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; and COALITION TO PROTECT NEW YORK by and in the name of KATHRYN BARTHOLOMEW, its Treasurer; and SENECA LAKE GUARDIAN, A WATERKEEPER AFFILIATE by and in the name of YVONNE TAYLOR, its Vice President,

Petitioners,

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

–against–

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

Respondents.

NOTICE OF APPEAL

Index No. 2017-0232

PLEASE TAKE NOTICE that Petitioners Sierra Club, Committee to Preserve the Finger Lakes, Coalition to Protect New York and Seneca Lake Guardian hereby appeal to the Appellate Division of the Supreme Court, Fourth Judicial Department, from the Order and Judgment of the Supreme Court, Yates County, Hon. William J. Kocher, Supreme Court Justice Presiding, dated December 4, 2018, entered in the Yates County Clerk's Office on December 17, 2018, with Notice of Entry served by email and mail upon Petitioners' counsel on December 21, 2018. A copy of the Order and Judgment is attached hereto together with the underlying Decision dated November 8, 2018.

Petitioners hereby appeal from each and every part of the Order and Judgment.

DATED: Hammondsport, New York
January 16, 2019

Respectfully submitted,

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COPY

STATE OF NEW YORK
SUPREME COURT : COUNTY OF YATES

In the Matter of the Application of

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

Petitioners,

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

Respondents.

ORDER AND JUDGMENT

Index No. 2017-0232

WHEREAS, petitioners 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; and Seneca Lake Guardian, A Waterkeeper Affiliate, by and in the name of Yvonne Taylor, its Vice President, brought this Article 78 proceeding against the New York State Department of Environmental Conservation and Commissioner Basil Seggos (collectively, DEC Respondents) and Greenidge Generation, LLC and Lockwood Hills, LLC (collectively, the Greenidge Respondents), by notice of petition on November 8, 2017.

WHEREAS, on December 22, 2017, petitioners served a memorandum of law and affirmation in support of the petition.

WHEREAS, on March 2, 2018, DEC Respondents served an answer, administrative return, affidavits, and a memorandum of law with objections in point of law opposing the petition.

WHEREAS, on March 2, 2018, the Greenidge Respondents also served an answer, attorney affirmation, and a memorandum of law with objections in point of law opposing the petition.

WHEREAS, on April 27, 2018, petitioners served a reply in opposition to respondents' papers, including affidavits.

WHEREAS, on May 11, 2018, DEC Respondents served a motion to strike portions of petitioners' April 28, 2018 reply.

WHEREAS, on May 15, 2018, the Greenidge Respondents served an affirmation supporting DEC Respondents' motion to strike.

WHEREAS, on May 18, 2018, petitioners opposed the motion to strike.

WHEREAS, on May 21, 2018, the Greenidge Respondents served a supplemental affirmation supporting DEC Respondents' motion to strike.

WHEREAS, on May 22, 2018, the Court held oral argument on the petition and the motion to strike.

WHEREAS, at the May 22, 2018 oral argument, the Court determined that it would look at the affidavits to which DEC Respondents objected solely for the purposes of establishing petitioners' standing.

NOW, upon reading and filing the parties' submissions, including: the verified petition, dated November 8, 2017; the notice of petition, dated November 8, 2017; petitioners' memorandum of law, dated December 22, 2017; the affirmation of Rachel Treichler in support of petitioners' memorandum of law, dated December 22, 2017; DEC Respondents' verified answer, dated February 28, 2018; the administrative return, dated February 28, 2018; the affidavit of Michael Caseiras, dated February 28, 2018; the affidavit of Colleen Kimble, dated February 28, 2018; the affidavit of Scott Sheeley, dated February 28, 2018; DEC Respondents' memorandum of law, dated March 2, 2018; Greenidge Respondents' answer, dated March 2, 2018; Greenidge Respondents' memorandum of law, dated March 2, 2018; the affirmation of Yvonne Hennessey in support of Greenidge Respondents' memorandum of law, dated March 2, 2018; the affidavit of Eileen and John Moreland, dated April 23, 2018; the affidavit of Abi and Winton Buddington, dated April 24, 2018; the affidavit of Roger Downs, dated April 24, 2018; the affidavit of Kathryn Bartholomew, dated April 25, 2018; the affidavit of Linda Bracht, dated April 25, 2018; the affidavit of Carolyn McAllister, dated April 25, 2018; the affidavit of Jane Crumlish, dated April 25, 2018; the affidavit of Peter Gamba, dated April 25, 2018; the affidavit of Mary Anne Kowalski, dated April 25, 2018; the affidavit of Linda Downs, dated April 25, 2018; the affidavit of Gregory Boyer, dated April 26, 2018; petitioners' reply memorandum, dated April 27, 2018; DEC Respondents' notice of motion to strike, dated May 11, 2018; the affirmation of Nicholas Buttino in support of DEC Respondents' motion to strike, dated May 11, 2018; DEC Respondents' memorandum of law in support of the motion to strike, dated May 11, 2018; Yvonne Hennessey's affirmation in support of DEC Respondents' motion to strike, dated May 15, 2018; petitioners' memorandum of law in opposition to DEC Respondents' motion to strike,

dated May 18, 2018; Yvonne Hennessey's supplemental affirmation in support of DEC Respondents' motion to strike, dated May 21, 2018; letter from Greenidge Respondents to the Court, dated July 18, 2018; letter from petitioners to the Court, dated July 23, 2018; letter from Greenidge Respondents to the Court, dated July 24, 2018; letter from DEC Respondents to the Court, dated July 25, 2018; letter from Greenidge Respondents to the Court, dated September 14, 2018; and, upon all the papers, pleadings, and materials submitted by the parties, as well as all oral arguments presented at the hearing on the petition and motion on May 22, 2018,

AND, after due deliberation having been had, and for the reasons set forth in the written decision of the Court, dated November 8, 2018 (a copy of which is attached), it is:

ORDERED and **ADJUDGED** that the petition is dismissed on the merits according to the decision dated November 8, 2018.

This constitutes the Order and Judgment of the Court.

DATED: 12/4/18

Hon. William F. Kocher
Acting Supreme Court Justice

FILED & ENTERED
12-7-18 1:00PM
YATES COUNTY CLERK
Deputy

STATE OF NEW YORK
SUPREME COURT COUNTY OF YATES

In the Matter of the Application of

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

Petitioners,

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

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

Respondents.

DECISION
Index No. 2017-0232

2017-0232

Petitioners brought this application by way of a Notice of Petition and Verified Petition challenging the issuance of two permits to Respondent Greenidge Generation ("GGLLC") on September 11, 2017. The challenges for each permit focus on both the alleged violations of the Environmental Conservation Law and respondent New York State Department of Environmental Conservation's ("DEC") State Environmental Quality Review Act ("SEQRA") determinations. Both GGLLC and the DEC have answered the Petition[1].

1 The issue of standing has been resolved by the parties and will not be addressed.

As a preliminary matter, this Court previously issued a Decision regarding the challenge to the SEQRA review in conjunction with the claim that the issuance of air permits to GGLLC was in error (the Greenidge I action). Following the determination that the air permits were, in all respects properly issued, the present Petitioners filed this action challenging the issuance of the Water Withdrawal Permit and the SPDES permit.

Following oral argument of the case on May 22, 2018, Respondent GGLLC submitted a number of documents related to Petitioners' motion practice at the Appellate Division, Fourth Department in Petitioners' appeal from this Court's order in the Greenidge I action. Petitioners objected to the submission on the ground that they were improper and untimely.

FINDINGS OF FACT

The Greenidge Station ("the Facility") is an electric generating facility located in the Town of Torrey, Yates County, New York. It currently consists of one 107 megawatt generating unit, known as Unit 4, which historically operated as a coal-fired power plant. The Facility was initially constructed in the 1930s. The plant was built to use once-through condenser cooling, taking water withdrawn from Seneca Lake to cool the turbines and then discharge the water into the Keuka Outlet, upstream from Seneca Lake. Unit 4 was installed in 1953. In 1999, the facility and the Lockwood Ash Disposal Site ("LADS"), located across NYS Route 14 from the Facility, were acquired by AES AEE2, LLC.

On January 29, 2010, the DEC renewed the SPDES permit for the Facility effective February 1, 2010. The permit required various reports in compliance with 6 NYCRR 704.5. Following an Impingement and Entrainment Characterization Study, the DEC issued a modification to the SPDES permit.

In September 2010, AES AEE2, LLC, notified the New York State Public Service Commission that the Greenidge Unit 4 would be placed in protective lay-up status in March 2011. In May 2011, a lay-up plan for LADS was submitted to the DEC.

In December 2011, AES AEE2, LLC and its parent company, AES Eastern, filed for Chapter 11 bankruptcy. Petitioners allege that in September 2012, AES AEE2, LLC indicated in bankruptcy papers that the Facility would be permanently retired and transferred to a salvage company to dismantle. Thereafter, AES AEE2, LLC sought permission to sell the Facility to GMMM Holdings I, LLC. In October 2012 the sale was approved by the bankruptcy court. On January 15, 2013, the SPDES permit for the Facility, then held by AES Eastern, was transferred to GMMM Greenidge LLC, a subsidiary of GMMM Holdings. In March of 2013, AES AEE2, LLC deeded certain property to GMMM Greenidge and additional adjoining property to GMMM Lockwood LLC, also a subsidiary of GMMM Holdings. In May 2013, GMMM Greenidge applied to the DEC for a water withdrawal permit for the Facility.

In February and March of 2014, GMMM Greenidge was sold to Atlas Holdings and renamed Greenidge Generation, LLC (GGLLC). At the same time, GMMM Lockwood, LLC was sold and renamed Lockwood Hills, LLC.

On May 16, 2014, GGLLC submitted an air permit application for the Facility. Thereafter, in August 2014, GGLLC applied to renew the SPDES permit for the Facility. One year later, in August 2015, the DEC published notices that GGLLC had applied for air permits, water withdrawal permits and a renewal of the permit. The notice for the renewal of the SPDES permit indicated that the DEC was proposing a department-initiated modification to the SPDES

permit. The notice further indicated that the DEC, as lead agency, had determined that the entire project was a Type I action and would not have a significant impact on the environment.

In September 2015, petitioner Committee to Preserve the Finger Lakes filed comments with the DEC opposing all three permits. Specifically, Petitioners objected to the permits contending that had the applications been treated as applications for new permits, additional permit conditions would have been imposed. Petitioners further opposed the issuance of the petitions on the basis that the DEC failed to take a hard look at the environmental impacts of resuming operation at the Facility.

On June 29, 2016, the DEC issued an Amended Negative Declaration covering the SPDES permit. On September 11, 2017, the DEC issued the water withdrawal permit and SPDES permit to GGLLC. The water withdrawal permit authorizes the withdrawal of 139,248,000 gallons of water per day from Seneca Lake. The SPDES permit authorizes the discharge of 134,000,000 gallons of water per day into the Keuka Outlet. The permit requires the installation of wedge-wire screens and variable speed drives.

CONCLUSIONS OF LAW

Petitioners commenced this proceeding challenging certain actions of the Respondent DEC. The "review of an agency determination that was not made after a quasi-judicial hearing is limited to consideration of whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion" (*Matter of Harpur v Cassano*, 129 AD3d 964, 965, *lv denied* 26 NY3d 916; *see also Town of Marilla v Travis*, 151 AD3d 1588, 1589).

PETITIONERS' FIRST CAUSE OF ACTION

As a first cause of action, Petitioners contend that the Water Withdrawal Permit dated September 11, 2017 was issued in error. Specifically, Petitioners contend that the DEC should have considered the Water Withdrawal Permit application as an application for a new withdrawal rather than treating GGLLC as an existing user. Petitioners also contend that the DEC failed to consider the environmental impacts of the permit and failed to set appropriate conditions in issuing the permit.

As noted above, the Facility operated as a coal burning electric generating station since the 1930s. Although the Facility was placed in protective lay-up in March of 2011, on January 16, 2012, the Facility's water withdrawals were reported to the DEC pursuant to ECL 15-1501(9) which provides,

> 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.

Therefore, the DEC issued the initial permit to GGLLC as an existing user.

The DEC's interpretation of ECL 15-1501(9) as mandating the issuance of an initial permit to any person who reported the maximum water withdrawal capacity before February 15, 2012 was not irrational or unreasonable. "Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld" (*Kurcsics v Merchants Mut. Ins.*

Co., 49 NY2d 451, 459). Here, the requirement of ECL 1501(9) was for reporting of water withdrawal capacity. Had the legislature intended to consider only facilities that were operating as of February 15, 2012, the reporting requirement would have been for actual gallons withdrawn, and not for capacity.

Petitioners further contend that even had the DEC properly determined that GGLLC was an existing water user, the DEC erred in failing to impose adequate conditions on the Water Withdrawal Permit. The DEC does not dispute that it was entitled to place appropriate terms and conditions on the permit but does dispute that it was required to satisfy the requirements of ECL 15-1503. ECL 15-1503 requires the DEC to consider several factors when deciding whether to grant a permit, deny a permit or grant a permit with conditions. Those factors include whether "the proposed water withdrawal will be implemented in a manner to ensure it will result in no significant individual or cumulative adverse impacts on the quantity or quality of the water source and water dependent natural resources," and whether "the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures" (ECL 15-1503 [2] [f], [g]).

In *Sierra Club v Martens* (158 AD3d 169 [2d Dept 2018]), the Second Department cited the consideration and application of the factors set forth in ECL 15-1503(2) as a reason why the issuance of an initial water withdrawal permit is a Type II action under SEQRA. The Court noted that the DEC is required to consider the factors set forth in ECL 15-1503.

This Court finds that the DEC was required to consider the factors set forth in ECL 15-1503. However, it is clear from the record that the DEC did consider the factors set forth in ECL 15-1503 when it placed permit conditions "including environmentally sound and economically

feasible water conservation measures to promote the efficient use of supplies" (6 NYCRR 601.7). The conditions placed on the Water Withdrawal Permit, including the installation of meters, water auditing, and reporting of audits and leaks as well as the "Incorporation of the Cooling Water SPDES Water Conservation and Fisheries Protection Measures," satisfied the requirements of both ECL 15-1503 and 6 NYCRR 601.7.

Petitioners' contention that the DEC's failure to consider wet closed-cycle cooling as a viable alternative in the issuance of the water withdrawal permit violates the Water Supply Law is without merit. As discussed below, the closed-cycle cooling system is only an absolute requirement for new facilities. Furthermore, and again, as discussed below, the alternative conditions placed on the SPDES permit present equivalent results to closed-cycle cooling. Petitioners' attempt to compare the permits and conditions of an unrelated project to the permits issued in relation to the Facility are unpersuasive. The DEC considers the Best Technology Available on a "site specific, case by case basis" (Commissioner's Policy on Best Technology Available [sp-52], Record, 729).

The issuance of the Water Withdrawal Permit was not arbitrary and capricious, or an abuse of discretion and the Petitioners' first cause of action is dismissed.

PETITIONERS' SECOND CAUSE OF ACTION

Petitioners contend that the DEC failed to comply with SEQRA when it determined that the Water Withdrawal Permit constituted a Type II action. The DEC contends that even though the issuance of the Water Withdrawal permit was considered a Type II action, the entire project was reviewed as a Type I action and a negative declaration was properly issued.

As a preliminary matter, "[a] four-month statute of limitations is applicable to allegations of SEQRA violations" (*Matter of Eadie v Town Bd. of Town of N. Greenbush*, 22 AD3d 1025, 1027, *affd.* 7 NY3d 306). The question is whether the fourth-month statute of limitations commenced when the negative declaration was issued as respondent Greenidge contends or whether it commenced when the DEC issued the Water Withdrawal Permit and SPDES Permit as Petitioners contend.

In *Eadie v Town Bd. of Town of N. Greenbush* (7 NY3d 306, 317), relied upon by the Petitioners, the Court of Appeals cited two factors in determining when the statute of limitations begins to run. The Court noted that in cases involving the enactment of legislation, the four-month period commences with the date of enactment of the legislation, and not the issuance of the SEQRA findings. The Court also found that where "the completion of the SEQRA process was the last action taken by the agency whose determination petitioners challenged," the running of the four months begins upon the issuance of the SEQRA findings. The *Eadie* case does not directly answer the question presented here, that is, when does the statute of limitations begin to run where there is no legislation to be enacted and where the SEQRA determination is not the "last action taken by the agency." This Court is persuaded by the fact that the DEC was required to issue several permits following the negative declaration before the petitioners suffered harm and therefore, the statute of limitation did not begin to run until the DEC issued the permits (*see*, *Town of Marilla v Travis*, 49 Misc3d 1203(A), *affd*, 151 AD3d 1588) and Petitioners' SEQRA claims are not time barred.

Furthermore, Respondent GGLLC contends that Petitioners' SEQRA claims are barred by the doctrine of *res judicata*. In the previous Greenidge Decision, this Court stated,

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

Petitioners contend that the doctrine of *res judicata* cannot be applied because there is an additional party in the present proceeding and because the claims in the previous proceeding involved permits that are different from the permits being challenged in the present action. Petitioners' claims in the second and fourth causes of action challenge not the issuance of the permits but the way the SEQRA review was conducted and the conclusions reached from the SEQRA review. The fact that the issuance of the permits was the manifestation of the "harm" suffered by the Petitioners does not change the fact that the SEQRA review challenged in Greenidge I is the same as that challenged in the present action. Therefore, with respect to the Petitioners involved in that case, the challenge to the SEQRA review is barred by the doctrine of *res judicata*. Due to the fact that the present action involves a Petitioner that was not a party to the prior action, this Court will discuss the merits of Petitioners' claims as if there was no *res judicata* preclusion.

Under SEQRA, actions are classified a Type I, Type II or Unlisted (*see* 6 NYCRR 617.2[ai], [aj], [ak]). Type I actions are those actions that "may have a significant adverse impact on the environment and require the preparation of an EIS" (6 NYCRR 617.4[a][1]). Type II actions are activities that "have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8" (6 NYCRR 617.5[a]). Unlisted actions are "all actions not

identified as a Type I or Type II action in this Part" (6 NYCRR 617.2[ak]). All Type I and unlisted actions initially require the preparation of an Environmental Assessment Form (EAF), whose purpose is to aid an agency "in determining the environmental significance or non-significance of actions" (6 NYCRR 617.6[a][2], [3]; 6 NYCRR 617.2[m]). If an action is determined to be Type II, no further action is required (6 NYCRR 617.6[a][1][i]).

After reviewing the EAF, if the lead agency determines the significance of a Type I or Unlisted action. If "the action may include the potential for at least one significant adverse environmental impact," an Environmental Impact Statement (EIS) is required (6 NYCRR 617.7[a][1]). If the lead agency determines "that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant" no EIS is required (a negative declaration) (6 NYCRR 617.7[a][2]).

Importantly for the determination of this case, Type II actions include "official acts of a ministerial nature involving no exercise of discretion" (6 NYCRR 617.5[c][19]). This was the DEC's basis for determining that the issuance of the Water Withdrawal Permit was a Type II action. This Court is persuaded by the holding in *Sierra Club v Martens* (158 AD3d 169, *supra*, at 177) that the issuance of the initial Water Withdrawal Permit was not a ministerial act. The *Martens* court stated,

> Here, while ECL 15-1501 (9) states that the DEC "shall issue" an initial permit to an existing operator for its self-reported maximum water withdrawal capacity, the statute provides that such initial permit is "subject to appropriate terms and conditions as required under this article." Notably, the WRPA specifically provides the DEC with the power "to grant or deny a permit or to grant a permit *with conditions*" (ECL 15-1503 [2] [emphasis added]). The statutory factors that the DEC is required to consider when reviewing an application and imposing conditions on the permittee do not lend themselves to mechanical application. For instance,

> whether "the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures" (ECL 15-1503 [2] [g]) will almost certainly vary from operator to operator, or from water source to water source. The DEC's own regulations state that an "initial permit" must include "environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies" (6 NYCRR 601.7 [e]). Whether a condition is "appropriate" for a given operator is a matter that falls within the DEC's expertise and involves the exercise of judgment, and, therefore, implicates matters of discretion (*see New York Civ. Liberties Union v State of New York*, 4 NY3d at 184; *Tango v Tulevech*, 61 NY2d at 41; *see also Tarter v State of New York*, 68 NY2d at 518-519).

As Petitioners contend, the issuance of the Water Withdrawal Permit constitutes a Type I action (6 NYCRR 617.4[b][6][ii]).

Although the DEC may have incorrectly considered the issuance of the Water Withdrawal Permit as a Type II action, it is clear from the record that the DEC properly conducted a consolidated SEQRA review and considered the entire project a Type I action. The SEQR full EAF lists the title of the action as "Greenidge Station Reactivation" and specifically discusses "an initial permit for the withdrawal of water pursuant to 6 NYCRR Part 601" (Record, 1054-1055). Furthermore, the EAF specifically notes, "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" (Record, 1055).

Here, after preparing a full EAF, the DEC, as the lead agency, issued a negative declaration. The Record establishes that the DEC "identified the relevant areas of environmental

concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417). The DEC "complied with the requirements of SEQRA in issuing the negative declaration and, ...the 'designation as a type I action does not, per se, necessitate the filing of an environmental impact statement ..., nor was one required here'" (*Wooster v Queen City Landing, LLC*, 150 AD3d 1689, 1692, *rearg denied*, 151 AD3d 1970, *quoting Matter of Mombaccus Excavating, Inc. v Town of Rochester, N.Y.*, 89 AD3d 1209, *lv. denied* 18 NY3d 808; *see also*, *Fichera v New York State Dept. of Envtl. Conservation*, 159 AD3d 1493, 1497).

Petitioners' second cause of action for a violation of SEQRA in the issuance of the Water Withdrawal Permit is dismissed.

PETITIONERS' THIRD CAUSE OF ACTION

Petitioners contend that the DEC violated the Water Pollution Control Law in issuing a State Pollution Discharge Elimination System (SPDES) permit without conducting a full technical review and without imposing adequate terms and conditions[2]. Respondent DEC states that a full technical review of the application was conducted before the SPDES permit was renewed and that appropriate and adequate conditions were imposed.

"[T]hermal discharge—which deleteriously impacts fish populations—falls within the definition of water pollution regulated by the Clean Water Act (*see* 33 USC § 1326[b]; § 1362[6]). New York, mirroring federal regulations, requires power plants that employ water intake and thermal discharge systems [ ] to obtain a permit from respondent Department of

2 To the extent that petitioners challenge the 2013 transfer of the Greenidge SPDES permit, the challenge to that action is barred by the four-month statute of limitations.

Environmental Conservation (hereinafter DEC) under the State Pollutant Discharge Elimination System (*see* ECL 17–0701, 17–0801—17–0831)" (*Riverkeeper, Inc. v Crotty*, 28 AD3d 957, 957).

Petitioners contend that the DEC was required to treat the SPDES renewal application as a new application because the Facility "has not operated" during the term of the prior permit pursuant to 6 NYCRR 621.11(b)(3). Respondent DEC contends that a renewed SPDES permit must be treated as a new permit application pursuant to 6 NYCRR 621.11(i). "In 1994 the Legislature amended the procedure for the renewal and review of SPDES permits * * * by providing that all SPDES permits may be 'administratively renewed,' but that the DEC would conduct a 'full technical review' of SPDES permits according to a 'priority ranking system' (ECL 17–0817 [2], [4])" (*Nat. Resources Defense Council, Inc. v New York State Dept. of Envtl. Conservation*, 54 AD3d 866, 866). Full technical review is defined as "the complete evaluation of all elements of the permit associated with the ranking system's priority ranking factors, together with substantive issues identified in comments submitted during the public comment period, and the verification of the accuracy and appropriateness of all other information contained in the permit" (ECL 17-0817[4]).

From a review of the record, and contrary to Petitioners' allegations, it is clear that the permit application underwent a full technical review resulting in a renewal of the permit with additional conditions imposed. The documents reviewed as part of the full technical review are included in the record at pages 464-709. The full technical review is further evidenced by the conditions attached to the SPDES permit.

The Petitioners also contend that the DEC erred in failing to require the installation of closed-cycle cooling. The DEC's regulations require the use of the "best technology available" in the construction of cooling water intake structures (6 NYCRR 704.5). The DEC Policy sheet on Best Technology Available issued on July 10, 2011 states that it applies to "all existing and proposed industrial facilities designed to withdraw twenty (20) million gallons per day." The documents make clear that wet closed-cycle cooling is not the sole means of obtaining the performance goal. "The performance goal for existing industrial facilities in New York is closed-cycle cooling or the equivalent. Department staff believe that the majority of facilities that install and properly operate and maintain approved closed-cycle-equivalent technologies should be capable of meeting the performance goals established in this policy" (Record, 730). The policy sheet also states that staff will impose permit conditions on "a site specific, case by case basis." The document makes clear that wet closed-cycle cooling is the performance goal for all new facilities and wet closed cycle cooling *or its equivalent* is the goal for all existing industrial facilities. Equivalent is defined 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" (Record, 726).

Despite Petitioners' arguments to the contrary, wet closed-cycle cooling was not the only option for the SPDES permit for the Facility. The DEC was authorized to consider other options for the Facility as it was in existence at the time the SPDES permit was issued. The DEC imposed cylindrical wedge screens and variable speed pumps as the equivalent of closed-cycle cooling. Petitioners have failed to submit any statements to contradict the DEC's opinion that the conditions imposed will reduce impingement mortality by 95% and entrainment mortality by

85%. In fact, Petitioners' argument is not that the wedge screens and variable speed pumps are inequivalent to wet closed-cycle cooling but rather that the DEC lacked the ability to impose anything but wet closed-cycle cooling. As discussed above that argument fails as a reading of the 2011 policy statement indicates.

The DEC's issuance of the SPDES permit, with the imposed requirements, was not arbitrary and capricious nor was it an abuse of discretion and Petitioners' third cause of action is dismissed.

PETITIONERS' FOURTH CAUSE OF ACTION

Petitioners contend that the DEC erred in finding that there were no significant adverse impacts with the renewal of the SPDES permit. Petitioners also contend that the DEC erred in issuing a negative declaration because it constitutes a "conditioned negative declaration" which is impermissible for Type I actions. Petitioner further contends that the DEC improperly segmented the SEQRA review of the Facility from the review of the LADS and applied an incorrect baseline.

"Judicial review of SEQRA findings 'is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination "was affected by an error of law or was arbitrary and capricious or an abuse of discretion"' (*Akpan v Koch*, 75 NY2d 561, 570, *quoting* CPLR 7803[3]). This review is deferential for 'it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively' (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 416)" (*Friends of P.S. 163, Inc. v Jewish Home*

Lifecare, 30 NY3d 416, 430, *reargdenied sub nom. Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 31 NY3d 929).

A review of the EAF prepared by the DEC revels that the DEC fully considered all of the potential environmental impacts of the renewed SPDES permit, including those to surface waters (Record, 1043). Furthermore, as the 2017 SPDES permit contained more stringent conditions than had existed previously, it would have been arbitrary and capricious should the DEC have determined that there was a significant adverse environmental impact. The DEC was reviewing an application for a renewed SPDES application on an existing facility. To have compared the environmental impacts of the renewed SPDES permit to a fictional nonexistent facility would have been an abuse of discretion.

Petitioners contend that the negative declaration fails to evaluate the thermal impacts on the area of the lake surrounding the Keuka Outlet.

> [T]here is nothing inherently improper in "allow[ing] for ambient [temperature] above the criteria in small areas near outfalls" (EPA, Water Quality Standards Handbook: Second Edition at 5–1 [Aug.1994], available at https://www.epa.gov/sites/production/files/2016–06/documents/wqs–handbook–1994.pdf [accessed July 13, 2017]). New York has adopted such a "mixing zone" policy (*see* 6 NYCRR 704.1[b]; 704.3; *see also* 40 CFR 131.13), and such a zone will pass muster so long as it is defined in scope, does "not interfere with spawning areas, nursery areas and fish migration routes" (6 NYCRR 704.3[c]) and avoids lethality "*in contravention of water quality* standards to aquatic biota which may enter" it (6 NYCRR 704.3[b]). Lethality, for purposes of mixing zones, focuses upon the impacts of a mixing zone upon an entire population, not whether the water temperature in the zone will prove deadly to an individual organism (see 6 NYCRR 704.1[a]; EPA, Water Quality Standards Handbook: Second Edition at 5–6 [Aug.1994], available at https://www.epa.gov/sites/production/files/2016–06/documents/wqs–handbook–1994.pdf [accessed July 13, 2017]).

(*Riverkeeper, Inc. v New York State Dept. of Envtl. Conservation*, 152 AD3d 1016, 1019).

This Court has reviewed the Discharge Monitoring Report Summaries for Greenridge Station (Record, 710-723) for the year prior to the lay-up. The report indicates that the maximum temperature of the water being discharged from the Facility in the summer was 102° and the maximum temperature of the water being discharged from the Facility in the winter was 85°. Both the current and prior SPDES Permit require a maximum discharge temperature of 108° in the summer and 86° in the winter, with a differential of 26° in the summer and 31° in the winter. Furthermore, the current SPDES Permit requires GGLLC to submit an updated schedule to the Thermal Discharge Study Plan that was submitted on January 27, 2011 within three months of the reactivation date. The existing Thermal Discharge Study Plan (Record 690-707) fully detailed the manner in which the study and monitoring of the thermal discharge is to be conducted. The foregoing constitutes a rational basis from which the respondent DEC could conclude that issuance of SPDES Permit would result in no significant adverse environmental impact.

Petitioners contend that the DEC utilized the wrong baseline in determining that the recommencement of operations at the Greenidge Facility would not result in any significant adverse environmental impacts. Specifically, the Petitioners contend that the baseline should have been "no operations" rather than pre-layup operations. Petitioners are unable to cite any authority for their position that the Facility's lay-up status required using a baseline as if there was no existing facility. The determination to use a pre-layup baseline was not arbitrary or capricious.

Petitioners are correct that a conditioned negative declaration cannot be issued for a Type I Action (*Ferrari v Town of Penfield Planning Bd.*, 181 AD2d 149, 151). Although the SPDES permit contains sections titled "Additional Requirements" and "Biological Monitoring Requirements" (Record, 1427-1429), this does not make the negative declaration a conditioned negative declaration. The amended negative declaration was for a project that involved a SPDES permit with requirements. Notably, Part 3 of the EAF states. "The project will ultimately involve a modification of the cooling water intake structure (CIWS) at the facility. The modification will include the installation of 'Best Technology Available' (BTA) measures *in accordance with Commissioner's Policy CP-52* to reduce fish entrainment and impingement" (Record, 1054). Therefore, the inclusion of the BTA requirements in the SPDES Permit only clarified that GGLLC was required to do to be in compliance with the Commissioner's Policy CP-52 and other regulations. They should not be considered conditions any more than other requirements that the permittee comply with the law are requirements.

A conditioned negative declaration is defined as "a negative declaration issued by a lead agency for an Unlisted action, involving an applicant, in which the action as initially proposed may result in one or more significant adverse environmental impacts; however, mitigation measures identified and required by the lead agency, pursuant to the procedures in section 617.7(d) of this Part, will modify the proposed action so that no significant adverse environmental impacts will result" (6 NYCRR 617.2[h]). The Court of Appeals has discussed the issuance of conditioned negative declaration in *Merson v McNally* (90 NY2d 742). The Court stated that determining whether a conditioned negative declaration has been impermissibly issued involves a two-part analysis. "(1) whether the project, as initially proposed, might result in

the identification of one or more 'significant adverse environmental effects'; and (2) whether the proposed mitigating measures incorporated into part 3 of the EAF were 'identified and required by the lead agency' as a condition precedent to the issuance of the negative declaration" (*Merson v McNally* at 752-53). This analysis "allows for consideration of the legitimate maturation of a development project in accordance with the goals of environmental regulation" (*Merson v McNally*, 90 NY2d 742, 750).

Inasmuch as Petitioners contend that it is the conditions placed on the SPDES permit that created the conditioned negative declaration, this Court will consider whether the environmental impacts of a SPDES permit without the conditions may have resulted in a significant adverse environmental impact. This Court concludes that it would have. To determine otherwise would be to ignore the importance of minimizing or eliminating entrainment and impingement. Therefore, because the first prong of the test established by the Court of Appeals has been satisfied, the Court will go on to consider the second prong, whether the mitigating measures were required by the lead agency as a condition precedent to issuing the negative declaration. The Court determines that they were not.

Here, the "mitigating measures" were not truly conditions as they were a statement of the policy and regulations required to be imposed upon the issuance of a permit. The "revisions" were a natural part of the permitting process, to specify the conditions the permittee must meet to follow the law. The provisions were submitted and publicly evaluated prior to the issuance of the negative declaration (*Merson v McNally*, 90 NY2d at 755).

"Where mitigating measures are part of the 'give and take' of the application process, rather than a condition of approval, a negative declaration may be valid (see, *Matter of Merson v McNally, supra,* at 753)" (*Hoffman v Town Bd. of Town of Queensbury*, 255 AD2d 752, 754).

Petitioners further contend that the DEC improperly segmented its review of the environmental impacts of the operations of the Greenidge Station from its review of the operations of Lockwood Ash Disposal Site, Petitioners contend that the impact of depositing the waste from the Greenidge Station should have been included in the EAF. The DEC contends that the consideration of the Facility as separate from the landfill was appropriate.

Segmentation is defined as "the division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance" (6 NYCRR 617.2[ag]). Although the SPDES permit associated with the Landfill was not formally part of the negative declaration issued as part of the re-activation of the Facility, the DEC did consider the environmental impact of the waste from the Facility. The DEC specifically stated, in a section titled "Solid Waste Management" that there would be no impacts related to solid waste. management. "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" (Record, 1057). This Court finds that the DEC did not improperly segment the review of the environmental impacts of operating the Facility from the environmental impacts of operating the landfill.

Petitioners' fourth cause of action for a violation of SEQRA in the issuance of the Water Withdrawal Permit is dismissed.

RESPONDENT GGLLC'S ADDITIONAL SUBMISSIONS

Finally, following the argument of this case, Respondent GGLLC submitted to this Court a number of documents that had been submitted to the Appellate Division, Fourth Department by the Petitioners. As a preliminary matter, this Cases makes no determination on whether the papers submitted to this Court by Respondent GGLLC are properly before the Appellate Division.

This Court does disagree with Respondent GGLLC that the recent motion practice at the Appellate Division renders the present Greenridge action moot. This Court finds that this Greenidge action is not moot and is properly before this Court.

The Petition is dismissed in its entirety. This constitutes the Decision of the Court. Respondent DEC to submit an order, on notice to the Petitioners and Respondent GGLLC on or before December 3, 2018.

Dated: 11/8/ YORK
Penn Yan, New York.

W. F. Kocher

Hon. William F. Kocher
Acting Supreme Court Justice

ERED
November 14 2018 10:40pm
YATES COUNTY CLERK

STATE OF NEW YORK, COUNTY OF YATES, SS:
I, LOIS E. HALL, Clerk of the County of Yates
and clerk of the Supreme and County Courts of the County of Yates,
both being Courts of Record having a common seal,
DO HEREBY CERTIFY that I have compared the copy with the
original [illegible] in this office, and that the same is
a true copy of the whole of said original.
IN WITNESS WHEREOF, I have hereunto set my hand and affixed
the seal of said county and courts on November 14 2018

Yates County Clerk