To be Argued by:
RICHARD J. LIPPES, ESQ.
(Time Requested: 15 Minutes)

Appellate Division 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.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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PRELIMINARY STATEMENT

This reply brief for the Petitioners-Appellants ("Petitioners") is submitted in reply to issues raised by the Respondents-Respondents ("Respondents") in their briefs on appeal and in their memoranda of law in support of the motion by Respondents Greenidge Generation LLC, Greenidge Pipeline LLC, Greenidge Pipeline Properties Corporation, and Lockwood Hills, LLC ("Greenidge Respondents") to dismiss the appeal on the ground of mootness and in opposition to Petitioners' motion for temporary injunctive relief on appeal. This reply brief will also clarify and support the arguments made in Petitioners' initial brief and in Petitioners' memorandum of law in opposition to the motion to dismiss the appeal and in support of Petitioners' motion for temporary injunctive relief as they relate to the arguments made by Respondents in their briefs and memoranda of law. Although this court has denied both motions, many of the issues addressed in the parties' memoranda of law supporting and opposing the motions address issues that are also raised in Respondents' briefs on appeal and thus are addressed herein. As will therefore be seen, mootness is not applicable to the facts of this case and Respondents' arguments in support of Supreme Court's decision below are unavailing.

REPLY ARGUMENT

The fundamental issue in this case is whether Respondent New York State Department of Environmental Conservation ("Respondent DEC") violated the State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law ("ECL") Article 8, when it issued new Title IV and Title V air permits for new operations at Unit 4 of the Greenidge Generating Station ("Greenidge Station") on Seneca Lake without requiring preparation of a full environmental impact statement ("EIS"). At the time the permits were issued on September 8, 2016, Greenidge Station was shut down and had not operated since before March 2011. R. 59,

63. This appeal challenges the ruling of the court below dismissing the petition on the ground that Respondent DEC met the requirements of SEQRA when it issued an amended negative declaration effective July 6, 2016 that no significant impacts would result from allowing new operations at Greenidge Station (the "Negative Declaration"). As explained in Petitioners' initial brief, Supreme Court erred in ruling on the merits of Petitioners' SEQRA claims when the question presented by Respondents' motions to dismiss was whether or not Petitioners' had stated valid claims. Petitioners also appeal Supreme Court's denial of its requests for temporary injunctive relief enjoining operation of the plant during the pendency of this proceeding.

I. THIS PROCEEDING IS NOT MOOT

Respondent DEC and the Greenidge Respondents focus their appeal arguments on the assertion that Petitioners' claims are moot. Despite Respondents' claims to the contrary, however, the controversy at the heart of this proceeding is not moot.

A. Supreme Court Did Not Rule that Petitioners' Claims Are Moot

The statement in the appeal brief filed the Greenidge Respondents that "Petitioners-Appellants' claims were properly dismissed as moot", GR Brief, p. 14, is incorrect. Although Supreme Court made factual findings regarding the completion of various steps of construction of the Greenidge repowering project, R. 18-19, the court did not rule that Petitioners' claims are moot.

B. The Construction that Has Been Completed at Greenidge Station Is Only a Small Portion of the Overall Greenidge Project

The fact that construction of only a small portion of the Greenidge project has actually been completed is made apparent in the filings made by the Greenidge Respondents in support of their motion to dismiss the appeal on the ground of mootness. The information set forth in the

reply affidavit of Dale Irwin, president and chief executive officer of each of the Greenidge Respondents and the facilities manager of the Greenidge Station sworn July 12, 2018 regarding the plans of the Greenidge Respondents to install equipment to reduce fish impingement and entrainment ("I&E") at Greenidge Station makes clear that construction has not yet begun on the installation of I&E equipment at the plant. For this reason, Respondents' assertions that all construction on the repowering project is now completed are incorrect. It is remarkable that Mr. Irwin includes no estimates for the cost of I&E construction in the table of costs for "Greenidge Project Construction" attached as Exhibit B to his June 21, 2018 affidavit in support of the Greenidge Respondents' motion to dismiss the appeal on the ground of mootness. Petitioners observe that the installation of I&E equipment is certain to be the most expensive component of the Greenidge repowering project. Petitioners estimate that $44,000,000 may be a reasonable estimate of the cost of installing new I&E equipment at Greenidge Station. This is the figure given in *Matter of Sierra Club v. Martens (Con Ed)*, 2016 NY Slip Op 51391 (New York Cty 2016), *aff'd in part* 156 A.D.3d 454 (1st Dep't 2017) as the cost of upgrading I&E equipment at the East River Generating Station in Manhattan. Although the East River Station is a larger generating station than Greenidge Station and probably requires more sizeable I&E equipment, the costs referenced in *Sierra Club v. Martens* were to upgrade I&E equipment already installed, while Greenidge Station currently has no I&E equipment whatsoever. In these circumstances, $44,000,000 may be a reasonable estimate of the cost of installing new I&E equipment at Greenidge Station. In any event, the cost of installing completely new I&E equipment at Greenidge Station is certain to be substantially greater than the other costs expended to date, and thus the bulk of the costs of constructing the Greenidge repowering project have not yet been incurred. Petitioners' observe that, of the $12,925,512 in construction costs identified in Exhibit

B of Mr. Irwin's June affidavit, $5,517,789 in costs are attributable to the construction of the Greenidge pipeline, which the parties have agreed is beyond the purview of this proceeding. When the costs of the construction of the Greenidge pipeline are deducted, the total costs identified by the Greenidge Respondents as having been expended to date on the Greenidge repowering project amount to $7,407,723. Most of these costs are interconnection costs. *Id*. Only $1,874,492 is attributed to in-plant work on the Title V air permit. *Id*.

The current lack of any I&E equipment at Greenidge Station is confirmed by the Biological Fact Sheet for the Cooling Water Intake Structure for Greenidge Generating Station, dated March 17, 2017, prepared by William C. Nieder of Respondent DEC's Bureau of Habitat. The fact sheet is attached as Exhibit B to the affidavit of Rachel Treichler Affidavit, dated July 6, 2018 ("Tr. Aff."). The Biological Fact Sheet, states that Greenidge Station's "*cooling water intake structure lacks any fish protection technology, therefore the facility does not meet either the requirements of 6 N.Y.C.R.R. § 704.5 nor the requirements of the CWA [Clean Water Act] § 316(b) Phase II Rule (40 CFR Parts 122 and 125)* [emphasis added]." Tr. Aff., Ex. B, p. 1.

The fact that Respondent DEC is allowing Greenidge Station to operate without installation of the I&E equipment necessary for compliance with the Clean Water Act and New York's State Pollution Discharge Elimination System ("SPDES") regulations does not mean that construction of the Greenidge repowering project is complete. The operation of Greenidge Station necessarily involves the withdrawal and discharge of huge amounts of water using for cooling and other purposes. For this reason, any evaluation of the environmental impacts of allowing new operations at Greenidge Station must evaluate the impacts of the huge water withdrawals and discharges. The Negative Declaration addresses these impacts in only one way, by describing the new I&E equipment Respondent DEC planned to require at Greenidge Station.

Under the heading "Impacts on Surface Water," the Negative Declaration describes the types of I&E equipment Respondent DEC will require in a proposed modified SPDES permit, and then concludes, "As a result there are no significant adverse impacts associated with the Department's renewal and modification of the facility SPDES permit." R. 103-104. Implicit in Respondent DEC's inclusion of I&E conditions in the Negative Declaration is a finding that without the conditions, new operations at Greenidge Station would have a significant impact on the environment.

For these reasons, it is apparent that construction of the Greenidge repowering project will not be completed until I&E equipment is installed and Greenidge Station is brought into compliance with the requirements of New York's SPDES regulations, 6 N.Y.C.R.R. § 704.5 and the requirements of the Clean Water Act § 316(b) Phase II Rule, 40 CFR Parts 122 and 125.

C. The Construction that Has Been Completed Does Not Need to Be Undone

Petitioners have not asked that any work that has been completed be undone. As described in Respondent DEC's brief on appeal, Greenidge Station was initially constructed in the 1930s and the current generating unit, Unit 4, was installed in 1915. DEC Brief at 2, citing R. 215. Compared to the initial costs of constructing the generating station, the costs expended recently on certain components of the repowering project are not significant. Petitioners are not seeking to have any of the construction that has been completed, old or new, undone. Petitioners are asking that operations be temporarily halted while an environmental review that complies with the requirements of SEQRA is performed and alternatives to best mitigate the station's impacts are evaluated. See discussion of Petitioners' request for a preliminary injunction below. For this reason, the case of *Matter of Weeks Woodlands Association, Inc. v. Dormitory Authority of the State of New York*, 95 A.D.3d 747 (1st Dep't 2012) cited by the Greenidge Respondents,

and other cases discussing the "undue hardship" of undoing construction are not applicable. The only construction component of the Greenidge repowering project that Petitioners are challenging is the installation of I&E equipment, and construction of this component of the Greenidge repowering project has not yet begun. There is no hardship therefore in enjoining construction of this aspect of the project.

D. Even if Construction Had Been Completed, Petitioners' Did Not Delay in Prosecuting their Claims and Immediately Sought Preliminary Injunctive Relief

Even if the Greenidge Respondents had installed the necessary I&E equipment and had substantially completed construction of the Greenidge repowering project, this proceeding would not be subject to dismissal on the ground of mootness under the principles enunciated in *Matter of Dreikausen v. Zoning Bd. of Appeals of City of Long Beach,* 98 N.Y.2d 165 (2002). *Dreikausen* establishes that even if a project is substantially complete, it will not be dismissed on the ground of mootness if the parties seeking to challenge the project did not delay in prosecuting their claims and promptly sought preliminary injunctive relief. For this reason, the cases cited by Respondent DEC do not apply to the circumstances of this proceeding. See *Matter of Graf v. Livonia*, 120 A.D.3d 944 (4th Dep't 2014), *Matter of Many v. Village of Sharon Springs Bd. of Trustees,* 234 A.D.2d 643 (3rd Dep't 1996), *lv. denied* 89 N.Y.2d 811 (1997). The petitioners in those cases did not seek injunctive relief during the trial court proceeding or on appeal. Petitioners have done both.

Petitioners filed their verified petition and order to show cause seeking a preliminary injunction less than two months after DEC issued the air permits on September 8, 2016. The verified petition was filed on Friday, October 28, 2016, R. 21, and the order to show cause was signed by Justice Dennis Bender on Monday, October 31, 2016, R. 49. The petition was filed 42 days after the New York State Public Service Commission ("PSC") issued certificates of

convenience and public necessity on September 16, 2016, authorizing the repowering of Greenidge Station and the construction of a new gas pipeline to the plant, R. 323-356, and only 11 days after PSC issued a letter on October 17, 2016, authorizing moving forward with the construction of the pipeline. R. 111. It would have been difficult for Petitioners to have filed much more quickly than this. As observed by the Court in *Allison v. New York City Landmarks Preservation Commission*, 35 Misc.3d 500 (New York Cty 2011), "[t]he short, four months statute of limitations applicable to this proceeding, CPLR § 217(1), itself almost defies a laches defense. It ensures in the first instance against stale claims." Id. at 514. In the present case, Petitioners did not wait four months, but filed within two months of the issuance of the air permits and only 11 days after the PSC authorized construction to begin on the pipeline.

Respondents ignore the order to show cause and focus on Petitioners' subsequent filing of a motion for temporary injunctive relief on December 23, 2016, as if this was Petitioners' only effort to obtain temporary injunctive relief. For purposes of obtaining injunctive relief and providing notice to Respondents, however, Petitioners' December 2016 motion was superfluous. The reason Petitioners filed the motion was as part of an agreement on a briefing schedule that allowed Petitioners to submit a memorandum of law with the motion. See R. 395.

Even before the order to show cause and verified petition were filed and served, Respondents were well aware of Petitioners' opposition to the environmental review conducted by Respondent DEC. Petitioners' request for a preliminary injunction did not come as a surprise. The comments Petitioners' filed on Respondent DEC's proposed permits and negative declaration and Petitioners' participation in the PSC proceedings related to issuance of the certificates of compliance for the repowering of Greenidge Station provided notice to Respondents of Petitioners' opposition to the inadequacy of the environmental review

Respondent DEC had conducted. After the order to show cause was served, the Greenidge Respondents moved ahead quickly with their construction activities with full knowledge that the Petitioners were seeking preliminary injunctive relief, and therefore, proceeded at their own risk. In similar circumstances, the court in *Allison v. New York Landmarks Preservation Commission, supra*, ruled against a laches claim, stating: "Respondents weighed the risk against their business incentive not to wait for that [statute of limitations] period to expire, but to proceed immediately, at their own risk, to undertake costly work, despite the obvious opposition by members of the public, including Grunewald and petitioner organization's members, at LPC's hearings and meetings [citations omitted]. Respondents continued the work despite petitioners' motion for a preliminary injunction and its partial and potential further success." *Id*. at 514. In this proceeding, the Greenidge Respondents initiated their construction projects without waiting for the expiration of the statute of limitation on challenges to the issuance of the air permits and despite Petitioners' obvious opposition to the environmental review process and these actions were taken at their own risk.

E. Whatever Delay Occurred in Filing Petitioners' Motion for Temporary Injunctive Relief on Appeal Did Not Prejudice Respondents

Respondents' assert that Petitioners' improperly delayed in filing their motion for temporary injunctive relief on appeal. Whatever delay has occurred, however, has not prejudiced Respondents. Petitioners' motion on appeal did not seek to halt the ongoing operations of Greenidge Station. As discussed above, operations at Greenidge Station are currently being conducted without I&E equipment. The Greenidge Respondents have made no allegations that the plant's operations are hampered by the lack of I&E equipment. In the absence of prejudice to Respondents, the equitable doctrine of laches is not applicable. As the court stated in *Skrodelis v. Norbergs*, 272 A.D.2d 316, 2nd Dep't 2000, "[t]he mere lapse of time without a showing of

prejudice will not sustain a defense of laches. In addition, there must be a change in circumstances making it inequitable to grant the relief sought. Prejudice may be established by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay [citations omitted]." Id. at 316-317. Accord *Matter of Sierra Club v. Village of Painted Post*, 134 A.D.3d 1475, 1476-1477 (4th Dep't 2015) ("Although there may be triable issues of fact on the element of delay, we conclude that there is no evidence in the record that respondents would suffer any injury or prejudice in the event relief is accorded to petitioners."); *Santillo v. Santillo*, 155 A.D.3d 1688 (4th Dep't 2017) ("The defense of laches requires both delay in bringing an action and a showing of prejudice to the adverse party. Even assuming, arguendo, that there was a delay in seeking to vacate the QDRO, we conclude that plaintiff has not demonstrated that she was prejudiced by that delay."); *Rosenthal v. City of New York*, 283 A.D.2d 156 (1st Dep't 2001) ("Finally, dismissal is not warranted on the basis of laches. The municipal defendants have not shown that they have taken any irreversible actions that, had plaintiffs acted sooner, would have been avoided. All that the municipal defendants have alleged is that, should the WEP program be enjoined or curtailed, they will have to formulate and implement new ways of satisfying the workfare requirements for social services funding under Federal and State law. As the IAS court held, this is not cognizable prejudice for showing laches."); *Matter of Tirado v. NYC Fire Dep't Pension Fund*, 142 A.D.3d 709, 2nd Dep't 2016) (Moreover, the proceeding is not barred by the doctrine of laches. . . . Further, since the petitioner sought only prospective pension benefits and not recovery of payments which had already been made to the children, the appellants failed to show any prejudice resulting from the petitioner's delay in seeking payments after she obtained vacatur of the default divorce judgment in 2005," citing *Matter of Sierra Club v. Village of Painted Post*, *supra*.)

The fact that the Greenidge Respondents have engaged in studies to evaluate I&E systems is not a disadvantage to them. These studies will remain useful even if Petitioners are successful in obtaining an annulment of the Negative Declaration. In that event, the studies will be helpful in assisting Respondents prepare a draft environmental impact statement evaluating alternatives to protect against fish impingement and entrainment.

The reason why Petitioners waited several months to perfect their appeal and file their motion for temporary injunctive relief on appeal is obvious. Petitioners' were busy preparing their legal challenge to the SPDES permit and water withdrawal permit issued to the Greenidge Respondents by Respondent DEC on September 11, 2017. Based on the ruling in the *Sierra Club v. Martens (Con Ed)* case, *supra*, that a two-month statute of limitations applies for challenges to water withdrawal permits issued pursuant to ECL Article 15, Title 15, Petitioners undertook to file the second Greenidge Article 78 proceeding within two months of September 11, 2017, and did so on November 7, 2018. Petitioners then prepared a memorandum of law for the second Greenidge case and prepared to reply to Respondents' answers, memoranda of law and Respondent DEC's 1500-page administrative record. During the same time period Petitioners were preparing the record on appeal and Petitioners' initial brief in this appeal. Petitioners reply memorandum of law and twelve accompanying affidavits were filed on April 27, 2018. Oral arguments in the second Greenidge case were held on May 22, 2018. In these circumstances, it can be seen that Petitioners did not unreasonably delay in perfecting this appeal on April 17, 2018, and in filing their motion for temporary injunctive relief on appeal on July 6, 2018.

F. Respondents' Assertions Regarding Petitioners' Delay Are Laches Defenses and Were Not Raised Below or Preserved for Appeal

Respondents' assertions regarding Petitioners' alleged delays in seeking a preliminary injunction in Supreme Court are laches defenses and were not raised below or preserved for appeal. Although Respondents have raised mootness as a jurisdictional issue in this appeal, the equitable doctrine of laches is not jurisdictional. It must be pleaded and proved, and Respondents failed to do so. See *Dreikausen, supra,* 98 N.Y.2d at 174, n. 4, "Laches must be pleaded and proved by one who urges it."

G. Petitioners' Have Not Conceded that Their Claims Are Moot

There is no basis for Respondent DEC's assertion that Petitioners' motion for temporary injunctive relief on appeal effectively concedes that Petitioners' claims are moot. DEC MOL p. 9. To the contrary, by highlighting the fact that the most-costly component of the construction necessary to complete the Greenidge project has not yet begun, i.e., installation of the I&E equipment, Petitioners' motion highlights the fact that Petitioners' claims are not moot.

II. PETITIONERS STATE VALID CLAIMS

Respondent DEC does not take issue in its appeal brief with Petitioners' claim on appeal that Supreme Court erred in ruling on the merits of Petitioners' SEQRA claims before respondents served answers or filed the administrative record. In fact, Respondent DEC asserts in its appeal brief that it should be allowed to answer and submit a record if the motion to dismiss is overturned. DEC Brief at 16.

The issues the Greenidge Respondents raise with Petitioners' SEQRA claims do not relate to the validity of these claims, but to the standard of proof that should be applied in deciding these claims on their merits.

A. The Issues Raised by the Greenidge Respondents Do Not Relate to the Validity of Petitioners' Claims

The Greenidge Respondents assert that "Petitioners-Appellants did not state a single *prima facie* claim under SEQRA." GR Brief at 20 and 23. They repeat this assertion for each of the three individual SEQRA claims Petitioners identified in their initial brief. *Id*. at 23, 25 and 28. The Greenidge Respondents state, "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." *Id*. at 23. Similarly, regarding Petitioners' claim that DEC segmented its review of the repowering of Greenidge Station from its review of the operations of the Lockwood Hills landfill, the Greenidge Respondents state that "[w]hether 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 application law and regulations." *Id*. at 25. With regard to Petitioners' claim that Respondent DEC failed to take a hard look at the impacts of the Greenidge repowering project because it used the wrong baseline to evaluate impacts, the Greenidge Respondents state, "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 a[s] true, they failed to state a prima facie claim." *Id*. at 28. These assertions, however, do not go to the issue of whether or not Petitioners have stated valid claims. The issue of whether or not a petitioner has stated a *prima facie* claim goes to the merit of the claim and the sufficiency of the evidentiary proof in the record. This is the standard of proof that applies in

evaluating whether a claim is subject to dismissal on a summary judgement motion, not the standard of proof that apply in deciding a motion to dismiss. Compare *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986) ("the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact") with *Rovello v. Orofino Realty Co*., 40 N.Y.2d 633, 634 (1976) ("[u]nder modern pleading theory, a complaint should not be dismissed on a pleading motion so long as, when the plaintiff is given the benefit of every possible favorable inference, a cause of action exists"). Although a motion to dismiss may be treated as a motion for summary judgment, this is not proper unless the parties have had the opportunity to "submit any evidence that could properly be considered on a motion for summary judgment." CPLR 3211(c). "Thus, notice that a motion to dismiss under CPLR 3211 will be treated as a motion for summary judgment is required prior to dismissal on the merits unless it is clear from the papers that no prejudice has resulted from omission of notice." *Nassau BOCES Central Council of Teachers v. BOCES*, 63 N.Y.2d 100, 103 (1984). Supreme Court gave no notice that it was converting Respondents' motions to dismiss to summary judgment motions, so the issue presented in this appeal is whether Supreme Court applied the correct standards in granting the motions to dismiss. The Greenidge Respondents have not shown that the correct standards were applied.

B. Petitioners State Their Claims with Factual and Legal Specificity

Petitioners' plead the all the elements necessary to establish each of their claims for violation of SEQRA with factual specificity. Ample facts are alleged in the petition to support each of Petitioners' claims. Petitioners also allege ample legal authority in the petition and in their initial brief to support the validity of each of their claims.

The cases cited by the Greenidge Respondents in opposition to Petitioners' claim of an impermissible conditioned negative declaration of a Type I action, *McNeary v. Niagara Mohawk Power Corporation,* 286 A.D.2d 522 (3rd Dep't 2001), *Matter of David's Lane—Pondview Pres. Ass'n v. Planning Bd. of the Inc. Vill. of East Hampton*, 216 A.D.2d 389 (2nd Dep't 1995) and *Matter of Association for Protection of Adirondacks Inc. v. Town Bd. of Town of Tupper Lake*, 2007 NY Slip Op 52119 (U) (Franklin Cty 2007), do not address the validity of conditioned negative declarations for Type I actions and therefore are not pertinent to the issues presented in this case. The Greenidge Respondents also cite several provisions from the *SEQRA Handbook*, but do not address the provisions related to conditioned negative declarations for Type I actions described in Petitioners' initial brief.

The cases cited by the Greenidge Respondents in support of their arguments against the validity of Petitioners' claim of SEQRA segmentation, *Matter of Dunk v. City of Watertown*, 11 A.D.3d 1024 (4th Dep't, 2004) and *Matter of Settco, LLC v. New York State Urban Development Corporation*, 305 A.D.2d 1026 (4th Dep't 2003), hold that the SEQRA review of the projects at issue in those cases were not segmented, but nothing in these cases indicates that Petitioners' failed to state a valid claim of segmentation. In *Dunk* the court determined that the two projects that were alleged to have been segmented were not in any way related. Petitioners have alleged that the Greenidge repowering project which calls for the disposal of waste from Greenidge Station in the Lockwood Landfill is related the DEC proceeding investigating the landfill's contamination of area groundwater. In *Settco*, the court determined that there was no improper segmentation of environmental review because the action at issue in the case was specifically exempted from review under SEQRA as a Type II action. In the present case, the action at issue is a Type I action and is subject to SEQRA review.

The cases cited by the Greenidge Respondents in support of their arguments against the validity of Petitioners' claim that Respondent DEC applied the wrong baseline in evaluating environmental impacts in violation of the "hard look" requirements of SEQRA hold that a court should defer to an agency's interpretation of its statutory duties in certain instances. None of the cases cited indicate that the principle of deference is relevant in determining the validity of a SEQRA claim.

Petitioners have not presented documentary evidence to support each fact alleged in the Petition, nor are they required to do so in response to a motion to dismiss. *Palmisano v. Modernismo Publ'n, Ltd*., 98 A.D.2d 953 (4th Dep't 1983) ("Because defendants' motions were to dismiss, rather than for summary judgment, plaintiff had no obligation to show evidentiary facts to support the allegations in his complaint.")

C. Respondents Have Not Conceded All the Factual Allegations in the Petition

The Greenidge Respondents assert that Supreme Court properly ruled against the merits of Petitioners' claims based on the provisions of the Negative Declaration. As discussed in Petitioners' initial brief, a decision on the merits is not generally considered to be appropriate until Respondents have answered and filed the administrative record. See *Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs.*, 63 N.Y.2d 100, 102 (1984). ("The mandate of CPLR 7804 (subd [f]) that, "If the motion is denied, the court shall permit respondent to answer, upon such terms as may be just" proscribes dismissal on the merits following such a motion, unless the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer." [citation omitted]. There having been no such development of the facts in the present case, Special Term erred in dismissing the petition on the merits prior to

service of respondents' answer. The order of the Appellate Division should, therefore, be reversed and the matter remitted to Special Term for further proceedings in accordance with this opinion."). Respondent DEC takes a position in accordance with this general rule, asserting that if this Court "reinstates the petition, rather than addressing the merits, it should remit the proceeding to Supreme Court and allow Respondents to submit the administrative record and answer the petition." DEC Brief at 16.

Although courts have occasionally determined that sufficient facts are in the record to decide a motion to dismiss without giving the respondents an opportunity to file the administrative record and serve their answers, these cases are based on a determination that there are no factual disputes among the parties. See *Matter of Roth v. Syracuse Housing Authority*, 270 A.D.2d 909 (4th Dep't 2000) lv. denied 95 N.Y.2d 756 ("We further conclude that it was harmless error for the court to rule on the merits of the petition without affording respondent an opportunity to serve an answer [citations omitted]. The record was fully developed with respect to whether screening by petitioners was required, and the dispositive facts were not in dispute."); *Matter of Retail Sprawl v. Giza*, 280 A.D.2d 234, 240 (4th Dep't 2001) ("Because the motion to dismiss and petitioners' opposing papers are of such detail and the record sufficiently developed with respect to the issue of whether a final EIS is required in the circumstances of this case, we conclude that no prejudice will result from the failure to permit respondents to answer the petition [citations omitted]. Accordingly, the judgment should be reversed, the motion denied, the petition granted in part by annulling the Town Board's resolutions of December 20, 1999, which issued a negative declaration and conditionally rezoned the subject property, and the matter remitted to the Town Board for further proceedings not inconsistent with this opinion."); *Kuzma v. City of Buffalo*, 45 A.D.3d 1308, 1311 (4th Dep't 2007) ("Where, as here, the

dispositive facts and the positions of the parties are fully set forth in the record, thereby making it "clear that no dispute as to the facts exists and [that] no prejudice will result from the failure to require an answer," the court may reach the merits of the petition and grant the petitioner judgment thereon notwithstanding the lack of any answer and without giving the respondent a further opportunity to answer the petition."); *Matter of S & R Dev. Estates, LLC v. Feiner*, 112 A.D.3d 945, 946-947 (2nd Dep't 2013) (affirming the Supreme Court's denial of the appellants' motion to dismiss the petition and granting of the petition without the benefit of an answer or the filing of the full administrative record pursuant to CPLR 7804 [e]); *Matter of Rizvi v. New York College of Osteopathic Medicine*, 98 A.D.3d 1049 (2nd Dep't 2012) (denying the motion to dismiss the petition and reinstating and granting the petition.); *Matter of Universal Metal & Ore v. Westchester County Solid Waste Commission*, 145 A.D.3d 46, 59-60 (2nd Dep't 2016) ("where, as here, 'the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer' [citation omitted], the court may reach the merits of the petition and award judgment in favor of the petitioner notwithstanding the lack of an answer. [citations omitted]").

The Greenidge Respondents assert that there is sufficient evidence is in the record below to decide Petitioners' claims as a matter of law. Petitioners agree that all facts necessary to decide Petitioners' claim of an impermissible conditioned negative declaration are in the record. This claim can be decided by reference to the Negative Declaration, which was placed in the record by both Petitioners and the Greenidge Respondents. R. 89-106 and 141-144. With regard to Petitioners' segmentation claim and hard look claim, Petitioners are of the opinion that further development of the record is necessary to establish evidence supporting those claims. Petitioners have alleged a number of facts supporting these claims in the petition. Evidence supporting

these allegations has not been added to the record. Only a few of Petitioners' allegations are addressed in Respondents' filings. Other facts may also be relevant in deciding these claims. Key facts relevant to Petitioners' SEQRA segmentation claim and hard look claim may be in dispute. In these circumstances, it is not appropriate to decide these claims without further development of the evidence.

D. Should This Court Decide to Rule on the Merits of Petitioners' Conditioned Negative Declaration Claim, the Applicable Legal Authorities Support Petitioners' Claim

With regard to the law and regulations applicable to Petitioners' conditioned negative declaration claim, it is notable that the Greenidge Respondents do not address the case law cited in Petitioners' initial brief holding that conditioned negative declarations are not permissible for Type I actions, *Myerson v. McNally*, 90 N.Y.2d 742 (1997), and *Ferrari v. Penfield Planning*, 181 A.D.2d 149 (4th Dep't 1992), or the other cases ruling against conditioned negative declarations for Type I actions such as *Matter of Retail Sprawl v. Giza*, 280 A.D.2d 234 (4th Dep't 2001) and *Shawangunk v. Planning Bd.*, 157 A.D.2d 273 (3rd Dep't 1990). As noted above, the cases and regulatory provisions cited by the Greenidge Respondents do not address the validity of conditioned negative declarations for Type I actions and therefore are not pertinent to the issues presented in this case. A fair reading of the applicable legal authorities makes clear that the Negative Declaration issued by Respondent DEC is an impermissible conditioned negative declaration of a Type I action.

III. PETITIONERS ARE ENTITLED TO A PRELIMINARY INJUNCTION AGAINST OPERATIONS AT GREENIDGE STATION

Respondent DEC did not oppose Petitioners' request for temporary injunctive relief below, stating at one point that "The Department takes no position on whether the requested

temporary restraining order is now moot because petitioners did not seek temporary injunctive relief against the Department." R. 397. Nor has Respondent DEC challenged Petitioners' argument that Supreme Court erred in denying Petitioners' request for a preliminary injunction in its appeal brief. Respondent DEC did challenge Petitioners' motion for temporary injunctive relief on appeal in its memorandum of law in response to Petitioners' motion on appeal. In the discussion below, Petitioners rebut certain arguments regarding the installation of I&E equipment made in Respondent DEC's memorandum of law.

In contrast to Respondent DEC, the Greenidge Respondents assert that Supreme Court properly denied Petitioners' requests for temporary injunctive relief. None of the arguments offered by the Greenidge Respondents in their appeal brief, however, support this conclusion.

A. Petitioners' Request for a Preliminary Injunction Encompassed the Installation of I&E Equipment

Petitioners' order to show cause, verified petition, amended verified petition and motion for temporary injunctive relief all sought to enjoin the Greenidge Respondents "from taking steps to repower the Greenidge Generating Station or construct a gas pipeline to the station until such time as Respondents shall have complied with all applicable federal and state laws." R. 22-23, 48, 55-56 and 82-83. (As previously noted, Petitioners subsequently abandoned their claims regarding the construction of the gas pipeline.) Because the installation of equipment to prevent fish impingement and entrainment is one of the steps necessary to repowering Greenidge Station, it is apparent that in seeking an injunction against "taking steps to repower the Greenidge Generating Station . . . until such time as Respondents shall have complied with all applicable federal and state laws," Petitioners sought to enjoin operations at the plant until I&E equipment was installed.

The fact that there is an overlap between the conditions the Negative Declaration states will be required in the SPDES permit and the conditions that Respondent DEC ultimately included in the SPDES permit Respondent DEC issued on September 11, 2017, a full year after the date it issued the air permits, does not invalidate Petitioners' claims in this proceeding regarding the problems with the Negative Declaration or Petitioners' request for a preliminary injunction to halt operations at Greenidge Station until there is compliance with all legal requirements. It was Petitioners' assumption, stated in the petition, that DEC would issue the SPDES and water withdrawal permits and that the petition would be amended to include those permits and bring them within the scope of this proceeding if appropriate. R. 76. Instead, Respondent DEC waited until Supreme Court issued its decision in this proceeding and Petitioners had filed their notice of appeal before issuing the SPDES and water withdrawal permits on September 11, 2017. For whatever reasons Respondent DEC delayed its issuance of the second set of Greenidge permits, Respondent DEC's issuance of a modified SPDES permit to the Greenidge Respondents does not preclude this court from addressing the adequacy of Supreme Court's review of Petitioners' claims in this proceeding.

B. Petitioners' Request for a Preliminary Injunction against the Installation of I&E Equipment at Greenidge Station Does Not Violate State or Federal Law

Based on its assertion that Petitioners' efforts to obtain an injunction against the installation of I&E equipment at Greenidge Station seek to enjoin compliance with the Greenidge SPDES permit, DEC MOL at 12, Respondent DEC asserts that granting an injunction against enforcement of these conditions would be a violation of state and federal law. *Id*. The only legal authority Respondent DEC offers in support of this assertion are the cases of *Matter of Deane v. NYC Dep't of Bldgs*, 177 Misc.2d 687 (New York Cty 1998) and *Village of Port Chester v. Indus. Commr*., 32 Misc.2d 64 (New York Cty 1961). Unlike the circumstances at

issue in the present case, however, these cases involved actions to compel a public agency to perform certain duties. *Deane* involved an action to compel the New York City Landmarks Preservation Commission to calendar and hold hearings on an application for landmark status. The court concluded that it had no power to compel the commission to entertain the application. Petitioners' motion for temporary injunctive relief on appeal does not seek to compel any action by Respondent DEC. In the *Port Chester* case, the petitioner sought an order forbidding all further hearings and proceedings concerning Labor Law complaints filed with the Industrial Commissioner of the State of New York in 1950 and 1951 involving prevailing rate of wage. The court dismissed the petition. In this case, Petitioners do not seek to enjoin any actions by Respondent DEC.

More generally, it is clear that courts have authority to invalidate permits and negative declarations based on a lead agency's failure to comply with statutory and regulatory requirements. See *Matter of Sierra Club v. Martens (Ravenswood),* 158 A.D.3d 169 (2nd Dep't 2018), annulling a water withdrawal permit because a proper SEQRA review not conducted. It is also clear that a court may enjoin compliance with a challenged permit until the court has decided the issue of the validity of the permit.

Neither the state SPDES law nor the federal Clean Water Act mandate use of the type of I&E equipment DEC has specified for Greenidge Station. In fact, both the SPDES law guidelines and the Clear Water Act guidelines favor the installation of closed-cycle cooling to reduce fish impingement and entrainment instead of allowing once-through cooling systems like the one used at Greenidge Station. See DEC policy document CP-#52 / Best Technology Available (BTA) for Cooling Water Intake Structures, which requires closed-cycle cooling for

new facilities and repowered facilities, and Clean Water Act § 316(b) Phase II Rule, 40 C.F.R. Parts 122 and 125.

For these reasons, there is no basis for DEC's assertion that Petitioners' request for a preliminary injunction against installation of I&E equipment at Greenidge Station is a violation of state and federal law.

C. Petitioners Meet Each Prong of the Test for Issuance of a Preliminary Injunction

1. *Petitioners' Are Likely to Succeed on their Claims*

The Greenidge Respondents argue in their appeal brief that Petitioners' have not demonstrated a likelihood or probability of success on the merits of their claims that DEC's actions in issuing the revised air permits and amended negative declaration were arbitrary and capricious and violated SEQRA. GR Brief at 33. The strong evidence already in the record supporting Petitioners' claim of an impermissible conditioned negative declaration and the strong factual allegations supporting Petitioners' claims of segmentation and failure to take a hard look contradicts this assertion contradicts this assertion. The Greenidge Respondents challenge application of the rule from *Tucker v. Toia*, 54 A.D.2d 322, 326 (4th Dep't 1976), discussed in Petitioners' initial brief that "the showing of a likelihood of success on the merits required before a preliminary injunction may be properly issued must not be equated with the showing of a certainty of success [citations omitted]. It is enough if the moving party makes a *prima facie* showing of his right to relief; the actual proving of his case should be left to the full hearing on the merits." *Id*. at 326. The Greenidge Respondents assert that this rule should not apply to the present case because the *Tucker* case and the other case cited by Petitioners, *Time Square Books, Inc. v. City of Rochester*, 223 A.D.2d 270 (4th Dep't 1996), involved constitutional claims, which are subject to more stringent considerations. The Greenidge

Respondents fail to acknowledge that the rule enunciated in *Tucker v. Toia* was based on a non-constitutional case involving the interpretation of corporate bylaws, *Swope v. Melian*, 35 A.D.2d 981 (2nd Dep't 1970), and has been applied in a number of cases do not involve constitutional issues. For example, in the case of *Gambar Enterprises v. Kelly Services, Inc.*, 69 A.D.2d 297 (4th Dep't 1979), a case involving a dispute over the terms of an employment contract, this court stated, "As to likelihood of success, '[i]t is enough if the moving party makes a prima facie showing of his right to relief; the actual proving of his case should be left to the full hearing on the merits [citations omitted]' (*Tucker v Toia,* supra, p 326)." Similarly, in *Destiny USA Holdings, LLC v. Citigroup Global Mkt. Realty Corp.,* 69 A.D.3d 212 (4th Dep't 2009), a case involving a dispute over the terms of a loan, this court stated, "'A preliminary injunction is a provisional remedy. Its function is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits' [citations omitted]. It is well-settled that plaintiff need not demonstrate certain success in the underlying action, but the plaintiff is not entitled to preliminary injunction when the underlying case will fail as a matter of law," citing *Pamela Equities Corp. v 270 Park Ave. Café Corp*., 62 A.D.3d 620, 621 (1st Dep't 2009) and *Tucker v Toia*. *Id*. at 224. The *Swope* court stated the rule thusly, "In view of the conflicting affidavits and the incomplete state of the record, plaintiffs at the very least raised triable issues which could only be resolved in the main action. They were therefore properly granted a preliminary injunction pending a final determination of the intracorporate struggle." 35 A.D.2d at 981. See also *Sutton, DeLeeuw, Clark & Darcy v. Beck*, 155 A.D.2d 962, 963 (4th Dep't 1989) (A party moving for a preliminary injunction need not establish a certainty of success on the merits."). Accord *Holdsworth v. Doherty*, 231 A.D.2d 930 (4th Dep't 1996). The *Sutton* and *Holdsworth* cases state that when the facts necessary to establish the cause of action

are, in sharp dispute, a preliminary injunction should not issue. Although certain facts relevant to Petitioners' SEQRA segmentation and baseline claims may be in dispute in the present case, the facts underlying Petitioners' claim of an impermissible conditioned negative declaration are not in dispute, see discussion above, and issuance of a preliminary injunction is therefore appropriate based on Petitioners' claim that the Negative Declaration issued by Respondent DEC is an impermissible conditioned negative declaration of a Type I action.

2. *Petitioners Have Demonstrated Irreparable Harm*

The second prong of the test for issuance of a preliminary injunction is whether Petitioners will be irreparably harmed if injunctive relief is not granted. Respondent DEC asserts in the memorandum of law in opposition to Petitioners' motion for temporary injunctive relief on appeal that "the only injury Petitioners allege is that this proceeding will become moot. . . Mootness is not an injury." DEC MOL 2, at 18. Petitioners dispute the assertion that mootness is not an injury. It is difficult to envision a more significant injury than foreclosing a party's right to relief for injuries they have suffered and will suffer.

The Greenidge Respondents argue that Petitioners' have not demonstrated any irreparable harm if their request for injunctive relief below is denied. GR Brief at 35. At the time Petitioners' filed their request for a preliminary injunction, Greenidge Station was not operating and predictions of harm from its renewed operations were necessarily speculative. What was clear at that time was that allowing the plant to begin operations without an environmental impact statement would expose Petitioners and the public to large risks of harm and that a preliminary injunction was necessary to prevent those operations and preclude the case from becoming moot. As was stated in Petitioners' notice of motion for temporary injunctive relief, allowing the Greenidge Respondents to proceed with construction of the Greenidge repowering

project "could raise a colorable claim of mootness of the pending proceeding which could render ineffectual any judgment ultimately obtained by Petitioners thereby causing them irreparable harm." R. 83.

The assertion of the Greenidge Respondents that Petitioners did not submit a single affidavit showing harm ignores the nine affidavits in the record from members of Petitioners' organizations asserting injury-in-fact from the proposed operations of the Greenidge Generating Station. R. 238-320. The affiants are individuals who reside on the shore of Seneca Lake very near the location where the discharges from the Greenidge plant flow into the Keuka Outlet and into Seneca Lake. Some of the affiants and their families use water they pipe from the lake for showering, washing dishes, and washing clothes. Several of the affiants use water piped from the lake for brushing teeth and sometimes for cooking. Each of the affiants swim in the lake and uses the lake for other recreational activities such as fishing and boating. Each of the affiants alleges that they will be adversely affected by the actions complained of in the amended verified petition and that their use and enjoyment of Seneca Lake will be diminished and their health may be harmed by the huge water withdrawals and discharges of heated water caused by the new operations of the Greenidge Generating Station, including the possibility that the large discharges of heated water from the plant might create more favorable conditions for toxic algae blooms on their shorelines. *Id*.

3. *The Balance of Equities Favors Petitioners*

The Greenidge Respondents argue that Petitioners' have not demonstrated that the balance of the equities tips in favor of granting injunctive relief. The Greenidge Respondents assert that the public will be harmed by not having the electricity produced by Greenidge Station or the jobs provided by the operation of Greenidge Station and that these harms outweigh the

harms identified by Petitioners. Petitioners dispute the Greenidge Respondents' assertion that the power produced by Greenidge Station benefits the public. Almost every other provider of electric power operates with less damaging environmental impacts. Petitioners are not aware of any other electric generating station that is operating without any equipment to reduce fish impingement and entrainment. The Greenidge Respondents are imposing significant environmental harms on the public in order to reduce the costs of operations at Greenidge Station. Allowing these harms increases the profits of the Greenidge Respondents. It does not benefit the public. The environmental costs of operating the plant could be greatly reduced if the Greenidge Respondents installed closed cycle cooling. The public is entitled to participate in an environmental review process that addresses the impacts of the operations of Greenidge Station. As the court stated in *Merson v. McNally*, supra, "[t]he environmental review process was not meant to be a bilateral negotiation between a developer and lead agency but, rather, an open process that also involves other interested agencies and the public." *Id*. at 753-754.

The other benefit mentioned by the Greenidge Respondents, an increase in jobs produced by operations at Greenidge Station, also needs to be evaluated as part of an environmental review process. It is possible that an increase in jobs at Greenidge Station is outweighed by the community impacts of job losses in the local recreational fishing and tourism industries as a result of the plant's destruction of fish and other aquatic life in Seneca Lake. Another substantial harm to the residents of Seneca Lake and to the tourism industry in the area that needs to be evaluated in an environmental review process is the possibility that the huge discharges of heated water from Greenidge Station into Seneca Lake are fostering conditions that promote harmful algae blooms. Overall, the balance of the equities favors protecting Seneca Lake until an adequate environmental review process is conducted.

CONCLUSION

For these reasons, Petitioners' respectfully request that this Court reverse the Supreme Court's decision dismissing the Petition and either invalidate the Title IV and Title V air permits based on the impermissible conditioned negative declaration or grant Petitioners' request for a preliminary injunction to temporarily halt operations at Greenidge Station until such time as further proceedings can be conducted to determine whether Respondents have complied with all applicable federal and state laws.

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Respectfully submitted,

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