establish: (1) a likelihood of success on the merits; (2) irreparable injury absent injunctive relief; and (3) a balance of equities in their favor?

   Supreme Court correctly held that they did not.

COUNTER STATEMENT OF FACTS

The Greenidge Station is an electric generating facility (the "Greenidge Station" or the "Facility") located in the Town of Torrey, New York that was constructed in the 1930s. [R. 15]. It currently consists of one 107 megawatt generating unit, known as Unit 4, which historically operated as a coal-fired power plant. *Id.* Unit 4 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.* Thereafter, Respondent-Respondent Greenidge Generation, LLC ("Greenidge Generation") acquired the Facility. [R. 15].

The Greenidge Project

Following its acquisition of the Facility, Greenidge Generation sought to resume operations at the Greenidge Station. *Id.* As part of the resumption of operations, Greenidge Generation proposed the Greenidge Project 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.* The Greenidge Project consisted of two main components, namely: (1) in-plant construction to allow Unit 4 to operate on 100 percent natural gas (with up to 19 percent biomass co-firing), and no longer burn coal; and, (2) construction of a 4.6 mile pipeline to fuel the Facility, and auxiliary services including a regulation station, a metering station and interconnection. [R. 15, 122].

In-plant construction at the Greenidge Station and the construction of the 4.6 mile pipeline commenced on October 17, 2016 and was completed in March of 2017. [R. 18, 393]. Shortly thereafter, the Greenidge Station resumed operations. [R. 393].

NYSDEC Environmental Review and Permitting

In furtherance of the Greenidge Project, in 2014, Greenidge Generation submitted applications to NYSDEC for Title IV and Title V air permits, a renewal of the Facility's State

Pollutant Discharge Elimination System ("SPDES") permit, and an initial water withdrawal permit. [R. 15, 132].

Following its review and analysis of Greenidge Generation's pending permit applications, and its completion of a coordinated SEQRA review of the potential adverse environmental impacts associated with the resumption of Greenidge Station operations, on July 30, 2015, NYSDEC issued a Notice of Complete Application and a Negative Declaration. [R. 15]. The Negative Declaration 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.* NYSDEC published notice of its Negative Declaration in the Environmental Notice Bulletin ("ENB") on August 12, 2015. *Id.* Also on August 12, 2015, NYSDEC noticed its intention to issue the applied for Title IV and Title V air, a renewal SPDES and water withdrawal permits, and provided drafts of same for public comment. *Id.* On September 11, 2015, Petitioner-Appellant CPFL submitted comments to NYSDEC on the draft permits and the Negative Declaration. [R. 16].

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 ("CAA"). *Id.* NYSDEC also provided a copy of the Responsiveness Summary and the proposed Title V permit to Petitioners-Appellants Sierra Club and CPFL. *Id.*

On December 7, 2015, USEPA issued a letter to NYSDEC requesting revisions to the draft Title V air permit for the Greenidge Station. *Id.* Specifically, USEPA found that the Prevention of Significant Deterioration ("PSD") and Nonattainment New Source Review ("NSR") requirements of the federal CAA applied to the resumption of Greenidge Station

operations, and that the Title V permit did not include those requirements. [R. 62]. From January 2016 through June 2016, Greenidge Generation worked with NYSDEC and USEPA to modify the draft Title V air permit to include PSD and NSR requirements as requested by USEPA. [R. 133, ¶ 15]. Greenidge Generation amended its air permit application and submitted a revised Part 1 of a Full Environmental Assessment Form to NYSDEC on March 16, 2016, which provided additional information on the resumption of operations and potential environmental impacts. [R. 62, 133, 145-48].

On June 28, 2016, NYSDEC issued an Amended Negative Declaration based on the revisions made to the draft Title V air permit. [R. 16]. The Amended Negative Declaration concluded once again that the resumption of operations at the Greenidge Station would not have a significant adverse impact on the environment. *Id.* While the Amended Negative Declaration included changes to the "Impacts on Air" section due to the revised Title V air permit and the associated environmental impacts, 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 issued by NYSDEC. [R. 141].

The Amended Negative Declaration includes a comprehensive discussion of the potential environmental impacts associated with the resumption of operations at Greenidge Station, and the reasons supporting NYSDEC's determination that resuming operations at the Facility would not have a significant adverse impact on the environment. *Id*. Specifically, the Amended Negative Declaration provides a detailed analysis of the potential impacts on: surface water, air, plants and animals, historic and archeological resources, energy, and solid waste management. *Id*.

NYSDEC published notice of its Amended Negative Declaration in the June 29, 2016 ENB. [R. 16, 141]. 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. [R. 16, 145]. On August 5, 2016, Petitioner-Appellant CPFL submitted comments on the draft Title IV and Title V permits and the Amended Negative Declaration, which Petitioner Seneca Lake Guardian signed onto. [R. 16]. On September 8, 2016, NYSDEC issued the final Title IV and Tile V air permits to Greenidge Generation, which authorized the in-plant construction work necessary to resume operations at the Greenidge Station with natural gas as its primary fuel source as well as subsequent operations. [R. 17].

The Greenidge Pipeline

In 2015, Respondents-Respondents Greenidge Pipeline, LLC and Greenidge Pipeline Properties Corporation (collectively, the "Pipeline Entities") submitted applications to NYSPSC for construction and operation of the Greenidge Pipeline. [R. 17]. On September 16, 2016, the NYSPSC issued an Order Granting Certificate of Environmental Compatibility and Public Need ("Certificate Order"), approving the construction and operation of the natural gas pipeline under Article VII of the Public Service Law ("PSL"). [R. 17-18]. The same day, NYSPSC also issued an Order Granting Certificates of Public Convenience and Necessity and Providing for Lightened and Incidental Regulation, which approved the resumption of Greenidge Station operations. [R. 227]. Petitioner-Appellant CPFL provided comments throughout NYSPSC's Article VII proceeding, but was denied party status by an Administrative Law Judge ("ALJ"). [R. 17]. It thereafter failed to appeal the ALJ's ruling, renew its request for party status, or seek rehearing of the Certificate Order approving the Greenidge Pipeline. *Id*. On October 17, 2016, NYSPSC issued the Pipeline Entities a Notice to Proceed with Construction of the Greenidge Pipeline. [R. 18].

Construction Timing and Costs

Because the winter weather conditions in Yates County make excavation and construction of a pipeline extremely difficult, and to start recouping a return on the significant investments already made in connection with the Greenidge Project, the Greenidge Respondents commenced in-plant construction work and construction on the pipeline on October 17, 2016. [R. 217-18, ¶¶ 19-20, 23]; s*ee also* Certificate Order, [R. 153] ("It is the Pipeline Companies' intent to commence construction soon after the Certificate is granted and all the appropriate permits and permission have been obtained."). Due to concerns over inclement weather and business factors, construction work on the Greenidge Pipeline was scheduled to be completed in January 2017. [R. 18, 218, ¶ 21]. The day after construction commenced, on October 18, 2016, a publicly announced groundbreaking ceremony was held. [R. 218, ¶ 23 and Exhibit A]; *see also* Amended Petition, [R. 76, ¶ 84].

As of November 3, 2016, the date that the Greenidge Respondents were served in this action, the cost of the work completed on the Greenidge Project totaled $3,020,866. [R. 19]. In terms of construction progress, all necessary materials to construct the Greenidge Project had been purchased, 30 percent of the in-plant construction work had been completed and 20 percent of the pipeline construction had been completed. [R. 18-19]. As of December 23, 2016, when Petitioners-Appellants filed their Motion for Temporary Injunctive Relief, approximately 80 percent of the Greenidge Project had been completed at a cost of $7,688,467. [R. 19]. On January 6, 2018, when the Greenidge Respondents moved to dismiss the action based on mootness, 94 percent of the Greenidge Project construction had been completed at a cost of over $11,400,000. *Id.*

Procedural History

On October 28, 2016, and as later amended on December 6, 2016, Petitioners-Appellants filed this Article 78 lawsuit in Supreme Court, Yates County challenging NYSDEC's approval of the Greenidge Project, specifically its SEQRA review and Amended Negative Declaration. [R. 54]. Petitioners-Appellants served the Greenidge Respondents with the October 28, 2016 Verified Petition on November 3, 2018. [R. 18]. In their Amended Verified Petition, Petitioners-Appellants 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 water withdrawal permits; and, (4) an injunction prohibiting the Greenidge Respondents from taking steps to resume operations at the Greenidge Station or constructing the 4.6 mile pipeline authorized by the NYSPSC. [R. 78].

On December 23, 2018, Petitioners-Appellants finally served a Notice of Motion for Temporary Injunctive Relief against only the Greenidge Respondents, seeking an order enjoining the Greenidge Respondents "from taking steps to repower the Greenidge Generating Station or construct a gas pipeline to the station pending the resolution of this proceeding or further order of the Court[.]" [R. 82].

On January 5, 2017, the State Respondents filed a Notice of Motion to Dismiss based on lack of standing and mootness. [R. 112]. On January 6, 2017, the Greenidge Respondents also filed a Notice of Motion to Dismiss pursuant to CPLR § 3211(a), together with an accompanying affidavit of Dale Irwin, President of the Greenidge Respondents. [R. 118, 213, 222]. Also on January 6, 2017, the Greenidge Respondents opposed Petitioners-Appellants' Motion for Temporary Injunctive Relief. [R. 131]. Oral argument was heard by the Honorable William J. Kocher, A.S.C.J., on January 24, 2017. [R. 357].

Thereafter, by letter to Supreme Court dated March 31, 2017, the Greenidge Respondents notified Supreme Court that all construction work had been completed as of March 1, 2017 and operations had resumed that week. [R. 393].

By decision dated April 21, 2017, Supreme Court found that the Petitioners-Appellants had standing, denied Petitioners-Appellants' Motion for Temporary Injunctive Relief, and found that NYSDEC's SEQRA decision was not arbitrary, capricious or an abuse of discretion. [R. 20]. In doing so, Supreme Court made, among others, the following findings of fact:

- The Pipeline Entities expressed their intention to commence construction soon after the requisite approvals were issued. [R. 18].
- In-plant construction work on the Greenidge Station and construction of the Greenidge Pipeline began on October 17, 2016. *Id*.
- By the time the Greenidge Respondents were served in the underlying action, all materials for the in-plant work had been purchased, over 30 percent of the in-plant construction work had been completed, all necessary materials for the construction of the Greenidge Pipeline had been purchased; 50 percent of the site clearing activities (including tree removal) had been completed, and 20 percent of the Greenidge Pipeline construction had been completed (trenched, welded, piping laid into the trench, and soil backfilled over the piping). [R. 18-19].
- The cost associated with the work that had been completed by November 3, 2016 totaled $3,020,866. [R. 19].
- As of December 23, 2016, when Petitioners sought injunctive relief, approximately 80 percent of the Greenidge Project had been completed at a cost of $7,688,467. *Id*.

- As of January 6, 2017, 94 percent of the Greenidge Project had been completed at a cost of $11,418,624. *Id*.

On June 13, 2017, Supreme Court entered an Order and Judgment: (1) denying Petitioners-Appellants' Motion for Temporary Injunctive Relief; (2) granting the State Respondents' and Greenidge Respondents' Motions to Dismiss; and, (3) dismissing the Amended Verified Petition. [R. 9]. On June 20, 2017, the Order and Judgment was filed and entered in the Office of the Yates County Clerk. [R. 10, 12]. On June 27, 2017, the State Respondents and the Greenidge Respondents each provided a Notice of Entry of the Order and Judgment. [R. 10-13]. On July 19, 2017, Petitioners-Appellants served a Notice of Appeal on the State Respondents and the Greenidge Respondents. [R. 3].

On April 17, 2018, over ten months after Supreme Court issued its Order and Judgment, and almost nine months from when Petitioners-Appellants filed their Notice of Appeal, Petitioners-Appellants finally perfected their appeal by filing the Record on Appeal and the Brief for Petitioners-Appellants ("Petitioners-Appellants Brief") with this Court.

Motion to Dismiss Appeal

On June 22, 2018, the Greenidge Respondents moved to dismiss the appeal as moot. The Greenidge Respondents' motion establishes that all work necessary to resume Greenidge Station operations, including construction of the natural gas pipeline and the in-plant construction work approved by the Title V air permit, had been completed by March 2017. (*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). They also demonstrated that, following shakedown and testing, operations resumed shortly thereafter, have continued to date and cannot be unilaterally halted. *Id.*

Between the time Greenidge Station resumed operations and Petitioners-Appellants perfected their appeal over a year later in April 2018, the Greenidge Respondents have spent over four million dollars in both additional capital funds to repower the Greenidge Station (approximately $1,500,000), and wages and benefits (approximately $2,308,817) to the Facility's eighteen employees, whose jobs depend on continued operation of the Greenidge Station. (*Id.*, ¶ 46-51).

The State Respondents support this motion. (*See* Affirmation of Claiborne E. Walthall in Support of Greenidge Respondents' Motion to Dismiss Appeal, dated June 27, 2018, ¶¶ 22-35).

Related Proceeding

In a separate Article 78 proceeding filed November 8, 2017, Petitioners-Appellants again challenged the same Amended Negative Declaration, and this time the issuance of a modified renewal SPDES permit for the Greenidge Station and a water withdrawal permit under Environmental Conservation Law ("ECL") Article 15. *See Matter of Sierra Club, et al. v. New York State Dep't of Envtl. Conservation*, Yates County Index No. 2017-0232. Both the State Respondents and Greenidge Respondents answered on or about March 2, 2018 and the State Respondents filed and served the full administrative return. Oral argument was held before the Honorable William F. Kocher, A.C.S.J. on May 22, 2018. A decision has not yet been issued in this action, which remains pending before Supreme Court.

ARGUMENT

POINT I

PETITIONERS-APPELLANTS' CLAIMS WERE PROPERLY DISMISSED AS MOOT

Despite the Greenidge Respondents' clear and unequivocal intent to commence construction of the Greenidge Project and resume operations of the Greenidge Station as soon as possible, Petitioners-Appellants waited almost two full months from the time NYSDEC authorized construction and operation of the Greenidge Station to file their Amended Verified Petition. They then delayed even longer, despite notice that construction had, in fact, commenced, to move for a temporary injunctive relief. During this time, the Greenidge Respondents substantially completed construction of the Greenidge Station in-plant work and the Greenidge Pipeline, at a cost of well over seven million dollars. [R. 18-19]. As such, Petitioners-Appellants' claims were moot and Supreme Court properly granted the Respondents-Respondents' Motions to Dismiss. [R. 9].

"It is a fundamental principle of our jurisprudence that the power of a court to declare the law arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal." *Hearst Corp v. Clyne*, 50 N.Y.2d 707, 713 (1980). "This principle, which forbids courts to pass on academic, hypothetical, moot or otherwise abstract questions, is founded both in constitutional separations of powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary." *Id.* at 713-14. Said differently, courts should not "resolve disputed legal questions unless [doing so] would have an immediate practical effect on the conduct of the parties." *New York Public Interest Research Group v. Carey*, 42 N.Y.2d 527, 530 (1977). Accordingly,

courts are precluded from considering questions which, "although once live, have become moot by passage of time or change in circumstances." *Hearst Corp.*, 50 N.Y.2d at 714.

Changes in circumstances that would prevent a court from rendering a decision to effectively determine an actual controversy, such that relief is not even theoretically available, require that the challenge be dismissed as moot. *See Citineighbors Coal. of Historic Carnegie Hill v. New York City Landmarks Pres. Comm'n*, 2 N.Y.3d 727, 728-30 (2004); *Dreikausen v. Zoning Bd. of Appeals of the City of Long Beach*, 98 N.Y.2d 165, 172 (2002). In the context of a construction project, legal attempts to cease or undo construction are rendered moot when, as here, construction was substantially complete at the time of the challenge. *Citineighbors Coal.*, 2 N.Y.3d at 729; *Weeks Woodlands Ass'n, Inc. v. Dormitory Auth. of the State of N.Y.*, 95 A.D.3d 747, 747 (1st Dep't 2012), *aff'd*, 20 N.Y.3d 919 (2012) ("Under the particular circumstances of this case, we agree with the Appellate Division majority that the challenged project is substantially complete and that the proper course of action was to dismiss the appeals taken to that Court as moot."); *see also Matter of Riverkeeper, Inc. v. Johnson*, 52 A.D.3d 1072 (3d Dep't 2008).

Factors considered in whether substantial construction renders a challenge moot include: (1) whether the challenger timely sought a preliminary injunction or otherwise sought to preserve the status quo or prevent construction from commencing or continuing; (2) whether the work was completed in good faith and under authority of law; and (3) whether the work could be readily undone without undue hardship. *Citineighbors Coal.*, 2 N.Y.3d at 729.

In *Citineighbors Coalition*, the Court of Appeals found that because the building's steel and concrete structure had been erected, the brick façade complete, and 90 percent of the window frames installed, at a rough cost of $25.7 million, construction was substantially

complete. The court also found there was no "unseemly race to completion intended to moot petitioners' lawsuit" because the property owner and developer had obtained necessary approvals, and there was every business incentive to complete the building quickly to begin recouping a return on investment and avoid paying interest on construction loans. *Citineighbors Coal.*, 2 N.Y.3d at 729.

In *Matter of Riverkeeper, Inc. v. Johnson*, the petitioners filed an Article 78 action to review a determination by NYSDEC regarding modifications to the respondents' cooling system. 52 A.D.3d at 1073. The trial court transferred the proceeding to the Appellate Division, Third Department pursuant to CPLR 7804(g). Respondent moved for dismissal of the petition based on the petitioners' failure to seek injunctive relief during the pendency of the proceeding. The Third Department concluded that dismissal was warranted, in part, because the respondents had completed the modification of the existing system at a cost of over $1 million and, during that time the petitioners had failed to preserve their rights pending judicial review, thus rendering the matter moot. *Id.* at 1074.

In *Weeks Woodlands Association*, the First Department considered the construction to be substantially complete, in part, because the excavations and foundations were complete, the steel erection was 70 percent complete, and installation of concrete slabs were 50 percent complete. 95 A.D.3d at 748-49. The court noted that construction was so far advanced that it could not be undone without undue hardship, and that construction need not be "virtually completed" to be moot, a finding upheld by the Court of Appeals. *Id*. at 753. The court also noted that the property owner would be penalized for having gone forward in reliance on the issuance of all necessary governmental permits and the petitioners' failure to seek prompt injunctive relief. *Id.*

Similar to the claims brought in *Citineighbors Coalition*, *Matter of Riverkeeper*, and *Weeks Woodlands Association*, Petitioners-Appellants' claims in this action were moot when they were before Supreme Court. Petitioners-Appellants did not immediately seek temporary injunctive relief or otherwise seek to preserve the status quo when NYSDEC issued the Amended Negative Declaration on June 28, 2016 – the key NYSDEC determination at the heart of Petitioners-Appellants' claims. [R. 18]. Again, they failed to seek injunctive relief or otherwise seek to preserve the status quo when NYSDEC issued the final Title IV and Title V air permits on September 8, 2016, or even when NYSPSC issued its Certificate approving construction of the pipeline on September 16, 2016, or critically, before NYSPSC issued its Notice to Proceed with construction on October 16, 2016 or when construction actually commenced on October 17, 2016. *Id*.

Instead, Petitioners-Appellants waited until the statute of limitations had all but expired on their SEQRA claims and after construction had been continuing for several weeks to file their action. [R. 21]. Petitioners-Appellants then waited almost another full week, until November 3, 2016, to serve the Greenidge Respondents. As of November 3, 2016, all materials had been purchased and construction was substantially complete, with over 30 percent of the in-plant construction work finished and approximately 20 percent of the pipeline and related facilities constructed. [R. 19].

In terms of cost, from the time NYSDEC approvals were issued until Petitioners-Appellants served the Greenidge Respondents on November 3, 2016, approximately $3,020,886 had been expended on construction of the in-plant upgrades, pipeline and related facilities. [R. 19]. Thereafter, due to risks associated with inclement weather, the business incentive to complete construction, and potentially significant penalties from the construction company for

halting and restarting work, and because no attempt was made by Petitioners-Appellants to secure a temporary restraining order or otherwise preserve the status quo, construction continued with full knowledge of Petitioners-Appellants, with completion scheduled for January 2017.

Furthermore, compounding the delay in Petitioners-Appellants' filing and then service of the Verified Petition, Petitioners-Appellants did not expeditiously and promptly seek to prevent or even halt construction of the Greenidge Project, particularly when the necessary approvals were issued by NYSDEC on September 8, 2016 – almost two months before service of this action was effectuated. [R. 76]. And yet, Petitioners-Appellants were fully aware of these approvals as they actively participated in NYSDEC's multi-year environmental review and repeatedly filed comments opposing the Greenidge Project and the sufficiency of NYSDEC's environmental review. [R. 132-34]. They also were on notice of the Greenidge Respondents' intentions to quickly commence and complete construction, and that construction in fact commenced soon after the necessary regulatory approvals had been issued. Certificate Order, [R. 153] ("It is the Pipeline Companies intent to commence construction soon after the Certificate is granted and all the appropriate permits and permission have been obtained."); Amended Verified Petition [R. 52, ¶ 84] ("GGLLC held a groundbreaking ceremony for the repowering of the Greenidge Station at the facility on October 18, 2016").

Instead, before moving for temporary injunctive relief Petitioners-Appellants elected to wait:

(1) six months from NYSDEC's issuance of the Amended Negative Declaration;

(2) more than three and a half months from NYSDEC's issuance of the air permits authorizing in-plant construction activities and the resumption of operation of the Greenidge Station;

(3) more than three and a half months from when NYSPSC's issuance of the Certificate approving of construction and operation of the pipeline;

(4) over two months from when NYSPSC issued its Notice to Proceed with construction of the Greenidge Pipeline; and

(5) over two months after construction commenced in a very open and notorious way.

During this time, approximately 80 percent of the Greenidge Project had been completed at a cost of $7,688,467. [R. 19]. With construction substantially complete, it could not have been undone without undue hardship to the Greenidge Respondents or the landowners for the properties on which the pipeline has been constructed. [R. 125, ¶ 39]; *Citineighbors Coal.*, 2 N.Y.3d at 729; *Weeks Woodlands Ass'n*, 95 A.D.3d at 753.

And, by January 6, 2017, 94 percent of the Greenidge Project construction had been completed at a cost of $11,418,624 to the Greenidge Respondents. [R. 19]. Construction of the Greenidge Pipeline and all in-plant construction at the Greenidge Station was then completed by March 31, 2017, and following extensive and costly testing, the Greenidge Station subsequently resumed operations. [R. 393].

In short, through the entire process Petitioners-Appellants failed to promptly seek temporary injunctive relief. Accordingly, their claims were moot and Supreme Court properly granted the Greenidge-Respondents' Motion to Dismiss. [R. 9].

POINT II

PETITIONERS-APPELLANTS FAILED TO STATE ANY COGNIZABLE SEQRA CLAIM

Petitioners-Appellants maintain that Supreme Court erred in ruling on the merits of their claims before the Respondents-Respondents served answers or the State Respondents filed the administrative record. They then go on to detail their assertions that they adequately stated

prima facie claims under SEQRA. *See* Petitioners-Appellants Brief, Point I(A)-(C). Even taking the allegations in their Amended Verified Petition as true and affording Petitioners-Appellants the benefit of every inference, controlling law coupled with the Amended Negative Declaration itself, which was put before Supreme Court by Petitioners-Appellants, establish that Petitioners-Appellants did not state a single *prima facie* claim under SEQRA.

Dismissal is appropriate where "the pleading fails to state a cause of action[.]" CPLR § 3211(a)(7). The test in deciding a motion to dismiss is whether the proponent of the pleading has a cause of action, "not whether he [or she] has stated one." *Inguitti v. Rochester Gen. Hosp.*, 145 A.D.3d 274, 274 (4th Dep't 2016). Section 3211(a)(7) of the CPLR requires the court to afford the pleading in dispute "a liberal construction," accept the facts as alleged in the complaint as true, and "accord plaintiffs the benefit of every possible favorable inference." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994).

Yet even under New York's liberal pleading standard, conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient and cannot survive a motion to dismiss. *See Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009); *see also Kaisman v. Hernandez*, 61 A.D.3d 565, 566 (1st Dep't 2009); *Ruffino v. New York City Transit Auth.*, 55 A.D.3d 817, 818 (2d Dep't 2008); *Soule v. Norton*, 299 A.D.2d 827, 829 (4th Dep't 2002); *Rose v. Gelco Corp.*, 261 A.D.2d 381, 382 (4th Dep't 1999). In that same vein, "a court need not accept as true legal conclusions or factual allegations that are either inherently incredible or flatly contradicted by documentary evidence." *McNeary v. Niagara Mohawk Power Corp.*, 286 A.D.2d 522, 524 (3d Dep't 2001).

For example, in *M & B Joint Venture, Inc. v. Laurus, Ltd.*, 12 N.Y.3d 798 (2009), plaintiff claimed a lien on real property and unjust enrichment. The trial court denied

defendants' motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action. The Court of Appeals reversed and granted defendants' motion to dismiss because "plaintiff's own evidentiary submissions 'conclusively establish that [it] has no cause of action[.]'" *Id.* at 800 (internal citations omitted).

Similarly, in *Zigabarra v. Falk*, 143 A.D.2d 901 (2d Dep't 1988), the sufficiency of the plaintiff's complaint was challenged for failure to allege any authority that could hold defendants liable. The court affirmed dismissal stating "a motion to dismiss a complaint for failure to state a cause of action must be granted where, as here, the allegation consist of 'bare legal conclusion, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence'" *Id.* at 902 (citations omitted). Similarly, here, Petitioners-Appellants' own evidentiary submissions conclusively establish that they have no cause of action.

Admittedly, Supreme Court's Decision and Order and Judgment is not a model of clarity. However, what is clear is that:

1. Petitioners-Appellants have asserted three SEQRA claims – improper conditioned negative declaration, segmentation and the failure to take a "hard look" as the potential impacts of the Greenidge Project due to the use of an improper baseline. [R. 76-78]; *see also* Petitioners-Appellants Brief, Point I(A)-(C).
2. The Greenidge Respondents' Motion to Dismiss was made pursuant to CPLR § 3211(a)(7). [R. 117-18].
3. Both Petitioners-Appellants and the Greenidge Respondents briefed the sufficiency of each of Petitioners-Appellants' SEQRA claims as part of the Petitioners-Appellants' Motion for Temporary Injunctive Relief and also

submitted documentary evidence, including the Amended Negative Declaration. [R. 82-111, 119-212].

4. Supreme Court heard from the Petitioners-Appellants at oral argument on the sufficiency of their claims. [R. 383-85].

It is also undisputed that the full environmental assessment form for the Greenidge Project, along with the challenged Amended Negative Declaration and other relevant documentary evidence, were put before Supreme Court at the time it rendered its decision [R. 89-106]. As such, given the documentary evidence and legal briefing before Supreme Court as to whether Petitioners-Appellants stated a *prima facie* SEQRA claim, dismissal of Petitioners-Appellants' claims was proper. It is of no moment that Supreme Court did not have the full administrative record or that it purportedly reached a decision on the merits. Indeed, Petitioners-Appellants effectively concede as much by arguing to this Court that they stated *prima facie* SEQRA claims. *See* Petitioners-Appellants Brief, pp. 7-11.

Even if this Court determines that Supreme Court improperly ruled on the merits, based on the arguments presented to it by Petitioners-Appellants, it can affirm on other grounds by dismissing Petitioners-Appellants' claims for failure to state a *prima facie* claim. *See Parochial Bus. Sys. v. Board of Educ. of City of N.Y.*, 60 N.Y.2d 539, 545-46 (1983); *Cleary v. Walden Galleria LLC*, 145 A.D.3d 1524, 1526 (4th Dep't 2016) (noting that defendants could raise grounds not addressed by lower court as alternative bases for affirmance of the order granting their motion); *Vanyo v. Buffalo Police Benevolent Ass'n*, 159 A.D.3d 1448 (2018) (same).

Petitioners-Appellants' claims are limited to SEQRA claims; specifically, that NYSDEC violated SEQRA because: (1) the Amended Negative Declaration is an impermissible conditioned negative declaration ("CND"); (2) the Amended Negative Declaration segmented

the environmental review of the resumption of Greenidge operations and the operation of the Lockwood Hills landfill; and, (3) the Amended Negative Declaration used the wrong baseline to evaluate the environmental impacts associated with resuming Greenidge Station operations. [R. 76-78]; *see also* Petitioners-Appellants Brief, pp. 6-10. Even taking the allegations in their Amended Verified Petition as true and affording Petitioners-Appellants the benefit of every inference, the Amended Negative Declaration and controlling law establishes that Petitioners-Appellants failed to state a single *prima facie* claim under SEQRA.

A. Petitioners-Appellants Cannot State a Cognizable Claim That NYSDEC's Amended Negative Declaration Is a Conditioned Negative Declaration

Petitioners-Appellants' first SEQRA claim is that the Amended Negative Declaration is an impermissible CND. [R. 78, ¶ 100]; *see also* Petitioners-Appellants Brief, p. 6. A full reading of the Amended Negative Declaration alone establishes that, even taking Petitioners-Appellants' allegations as true, they failed to state a *prima facie* claim. This is because whether the Amended Negative Declaration is a CND as Petitioners-Appellants claim, is a legal issue that can be decided by reviewing only the Amended Negative Declaration and the applicable law and regulations. *See* Petitioners-Appellants Brief, pp. 7-8 (citing the standard for a CND and comparing only to the Amended Negative Declaration); *see also McNeary*, 286 A.D.2d at 524. Indeed, Petitioners-Appellants do not cite a single document that was not before Supreme Court that would have been necessary to determine the existence of their claim. As such, the purported need for an answer and full administrative record by Petitioners-Appellants is nothing but a red herring.

The basis of Petitioners-Appellants' CND claim is that NYSDEC's modifications to the Greenidge Station SPDES renewal permit to include Best Technology Available ("BTA") measures for fish entrainment and impingement and a dilution study were impermissible

conditions of the Amended Negative Declaration. [R. 64-65, 76-78]; *see also* Petitioners-Appellants Brief, p. 8. However, such modifications to the Greenidge Station SPDES permit do not convert NYSDEC's Amended Negative Declaration into a CND. This is because they are standards required by NYSDEC's SPDES program, not conditions outside of NYSDEC's authority.

Petitioners-Appellants ignore the fact that a lead agency, as NYSDEC was here for the Greenidge Project, 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, ch. 4(E) (found 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 CND); *see also David's Lane – Pondview Preserv. Ass'n v. Planning Bd.*, 216 A.D.2d 389 (2d Dep't 1995) (citing NYSDEC's SEQRA Handbook as one basis for upholding a negative declaration); *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].").

Here, NYSDEC was the SEQRA lead agency and Petitioners-Appellants do not allege otherwise. [R. 89]. NYSDEC also is charged with implementing the SPDES permit program, and, the NYSDEC modifications to Greenidge Station's SPDES permit are explicitly-articulated permit standards and requirements associated with NYSDEC's SPDES permit program. *See* 33 U.S.C. § 1326; 6 N.Y.C.R.R. § 704.4. As a result, Petitioners-Appellants' claim that

NYSDEC issued a CND is simply incorrect such that they have failed to state a cognizable SEQRA claim. Supreme Court's dismissal of their CND claim should therefore be affirmed.

B. Petitioners-Appellants Cannot State a Cognizable Claim That NYSDEC Segmented the Environmental Review of the Greenidge Project

Petitioners-Appellants' second claim is that NYSDEC violated SEQRA by segmenting its review of the resumption of Greenidge Station operations by not including in the Amended Negative Declaration the impact from "depositing new waste in the Lockwood Hills landfill." *See* Petitioners-Appellants Brief, p. 9; *see also* [R. 77]. Again, a full reading of the Amended Negative Declaration alone establishes that, even taking Petitioners-Appellants' allegations at true, they failed to state a *prima facie* claim.

Whether NYSDEC segmented its review of the Lockwood Hills landfill is a legal issue that can be decided by reviewing only the Amended Negative Declaration, taking as true Petitioners-Appellants' allegations, including that the Lockwood Hills landfill is operating under a Consent Order, and applying applicable law and regulations. *See* Petitioners-Appellants Brief, pp. 8-9 (citing the prohibition on segmentation, the existence of the Lockwood Hills landfill's Consent Order with NYSDEC and noting alleged deficiencies in the Amended Negative Declaration). Indeed, Petitioners-Appellants do not cite a single document that was not before Supreme Court that is necessary to determine the existence of their segmentation claim because it is clear from the Amended Negative Declaration alone that impacts from the Lockwood Hills landfill were not included. As such, the service of answers and the full administrative record are of no moment.

That Supreme Court needed to review only the Amended Negative Declaration to rule on this issue is again made clear in Petitioners-Appellants Brief itself, which bases its segmentation argument on its allegation that the Amended Negative Declaration failed to evaluate "the impacts

of the projected disposal of new wastes from the generating station[.]" *See id.*, p. 9. Petitioners-Appellants then attempt to support their segmentation claim by discussing what the Amended Negative Declaration states regarding waste disposal. *Id.*

Segmentation requires "the division of the environmental review of an action so that various activities or stages are addressed as though they were independent, unrelated activities." NYSDEC SEQRA HANDBOOK, ch. 2(D); 6 N.Y.C.R.R. § 617.2(ag); *see also Settco, LLC v. New York State Urban Dev. Corp.*, 305 A.D.2d 1026, 1027 (4th Dep't 2003), *leave denied*, 100 N.Y.2d 508 [2003]) ("The 'actions' or 'projects' in question are distinct and are not merely separate parts 'of a set of activities or steps' in a single action or project"); *Dunk v. City of Watertown*, 11 A.D.3d 1024, 1026 (4th Dep't 2004) (evaluating whether two proposed projects were related); *Forman v. Trustees of State Univ. of New York*, 303 A.D.2d 1019, 1020 (2003) (same, also noting that the danger of segmentation is considering related actions separately and breaking up a larger project into smaller actions).

Petitioners-Appellants' segmentation claim is hard to comprehend. Here, there were not two separate activities or stages of one project requiring environmental review under SEQRA that could have been segmented – only the Greenidge Project. The Lockwood Hills landfill is a separate facility, operating under existing permits. No changes to the Lockwood Hills landfill or its existing permits were necessary or have been sought because of the Greenidge Project, and Petitioners-Appellants do not even allege as much. [R. 77, ¶ 97] (alleging only that NYSDEC segmented "its review of impacts of waste disposal at the Lockwood landfill pursuant to [NYS]DEC's consent order"); *see also id.*, ¶ 79. Rather, Petitioners-Appellants point only to ongoing clean-up operations at the Lockwood Hills landfill and alleged operating problems. Petitioners-Appellants Brief, p. 10. Even taking these allegations as true, despite not being

specified with any level of particularity in the Amended Verified Petition, they also do not establish any "Action" under SEQRA that was or could have been segmented. *See* 6 N.Y.C.R.R. § 617.7(2)(b). As such, Petitioners-Appellants cannot state a *prima facie* segmentation claim.

Further, the clear language of the Amended Negative Declaration shows that the environmental impacts of the solid waste that would be generated by resuming Greenidge Station operations were indeed considered by NYSDEC. [R. 144]. NYSDEC's Amended Negative Declaration includes an entire section titled "Solid Waste Management," which specifically discusses the solid waste impacts associated with resuming Greenidge Station operations, including disposal of ash. [R. 106]. And, as Petitioners-Appellants concede and do not take issue with, the Amended Negative Declaration states, "No impacts related to solid waste management are expected to result from the re-activation of Greenidge Station. By eliminating the use of coal as a fuel source, the generation of solid waste from the facility will be significantly reduced compared to prior operations." Petitioners-Appellants Brief, pp. 9-10.

Given the foregoing, Supreme Court properly dismissed Petitioners-Appellants' segmentation claim, which even taking the allegations as true in the Amended Verified Petition does not state a cognizable claim. Supreme Court's dismissal of Petitioners-Appellants' segmentation claim should therefore be affirmed.

C. Petitioners-Appellants Cannot State a Cognizable Claim That NYSDEC Utilized an Improper SEQRA Baseline

Petitioners-Appellants' last claim is that NYSDEC failed to take a hard look at the environmental impacts of resuming Greenidge Station operations because it used the wrong environmental baseline in the Amended Negative Declaration. [R. 89-90]; *see* Petitioners-Appellants Brief, p. 10. Like Petitioners-Appellants' other claims, this claim can be completely

assessed from the Amended Negative Declaration alone which establishes that, even taking Petitioners-Appellants' allegations at true, they failed to state a *prima facie* claim.

Here, the baseline used by NYSDEC is abundantly clear on the face of the Amended Negative Declaration – an existing electric generating facility that operated on coal for more than half a century. [R. 103-06]. Therefore, the only question is whether NYSDEC's use of that baseline, as opposed to the one urged by Petitioners-Appellants, taking the allegations in their Amended Verified Petition as true, is permissible under SEQRA. Because it is irrespective of any additional information that could have been found in answers or the administrative record, Petitioners-Appellants cannot state a claim that NYSDEC utilized an improper baseline.

Preliminarily, it is well settled that an agency's interpretation of a statute or regulation should be granted substantial deference if that agency administers 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 (2004); *Carver v. State of New York*, 87 A.D.3d 25, 33 (2d Dep't 2011). It is also well settled that judicial review of a lead agency's SEQRA 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); *Matter of Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 N.Y.3d 219, 232 (2007) (citing *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990)) ("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.'"). Therefore, even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of NYSDEC. *Lane Constr. v. Cahill*, 270 A.D.2d 609, 611 (3d Dep't 2000).

Here, in its Amended Negative Declaration, NYSDEC acknowledged as part of its SEQRA review that the Greenidge Station had been in protective lay-up since 2011 – the key basis for Petitioners-Appellants' baseline claim. [R. 103]. 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. *Id.* In other words, the baseline utilized by NYSDEC was an existing facility that operated for approximately 80 years with coal as its primary fuel source. The mere fact that the Facility was in protective lay-up status for a few years does not alter this fact as Petitioners-Appellants urge. Indeed, it would have been improper to do as Petitioners-Appellants suggest – which would be to ignore the Greenidge Station's existing footprint and long-standing operations.

Importantly, NYSDEC is the agency responsible for administering the statutory programs for SEQRA. *See* ECL Article 8. It is also the agency charged with promulgating regulations to implement SEQRA because it has the requisite expertise. *See id.*; 6 N.Y.C.R.R. Part 617. Petitioners-Appellants fail to show, let alone allege, how NYSDEC's actions in using its selected baseline were irrational and cite no case law for their argument, simply suggesting that NYSDEC should have "compared the impacts of new operations to no operations." Petitioners-Appellants Brief, p. 11; [R. 89-90]. This is because there is no support for their claim, which boils down to a disagreement with NYSDEC's baseline selection, which was based on NYSDEC's expertise and wholly supported by even the facts alleged by Petitioners-Appellants.

Once again, Petitioners-Appellants do not argue that answers or the full administrative record would have informed their claim. They also do not cite to any case law supporting their baseline claim. Rather, they point only to USEPA's determination that the PSD/NSR requirements of the CAA applied to the resumption of Greenidge operations. Petitioners-

Appellants Brief, p. 11. As alleged by Petitioners-Appellants, this USEPA letter to NYSDEC disapproved of the initial draft air permits noticed by NYSDEC, finding that for purposes of the CAA's NSR/PSD programs, the facility should have been considered a new source upon reactivation. Petitioners-Appellants erroneously rely on this letter to argue that NYSDEC "should have applied the standards required by EPA for issuance of air emission permits in its SEQRA review of the impacts of the air permits . . . ." Petitioners-Appellants Brief, p. 11.

However, USEPA's CAA NSR/PSD determination is not relevant to NYSDEC's SEQRA analysis. SEQRA is a state law that has an entirely different purpose than the CAA, and has its own set of requirements. *See generally* N.Y. Envtl. Conservation Law § 8-0101. For purposes of SEQRA, NYSDEC is not controlled by USEPA's interpretation of a provision of the federal CAA. Moreover, because the Greenidge Station is an existing source, USEPA did not require the Greenidge Facility to be subjected to the CAA's New Source Performance Standards, which apply to all new, modified and reconstructed natural gas power plants, and Petitioners-Appellants' do not allege as much. *See* 40 CFR 60.40Da(a)(1). Had USAEPA ignored the Facility's long-standing operations and determined it to be a "new" source or facility for all purposes, it assuredly would have done so. USEPA's PSD/NSR determination under the CAA, therefore, is not only irrelevant to NYSDEC's SEQRA determination, it actually fails to support Petitioners-Appellants' argument.

In short, the Amended Negative Declaration completely refutes Petitioners-Appellants' claim that NYSDEC's actions were arbitrary and capricious. Even taking the allegations in their Amended Verified Petition as true, Petitioners-Appellants failed to state a cognizable SEQRA baseline claim. *See generally* Amended Negative Declaration [R. 89-106]. Supreme Court's dismissal of Petitioners-Appellants' baseline claim should therefore be affirmed.

POINT III

SUPREME COURT PROPERLY DENIED PETITIONERS-APPELLANTS' MOTION FOR TEMPORARY INJUNCTIVE RELIEF

Petitioners-Appellants' Motion for Temporary Injunctive Relief requested that the Greenidge Respondents be enjoined from "taking steps to repower the Greenidge Generating Station or construct a gas pipeline to the station pending the resolution of this proceeding or further order of the Court[.]" [R. 82-83]. Due to Petitioners-Appellants' unequivocal failure to satisfy even one of necessary requirements to establish entitlement to injunctive relief, Supreme Court correctly denied Petitioners-Appellants' request.

The decision to grant or deny a request for injunctive relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts. *Doe v. David Axelrod, as Commissioner of Health of the State of New York*, 73 N.Y.2d 748, 750 (1988) (citing *James v. Board of Educ.*, 42 N.Y.2d 357, 363-64 (1977)). The power of an appellate court to review such decisions is, therefore, limited to determining whether the lower courts' discretionary powers were exceeded or, as a matter of law, abused. *Id.*

Injunctive relief is a drastic remedy that is not routinely granted. *Sutherland Global Servs., Inc. v Stuewe*, 73 A.D.3d 1473, 1474 (4th Dep't 2010); *City of Buffalo v. Mangan*, 49 A.D.2d 697 (4th Dep't 1975). "It should be awarded sparingly, and only where the party seeking it has met its burden of proving both the clear right to the ultimate relief sought, and the urgent necessity of preventing irreparable harm." *City of Buffalo*, 49 A.D.2d at 697. The "clear right" to injunctive relief must be established "under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant." *Fricano v. Georgeades*, 147 A.D.2d 940, 940 (4th Dep't 1989) (citing *First Nat'l Bank v. Highland Hardwoods*, 98 A.D.2d 924, 926 (3d Dep't 1983)). "A preliminary injunction should not be

granted where the right to ultimate relief in the action is in doubt." *Rupert v. Rupert*, 190 A.D.2d 1028, 1028 (4th Dep't 1993).

As properly applied by Supreme Court, to establish entitlement to a preliminary injunction, a party must show (1) a likelihood of success on the merits; (2) irreparable injury in the absence of injunctive relief; or (3) a balance of equities in their favor. *Eastman Kodak Co. v. Carmosino*, 77 A.D.3d 1434, 1435 (4th Dep't 2010) (citing *Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839 (2005)); *Emerald Enters. v. Chili Plaza Assoc.*, 237 A.D.2d 912, 912 (4th Dep't 1997); *compare* Decision [R. 19]. Clear and convincing evidence must be provided to support each and every element. *Sutherland Global Servs.*, 73 A.D.3d at 1474 . Otherwise, the request for injunctive relief must be denied. *Id.*; *see also Axelrod*, 73 N.Y.2d at 751. Conclusory statements and unsupported assertions are patently insufficient to establish entitlement to a preliminary injunction. *Fricano*, 147 A.D.2d at 940.

As a threshold matter, Petitioners-Appellants' request for temporary injunctive relief sought an order enjoining the Greenidge Respondents from activities that were substantially complete at the time of Petitioners-Appellants' motion, and then at the time of the Decision appealed from, fully completed. [R. 82-83; 393]. All steps to repower the Greenidge Station and construction of the Greenidge Pipeline were completed in March 2017, and Greenidge Station resumed operations soon thereafter. [R. 393]. Despite their claims to the contrary, Petitioners-Appellants never sought to enjoin operation of the Greenidge Station. *See* [R. 82-83]. Further, even if Petitioner-Appellants had made such a request, as further discussed below, Supreme Court did not abuse its discretion in denying it.

With respect to the activities they did seek to enjoin, Petitioners-Appellants unsupported assertions utterly failed to meet their burden to establish entitlement to the relief they sought.

Supreme Court, therefore, correctly denied Petitioners-Appellants' Motion for Temporary Injunctive Relief and, at the very least, did not abuse its discretion in doing so.

A. Petitioners-Appellants Failed to Establish a Likelihood of Success on the Merits

Petitioners-Appellants assert that they made a prima facie showing on the merits sufficient to establish their likelihood of success. They also assert that the Greenidge Respondents "did not argue that Petitioners[-Appellants] did not show a likelihood of success on the merits." Petitioners-Appellants Brief, p. 14.

The Greenidge Respondents vehemently opposed Petitioners-Appellants' likelihood of success on the merits in their opposition to Plaintiffs-Appellants' Motion for Temporary Injunctive Relief. [R. 8]. That the Greenidge Respondents only included their opposition in their memorandum of law, as referenced during oral argument and not in their affidavits in opposition to Petitioners-Appellants' motion, is of no moment. [R. 389]. Indeed, as the Greenidge Respondents' arguments were legal in nature, as restated here (*see* Point II, *supra*), they were properly presented in the Greenidge Respondents' Memorandum of Law in Opposition to Petitioners' Motion for Temporary Injunctive Relief dated January 6, 2017, which was supported by the Affidavits of Yvonne E. Hennessey, Esq. and Dale Irwin, both dated January 5, 2017. [R. 8]. Affidavits are typically to put issues of fact, not law, before the court.

Not only have Petitioners-Appellants self-servingly misconstrued the Greenidge Respondents' arguments below, they have also severely overstated the sufficiency of their allegations and ignored the documentary evidence before Supreme Court, which included the very Amended Negative Declaration that is at the heart of their claims. The Amended Negative Declaration confirms that NYSDEC did <u>not:</u> (1) issue a CND; (2) segment its environmental review; or (3) use an improper baseline. *See* Point II, *supra*. Moreover, NYSDEC's SEQRA determinations are afforded substantial deference. It is therefore not surprising that Supreme

Court found that Petitioners-Appellants failed to establish a likelihood of success on the merits. [R. 9, 19].

Petitioners-Appellants' reliance on *Tucker v. Toia*, 54 A.D.2d 322, 326 (4th Dep't 1976), is unavailing. In *Tucker*, this Court considered the propriety of a lower court's grant of a preliminary injunction staying implementation of amendments to the Social Services Law that would have terminated the moving parties' home relief benefits. *Id.* at 323. The plaintiffs' underlying argument was that the amendment violated the State Constitution. Recognizing that the appropriate standard for a preliminary injunction was a showing of likelihood of success, this Court upheld the lower court's grant of a preliminary injunction. *Id.* at 326 (rejecting a moving party's need to show "a certainty of success" and requiring that "the moving party make[ ] a prima facie showing of his right to relief"). In doing so, this Court recognized the existence of "substantial" issues of constitutional law and "novel issues of first impression" associated with the plaintiffs' constitutional claims. *Id.*

Here, Petitioners-Appellants' claims are not based on any principles of constitutional law, let alone "substantial" ones, nor are they novel issues of first impression. Petitioners-Appellants' claims are simply that NYSDEC's environmental review under SEQRA was erroneous. There is nothing constitutional or novel about that. And, even for those cases that actually are related to important constitutional issues of first impression, which this case is not, *Tucker* still requires a *prima facie* showing of likelihood of success, which is lacking here. *Id.*

Accordingly, Supreme Court did not abuse its discretion in determining that Petitioners-Appellants failed to establish a likelihood of success on the merits.

B. Petitioners-Appellants Failed to Demonstrate They Would Suffer Imminent and Immediate Irreparable Harm

Relying only on their attorney's unsworn statements in oral argument below, Petitioners-Appellants maintain that they will be irreparably harmed because "without an environmental impact statement, the public will not know all of the potential adverse effects of operating Greenidge Station and how these impacts could be mitigated." Petitioner-Appellants Brief, p. 14. It is therefore not surprising that Supreme Court found that they failed to establish irreparable harm sufficient to warrant a injunctive relief.

Irreparable harm is a threshold requirement for injunctive relief. *See Rochester v. Sciberras*, 55 A.D.2d 849, 849-50 (4th Dep't 1976) (finding no justification for issuance of a preliminary injunction where there is no evidence of immediate injury to the moving party or the public); *see also Golden v. Steam Heat*, 216 A.D.2d 440, 442 (2d Dep't 1995). An injunction should only be issued "where the peril to the petitioners is very substantial and imminent." *Scott v. City of Buffalo*, 16 Misc. 3d 259, 291-92 (Sup. Ct. Erie County 2006). Remote or speculative harm is insufficient to show that a preliminary injunction should be granted. *White v. F.F. Thompson Health Sys., Inc.*, 75 A.D.3d 1075, 1076-77 (4th Dep't 2010); *Golden*, 216 A.D.2d at 442.

Below, Petitioners-Appellants devoted less than a page of their supporting memorandum of law to their argument of irreparable harm and failed to submit a single affidavit alleging any harm. Petitioners-Appellants' only claim of irreparable, imminent and immediate harm to Supreme Court was that their underlying claims could become moot if the injunctive relief was not granted. [R. 87]. As Supreme Court found, this alleged harm is patently insufficient as Petitioners-Appellants failed to allege any specific harm or injury that has or would occur if the

requested injunctive relief was not granted, let alone how such an injury was imminent or substantial.

Here, Petitioners-Appellants now claim that they will be irreparably harmed because the public does not have an environmental impact statement to understand all of the potential adverse effects of operating Greenidge Station and the options for mitigation. Petitioners-Appellants Brief, p. 14. First, Petitioners-Appellants cannot cite to a single affidavit establishing such an "injury." Rather, Petitioners-Appellants rely only on their attorneys unsworn argument before Supreme Court. *Id.*

Moreover, this allegation of "informational injury" is wholly unsupported. Indeed, Petitioner-Appellants have not, because they cannot, cited a single case acknowledging informational injury in New York, let alone finding it sufficient to establish irreparable harm. Moreover, in the one federal case where this claimed type of injury in a National Environmental Policy Act ("NEPA") context has been analyzed for purposes of standing, the court rejected informational injury as contrary to established principles of NEPA. *Atlantic States Legal Found. v. Babbit*, 140 F. Supp. 2d 185, 192-93 (N.D.N.Y. 2001). If such an injury were recognized, and further recognized as sufficient to obtain a preliminary injunction, it would allow anyone to halt projects properly approved by New York State agencies, simply by requesting an EIS.

Also of note, Petitioners-Appellants' allegations of harm self-servingly ignore that the Greenidge Project was subjected to a full environmental review under SEQRA by NYSDEC as well as part of the Article VII approval process conducted by NYSPSC as well as a lengthy permitting review. [R. 15-18]. That they disagree with the results of that environmental review does not negate its existence. The Amended Negative Declaration and completed environmental

assessment does provide the public with a description of the potential environmental impacts of the Greenidge Project and how they have been, or are being, mitigated. [R. 89-106].

Petitioners-Appellants also now claim that for purposes of their request for preliminary injunctive relief, their injury is cumulative over time. This is the opposite of the imminent and immediate harm required for a injunctive relief to be granted. *See Sciberras*, 55 A.D.2d at 849-50 (finding no justification for issuance of a preliminary injunction where there is no evidence of immediate injury to the moving party or the public).

Finally, it is telling that the irreparable harm alleged by Petitioners-Appellants was not imminent and substantial enough for them to make any effort to seek injunctive relief from this Court, and that they waited almost exactly nine months to perfect their appeal despite actual knowledge that construction of the Greenidge Project was complete and that Greenidge Station resumed operations.

Given the foregoing, Supreme Court did not abuse its discretion in finding that Petitioners-Appellants had failed to establish that the requisite irreparable harm would occur if their Motion for Temporary Injunctive Relief was not granted.

C. The Balancing of Equities Tips in Favor of the Greenidge Respondents

Pointing to an alleged "strong public interest in seeing that an adequate environmental review of the impacts of new operations at Greenidge Station is conducted[]" and a conclusory dismissal of the harm to the Greenidge Respondents, Petitioners-Appellants maintain that the balance of equities tips in their favor. Petitioners-Appellants Brief, p. 15. These unsupported allegations are patently insufficient. In addition, the record before Supreme Court overwhelmingly established the harm injunctive relief would cause not only to the Greenidge Respondents but also the harm to third parties and the public at large, in the form of lost wages and benefits and negative impacts on energy reliability and pricing.

Supreme Court did not abuse its discretion when it determined that the balance of the equities did not tip in Petitioners-Appellants' favor. The purported basis for Petitioners-Appellants' assertion to the contrary is the public's purported strong interest in ensuring that an adequate environmental review of the Greenidge Station was performed. Petitioners-Appellants Brief, p. 15. Petitioners-Appellants draw the unsupported conclusion that such an interest "is more burdensome than the harm that might be caused to Respondent . . . through imposition of a temporary injunction on the operations of Greenidge Station." *Id.* As Petitioners-Appellants' assertions are wrong, so too is their argument that the balance of the equities favors a preliminary injunction. *Id.* Further, as noted above, Petitioner-Appellants never requested that operation of Greenidge Station be enjoined. [R. 82].

"When balancing the equities and upon weighing the hardships that might be imposed, where the balance appears to favor the defendants, the preliminary injunction must be denied." *Scott*, 16 Misc. 3d at 291-92 (citing *Western N.Y. Motor Lines v Rochester-Genesee Regional Transp. Auth.*, 72 Misc. 2d 712, 717 (Sup. Ct. Monroe County 1973)); *see also Nobu Next Door, LLC*, 4 N.Y.3d 839 (upholding decision to vacate preliminary injunction because balance of the equities did not tip in plaintiff's favor); *Porter v. Chem-Trol Pollution Servs., Inc.*, 60 A.D.2d 987, 988 (4th Dep't 1978) (upholding denial of preliminary injunction noting a "total failure" by plaintiff to establish "a balance of equities in its favor"); *Eastman Kodak Co.*, 77 A.D.2d at 1436.

At the outset, Petitioners-Appellants have not established that the equities balance in their favor. Petitioners-Appellants make only generalized statements about weighing the public interest and the public's interest "in seeing an adequate environmental review of the impacts of new operations at the Greenidge Station is conducted." Petitioners-Appellants Brief, p. 15.

These vague and ambiguous claims are wholly insufficient and legally infirm. *See also* Point III(B), *supra*.

Given this, Petitioners-Appellants assert, without any evidence contradicting the sworn testimony submitted by the Greenidge Respondents, that there would be no significant harm to Greenidge Respondents if injunctive relief was granted. Petitioners-Appellants Brief, p. 15 Contrary to Petitioners-Appellants' self-serving assertions, if the injunction requested by Petitioners-Appellants' had been granted, it would have delayed completion of the Greenidge Project construction. As construction crews and materials were already mobilized on-site, at the time Petitioners-Appellants made their request to Supreme Court a delay would have required costly demobilization, and then remobilization once this action was concluded. [R. 124].

Furthermore, because the Greenidge Station already had all approvals necessary for operation at the time Petitioners-Appellants made their motion, if construction had been enjoined, it would have resulted in delaying the resumption of operations at the Greenidge Station. [R. 123]. In order to start recouping a return on the very significant investments that have been made on the Greenidge Project, the Greenidge Respondents planned to resume operations as soon as construction of the Greenidge Project was complete. *Id.* Indeed, this is what has happened as Greenidge Station has been operational since Spring 2017. [R. 393]. Each day that operations would have been delayed, it was estimated that the Greenidge Respondents would lose approximately $15,000-50,000 per day. *Id.*

In addition to this substantial harm to the Greenidge Respondents, an injunction also would have inflicted harm on third parties and the public at large. At the time of Petitioners-Appellants' motion, the Greenidge Respondents were in the process of hiring employees to operate the Greenidge Station, employees that would not have been able to start work if

Petitioners-Appellants' Motion for Temporary Injunctive Relief had been granted. *Id.* Furthermore, if construction had been halted and operations of the Greenidge Station delayed, a very real risk existed that essential supplies of electricity would have been cut off during periods of peak demand. [R. 139, 212].

Petitioners-Appellants' self-serving assertion that there is no need for the Greenidge Station to operate is simply incorrect and ignores the evidence presented by the Greenidge Respondents, including the Certificate of Environmental Compatibility and Public Need issued by NYSPSC under Article VII of the Public Service Law, which Petitioners-Appellants even acknowledge in their Amended Verified Petition [R. 75, ¶ 81; 137-39; 149-210].

On balance, the hardships that could have befallen Greenidge Respondents as well as the employees of the Greenidge Station and the public at large were much greater than the vague, unrecognized, harms alleged by Petitioners-Appellants. As such, Supreme Court correctly found that Petitioners-Appellants failed to establish that the balance of equities tip in their favor.

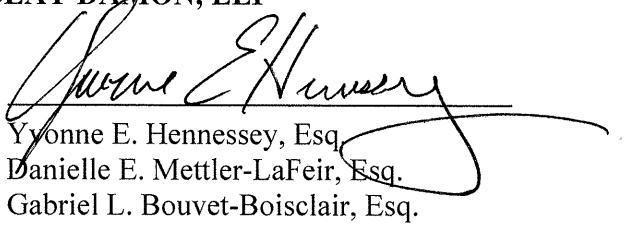
In short, Petitioners-Appellants altogether failed to meet their burden in establishing any of the three conditions necessary to show entitlement to temporary injunctive relief. Petitioners-Appellants' Motion for Temporary Injunctive Relief was therefore properly denied by Supreme Court.

CONCLUSION

For all of the reasons set forth herein, the Greenidge Respondents respectfully submit that Supreme Court's decision should be upheld in its entirety and the Amended Verified Petition dismissed *in toto*.

Dated: July 6, 2018
Albany, New York

BARCLAY DAMON, LLP

By: 

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