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

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,

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 AFFIRMATION OF YVONNE E. HENNESSEY

Docket No. CA 18-00648

Yates County Supreme Court
Index No. 2016-0165

FILED 2018 JUL 13 PM 3:49

STATE OF NEW YORK)
) **SS.:**
COUNTY OF ALBANY)

Yvonne E. Hennessey, Esq. affirms, under the penalties of perjury pursuant to Rule 2106 of the Civil Practice Law and Rules ("CPLR"):

1. I am an attorney at law duly licensed to practice in the courts of the State of New York and a member of the firm of Barclay Damon LLP, attorneys for Greenidge Generation, LLC, Greenidge Pipeline, LLC, Greenidge Pipeline Properties Corporation, and Lockwood Hills, LLC (collectively, the "Greenidge Respondents").

2. I am fully familiar with the circumstances and proceedings in this action.

3. I make this Reply Affirmation in further support of the Greenidge Respondents' motion to dismiss this appeal, perfected by Petitioners-Appellants on April 17, 2018.

Additionally, I make this Reply Affirmation in opposition to Petitioners-Appellants' Motion for Temporary Injunctive Relief, served upon the Greenidge Respondents on July 6, 2018.

4. This Reply Affirmation is based upon my review of relevant documents as well as my representation of the Greenidge Respondents in this action and in the separate Article 78 proceeding filed by Petitioners-Appellants on November 8, 2017 entitled *Matter of Sierra Club, et al. v. New York State Dep't of Envtl. Conservation et al.*, Yates County Index No. 2017-0232 ("*Greenidge II*") which also challenges the New York State Department of Environmental Conservation's ("NYSDEC") environmental review and approval of the Greenidge Project.

5. As set out in the Greenidge Respondents' June 22, 2018 Motion to Dismiss, Petitioners-Appellants' failed to move for an injunction at any time pending this appeal. They also delayed perfecting their appeal of Supreme Court's decision for nine months, during which time the Greenidge Respondents completed all aspects of the construction for the Greenidge Project and resumed operation of the Greenidge Station.

6. In their opposition to the Greenidge Respondents' Motion, Petitioners-Appellants completely failed to respond to the Greenidge Respondents' Motion to Dismiss the appeal, instead focusing on the mootness determination by Supreme Court with respect to the underlying claims – an entirely different issue. Accordingly, the Greenidge Respondents' Motion to Dismiss this appeal should be granted.

7. Not only have Petitioners-Appellants failed to respond to the Greenidge Respondents' Motion to Dismiss this appeal, they are now conflating arguments and claims arising out of *Greenidge II* – a separate Article 78 proceeding they filed against Respondents-Respondents concerning the Greenidge Project.

8. Petitioners-Appellants are purportedly doing this to save what is abundantly clear from the Greenidge Respondents' Motion – this appeal concerning the Facility's air permits is moot.

9. By Notice of Petition, Petitioners-Appellants filed their Verified Petition in *Greenidge II* on November 8, 2017. A true and accurate copy of Petitioners-Appellants Verified Petition in *Greenidge II* is attached as **Exhibit A.**

10. In *Greenidge II* Petitioners-Appellants again challenged NYSDEC's environmental review and permitting of the Greenidge Project. Specifically, they brought four claims for relief: (1) violation of the Water Resources Protection Law in issuing an initial water withdrawal permit for the Greenidge Station; (2) violation of the State Environmental Quality Review Act ("SEQRA") in characterizing the initial water withdrawal permit as a Type II action; (3) failure to impose appropriate terms and conditions in the Greenidge Station's State Pollutant Discharge Elimination System ("SPDES") permit or more particularly, failure to require closed-cycle cooling as Best Technology Available ("BTA") for Greenidge Station; and (4) violation of SEQRA in issuing the SPDES permit. *See, generally*, **Exhibit A.**

11. Notably, in their Memorandum of Law in Support of their Verified Petition in *Greenidge II*, Petitioners-Appellants distinguished the present appeal from *Greenidge II*:

> Petitioners .... Contend that DEC violated the requirements of the applicable permitting statutes and the State Environmental Quality Review Act ("SEQRA") in failing to impose required terms and conditions in *the GGLLC withdrawal and discharge permits* or to conduct adequate SEQRA reviews of the permit applications.
>
> This is the second case Petitioners have filed challenging permits DEC has issued to GGLLC for operation of Greenidge Station. Petitioners CPFL and CPNY filed an Article 78 proceeding on October 28, 2016 in Yates County Supreme Court *challenging GGLLC's air permits and DEC's review of the environmental impacts of issuing the air permits under SEQRA*. Sierra Club was added as the lead petitioner on December 6, 2016. On April 21, 2017, this court issued an order granting Respondents' motion to dismiss the

> petition. Sierra Club, CPFL and CPNY are currently perfecting their appeal to the Appellate Division Fourth Department.

See Petitioners' Memorandum of Law in Support of the Verified Petition, at p. 1 (emphasis added), a true and accurate copy of which is attached hereto as **Exhibit B**.

12. Both the State and Greenidge Respondents answered the Verified Petition in *Greenidge II* on or about March 2, 2018 and the State Respondents filed and served the full administrative return.

13. Together with their Answer, the Greenidge Respondents' asserted as an Objection in Point of Law that Petitioners-Appellants were precluded from bringing their second and fourth causes of action under SEQRA in *Greenidge II* since these claims were previously dismissed by Supreme Court in this action. *See* Third Affirmative Defense and Objection in Point of Law at p. 14 of Greenidge Respondents' March 2, 2018 Verified Answer and Objections in Point of Law, a true and accurate copy of which is attached hereto as **Exhibit C**.

14. The Greenidge Respondents did not argue that Petitioners-Appellants' non-SEQRA claims concerning the permitting requirements associated with the Facility's initial water withdrawal or SPDES permit were barred. *See id.*, *see also* The Greenidge Respondents' Memorandum of Law in Opposition to the Verified Petition, dated March 2, 2018, at Point I(A) (arguing that Petitioners-Appellants' SEQRA claims, as opposed to their permitting claims in their first and third causes of action, were barred by *res judicata*), a true and accurate copy of which is attached hereto as **Exhibit D**.

15. In response to the Greenidge Respondents' objection in point of law based on *res judicata*, Petitioners-Appellants argued to Supreme Court:

> Petitioners' claims are not barred by the doctrine of res judicata or claim preclusion. There has been no prior decision involving the claims Petitioners raise in this proceeding. Petitioners' claims regarding the water withdrawal permit and the modified SPDES permit issued to GGLLC on September 11, 2017 were not addressed in the earlier case between Petitioners and

> Respondents, *Matter of Sierra Club v. DEC* ("*Greenidge I*"), Yates County Supreme Court, Index No. 2016-0165, currently on appeal to the Fourth Department. *Greenidge I* involves Petitioners' claims regarding the Title IV and Title V air emission permits issued to GGLLC on September 8, 2016. Because the claims in the earlier proceeding involved different permits, and because Petitioners could not have raised their claims regarding the water withdrawal permit and the modified SPDES permit in the earlier proceeding, the doctrine of *res judicata* does not apply.

See Petitioners' Reply Memorandum of Law, at Point IV, a true and accurate copy of which is attached hereto as **Exhibit E**.

16. Oral argument was held before the Honorable William F. Kocher, A.C.J.S. on May 22, 2018.

17. Counsel for Petitioners-Appellants addressed the Greenidge Respondents' *res judicata* argument during oral argument and, in doing so, again represented to Supreme Court that the two actions were separate and distinct as this appeal concerned the Facility's air permits and *Greenidge II* concerned the Facility's water withdrawal and SPDES permits.

18. A decision has not yet been issued in *Greenidge II*.

19. Despite their repeated representations to Supreme Court that only *Greenidge II* concerned the Facility's water withdrawal and SPDES permits and this appeal concerns the Facility's air permits, Petitioners-Appellants have now moved this court to enjoin the Greenidge Respondents "from taking any further steps to construct and install equipment to prevent fish impingement and entrainment at Greenidge Generating Station pending the resolution of this proceeding . . ." *See* Petitioners-Appellants' Notice of Motion for Temporary Injunctive Relief, at p. 1.

20. Preliminarily, Petitioners-Appellants should not be permitted to seek such relief in this action.

21. The Amended Verified Petition does not challenge the Facility's SPDES permit let alone request the relief that Petitioners-Appellants now seek. (R. 54-80).

22. Any such relief should have been requested in *Greenidge II* in which the SPDES permit is being challenged, not in this action.

23. Tellingly, however, Petitioners-Appellants have never requested the relief they now seek from Supreme Court in *Greenidge II*, despite NYSDEC's issuance of the Facility's SPDES permit almost 10 months ago, making Petitioners-Appellants' request here entirely suspect, whether by the Amended Verified Petition or motion.

24. Further, even assuming such relief could be requested in this action, it is improper to do so now on appeal when at no juncture of this entire proceeding have Petitioners-Appellants ever sought the relief they now seek regarding the Greenidge Respondents' SPDES permit from Supreme Court.

25. Petitioners-Appellants also offer no explanation for why they have waited until now, only in response to the Greenidge Respondents' Motion to Dismiss, to make their request to this Court for temporary injunctive relief.

26. The SPDES permit was issued on September 11, 2017, with an effective date of October 1, 2017. It has therefore been almost 10 months since the SPDES permit Petitioners-Appellants seek to enjoin the Greenidge Respondents from complying with was issued by NYSDEC upon notice to Petitioners-Appellants.

27. Furthermore, Petitioners-Appellants have failed to satisfy any of the three necessary requirements to establish entitlement to temporary injunctive relief.

28. Petitioners-Appellants have not offered a shred of evidence, by affidavit or otherwise, to support any of their allegations that they meet the necessary requirements.

29. Accordingly, the Greenidge Respondents' Motion to Dismiss should be granted and Petitioners-Appellants' Motion for Temporary Injunctive Relief should be denied in its entirety.

Dated: July 13, 2018
Albany, New York

YVONNE E. HENNESSEY, ESQ.

15399173

EXHIBIT A

[illegible filing stamp, Yates County Clerk]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF YATES

In the Matter of the Application of

SIERRA CLUB, COMMITTEE TO PRESERVE THE FINGER LAKES by and in the name of PETER GAMBA, its President; COALITION TO PROTECT NEW YORK by and in the name of KATHRYN BARTHOLOMEW, its Treasurer; 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.

ORAL ARGUMENT REQUESTED

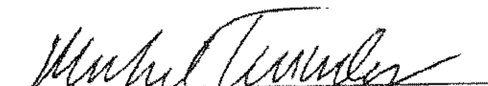
NOTICE OF PETITION

Index No. 2017-0232

PLEASE TAKE NOTICE that upon the accompanying verified petition of Sierra Club, Committee to Preserve the Finger Lakes, Coalition to Preserve New York and Seneca Lake Guardian, a Waterkeeper Affiliate, dated November 8, 2017, Petitioners will move this court, at 2:00 PM on the 6th day of December 2017, or as soon thereafter as counsel may be heard, at the Yates County Courthouse at 415 Liberty Street, Penn Yan, New York for an order and judgment pursuant to Article 78 of the Civil Practice Law and Rules for the relief demanded in the petition.

DATED: Hammondsport, New York
November 8, 2017

Respectfully submitted,



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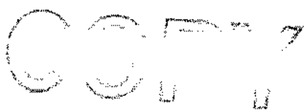

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF YATES

Lois E. Hall
Yates County Clerk

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,

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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.

ORAL ARGUMENT REQUESTED

VERIFIED PETITION

Index No. 2017-0232

Petitioners Sierra Club, Committee to Preserve the Finger Lakes, Coalition to Preserve New York and Seneca Lake Guardian, a Waterkeeper Affiliate (collectively "Petitioners"), for their verified petition for judgment pursuant to Article 78 of the New York Civil Practice Law and Rules, by their undersigned attorneys, allege as follows.

I. PRELIMINARY STATEMENT

1. This proceeding challenges the actions of Respondent New York State Department of Environmental Conservation (DEC") in issuing two permits to Respondent Greenidge Generation LLC ("GGLLC") on September 11, 2017: a water withdrawal permit (the "GGLLC Withdrawal Permit"), and a modified state pollution discharge elimination system permit (the "GGLLC SPDES Permit").

2. The permits authorize water withdrawals and water discharges by GGLLC's Greenidge Generating Station ("Greenidge Station") located on the western shore of Seneca Lake.

3. DEC's issuance of the GGLLC Withdrawal Permit is legally deficient because DEC violated the requirements of the Water Supply Law, Environmental Conservation Law (ECL), Article 15, Title 15 when it failed to treat GGLLC's water withdrawal permit application as an application for a new withdrawal and failed to adequately assess the impacts of the permit or set appropriate conditions in the permit, and because DEC failed to comply with the State Environmental Quality Review Act, ECL Article 8 ("SEQRA") when it determined that issuance of the GGLLC Withdrawal Permit was a Type II action, not subject to review under SEQRA.

4. DEC issuance of the GGLLC SPDES Permit is legally deficient because DEC violated the requirements of the Water Pollution Control Law, ECL Article 17 when it failed to treat GGLLC's SPDES permit application as an application for a new discharge and failed to set appropriate terms and conditions in the permit, and because DEC failed to comply with SEQRA when it determined that issuance of the Greenidge SPDES Permit would not have a significant effect on the environment. Because DEC's negative declaration was based on new permit conditions for protections against fish impingement and entrainment that are not currently in place, it constituted a conditioned negative declaration. Conditioned negative declarations are impermissible for Type I actions. In addition, DEC's environmental assessment was based on incorrect assumptions concerning current and future operations at Greenidge Station, failed to compare the environmental impacts of the restarted operations to the current baseline of no operations, failed to identify all relevant areas of environmental concern, failed take a hard look at the impacts identified, failed to give a reasoned elaboration why the identified impacts would not adversely affect the environment, improperly segmented review of the impacts of waste disposal at the

adjoining coal ash landfill from the review of the impacts of restarting the generating station, and failed to consider the cumulative impacts of other withdrawals and discharges to the receiving water bodies.

5. Petitioners seek a judgment and order pursuant to Sections 7803 and 7806 of the Civil Practice Law and Rules ("CPLR") vacating and annulling the GGLLC Withdrawal Permit and the GGLLC SPDES Permit on the basis that they were issued in violation of lawful procedures, were affected by errors of law, were arbitrary and capricious, and their issuance constituted an abuse of discretion.

II. PARTIES

6. Petitioner Sierra Club is a national grassroots conservation organization. It is organized as a nonprofit corporation under the laws of the State of California. Sierra Club was founded in 1892. Its purposes include practicing and promoting the responsible use of earth's ecosystems and resources, and protecting and restoring the quality of the natural and human environment. The protection of air and water resources is a key aspect of Sierra Club's work. Sierra Club has approximately three million members and supporters nationwide. More than 50,000 Club members live in New York. Many of Sierra Club's members live on or near Seneca Lake and use and enjoy the lake and other resources that are adversely affected by the operations of the Greenidge Station. The interests of the Club and its members are injured by operations damaging the water quality of Seneca Lake which Club members use for drinking, bathing, swimming, fishing and boating, by operations damaging fish and other aquatic organisms in Seneca Lake, by operations increasing the temperature of Seneca Lake and the likelihood of toxic algae blooms, and by operations emitting carbon and toxic emissions into the atmosphere. Sierra Club and its members participated in the DEC proceedings related to GGLLC's permit

applications. The Club and its members suffer informational injury as a result of the lack of a full environmental impact statement covering the project at issue in this matter.

7. Petitioner Committee to Preserve the Finger Lakes ("CPFL") is a voluntary association formed in 2010 to preserve the natural beauty and the purity of the water in the Finger Lakes region of New York State. Peter Gamba is the President of CPFL. Membership of CPFL is centered in Yates County, New York and includes members living in the Village of Dresden, the Town of Torrey and the Town of Milo. Many of CPFL's members live on or near Seneca Lake and use and enjoy the lake and other resources that are adversely affected by the operations of the Greenidge Station. The interests of the CPFL and its members are injured by operations damaging the water quality of Seneca Lake which they use for drinking, bathing and boating, damaging fish and other aquatic organisms in Seneca Lake, increasing the likelihood of toxic algae blooms in Seneca Lake, and emitting carbon and toxic emissions into the atmosphere. CPFL and its members participated actively in the review given to the Greenidge restart project by Respondent DEC, the New York State Public Service Commission ("PSC"), and the Yates County Legislature. CPFL filed comment letters with DEC on the proposed SPDES permit and Withdrawal Permit and the Type II determination and the initial and amended negative declaration on September 11, 2015 and August 5, 2016. CPFL and its members suffer informational injury as a result of the lack of a full environmental impact statement covering the project at issue in this matter.

8. Petitioner Coalition to Protect New York ("CPNY") is a coalition of local environmental organizations in the Finger Lakes – Southern Tier area, and as such, is an unincorporated association. Kathryn Bartholomew is the Treasurer of CPFL. CPFL is a member organization of CPNY. The member organizations of CPNY work together to promote

the health and vibrancy of our land and resources, and to oppose the harms that are caused by gas drilling, gas drilling wastes and fossil fuel infrastructure. The interests of CPNY's and its members are injured by operations of the Greenidge Station damaging the water quality of Seneca Lake which they use for drinking, bathing and boating, damaging fish and other aquatic organisms in Seneca Lake, increasing the likelihood of toxic algae blooms in Seneca Lake, and emitting carbon and toxic emissions into the atmosphere. CPNY's and its members suffer informational injury as a result of the lack of a full environmental impact statement covering the project at issue in this matter. CPNY's member organization, CPFL filed comment letters with DEC on the proposed SPDES permit and Withdrawal Permit and the Type II determination and the initial and amended negative declaration on September 11, 2015 and August 5, 2016.

9. Petitioner Seneca Lake Guardian, a Waterkeeper Affiliate ("Guardian") is an affiliate of the Waterkeeper Alliance. SLG was founded in January 2016 by Gas Free Seneca co-founders, Dr. Joseph Campbell and Yvonne Taylor. Yvonne Taylor is Vice President of Guardian. Guardian's mission is to protect Seneca Lake from the many threats that endanger Seneca Lake's waters. The interests of Guardian are injured by the operations of the generating station and the adjoining coal ash landfill damaging the water quality of Seneca Lake which lake residents and tourists use for drinking, bathing and boating, damaging fish and other aquatic organisms in Seneca Lake, increasing the likelihood of toxic algae blooms in Seneca Lake, and emitting carbon into the atmosphere. Guardian suffers informational injury as a result of the lack of a full environmental impact statement covering the project at issue in this matter.

10. Respondent New York State Department of Environmental Conservation is the administrative agency of the State of New York performing the actions at issue in this case. DEC is the governmental body responsible for environmental protection in the state of New York and

for the protection of New York's natural resources. DEC administers New York's water pollution discharge and water withdrawal permitting programs. Basil Seggos is the Commissioner of DEC.

11. Greenidge Generation LLC ("GGLLC") is a limited liability company formed under the laws of Delaware with offices and facilities at 590 Plant Road, Dresden, New York 14441. GGLLC is a wholly-owned subsidiary of Greenidge Generation Holdings LLC.

12. Lockwood Hills LLC ("LHLLC") is a limited liability corporation authorized to do business in New York with offices and facilities at a New York limited liability company, whose address is 590 Plant Road, Dresden, New York 14441. LHLLC is under common ownership with GGLLC.

III. FACTUAL BACKGROUND

13. Greenidge Station is located on the western shore of Seneca Lake near the Village of Dresden in the Town of Torrey, Yates County, New York. The plant is located at the mouth of Keuka Outlet.

14. Seneca Lake is the largest of the eleven Finger Lakes in central New York State. It lies within Seneca, Yates, and Schuyler counties. The Village of Watkins Glen is located at the southern end of the lake and the City of Geneva is located at the north end near where the lake drains to the Seneca River /Cayuga-Seneca Canal. The lake is in the Seneca-Oneida-Oswego River system that drains to Lake Ontario and is part of the Great Lakes watershed.

15. Keuka Outlet is the largest tributary to Seneca Lake. The watershed area of the outlet represents 35% of the total watershed of the lake. Keuka Outlet is the sole outlet of Keuka Lake. Keuka Lake, to the west of Seneca Lake, drains into Seneca Lake through the outlet. The outlet flows east from the Village of Penn Yan at north end of the east branch of Keuka Lake to the

Village of Dresden on the western shore of Seneca Lake. The elevation along the seven mile length of the outlet drops 270 feet from Keuka Lake to Seneca Lake.

16. Over the millennia, sediment flowing down the Keuka Outlet has built a large shelf out into Seneca Lake. Although Seneca Lake is a deep lake, the bottom of the lake at the mouth of the outlet is shallow. The depth profile of the lake in the vicinity of the outlet shows that the shallow shelf extends 1,600 feet from the shore, and the bottom of the lake drops off from 5 feet to 20 feet over that distance. Beyond 1,600 feet, the bottom drops off more sharply, dropping from 20 feet to 180 feet between 1,600 feet to 2,400 feet from shore.

17. Seneca Lake is heavily used for recreational boating, fishing and swimming, and is a source of drinking water and water for other uses for lakeside residents, tourists, farmers, businesses and various municipalities around the lake. Seneca Lake is the central focus of the tourism and winemaking industries in the Seneca Lake watershed.

18. Greenidge Station began operation as a coal-fired electric generating station in the 1930's. The plant was built to use once-through condenser cooling taking water withdrawn from Seneca Lake to cool the turbines and then discharge the heated water into Keuka Outlet through a discharge canal that empties into Keuka Outlet 700-feet upstream from Seneca Lake.

19. Starting in 1979, the Lockwood Ash Disposal Site ("LADS") was constructed across NYS Route 14 from Greenidge Station.

20. In 1999, Greenidge Station and LADS were acquired by AES AEE2, LLC ("AEE2"), a subsidiary of AES Eastern Energy, L.P. ("AES Eastern") from New York State Electric & Gas Company ("NYSEG"). At that time, Greenidge Station consisted of two electric generating units: the 54 megawatt Unit 3 and the 107 megawatt Unit 4. Both units were served by

pulverized coal-fired boilers. Coal was delivered to the plant by train or truck. Fly ash and other coal combustion byproducts ("CCBPs") generated by the plant were hauled to LADS.

21. After acquisition by AEE2, CCBPs from four other coal burning power plants owned by AES Eastern—Hickling Station, Westover Station, Cayuga Station, and Jennison Station—were also deposited at LADS, as were coal bottom ash from Garlock, Inc. and coal fly ash from Eastman Kodak. The approved design capacity for the LADS facility was 750 tons per day.

22. In 2004, the United States Environmental Protection Agency ("EPA") promulgated a Phase II rule under section 316(b) of the Clean Water Act ("CWA"), 33 USC 1326(b), setting national standards for minimizing adverse environmental impact from fish impingement and entrainment at large existing power plants. Legal proceedings relating to EPA's implementation of the Phase II rule continue to the present day.

23. On March 29, 2005, AES Eastern and various subsidiaries, the State of New York, DEC, and NYSEG entered into a Clean Air Act consent decree (the "2005 Consent Decree") in the United States District Court, Western District of New York (the "WDNY Court"). Under the consent decree it was agreed that by December 31, 2009, Greenidge Unit 4 would install NO_x, SO_2, and particulate control technology, repower, or cease operations; and Greenidge Unit 3 would install emission control technology equivalent to Best Available Control Technology be repowered, or cease operations. During each of the years 2007, 2008 and 2009, Greenidge Unit 3 was subject to an annual operating limit of 1400 hours.

24. On December 8, 2008, the Great Lakes–St. Lawrence River Basin Water Resources Compact (the "GLB Compact"), ECL, Article 21, Title 10, became state and federal law. The GLB Compact is an interstate compact among the states of Illinois, Indiana, Michigan, Minnesota,

New York, Ohio, Pennsylvania and Wisconsin. The compact details how the member states manage the use of water resources in the Great Lakes Basin.

25. When the New York State legislature enacted the GLB Compact on March 4, 2008, the legislature directed the Great Lakes Basin Advisory Council (GLBAC), a statutory body created by the legislature in 1988, to develop recommendations to guide New York's implementation of the requirements of the compact. In June 2009, GLBAC released its final report on New York's implementation of the compact. A key recommendation was that New York pass legislation to regulate water withdrawals statewide.

26. On January 22, 2009, AES Eastern and AEE2 notified the New York State Public Service Commission ("PSC") that they were retiring AES Greenidge Unit 3 effective December 31, 2009, pursuant to the 2005 Consent Decree. Taking into consideration the cost of the necessary air emission controls, and the potential for expensive modifications to the cooling water intakes to satisfy 6 NYCRR 704.5 and Clean Water Act 316(b), AES Eastern decided to retire Unit 3 from service.

27. On January 29, 2010, DEC renewed SPDES permit #NY-0001325 held by AES Eastern for discharges into Keuka Outlet and Seneca Lake by Greenidge Station, effective February 1, 2010. The permit required various reports for compliance with 6 NYCRR 704.5, including an Impingement Mortality and Entrainment Characterization Study, a Design and Construction Technology Review, a Proposed Suite of Technologies and Operational Measures, a Technology Installation and Operation Plan, and a Verification Monitoring Plan.

28. On April 29, 2010, AES Greenidge LLC filed its Impingement and Entrainment Characterization Study (the "IEC Study"). The study stated that cooling water was supplied to Unit 4 by three circulating pumps of which only two are typically operated outside of the summer

months. The maximum cooling water intake capacity of Unit 4 is 91.2 kgpm. (A flow of 91.2 kgpm is equal to a flow of 131,301,900 gallons per day.) The study states that Unit 4 relies on suction to convey water from an intake pipe extending 650 feet into Seneca Lake on to the circulating water pumps. According to the study, this configuration does not allow for any type of componentry, including traveling screens, that would interrupt the suction upstream of the circulating water pumps. A result of this configuration all fish, including eggs, larvae, juveniles, and adults that enter the Unit 4 cooling water intake are entrained, i.e., destroyed as they pass through the facility.

29. The IEC Study states that impingement monitoring was not conducted at Unit 4 due to the nature of its condenser cooling water system.

30. On March 16, 2010, DEC issued a department-initiated modification to AES Eastern for its SPDES permit for discharges into Keuka Outlet from LADS.

31. On June 29, 2010 DEC issued a final modification to AES Eastern's SPDES permit for discharges from LADS.

32. On September 18, 2010, AEE2 notified the PSC, the New York Independent System Operator ("NYISO"), and NYSEG that AEE2 intended to place Greenidge Unit 4 into protective lay-up status on March 19, 2011 because the unit was operating at a net loss and was not economic.

33. As an integral component of the lay-up of Greenidge Station, LADS was also prepared for protective layup. In May 2011, AEE2 submitted a lay-up plan for LADS to DEC.

34. On August 15, 2011, Governor Andrew Cuomo signed into law new water withdrawal permitting legislation unanimously passed by the State Senate and Assembly. The new law, Chapters 400-402, Laws of 2011, expanded the water withdrawal permitting requirements

contained in ECL Article 15, Title 15 to include non-public water users withdrawing 100,000 gallons or more per day of the state's waters. The 2011 law was the first law in New York to require that non-public water users obtain permits. Public water supply systems in New York have been required to obtain permits since 1905. The new permitting requirements became applicable when DEC promulgated new regulations implementing the legislation.

35. The governor's press release stated that the purpose of the law was to enable New York to comply with its commitments under the Great Lakes Basin Compact.

36. The legislation applied key elements of the GLB Compact's decision-making standards to water withdrawal permits issued throughout the state; including the GLB Compact requirements that water withdrawals must "incorporate environmentally sound and economically feasible water conservation measures" and "result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources and the applicable Source Watershed." ECL 21-1001, Section 4.11.2.

37. On December 30, 2011, AES Eastern and AEE2 filed for chapter 11 bankruptcy protection in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court").

38. On September 18, 2012, AEE2 filed notice with the Bankruptcy Court that the Greenidge Station would be permanently retired and transferred to a salvage company to dismantle and salvage the facility.

39. Also on September 18, 2012, AEE2 filed notice with the PSC that it intended to permanently retire Greenidge Unit 4 on September 21, 2012, and transfer Greenidge Station to a salvage company to dismantle and salvage the facility. The notice stated that Greenidge Unit 4 had been in lay-up status since March 19, 2011 and had not operated since well before that date.

40. On September 19, 2012, AEE2 filed a motion with the Bankruptcy Court seeking authorization to sell four non-operating coal-fired power plants owned by AEE2, including Greenidge Station, to GMMM Holdings I, LLC ("GMMM Holdings") for $2,250,000. The motion stated that the purchaser intends to permanently retire the non-operating facilities, salvage or scrap the equipment, and demolish the buildings so the sites eventually can be redeveloped, and that the purchaser has extensive experience with power plant demolitions, asbestos abatement, and other necessary skills.

41. On October 11, 2012, the Bankruptcy Court approved AEE2's sale of Greenidge Station and the Lockwood Hills coal ash landfill to GMMM Holdings.

42. On November 21, 2012, DEC promulgated new regulations implementing the water withdrawal permitting law. The regulations became effective April 1, 2013.

43. On November 30, 2012, GMMM Lockwood LLC was formed by GMMM Holdings.

44. On December 18, 2012, the WDNY Court signed a stipulation and order to terminate the CAA consent decree.

45. On January 15, 2013, DEC authorized transfer of the SPDES permit for Greenidge Station from AES Eastern to GMMM Greenidge, LLC, a subsidiary of GMMM Holdings. The transfer was effective as of December 27, 2012.

46. On March 7, 2013, AEE2 deeded certain property in the Town of Torrey to GMMM Greenidge LLC and certain adjoining property to GMMM Lockwood LLC.

47. On May 28, 2013, GMMM Greenidge, LLC submitted an application to DEC for a water withdrawal permit for Greenidge Station.

48. On February 28, 2014, GMMM Holdings sold GMMM Greenidge, LLC and GMMM Lockwood LLC to an affiliate of Atlas Holdings, LLC.

49. On March 3, 2014, GMMM Greenidge, LLC, now under the ownership of Atlas Holdings, LLC, was renamed Greenidge Generation, LLC ("GGLLC") and GMMM Lockwood, LLC, also under the ownership of Atlas Holdings, LLC, was renamed Lockwood Hills LLC ("LHLLC").

50. On May 16, 2014, GGLLC submitted a Title IV/Title V air permit application to DEC for operation of the Greenidge Station.

51. On August 1, 2014, GGLLC submitted an application to DEC to renew the SPDES previously held by AEE2 for Greenidge Station.

52. On February 18, 2015, DEC entered into Consent Order No. R8-20140710-47 with LHLCC with respect to the SPDES permit held for LADS. The consent order states that DEC has determined that groundwater at the site contains substances in excess of the duly promulgated water quality standards for total dissolved solids, boron, manganese, magnesium, iron, sodium and sulfate and other substances in contravention of duly promulgated water quality standards in violation of ECL 17-0501 and 6 NYCRR 360-1.14(b)(2).

53. On May 26, 2015, LHLLC submitted its SPDES permit renewal application certification for LADS. The application states that none of the items on the self evaluation list apply to the facility at this time, but also states that it may be necessary to modify the permit in the future based on Consent Order R8-20140710-47.

54. On August 12, 2015, DEC published three separate notices in its Environmental Notice Bulletin ("ENB") giving notice that GGLLC had applied for Title IV and Title V air permits, for a water withdrawal permit and for renewal of a SPDES permit.

55. The notice for the water withdrawal permit application stated that DEC had determined that the facility was eligible as an existing user for an initial permit under ECL 15-1501.9 and had determined that the issuance of initial permits under ECL 15-1501.9 as implemented by 6 NYCRR 601.7, are Type II actions and not subject to SEQR.

56. The notice for the SPDES permit application stated that DEC had received an application for renewal of the SPDES permit for the Greenidge Station, that DEC was proposing a department-initiated modification to the SPDES permit, and that DEC as lead agency had determined under SEQRA that the project was a Type I action and would not have a significant effect on the environment.

57. On September 9, 2015, GGLLC filed a petition with the PSC seeking a certificate of public convenience and necessity to return Greenidge Unit #4 to service as a merchant generating facility operating in the wholesale power markets.

58. On September 11, 2015, CPFL and a group of local environmental organizations filed comments with DEC opposing issuance of the proposed water withdrawal permit, SPDES permit and air permits for the Greenidge Station (the "CPFL 2015 Comments"). The CPFL's comments stated that CPFL and the other signers to the comment letter opposed issuance of the proposed draft permits because DEC had failed to make determinations and impose the permit conditions that would be required if the applications were properly treated as applications for new permits, that DEC's environmental assessment was based on incorrect assumptions concerning current and future operations at Greenidge Station, that DEC's failed to identify all relevant areas of environmental concern, failed take a hard look at the impacts identified, failed to give a reasoned elaboration why the identified impacts would not adversely affect the environment, improperly segmented review of the impacts of waste disposal at the adjoining coal ash landfill

from the review of the impacts of restarting the generating station, and failed to consider cumulative impacts.

59. On September 23, 2015, two affiliates of GGLLC, Greenidge Pipeline LLC ("GPLLC") and Greenidge Pipeline Properties Corporation ("GPPC") filed a petition with the PSC seeking a certificate of public convenience and necessity to operate a natural gas pipeline from the Empire pipeline to Greenidge Station in the Towns of Torrey and Milo in Yates County, New York.

60. On October 2, 2015, GPLLC and GPPC filed an application for a certificate of environmental compatibility and public need for construction of the pipeline. The proposed route of the 4.6 mile pipeline ran along the top edge of the ravine on the south side of Keuka Outlet and ran across a portion of LADS.

61. On October 19, 2015, EPA's final rule on the disposal of coal combustion residuals from electric utilities under subtitle D of the Resource Conservation and Recovery Act, 42 USC 6901 *et seq.* (1976), went into effect. The rule regulates how coal combustion residuals generated by electric utilities and independent power producers are managed and disposed of in surface impoundments and landfills.

62. On November 4, 2015, PSC conducted a hearing at the Dresden Fire House in Dresden, New York on the PSC petitions filed by GGLLC and its affiliates. The hearing was attended by a number of Petitioners' members.

63. On November 9, 2015, CPFL filed comments with the PSC on the petitions filed by GGLLC, GPLLC and GPPC.

64. On November 10, 2015, representatives of CPFL attended a procedural conference held by the PSC in Albany, New York on the petitions filed by GGLLC, GPLLC and GPPC.

65. CPFL filed supplemental comments with the PSC on November 23, 2015.

66. On November 30, 2015, DEC wrote to GGLLC's attorneys objecting to the Engineering Report for Leachate/Stormwater Segregation at the Lockwood Ash Disposal Site which was submitted as a condition of Consent Order RS-20140710-47. DEC's letter noted that LHLLC proposed to follow the design and operation procedures that were primitive, little-changed from past practices and not the best treatment techniques available for physical chemical treatment of CCR wastewater.

67. On December 7, 2015, EPA's Region 2 Office sent a letter to DEC disapproving DEC's draft air permits for the Greenidge Station. The EPA letter stated that EPA objected to the issuance of the proposed Title V operating permit for the Greenidge Station on the basis that the facility has not operated for nearly five years and was permanently shut down, as demonstrated by the prior owners' representations to two federal courts and their relinquishment of their Clean Air Act Title V and Title IV permits. The EPA letter stated that DEC failed to incorporate into the proposed Title V permit the applicable requirements under the Clean Air Act's Prevention of Significant Deterioration ("PSD") program and implementing regulations, and failed to assure compliance with applicable PSD requirements.

68. On December 28, 2015, PSC issued a ruling denying CPFL's request for an evidentiary hearing on the PSC petitions of GGLLC, GPLLC and GPPC.

69. On February 11, 2016, CPFL filed comments with DEC objecting to the administrative renewal of the SPDES permit for LADS on the ground that there were outstanding permit violations and that the SPDES law did not allow the renewal of permits with outstanding violations.

70. On June 29, 2016, DEC gave notice in the ENB that revised proposed air permits had been prepared and that DEC had issued an amended negative declaration covering the revised air permits and the SPDES permit (the "Amended Negative Declaration"). The air permits had been completely rewritten to meet EPA's objections.

71. A notice of the revised proposed air permits and the Amended Negative Declaration was published by DEC in the Penn Yan *Chronicle Express* on July 6, 2016.

72. On August 5, 2016, CPFL and other local environmental groups filed comments on the revised proposed air permits and the Amended Negative Declaration (the "CPFL 2016 Comments"). The comments opposed the issuance of any permits to GGLLC until DEC conducted an adequate environmental review of the impacts of issuing the permits pursuant to SEQRA. The comments objected to the Amended Negative Declaration on the ground that DEC's determination that restarting the Greenidge Station would have no significant adverse impacts on the environment was without foundation because DEC's environmental assessment was based on incorrect assumptions concerning current and future operations at Greenidge Station, and because DEC failed to identify all relevant areas of environmental concern, failed take a hard look at the impacts identified, failed to give a reasoned elaboration why the identified impacts would not adversely affect the environment, improperly segmented review of the impacts of waste disposal at the adjoining coal ash landfill from the review of the impacts of restarting the generating station, and failed to consider cumulative impacts.

73. On September 8, 2016, DEC issued the revised air permits.

74. On September 16, 2016, noting the issuance of the air permits, the PSC issued an order granting certificates of convenience and necessity to GGLLC, GPLLC and GPPC for the generating station and the pipeline.

75. On October 17, 2016, the PSC issued a Notice to Proceed with Construction authorizing GPLLC and GPPC to begin activities required for the construction of the 4.6 miles of the natural gas pipeline along the top edge of the ravine on the south side of Keuka Outlet to Greenidge Station.

76. Also on October 17, 2016, CPFL and CPNY filed a petition for rehearing of the September 16, 2016 PSC order.

77. GGLLC held a groundbreaking ceremony for the repowering of the Greenidge Station at the facility on October 18, 2016.

78. Petitioners CPFL and CPNY filed an Article 78 proceeding challenging GGLLC's air permits and DEC's review of the environmental impacts of issuing the air permits under SEQRA on October 28, 2016 (the "2016 Petition"). Sierra Club was added as the lead petitioner on December 6, 2016.

79. The 2016 Petition stated that the petitioners would evaluate GGLLC's SPDES permit and water withdrawal permit when they were issued, and would seek to amend the petition to challenge these permits if any of their terms or conditions or the environmental review process pursuant to which they were issued violated state or federal law.

80. Construction on the new natural gas pipeline to the Greenidge Station began in November 2016.

81. On December 15, 2016, the PSC denied the request for rehearing filed by CPFL and CPNY.

82. On April 2, 2017, local residents received their first indication that Greenidge Station was beginning operations when they heard loud screeching noises coming from the plant.

83. On April 21, 2017, Judge William Kocher of the Yates County Supreme Court issued an order granting Respondents' motions to dismiss the 2016 Petition.

84. On June 26, 2017, DEC issued notice of entry of the judgment.

85. On July 19, 2017, Sierra Club, CPFL and CPNY filed a notice of appeal to the Appellate Division Fourth Department. Sierra Club, CPFL and CPNY are currently perfecting their appeal.

86. Loud noises from the plant continued through April, May, June, July, August and September.

87. DEC issued GGLLC's water withdrawal and SPDES permits on September 11, 2017. GGLLC's Withdrawal Permit authorizes the withdrawal of up to 139,248,000 gallons per day from Seneca Lake for operation of the plant's once through cooling system and other plant operations.

88. GGLLC's Withdrawal Permit is the largest water withdrawal permit issued by DEC in the Seneca Lake watershed and one of the largest water withdrawal permits issued in the Great Lakes watershed.

89. GGLLC's SPDES Permit authorizes the discharge of up to 134,000,000 gallons per day of condenser cooling water from the plant's once-through cooling system with a maximum temperature of 108° F in summer and 86° F in winter and into the Keuka Outlet. The permit requires the installation of cylindrical wedge-wire screens and variable speed drives to reduce impingement mortality and entrainment equivalent to that achievable with closed-cycle cooling and requires GGLLC to submit a Cylindrical Wedge-wire Screen (CWWS) Pilot Study Plan, Installation and Operation Plan, and a Verification Monitoring Plan. The SPDES Permit also requires a dilution study to determine appropriate dilution factors for Seneca Lake.

90. In addition to the discharge of up to 134,000,000 gallons per day of condenser cooling water into Keuka Outlet, the SPDES Permit also authorizes discharges into Seneca Lake and groundwater of bottom ash pond overflow (including stormwater, treated coal pile runoff, treated maintenance cleaning wastewater, oil separator, and boiler chemical cleaning final rinse); oil separator (process oil, fuel oil storage area); boiler water final rinse, coal pile runoff, fly ash hopper decant, demineralizer regenerate wastewater, maintenance cleaning wastewater, stormwater and other discharges. These additional discharges are not subject to any flow restrictions, but are subject to other standards that vary by the type of discharge.

91. GGLLC's SPDES Permit is the largest SPDES permit issued by DEC in the Seneca Lake watershed and one of the largest SPDES permits issued in the Great Lakes watershed.

IV. FIRST CAUSE OF ACTION VIOLATION OF THE WATER WITHDRAWAL PERMITTING LAW IN ISSUING THE GGLLC WITHDRAWAL PERMIT

92. Petitioners repeat and reallege the allegations in paragraphs 1 through 91 as though fully set forth herein.

93. DEC's issuance of the GGLLC Withdrawal Permit is legally deficient because DEC violated the requirements of the Water Supply Law, ECL Article 15, Title 15 when it failed to treat GGLLC's Withdrawal Permit application as an application for a new withdrawal, when it failed to assess the impacts of the permit as required by required by ECL 15-1503(2) and when it failed to set appropriate conditions in the permit as required by ECL 15-1503(4).

94. Even if DEC properly determined that GGLLC was an existing water user entitled to an initial permit under ECL 15-1501(9), that section requires that initial permits issued to existing users be subject to the same standards that apply to permits issued to new users.

95. For these reasons, DEC's issuance of the GGLLC Withdrawal Permit was made in violation of lawful procedures, affected by errors of law, arbitrary and capricious, and an abuse of discretion.

V. SECOND CAUSE OF ACTION
VIOLATION OF SEQRA IN ISSUING THE GGLLC WITHDRAWAL PERMIT

96. Petitioners repeat and reallege the allegations in paragraphs 1 through 95 as though fully set forth herein.

97. DEC failed to comply with SEQRA when it determined that issuance of the GGLLC Withdrawal Permit constituted a Type II action exempt from SEQRA review.

98. DEC's determination that its issuance of the GGLLC Withdrawal Permit was a non-discretionary act ignores the mandates of ECL 15-1503(2), ECL 15-1503(4) and ECL 15-1501(9) which require that DEC exercise discretion in setting appropriate terms and conditions in all water withdrawal permits, whether issued to new users or to existing users.

99. Because DEC is required to exercise discretion in issuing water withdrawal permits, DEC's failure to conduct a review of the environmental impacts of issuing the GGLLC Withdrawal Permit violated the requirements of SEQRA.

100. For these reasons, DEC's issuance of a Type II determination for the GGLLC Withdrawal Permit was made in violation of lawful procedures, affected by errors of law, arbitrary and capricious, and an abuse of discretion.

VI. THIRD CAUSE OF ACTION
VIOLATION OF THE WATER POLLUTION CONTROL LAW IN ISSUING THE GGLLC SPDES PERMIT

101. Petitioners repeat and reallege the allegations in paragraphs 1 through 100 as though fully set forth herein.

102. DEC issuance of the GGLLC SPDES Permit is legally deficient because DEC violated the requirements of the Water Pollution Control Law, ECL Article 17 when it failed to treat GGLLC's SPDES permit application as an application for a new permit and when it failed to impose appropriate terms and conditions to address fish impingement and entrainment.

103. No provision of the ECL authorizes the transfer of SPDES permits.

104. Even if the transfer is treated as a renewal, reissuance, recertification or modification of an existing SPDES permit, ECL 70-0115.2(c) provides that, "In the case of a request for the renewal, reissuance, recertification or modification of an existing state pollutant discharge elimination system permit issued in lieu of a national pollutant discharge elimination system permit the request shall be treated as an application for a new permit."

105. Pursuant to ECL 70-0115.2(c), GGLLC's SPDES Permit application should have been treated as an application for a new permit and appropriate terms and condition imposed.

106. Whether GGLLC's application for a SPDES permit is treated as an application for a new permit or as an application to renew an existing permit, compliance with CWA 316(b) and 6 NYCRR 704.5 requires closed cycle cooling.

107. For these reasons, DEC's issuance of the GGLLC SPDES Permit was made in violation of lawful procedures, affected by errors of law, arbitrary and capricious, and an abuse of discretion.

VII. FOURTH CAUSE OF ACTION
VIOLATION OF SEQRA IN ISSUING THE GGLLC SPDES PERMIT

108. Petitioners repeat and reallege the allegations in paragraphs 1 through 107 as though fully set forth herein.

109. DEC failed to comply with SEQRA when it determined that issuance of the GGLLC SPDES Permit would result in no significant adverse impacts on the environment, and issued a negative declaration.

110. DEC's SEQRA determination for the GGLLC SPDES Permit was fundamentally flawed because it was based on new permit conditions for protections against fish impingement and entrainment that are not currently in place. The negative declaration therefore constituted a conditioned negative declaration. Conditioned negative declarations are not permissible for Type I actions.

111. In addition, DEC's environmental assessment was based on incorrect assumptions concerning current and future operations at Greenidge Station, failed to compare the environmental impacts of the restarted operations to the current baseline of no operations, failed to identify all relevant areas of environmental concern, failed take a hard look at the impacts identified, failed to give a reasoned elaboration why the identified impacts would not adversely affect the environment, improperly segmented review of the impacts of waste disposal at the adjoining coal ash landfill from the review of the impacts of restarting the generating station, and failed to consider the cumulative impacts of other withdrawals and discharges to the receiving water bodies.

112. For these reasons, DEC's determination of no significant environmental impact for issuance of GGLLC SPDES Permit was made in violation of lawful procedures, affected by errors of law, arbitrary and capricious, and an abuse of discretion.

VIII. RELIEF REQUESTED

WHEREFORE, Petitioners respectfully request that this Court enter judgment against Respondents pursuant to CPLR 7803 and 7806 as follows:

A. Annulling the GGLLC Withdrawal Permit and GGLLC SPDES Permit issued on September 11, 2017 on the basis that they were issued in violation of lawful procedures, were affected by errors of law, arbitrary and capricious, and an abuse of discretion;

B. Annulling Respondent DEC's Type II SEQRA determination for the GGLLC Withdrawal Permit on the basis that it was made in violation of lawful procedure, affected by errors of law, arbitrary and capricious, and an abuse of discretion; and

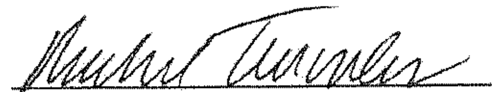
C. Annulling Respondent DEC's SEQRA findings and negative determination for the GGLLC SPDES Permit on the basis that they were made in violation of lawful procedure, affected by errors of law, arbitrary and capricious, and an abuse of discretion;

E. Granting Petitioners the costs and disbursements of this action; and

F. Granting such other and further relief as the Court deems just and proper.

DATED: Hammondsport, New York
November 8, 2017

Respectfully submitted,



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VERIFICATION

I, Rachel Treichler, an attorney admitted to the practice of law before the courts of the State of New York, and not a party to the above-captioned proceeding, affirm the following to be true under the penalties of perjury pursuant to CPLR 2106, that I am an attorney for the Petitioners in this proceeding and that the foregoing petition is true to my own knowledge, and upon my review of pertinent documents.

I am signing this verification pursuant to Rule 3020(d)(3) of the CPLR.

Dated: November 8, 2017
Hammondsport, New York

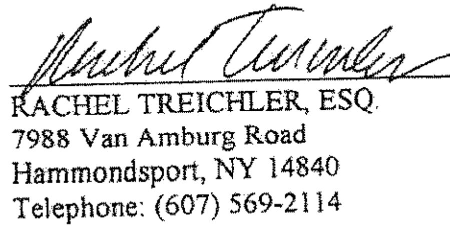

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EXHIBIT B

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,

ORAL ARGUMENT REQUESTED

Petitioners,

Index No. 2017-0232

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.

PETITIONERS' MEMORANDUM OF LAW
IN SUPPORT OF THE VERIFIED PETITION

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PRELIMINARY STATEMENT

This case involves two of the largest water withdrawal and discharge permits issued by Respondent New York State Department of Environmental Conservation ("DEC") for water withdrawals and discharges in Great Lakes Basin, the permits issued to Respondent Greenidge Generation LLC ("GGLLC") for its Greenidge Generating Station on Seneca Lake ("Greenidge Station"). The permits authorize GGLLC to withdraw up to 139,248,000 gallons of water per day from the lake and to discharge up to 134,000,000 gallons per day of heated condenser cooling water into the Keuka Outlet 700-feet upstream from Seneca Lake, plus additional discharges into Seneca Lake unlimited as to flow, but limited in concentrations of contaminants.

Petitioners Sierra Club, Committee to Preserve the Finger Lakes ("CPFL", Coalition to Preserve New York ("CPNY") and Seneca Lake Guardian, a Waterkeeper Affiliate (collectively "Petitioners") contend that DEC violated the requirements of the applicable permitting statutes and the State Environmental Quality Review Act ("SEQRA") in failing to impose required terms and conditions in the GGLLC withdrawal and discharge permits or to conduct adequate SEQRA reviews of the permit applications.

This is the second case Petitioners have filed challenging permits DEC has issued to GGLLC for operation of Greenidge Station. Petitioners CPFL and CPNY filed an Article 78 proceeding on October 28, 2016 in Yates County Supreme Court challenging GGLLC's air permits and DEC's review of the environmental impacts of issuing the air permits under SEQRA. Sierra Club was added as the lead petitioner on December 6, 2016. On April 21, 2017, this court issued an order granting Respondents' motions to dismiss the petition. Sierra Club, CPFL and CPNY are currently perfecting their appeal to the Appellate Division Fourth Department.

The present case is the third Article 78 proceeding in which Petitioner Sierra Club has challenged Respondent DEC's interpretation of the requirements applicable to water withdrawal permits. In December 2013 Sierra Club joined with the Hudson River Fishermen's Association ("HRFA") in challenging the first permit issued to a non-public user under the new law, the permit issued to TransCanada Ravenswood LLC for its Ravenswood Generating Station in Queens to take over 1.5 billion gallons per day from the East River in New York Harbor.[1] Sierra Club and HRFA received an adverse ruling in that case from the Queens County Supreme Court in October 2014.[2] They appealed that judgment to the Second Department in July 2015. Oral arguments were heard by the Second Department on February 6, 2017. The parties are awaiting the Second Department's ruling in the case.

In March 2015, Sierra Club and HRFA filed a challenge to the water withdrawal permit issued to Consolidated Edison for its East River Generating Station in Manhattan to take up to 373.4 million gallons per day from the East River. Sierra Club and HRFA received an adverse ruling from the New York County Supreme Court on September 29, 2016.[3] Sierra Club and HRFA appealed the trial court judgment to the First Department in July 2017. On December 12, 2017, the First Department ruled that the petition was time-barred.[4] The basis for the First Department's ruling does not apply to the present case or to the Second Department case because both these cases were filed within 60 days of the issuance of the applicable water withdrawal permit. The petition in the First Department case was not filed within 60 days of the issuance of

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[1] Pursuant to an agreement among the parties, Petitioners filed a new petition in February 2014. TransCanada was represented in the proceedings by Yvonne Hennessey, the attorney representing GGLLC in the present case.

[2] *Sierra Club v. Martens*, (Sup. Ct. Queens Cty., Oct. 1, 2014), Index No. 2949/14, McDonald, J., (*Sierra Club v. Martens I (Ravenwood)*. A copy of the memorandum decision issued by the court is attached as Exhibit A to the affirmation of Rachel Treicher dated December 22, 2017 ("Tr. Aff.").

[3] *Sierra Club v. Martens*, 2016 NY Slip Op 51391(U) (Sup. Ct. New York Cty., Sept. 29, 2016), *aff'd in part* 2017 NY Slip Op 08627 (1st Dep't, Dec. 12, 2017), copy attached as Exhibit B to Tr. Aff.

[4] *Sierra Club v. Martens*, 5138 100524/15, December 12, 2017, http://www.nycourts.gov/reporter/3dseries/2017/2017_08627.htm, copy attached as Exhibit C to Tr. Aff.

the permit and thus was held to be time-barred under ECL 15-0905(2). Because the First Department found that the petition was time-barred, the court did not reach the other issues in the case. The rulings of the Queens County and New York County trial courts are discussed below.

STATEMENT OF FACTS

The facts of this case are set forth in the verified petition.

ARGUMENT

POINT I

DEC VIOLATED WSL IN ISSUING A WATER WITHDRAWAL PERMIT TO GGLLC WITHOUT IMPOSING REQUIRED TERMS AND CONDITIONS

The water withdrawal permit DEC issued to GGLLC on September 11, 2017 violated the Water Supply Law, ECL Article 15, Title 15, 15-1501 *et seq.* (WSL) because it failed to contain terms and conditions required by the law. WSL was amended in 2011 by the Water Resources Protection Act of 2011, Chapters 400-402, Laws of 2011 to require that users other than public water supply systems obtain water withdrawal permits. Water withdrawal permits have been required for public water supply systems in New York since 1905.[5] The new law was enacted to conform New York's water withdrawal permitting law to the requirements of the Great Lakes–St. Lawrence River Basin Water Resources Compact (the "Compact"), ECL, Article 21, Title 10, which became state and federal law in 2008.

The legislation incorporated key elements of the Compact's decision-making standards, including the Compact requirements that water withdrawals must "result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water

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[5] The Water Supply Act of 1905 (Chapter 724, Laws of 1905).

Dependent Natural Resources and the applicable Source Watershed" and "incorporate environmentally sound and economically feasible water conservation measures." ECL 21-1001, Section 4.11.2. These Compact requirements are incorporated in ECL 15-1503(2), which mandates eight factors to be determined by the DEC in making a decision whether to grant or deny a water withdrawal permit. The factors include "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," ECL 15-1503(2)(f), and "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).

DEC promulgated new regulations implementing the new water permitting requirements in November 2012. 6 NYCRR Part 601. The regulations became effective April 1, 2013. 6 NYCRR 601.11(c) reinforces the mandates of ECL 15-1503(2) by requiring the same eight determinations.

When DEC was questioned during the comment period on the draft water withdrawal regulations in 2012 regarding whether there were any distinctions in the standards that applied to initial permits issued to existing users compared to the standards that apply to permits issued to new users arose, DEC responded that the standards are the same. 2012 Assessment of Public Comments on the Water Withdrawal Regulations, DEC, November 2012, pp. 41-42, Tr. Aff. Ex. D. Most notably, in response to a comment by Entergy Nuclear Operations, Inc. requesting clarification as to "whether the standards for issuance of initial permits for existing facilities are subject to the same issuance standards as new permits," DEC stated, "ECL §15-1503 establishes permit application requirements and standards for permit issuance. This Section applies to all

permits. *The statute does not authorize the Department to apply different standards for the issuance of initial permits.* [emphasis added]." *Id.* at 42.

It was not until notice for the TransCanada Ravenswood water withdrawal permit application was published in DEC's Environmental Notice Bulletin ("ENB") in August 2013 that DEC publicly stated that it was applying a distinction between the standards that applies to initial permits issued to existing users and permits issued to new users.

A. DEC Erred in Treating GGLLC's Withdrawal Permit Application as an Application for an Existing Water Use

On May 28, 2013, shortly after the new water withdrawal regulations became effective, GMMM Greenidge LLC, a previous owner of Greenidge Station, submitted an application to DEC for a water withdrawal permit for the plant. Petition ¶ 47. GMMM Greenidge's application was filed several months after it purchased Greenidge Station from AES AEE2, LLC ("AEE2"), a subsidiary of AES Eastern Energy, LP, in a chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court").

At the time GMMM Greenidge submitted its water withdrawal permit application, Greenidge Station was not operating and was not withdrawing water from Seneca Lake. The plant had been permanently retired on September 21, 2012, had been in lay-up status since March 19, 2011 and had not operated since well before that date. *Id.* ¶ 39. The purchase of Greenidge Station from AEE2 by an affiliate of GMMM Greenidge together with three other non-operating coal-fired power plants owned by AEE2 was approved by the Bankruptcy Court on October 11, 2012. *Id.* ¶ 41. After the purchase from AEE2 in 2012, GMMM Greenidge was sold to an affiliate of Atlas Holdings, LLC on February 28, 2014 and on March 3, 2014, GMMM Greenidge was renamed Greenidge Generation, LLC ("GGLLC"). *Id.* ¶ 49.

Greenidge Station was still not operating when DEC published notice in the ENB on August 12, 2015 that DEC had determined that GGLLC was eligible as an existing user for an initial water withdrawal permit under ECL 15-1501(9). ENB Notice, Tr. Aff. Ex. D.

Petitioners contend that there is no factual basis for DEC's determination that Greenidge Station should be treated as an existing user given that Greenidge Station had not operated since before the new water withdrawal permitting law was enacted and before the plant was owned by GGLLC. In these circumstances, DEC should have treated the plant as a new water user.

GGLLC did not commence operations at Greenidge Station until sometime in the spring of this year. DEC required that GGLLC obtain new air permits before restarting the plant as a result of requirements imposed by the United States Environmental Protection Agency ("EPA"). EPA required DEC to apply the standards applicable to a new air emission source to the air permits on the grounds that the plant had not operated for nearly five years, had been permanently shut down, and the previous owner had relinquished its air permits. See EPA Letter to DEC regarding the air permits for Greenidge Station dated December 7, 2015, Tr. Aff. Ex. E. In contrast to EPA's position regarding the air permits, DEC elected not to treat the new water withdrawals by Greenidge Station as new uses. Thus DEC allowed the GGLLC to begin new operations at Greenidge Station in spring 2017 without having a water withdrawal permit in place. The plant's water withdrawal permit was not issued by DEC until September 11, 2017, after new operations had already begun.

Allowing the plant to begin new water withdrawals without having a water withdrawal permit was a violation of the permitting requirements of WSL. ECL 15-1501(1) provides that "no person shall have the power "to make a water withdrawal from *an existing* or new source [emphasis added]" until that person shall have obtained a water withdrawal permit. The

appropriate terms and conditions required by WSL are specified in ECL 15-1503(4) and are based on the determinations specified in ECL 15-1503(2). ECL 15-1503(4) provides that DEC has the power "to grant or deny a permit or grant a permit with such conditions as may be necessary to provide satisfactory compliance by the applicant with the matters subject to department determination pursuant to subdivision 2 of this section." The statutory scheme requires that the determinations mandated by ECL 15-1503(2) be made as a basis for DEC to set adequate permit conditions. DEC failed to make the determinations required by ECL 15-1503(2) for operations by Greenidge Station and did not impose conditions to provide satisfactory compliance with those determinations in the GGLLC permit as required by ECL 15-1503(4). Among the determinations DEC failed to make for the GGLLC permit was a determination that the Greenidge 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 in Seneca Lake as required by ECL 15-1503(2)(f) or a determination that the Greenidge water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures as required by ECL 15-1503(2)(g). DEC's failure to make the determinations and set the conditions required by ECL 15-1503(2) and ECL 15-1503(4) for the GGLLC water withdrawal permit violated DEC's duties under WSL.

B. Even if GGLLC is treated as an Existing User, the Requirements of ECL 15-1503(2) and ECL 15-1503(4) Still Apply

Even if GGLLC is treated as an existing user under WSL, the requirements of ECL 15-1503(2) and ECL 15-1503(4) still apply. ECL 15-1501(9) does not exempt existing users from the requirements of ECL 15-1503(2) and ECL 15-1503(4). ECL 15-1501(9) provides that DEC "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 . . . as of February 15, 2012 [emphasis added]," i.e., an existing user. ECL 15-1501(9) specifies the size of the permit to be issued to an existing user, but in other respects, leaves the terms and conditions to be imposed to be determined by DEC "subject to appropriate terms and conditions as required by [WSL]." ECL 15-1503(2) and ECL 15-1503(4) specify the terms and conditions required by WSL, and the requirements of those sections are thus incorporated into the requirements applicable under ECL 15-1501(9). Petitioners contend that this statutory language is clear and cannot be interpreted to exclude application of the requirements of ECL 15-1503(2) and ECL 15-1503(4) in setting appropriate terms and conditions in permits issued to existing users.

On the issue of whether ECL 15-1501(9) requires compliance with the requirements of ECL 15-1503(2) and ECL 15-1503(4) for existing users, the trial courts in *Sierra Club v. Martens I (Ravenswood)* and *Sierra Club v. Martens II (Con Ed)* erred in deferring to DEC's interpretation of the statute.[6] Under the applicable case law, however, because DEC's current interpretation of ECL 15-1501(9) runs counter to the clear wording of the statute, judicial deference to DEC's interpretation of ECL 15-1501(9) is not appropriate. The rules for evaluating when a court should defer to an agency interpretation of a statute are explained in the decision of the Court of Appeals in *Raritan Development Corp. v. Silva,* 91 N.Y.2d 98 (1997):

> Where "the question is one of pure legal interpretation of statutory terms, deference to the [agency] is not required" . . . . On the other hand, when applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference. [Citations omitted.] Even in those situations, however, a determination by the agency that "runs counter to the

[6] Of course, the trial court decisions in *Sierra Club v. Martens I (Ravenswood)* and *Sierra Club v. Martens II (Con Ed)*, which involved the interpretation of the requirements applicable to existing users contained in ECL 15-1501(9), did not purport to interpret the requirements applicable to permits issued to new users such as GGLLC.

> clear wording of a statutory provision" is given little weight. [Citations omitted.]

Id. 102-103. In *Raritan*, the Court declined to defer to the interpretation of a section of New York City's Zoning Resolution put forth by the Board of Standards and Appeals of the City of New York (BSA). The Court said, "The statutory language could not be clearer. . . . BSA's interpretation conflicts with the plain statutory language and may not be sustained." *Id.* at 103. Similarly, in *Matter of Brown v. NYS Racing and Wagering Board*, 60 A.D.3d 107 (2nd Dep't 2009), the court stated: "when a 'question is one of pure legal interpretation of statutory terms, deference to the [agency] is not required. . . . In such instances, courts should construe clear and unambiguous statutory language as to give effect to the plain meaning of the words used." *Id.* at 115, citations omitted. The *Brown* court found, "There being no ambiguity in the operative statutory terms, we must necessarily deem the pertinent provisions of the Education Law as subject to pure legal interpretation and give effect to their plain meaning, without necessarily deferring to the interpretation advanced by NYSED." *Id.* at 116.

In the present case there is no ambiguity in the wording of ECL 15-1501(9) regarding the requirement that permits issued to existing users contain "appropriate terms and conditions as required under this article," and this court should give effect to the plain meaning of ECL 15-1501(9) without giving deference to DEC's interpretation.

The fact that DEC interpreted ECL 15-1501(9) as requiring the imposition of the same terms and conditions in permits issued to new users and to existing users during the drafting of the regulations in 2012, as noted above, further militates against giving deference to DEC's contrary interpretation today.

The trial court's decision in *Sierra Club v. Martens II (Con Ed)* relied on the fact that the withdrawals from the East River in New York Harbor at issue in that case were not withdrawals

of freshwater. On that basis the *Con Ed* trial court stated that it "declines to consider water conservation themes underlying WSL as a basis to require further consideration of closed-cycle methods leading to vacatur of the Initial Permit." The present case is easily distinguished because Greenidge Station is withdrawing fresh, potable water from Seneca Lake, which is used as a drinking water source by many municipalities and individuals around the lake.

POINT II

DEC VIOLATED SEQRA IN ISSUING A WATER WITHDRAWAL PERMIT TO GGLLC WITHOUT CONDUCTING AN ADEQUATE REVIEW OF THE IMPACTS OF GREENIDGE OPERATIONS

Under SEQRA, preparation of an Environmental Impact Statement ("EIS") is required whenever an action *may* have a significant impact on the environment. ECL 8-0109(2). An EIS must contain all the information necessary to assure that the decision-making body, called the "lead agency," can ultimately determine to go forward or not with a project in a manner that will create the least negative impact to the environment. *Id.* The lead agency must "act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid environmental effects." ECL 8-0109(1).

In determining whether an EIS needs to be prepared, the SEQRA regulations provide that the lead agency must first determine whether or not the proposed action falls within the categories of "Type I", "Unlisted", or "Type II." 6 NYCRR 617.6. Type I actions are those actions that because of their size, scope or type, are determined to be more likely to have adverse environmental consequences, and therefore require the drafting of an EIS. As explained in 6 NYCRR 617.4(a)(1):

> The purpose of the list of type I actions in this section is to identify, for agencies, project sponsors and the public, those actions and projects that are more likely to require the preparation of an EIS than unlisted actions. All agencies are subject to this

> type I list. . . . . [T]he fact that an action or project has been listed as a type I action, carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS.

In contrast, Type II actions do not require environmental review under SEQRA. Type II actions are identified in Section 617.5 of the regulations. They have already been determined not to have an adverse effect on the environment, and therefore no further SEQRA review is required. Unlisted actions are those actions that are neither Type I nor Type II. 6 NYCRR 617.2(ak). An environmental impact statement must be prepared for an unlisted action if the proposed action "may include the potential for at least one significant adverse environmental impact." 6 NYCRR 617.7(a)(1). Conversely, to determine that an EIS will not be required for an action, "the lead agency must determine either that there will be no adverse environmental impacts or the identified adverse environmental impacts will not be significant." 6 NYCRR 617.7(a)(2).

In the present case, DEC erred in determining that issuance of the GGLLC water withdrawal permit constituted a Type II action not subject to review under SEQRA. In fact, GGLLC's water withdrawals qualify as a Type I action because they are for more than 2,000,000 million gallons per day.

A. Issuance of GGLLC's Water Withdrawal Permit Does Not Qualify as a Type II Action under SEQRA

As a result of its failure to properly characterize the GGLLC's water withdrawal permit application as an application for a new withdrawal, DEC mischaracterizes GGLLC's application as a Type II action under SEQRA. Because Greenidge Station did not operate for more than five years and was not operating at the time GGLLC purchased the plant or applied for a water withdrawal permit, GGLLC must be treated as a new water user. Water withdrawal permits issued to new users are unquestionably subject to review under SEQRA.

Even if GGLLC is treated as an existing water user, the issuance of the GGLLC water withdrawal permit does not meet any of the Type II exemptions listed in 6 NYCRR 617.5(c) of the SEQRA regulations. DEC's claim that issuance of an initial water withdrawal permit to an existing user is a purely ministerial act within the scope of 6 NYCRR 617.5(c)(19) of the SEQRA regulations is simply incorrect and is based on DEC's misreading of the requirements of ECL 15-1501(9). As discussed above, ECL 15-1501(9) requires the exercise of extensive discretion by DEC in making the determinations required by ECL 15-1503(2) and in setting appropriate terms and conditions to address those determinations as required by ECL 15-1503(4).

The reliance by the trial courts in both *Sierra Club v. Martens I (Ravenswood)* and Sierra *Club v. Martens II (Con Ed)* upon the phrase "shall issue" in ECL 15-1501(9) as evidence that DEC has no discretion in setting terms and conditions under that section makes far too much of the word "shall," a word used in many of the permitting provisions of the ECL. For example, almost every subsection of ECL 15-1501 uses the word "shall." An interpretation of the "shall issue" wording in ECL 15-1501(9) as mandating that no other conditions may be imposed in the permit is contrary to DEC's well-established interpretations of similar "shall issue" wording under the permitting requirements of ECL Article 17, the Water Pollution Control Law governing SPDES permits. ECL 17-0701(5) provides that "[a] SPDES permit shall be issued to the applicant upon such conditions as the commissioner may direct," yet DEC interprets that provision as giving DEC sufficient discretion to require numerous terms and conditions in SPDES permits and to subject SPDES permit applications to review under SEQRA.

The reliance of the trial courts in *Ravenswood* and *Con Ed* upon the decision of the Court of Appeals in *Atlantic Beach v Gavalas*, 81 N.Y.2d 322 (1993) is also misplaced. *Gavalas*

supports a determination in the present case that DEC's issuance of an initial water withdrawal permit to an existing user is not a ministerial action. In *Gavalas*, the court stated that the "pivotal inquiry" in determining whether an agency decision is ministerial or discretionary for purposes of determining the applicability of SEQRA is "whether the information contained in an EIS may 'form the basis for a decision whether or not to undertake or approve such action,'" *Id.* at 326. The court noted that an agency evaluating an EIS is required to "assess the potential impact on land, water, plants and animals, growth and character of the community and other environmental concerns." The court determined that the village ordinance at issue in *Gavalas* did not give the village building inspector the type of discretion that would allow a permit grant or denial to be based on the environmental concerns detailed in an EIS. Therefore the court determined that issuance of the building permit at issue in that case did not constitute an agency "action" within the purview of SEQRA. *Id.* at 328.

The present case presents very different factual circumstance from the circumstances before the court in *Gavalas*. In this case, DEC's evaluation of the determinations required by ECL 15-1503(2) clearly would be informed by an EIS. For example, Section 15-1503(2)(g) requires that DEC "shall determine whether . . . the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures." This determination would be informed by an EIS. Section 15-1503(2)(d) mandates that, before issuing a water withdrawal permit, DEC determine whether "the need for all or part of the proposed water withdrawal cannot be reasonably avoided through the efficient use and conservation of existing water supplies." Again, this determination would be informed by an EIS. Unlike the circumstances before the court in *Gavalas*, the statutes and

regulations at issue in this case require DEC to make determinations and set conditions that have to do with environmental concerns that are central to SEQRA.

Thus, even if GGLLC is considered as an existing water user, DEC's determination that GGLLC's water withdrawal permit application was a Type II action exempt from review under SEQRA was improper.

B. Issuance of GGLLC's Water Withdrawal Permit Is a Type I Action under SEQRA

Due to the size of the proposed water withdrawals, GGLLC's permit application qualifies as a "Type I" action under SEQRA. The SEQRA regulations provide that "a project or action that would use ground or surface water in excess of 2,000,000 gallons per day" is a Type I action. The permit issued to GGLLC was for 70 times that amount—for 139,248,000 gallons per day— and its GGLLC's water withdrawal permit application should have been reviewed as a Type I action.

POINT III

DEC VIOLATED THE SPDES LAW IN ISSUING A SPDES PERMIT TO GGLLC WITHOUT IMPOSING REQUIRED TERMS AND CONDITIONS

The New York Legislature established the State Pollutant Discharge Elimination System (SPDES) program in 1973 to comply with new Federal requirements. The federal Water Pollution Control Act of 1972,[7] commonly referred to as the Clean Water Act (CWA), authorized development of a National Pollutant Discharge Elimination System (NPDES) to regulate discharges to surface waters of the United States. Section 301 of the CWA declares a prohibition against any discharge of any pollutant into waters of the United States except in compliance with a NPDES permit. The CWA authorizes the EPA to delegate the NPDES permit

[7] 33 U.S.C. 1251 et seq. (1972).

program to state governments, enabling states to perform many of the permitting, administrative and enforcement aspects of the NPDES Program.

The SPDES law allowed New York to become eligible to receive delegated authority to regulate discharge activities covered by the federal program.[8] In 1975, New York's SPDES program was approved by the EPA.[9] In order to take advantage of this federal delegation, New York State adopted its own SPDES permitting system, which is codified in Titles 7 and 8 of the Water Pollution Control Law, ECL Article 17 (the "SPDES Law"). Under the SPDES Law, DEC is charged with issuing and enforcing SPDES permits within New York State.[10]

ECL 17-0701 and ECL 17-0703 set forth the requirements for issuance of SPDES permits. ECL 17-0701(1) provides, in pertinent part, "[i]t shall be unlawful for any person, until a written SPDES permit therefor has been granted by the commissioner, or by his designated representative, and unless such permit remains in full force and effect, to: a. Make or cause to make or use any outlet or point source for the discharge of sewage, industrial waste or other wastes or the effluent therefrom, into the waters of this state, or . . . ." ECL 17-1701(5) provides that "[a] SPDES permit shall be issued to the applicant upon such conditions as the commissioner may direct." ECL 17-0703(1) provides that "[t]he permit provided in section 17-0701 and title 8 hereof shall be issued by the commissioner or by his designated representative, pursuant to regulations of the department adopted in accordance with subdivision 3 of section 17-030(3) and title 8 hereof."

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[8] Office of the State Comptroller, Clean Water Permit Process, 2001-S-18, March 13, 2003, http://osc.state.ny.us/audits/allaudits/093003/093003-h/01s18.pdf.

[9] *Id.*

[10] DEC, *SPDES Compliance and Enforcement, State Fiscal Year 2015/2016 Annual Report*, October 1, 2016, http://www.dec.ny.gov/docs/water_pdf/2015annualrpt.pdf [last accessed 07/25/17].

A. DEC Erred in Allowing GGLLC to Renew the AEE2 SPDES Permit

On August 1, 2014, GGLLC submitted an application to DEC to renew the SPDES previously held by AEE2 for Greenidge Station. Petition ¶ 51. At the time GGLLC submitted its SPDES permit application, Greenidge Station was not operating and was not withdrawing water from Seneca Lake. The plant was permanently retired on September 21, 2012, had been in lay-up status since March 19, 2011 and had not operated since well before that date. GGLLC's parent company Atlas Holdings, LLC, did not acquire Greenidge Station until February 28, 2014. *Id.* ¶ 49.

On August 12, 2015, DEC published notice in its Environmental Notice Bulletin ("ENB") giving notice that GGLLC had applied for renewal of a SPDES permit. ENB Notice, Tr. Aff. Ex. D. The notice stated that DEC had received an application for renewal of the SPDES permit for the Greenidge Station, that DEC was proposing a department-initiated modification to the SPDES permit, and that DEC as lead agency had determined under SEQRA that the project was a Type I action and would not have a significant effect on the environment. *Id.* DEC issued GGLLC's SPDES permits on September 11, 2017. Petition ¶ 87.

Applications for renewal of a SPDES permit for a facility that has not operated during the term of the permit, such as GGLLC's application for the renewal of the AEE2 SPDES permit for operation of Greenidge Station, are required by 6 NYCRR 621.11 (b)(3) to be treated as a new application and to be subject to a full technical review.[11] Because Greenidge Station did not operate during the term of the AEE2 permit, DEC erred in failing to treat GGLLC's application to renew the AEE2 SPDES permit as a new application. In these circumstances, DEC was

[11] 6 NYCRR 621.11 relating to applications for permit renewals and permit transfers provides in subsection (b)(3) that "[r]enewal of a SPDES permit where the facility that would be or is the source of the permitted discharge, but has not operated during the term of the permit, will be treated as a new application and be subject to a full technical review."

required by 6 NYCRR 621.11 (b)(3) to treat GGLLC's application as an application for a new permit and to subject it to a full technical review. DEC's failure to do so violated the requirements of 6 NYCRR 621.11 (b)(3) and the resulting permit must be annulled.

B. The SPDES Law Requires Closed Cycle Cooling upon Issuance of a New Permit

Discharges from power plant cooling systems are subject to special rules under the CWA. Pursuant to Section 402 of the CWA discharges from power plant cooling systems must be authorized by a NPDES permit or by a state permit program. Section 316(b) of the CWA requires EPA to issue regulations for cooling water intake structures to ensure "that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact."[12]

To comply with these requirements, DEC issued its most recent guidance on Best Technology Available ("BTA") for Cooling Water Intake Structures in 2011. [13] The BTA guidance requires closed cycle cooling. The BTA guidance states that cooling water intake structures will be subject to one of four "performance goals" when selecting BTA. Each of the four goals requires "closed-cycle cooling." *Id.* The guidance also states, "This policy will be implemented when: (i) an applicant seeks a new SPDES permit; (ii) a permittee seeks to renew an existing SPDES permit; or (iii) a SPDES permit is modified either by the Department or by the permittee, for a facility that operates a CWIS in connection with a point source thermal discharge." *Id.* Under the CWA requirements and DEC's BTA guidance document, closed-cycle cooling would have been implemented when a full technical review was conducted of GGLLC's SPDES permit application. Had DEC conducted the full technical review of GGLLC's SPDES

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[12] 33 U.S.C. 1316(b).

[13] "BTA for Cooling Water Intake Structures," July 10, 2011, http://www.dec.ny.gov/docs/fish_marine_pdf/btapolicyfinal.pdf, Treich. Aff. Ex. I.

permit application required by 6 NYCRR 621.11 (b)(3), DEC should have required closed-cycle cooling at the Greenidge Station. DEC's failure to do so violated the requirements of the SPDES law.

POINT IV

DEC VIOLATED SEQRA BY ISSUING A SPDES PERMIT TO GGLLC WITHOUT CONDUCTING AN ADEQUATE REVIEW OF THE IMPACTS OF GREENIDGE OPERATIONS

After determining that issuance of a modified SPDES permit to GGLLC constituted a Type I action under SEQRA, DEC erred in finding "no significant adverse impacts associated with the Department's renewal and modification of the facility SPDES permit." Amended negative declaration dated June 29, 2016 (the "Negative Declaration"), Tr. Aff. Ex. G.

A. DEC Erred in Issuing a Conditioned Negative Declaration for the GGLLC SPDES Permit

DEC's Negative Declaration is invalid because it is a conditioned negative declaration for a Type I action. Under the SEQRA regulations, conditioned negative declarations are not allowed for Type I actions. Conditioned negative declarations ("CNDs") are only authorized for unlisted actions. 6 N.Y.C.R.R. § 617.7(d). "The SEQRA regulations do not authorize the issuance of a conditioned negative declaration for Type I actions." *Ferrari v. Penfield Planning*, 181 A.D.2d 149, 151 (4th Dep't 1992). The SEQRA Handbook explains why: "The ability of a CND to incorporate controls which readily mitigate impacts assumes smaller and less complex actions and impacts. Therefore, it is appropriate to limit CNDs to Unlisted actions.

In *Myerson v. McNally*, 90 N.Y.2d 742 (1997), the court of appeals states that "a lead agency clearly may not issue a negative declaration [for a Type I action] on the basis of

conditions contained in the declaration itself." *Id.* at 753. That, however, is exactly what DEC has done in this case.

DEC's Negative Declaration for GGLLC's SPDES Permit describes major modifications that will be required in the SPDES permit to reduce fish entrainment and impingement:

> A review was completed and the Department is proposing modifications to the SPDES permit based on that evaluation. The primary changes are the inclusion of a dilution study to determine appropriate dilution factors in Seneca Lake, and revised conditions requiring implementation of the Department's Best Technology Available (BTA) determination the Department has determined that BTA for this facility will include the installation of wedge-wire intake screens on the CWIS [cooling water intake structure] and the installation of variable speed cooling water circulation pumps. The facility will be required to implement the BTA technologies and achieve an 85% reduction in the entrainment of all fish life stages and a 95% reduction in impingement mortality of all fish life stages. The proposed modified permit for Greenidge Station contains effluent limits and conditions which ensure that the existing beneficial uses of Seneca Lake will be maintained. As a result there are no significant adverse impacts associated with the Department's renewal and modification of the facility SPDES permit.

Id. Inherent in these conditions is the recognition by DEC that significant environmental impacts are posed by the Greenidge Project without imposition of the conditions. The Negative Declaration states that the conditions are being required for the stated purpose of achieving an 85% reduction in the entrainment of all fish life stages and a 95% reduction in impingement mortality of all fish life stages, and as such are conditional prerequisites for the issuance of the Negative Declaration. This type of conditioned negative declaration is not permissible for a Type I action.

For these reasons, DEC's Negative Declaration is invalid because it is a conditioned negative declaration for a Type I action.

B. DEC Erred in Improperly Segmenting its Review of the Impacts of Greenidge Operations

A second reason the Negative Declaration is invalid is because DEC segmented its review of the impacts of the operations of Greenidge Station in the Negative Declaration from its review of impacts of operation of the Lockwood Ash Disposal Site (LADS) where waste from the operations of the plant are deposited. The Negative Declaration does not evaluate the impacts of the waste disposal from the plant except to say that the waste generated by the plant's new operations will be less than the waste generated by the plant's previous operations because coal will no longer be used as a fuel source.

The Negative Declaration ignores the impacts of depositing significant amounts of additional waste into LADS and fails to mention the problems with current operations at LADS or that LADS is operating under a consent order entered into between Lockwood Hills LLC and DEC on February 18, 2015. See Consent Order attached as Ex. H to Tr. Aff. The consent order states that DEC 'has determined that groundwater at the site contains substances in excess of the duly promulgated water quality standards for, inter alia, total dissolved solids, boron, manganese, magnesium, iron, sodium and sulfate,' and that DEC 'believes that the Leachate Pond is a source of the substances and has contributed and continues to contribute to a contravention of duly promulgated water quality standards in violation of ECL § 17-0501 and 6 NYCRR § 360-1.14(b)(2).' *Id.* In these circumstances, DEC's review of solid waste impacts of operation of Greenidge Station should have evaluated the impacts of the deposit of additional wastes on the operations of LADS. Because DEC failed to do so, DEC impermissibly segmented its review of the impacts of waste disposal from the new operations at Greenidge Station.

C. DEC Erred in Applying an Incorrect Baseline for Evaluating Impacts of Greenidge Operations

For each impact discussed in the Negative Declaration, DEC concludes that the impacts of new operations at Greenidge Station will be less than or no greater than the impacts of the plant's previous operations. This is wrong baseline to evaluate the impacts of new operations at Greenidge Station. The station was shuttered in March 2011 and has not operated since. The correct baseline for evaluating impacts of the project is no operations.

DEC applies the wrong baseline in the Negative Declaration when it describes the modifications of the cooling water intake structure at the facility and states that the modifications are designed to "achieve an 85% reduction in the entrainment of all fish life stages and a 95% reduction in impingement mortality of all fish life stages." The discussion of a reduction in fish entrainment and impingement by the plant is compared to the plant's former operations when it operated without any technology to reduce fish entrainment and impingement by the plant. The Negative Declaration does not evaluate whether there are other technologies that further minimize fish entrainment and impingement and does not offer any data on what the actual fish entrainment and impingement amounts are estimated to be.

Although the Negative Declaration states that "the proposed modified [SPDES] permit for Greenidge Station contains effluent limits and conditions which ensure that the existing beneficial uses of Seneca Lake will be maintained," the Negative Declaration does not mention or evaluate the thermal impacts the plant's huge thermal discharges on the area of the lake surrounding the Keuka Outlet, including impacts on hazardous algae blooms (HABs) in the vicinity of the plant or impacts of the thermal discharges and contaminated discharges on fish spawning and nursery areas, notwithstanding the requirements of 6 NYCRR 704.2(a)(4) providing that the development and growth of nuisance organisms shall not occur in

contravention of water quality standards as a result of thermal discharges and of 6 NYCRR 704.3(c) providing that the location of mixing zones for thermal discharges shall not interfere with spawning areas, nursery areas and fish migration routes.

The Negative Declaration also fails to apply the correct baseline in its discussion of the impacts of plant's new operations on solid waste management, stating that "[n]o impacts related to solid waste management are expected to result from the re-activation of Greenidge Station." *Id.* at 4. The Negative Declaration explains that, 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. "If Unit 4 were reactivated with coal, approximately 78,000 tons of fly ash and 158 tons of other waste would be generated per year. However, this will be greatly reduced since coal will no longer be used as a fuel source." *Id.* But comparing the new operations of the plant to a baseline of previous operations is incorrect. The impacts of the solid waste produced by the plant need to be compared to a baseline of no solid waste production. The Negative Declaration provides no estimate of how much waste will produced by new operations at Greenidge Station, no evaluation of the impacts of this amount of waste being added to the Lockwood Hills ash disposal site and no consideration of the significant environmental issues being faced at that site.

Each of the evaluations of impacts made by DEC in the Negative Declaration is based on the assumption that because the impacts will be less than under previous operations at Greenidge Station, there will be no significant environmental impacts from new operations at the plant. It is not appropriate, however, to compare the environmental impacts of the plant's new operations to its previous operations for purposes of determining the environmental impacts of the new operations. The correct comparison is to a baseline of no operations. When compared to the

correct baseline, operations at Greenidge Station have significant impacts that must be evaluated under SEQRA.

CONCLUSION

For each of the reasons stated above, Petitioners respectfully request that the water withdrawal permit and the SPDES permit issued by DEC to GGLLC for its Greenidge Generating Station be annulled.

DATED: Hammondsport, New York
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Respectfully submitted,

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EXHIBIT C

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,

-against-

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

Respondents.

VERIFIED ANSWER AND OBJECTIONS IN POINT OF LAW

Index No. 2017-0232

Respondents Greenidge Generation, LLC and Lockwood Hills, LLC (collectively, the Greenidge Respondents"), by and through their attorneys, Barclay Damon LLP, as and for their Verified Answer with Objections in Point of Law to Petitioners' ("Petitioners") Verified Petition hereby:

PRELIMINARY STATEMENT

1. State that no response is required for the allegations contained in Paragraph 1 and refer the Court to the Verified Petition as best evidence of the claims brought in this action by Petitioners.

2. Admit the allegations contained in Paragraph 2.

3. Deny the allegations contained in Paragraph 3.

4. Deny the allegations contained in Paragraph 4.

5. State that no response is required for the allegations contained in Paragraph 5, refer the Court to the Verified Petition as best evidence of the relief sought in this action and deny that such relief is warranted.

PARTIES

6. Deny that Petitioner Sierra Club and/or its members suffer any injury from operations of the Greenidge Generating Station or Lockwood Ash Disposal Site ("Lockwood") or as a result of the permitting and environmental review conducted by the New York State Department of Environmental Conservation ("NYSDEC") relative to the resumption of operations at the Greenidge Generating Station (the "Greenidge Project"), deny that Petitioner Sierra Club filed comment letters with NYSDEC regarding the proposed SPDES and water withdrawal permits or Amended Negative Declaration and otherwise deny knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 6.

7. Deny that Petitioner Committee to Preserve the Finger Lakes ("CPFL") and/or its members suffer any injury from operations of the Greenidge Generating Station or Lockwood or as a result of the permitting and environmental review conducted by NYSDEC for the Greenidge Project, admit that Petitioner CPFL participated in the regulatory review of the Greenidge Project and filed comment letters with NYSDEC and otherwise deny knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 7.

8. Deny that Petitioner Coalition to Protect New York ("CPNY") and/or its members suffer any injury from operations of the Greenidge Generating Station or Lockwood or as a result of

the permitting and environmental review conducted by NYSDEC for the Greenidge Project, admit that Petitioner CPFL filed comment letters with NYSDEC and otherwise deny knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 8.

9. Deny that Petitioner Seneca Lake Guardian, a Waterkeeper Affiliate ("Guardian") and/or its members suffer any injury from operations of the Greenidge Generating Station or Lockwood or as a result of the permitting and environmental review conducted by NYSDEC for the Greenidge Project, and otherwise deny knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 9.

10. Admit the allegations contained in Paragraph 10.

11. Deny that Greenidge Generation LLC is a limited liability company formed under the laws of Delaware and admit the remaining allegations contained in Paragraph 11.

12. Admit the allegations contained in Paragraph 12.

FACTUAL BACKGROUND

13. Admit the allegations contained in Paragraph 13.

14. Admit the allegations contained in Paragraph 14.

15. Admit that Keuka Outlet is the largest tributary to Seneca Lake and otherwise deny knowledge or information sufficient to form a belief as to the remaining allegations in Paragraph 15.

16. Deny knowledge or information sufficient to form a belief as to the allegations in Paragraph 16.

17. With respect to the allegations contained in Paragraph 17, admit that Seneca Lake is used for recreational boating, fishing and swimming and deny knowledge or information sufficient to form a belief as to the remaining allegations in Paragraph 17.

18. Admit the allegations contained in Paragraph 18.

19. Admit the allegations contained in Paragraph 19.

20. Admit the allegations contained in Paragraph 20.

21. Admit the allegations contained in Paragraph 21.

22. State that no response is required for the allegations contained in Paragraph 22 and refer all legal questions regarding the United States Environmental Protection Agency's promulgation of rules under the Clean Water Act to the Court.

23. With respect to the allegations contained in Paragraph 23, admit that, on March 29, 2005, AES Eastern and various subsidiaries, the State of New York, NYSDEC, and NYSEG entered into a Clean Air Act consent decree in the United States District Court, Western District of New York (the "Consent Decree") and refer the Court to the Consent Decree as best evidence of its terms.

24. State that no response is required for the allegations contained in Paragraph 24 and refer all legal questions regarding the St. Lawrence River Basin Water Resources Compact to the Court.

25. State that no response is required for the allegations contained in Paragraph 25 and refer all legal questions regarding New York State's implementation of the St. Lawrence River Basin Water Resources Compact to the Court.

26. Admit the allegations contained in Paragraph 26.

27. With respect to the allegations contained in Paragraph 27, admit that NYSDEC issued a SPDES renewal permit for the Greenidge Generating Station on January 29, 2010 and refer the Court to the SPDES renewal permit #NY-0001325 as best evidence of its terms.

28. With respect to the allegations contained in Paragraph 28, admit that AES Greenidge LLC filed its Impingement and Entrainment Characterization Study on April 29, 2010, deny that the Unit 4 configuration results in destruction of all fish or that the term "entrained" means destroyed, and refer the Court to AES Greenidge LLC's Impingement and Entrainment Characterization Study as best evidence of its terms.

29. With respect to the allegations contained in Paragraph 29, refer the Court to AES Greenidge LLC's Impingement and Entrainment Characterization Study as best evidence of its terms and affirmatively state that impingement sampling was not conducted at Unit 4 because the configuration of the Greenidge condenser cooling water system does not allow for sampling upstream of the Unit 4 circulating water pumps. Instead, impingement sampling was conducted at Unit 3, and the data was used to characterize the potential impingement at Unit 4 using its flow, which characterization is included in AES Greenidge LLC's Impingement and Entrainment Characterization Study.

30. With respect to the allegations contained in Paragraph 30, refer the Court to the Lockwood SPDES permit as best evidence of its terms and affirmatively state that Lockwood's SPDES permit is irrelevant to Petitioners' claims in this action..

31. With respect to the allegations contained in Paragraph 31, refer the Court to the Lockwood SPDES permit as best evidence of its terms and affirmatively state that Lockwood's SPDES permit is irrelevant to Petitioners' claims in this action.

32. Admit the allegations contained in Paragraph 32 but affirmatively state that the notification letter was dated September 17, 2010 and the date indicated for protective lay-up status was March 18, 2011

33. Admit the allegations contained in Paragraph 33.

34. With respect to the allegations contained in Paragraph 34, admit that, on August 15, 2011, Governor Andrew Cuomo signed into law new water withdrawal permitting legislation and refer the Court to the new law, Chapters 400-402, Laws of 2011, as best evidence of its terms and requirements.

35. With respect to the allegations contained in Paragraph 35, refer the Court to the Governor's press release as best evidence of its statements.

36. With respect to the allegations contained in Paragraph 36, refer the Court to Chapters 400-402, Laws of 2011, as best evidence of the law's terms and requirements.

37. Admit the allegations contained in Paragraph 37.

38. With respect to the allegations contained in Paragraph 38, admit that, on September 18, 2012, AES AEE2, LLC filed a notice with the Bankruptcy Court and refer the Court to the notice as best evidence of its terms.

39. With respect to the allegations contained in Paragraph 39, admit that, on September 18, 2012, AES AEE2, LLC filed a notice with the New York State Public Service Commission ("PSC") and refer the Court to the notice as best evidence of its terms.

40. With respect to the allegations contained in Paragraph 40, admit that, on September 19, 2012, AES AEE2, LLC filed a motion with the Bankruptcy Court and refer the Court to the motion as best evidence of its terms.

41. Admit the allegations contained in Paragraph 41.

42. Admit the allegations contained in Paragraph 42.

43. Admit the allegations contained in Paragraph 43.

44. Admit the allegations contained in Paragraph 44.

45. Admit the allegations contained in Paragraph 45.

46. Admit the allegations contained in Paragraph 46.

47. Admit the allegations contained in Paragraph 47 and affirmatively state that the permit application was for an initial water withdrawal permit for the Greenidge Generating Station.

48. Admit the allegations contained in Paragraph 48.

49. Admit the allegations contained in Paragraph 49.

50. Admit the allegations contained in Paragraph 50.

51. Admit the allegations contained in Paragraph 51.

52. With respect to the allegations contained in Paragraph 52, admit that, on February 18, 2015, NYSDEC entered into a Consent Order with Lockwood Hills LLC, refer the Court to the Consent Order as best evidence of its terms and affirmatively state that Lockwood and the February 18, 2015 Consent Order are irrelevant to Petitioners' claims in this action.

53. With respect to the allegations contained in Paragraph 53, admit that, on May 26, 2015, Lockwood Hills LLC submitted its SPDES permit renewal application certification to the NYSDEC, refer the Court to the renewal application for best evidence of its contents and affirmatively state that Lockwood's SPDES permit is irrelevant to Petitioners' claims in this action.

54. Admit the allegations contained in Paragraph 54.

55. Admit the allegations contained in Paragraph 55 and affirmatively state that, despite the Type II designation for the water withdrawal permit application, NYSDEC indicated that "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."

56. Admit the allegations contained in Paragraph 56.

57. Admit the allegations contained in Paragraph 57.

58. With respect to the allegations contained in Paragraph 58, admit that, on September 11, 2015, CPFL and a group of local environmental organizations filed comments with DEC opposing, although not specifically raised by each Petitioner, issuance of the proposed water withdrawal permit, SPDES permit and air permits for the Greenidge Generating Station and refer the Court to the comments as best evidence of their contents as well as the Fifth Affirmative Defense set forth herein.

59. Admit the allegations contained in Paragraph 59.

60. With respect to the allegations contained in Paragraph 60, admit that on October 2, 2015, GPLLC and GPPC filed an application with the PSC for a certificate of environmental compatibility and public need for construction of a 4.6 mile pipeline ("Certificate"), deny that the proposed route of the 4.6 mile pipeline ran along the top edge of the ravine on the south side of Keuka Outlet or ran across a portion of Lockwood and affirmatively state that the PSC issued the requested Certificate and that construction of the 4.6 mile pipeline was completed in March 2017.

61. With respect to the allegations contained in Paragraph 61, admit that, on October 19, 2015, the United States Environmental Protection Agency's ("EPA") final rule on the disposal of coal combustion residuals from electric utilities under subtitle D of the Resource Conservation and Recovery Act, 42 USC 6901 *et seq.* (1976), went into effect and refer the Court to the EPA's rule as best evidence of its terms and requirements.

62. Admit the allegations contained in Paragraph 62.

63. Admit the allegations contained in Paragraph 63.

64. Admit the allegations contained in Paragraph 64.

65. Admit the allegations contained in Paragraph 65.

66. With respect to the allegations contained in Paragraph 66, admit that, on November 30, 2015, NYSDEC sent a letter to Greenidge Generation, LLC regarding the Engineering Report for Leachate/Stormwater Segregation at the Lockwood, refer the Court to the NYSDEC letter as best evidence of its terms and affirmatively state that Lockwood is irrelevant to Petitioners' claims in this action.

67. With respect to the allegations contained in Paragraph 67, admit that, on December 7, 2015, EPA's Region 2 Office sent a letter to NYSDEC disapproving NYSDEC's draft Title V air permit for the Greenidge Generating Station, refer the Court to the EPA's letter as best evidence of its terms and affirmatively state that, following the required revisions, a Title V air permit was issued for the Greenidge Generating Station with no objection by EPA.

68. Admit the allegations contained in Paragraph 68.

69. With respect to the allegations contained in Paragraph 69, refer the Court to the comment letter as best evidence of its terms and affirmatively state that Lockwood is irrelevant to Petitioners' claims in this action.

70. With respect to the allegations contained in Paragraph 70, admit that, on June 29, 2016, NYSDEC issued an Amended Negative Declaration in the Environmental Notice Bulletin ("ENB") due to the revisions to the proposed air permits and affirmatively state that the Amended Negative Declaration as it concerned NYSDEC's environmental review and proposed issuance of the renewal SPDES and initial water withdrawal permits was exactly the same as the original Negative Declaration issued on August 12, 2015.

71. Admit the allegations contained in Paragraph 71.

72. With respect to the allegations contained in Paragraph 72, admit that, on August 5, 2016, CPFL and other local environmental groups filed comments on the revised proposed air permits and the Amended Negative Declaration, although not specifically raised by each Petitioner,

and refer the Court to the comments as best evidence of their contents as well as the Fifth Affirmative Defense set forth herein.

73. Admit the allegations contained in Paragraph 73.

74. Admit the allegations contained in Paragraph 74.

75. With respect to the allegations contained in Paragraph 75, admit that, on October 17, 2016, the PSC issued a Notice to Proceed with Construction authorizing GPLLC and GPPC to begin activities required for the construction of the 4.6 miles of the natural gas pipeline to Greenidge Generating Station and deny that the pipeline as approved or constructed is located on the edge of the ravine.

76. Admit the allegations contained in Paragraph 76.

77. Admit the allegations contained in Paragraph 77.

78. Admit the allegations contained in Paragraph 78.

79. With respect to the allegations contained in Paragraph 79, refer the Court to the 2016 Petition as best evidence of its terms and affirmatively state that Petitioners cannot unilaterally extend or toll an applicable statute of limitations.

80. Deny the allegations contained in Paragraph 80 and affirmatively state that construction on the new natural gas pipeline to the Greenidge Generating Station began on October 17, 2016.

81. Admit the allegations contained in Paragraph 81.

82. Deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 82.

83. Admit the allegations contained in Paragraph 83 and affirmatively state that the Court's order also determined that NYSDEC's environmental review of the Greenidge Project under SEQRA was lawful and not arbitrary, capricious or an abuse of discretion.

84. Admit the allegations contained in Paragraph 84 and affirmatively state that the Greenidge Respondents also served notice of entry of the judgment on June 23, 2017.

85. With respect to the allegations contained in Paragraph 85, admit that, on July 19, 2017, Sierra Club, CPFL and CPNY filed a notice of appeal to the Appellate Division Fourth Department but deny knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 85.

86. Deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 86.

87. Admit the allegations contained in Paragraph 87.

88. Deny knowledge or information to form a belief as to the allegations contained in Paragraph 88.

89. With respect to the allegations contained in Paragraph 89, refer the Court to the issued SPDES Permit as best evidence of its terms.

90. With respect to the allegations contained in Paragraph 90, refer the Court to the issued SPDES Permit as best evidence of its terms.

91. Deny knowledge or information to form a belief as to the allegations contained in Paragraph 91.

FIRST CAUSE OF ACTION
VIOLATION OF THE WATER WITHDRAWAL PERMITTING LAW IN ISSUING THE GGLLC WITHDRAWAL PERMIT

92. Repeat and reallege their respective responses to Paragraphs 1 through 91 of the Verified Petition as if set forth in full in response to Paragraph 92 of the Verified Petition.

93. Deny the allegations contained in Paragraph 93.

94. Deny the allegations contained in Paragraph 94.

95. Deny the allegations contained in Paragraph 95.

SECOND CAUSE OF ACTION
VIOLATION OF SEQRA IN ISSUING THE GGLLC WITHDRAWAL PERMIT

96. Repeat and reallege their respective responses to Paragraphs 1 through 95 of the Verified Petition as if set forth in full in response to Paragraph 96 of the Verified Petition.

97. Deny the allegations contained in Paragraph 97 and affirmatively state that, despite the Type II designation for the water withdrawal permit application, NYSDEC indicated in its Negative Declaration, dated July 30, 2015 and its Amended Negative Declaration, dated June 29, 2017, that "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."

98. Deny the allegations contained in Paragraph 98.

99. Deny the allegations contained in Paragraph 99.

100. Deny the allegations contained in Paragraph 100.

THIRD CAUSE OF ACTION
VIOLATION OF THE WATER POLLUTION CONTROL LAW IN ISSUING THE GGLLC SPDES PERMIT

101. Repeat and reallege their respective responses to Paragraphs 1 through 100 of the Verified Petition as if set forth in full in response to Paragraph 100 of the Verified Petition.

102. Deny the allegations contained in Paragraph 102.

103. Deny the allegations contained in Paragraph 103.

104. With respect to the allegations contained in Paragraph 104, refer the Court to the cited provision of the ECL as best evidence of its terms and refer all legal questions to the Court.

105. Deny the allegations contained in Paragraph 105.

106. With respect to the allegations contained in Paragraph 106, deny that Greenidge Generating Station's application for a renewal SPDES permit should have been treated as a new application and refer all legal questions to the Court.

107. Deny the allegations contained in Paragraph 107.

FOURTH CAUSE OF ACTION
VIOLATION OF SEQRA IN ISSUING THE GGLLC SPDES PERMIT

108. Repeat and reallege their respective responses to Paragraphs 1 through 107 of the Verified Petition as if set forth in full in response to Paragraph 108 of the Verified Petition.

109. Deny the allegations contained in Paragraph 109.

110. Deny the allegations contained in Paragraph 110.

111. Deny the allegations contained in Paragraph 111.

112. Deny the allegations contained in Paragraph 112.

RELIEF REQUESTED

113. States that no response is required for Petitioners' prayer for relief in the Verified Petition. To the extent a response is required, the Greenidge Respondents deny that Petitioners are entitled to the relief requested.

114. The Greenidge Respondents deny every allegation in the Verified Petition not otherwise addressed herein.

FIRST AFFIRMATIVE DEFENSE
AND OBJECTION IN POINT OF LAW

115. Petitioners' challenge is untimely and barred by the applicable statute of limitations. The SPDES permit was transferred on January 15, 2013, more than four years ago and well beyond the applicable statute of limitations. In addition, NYSDEC issued the Amended

Negative Declaration being challenged in this action on June 28, 2016, well beyond the applicable statute of limitations.

SECOND AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW

116. Petitioners lack standing to bring their claims. Not one Petitioner has provided any evidence that one of its members has standing and Petitioners' attempt at claiming "informational injury" has no basis in law, is contrary to established SEQRA standing principles, and is not supported by the facts alleged by Petitioners in this action.

THIRD AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW

117. Petitioners are precluded from bringing their Second and Fourth causes of action, related to SEQRA, since this Court dismissed identical SEQRA claims already brought by Petitioners in *Sierra Club v. New York State Department of Environmental Conservation* (Yates County, Index No. 2016-0165). To the extent that Petitioners disagree with this Court's Decision, they should direct their arguments to the Appellate Division.

FOURTH AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW

118. As established in the prior action brought by Petitioners challenging the Greenidge Project, Petitioners claims are moot given that construction of the Greenidge Project was completed, and operations began in March 2017, both substantially prior to Petitioners' filing of this action.

FIFTH AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW

119. Petitioners failed to administratively exhaust their claims. Petitioners did not provide comments to NYSDEC regarding their claim in paragraph 110 of the Verified Petition that the NYSDEC's Amended Negative Declaration is a "conditioned negative declaration." In addition, Petitioners Sierra Club and CPNY failed to provide any comments to NYSDEC on the SEQRA analysis, the Amended Negative Declaration challenged in this action, the draft SPDES renewal permit or the draft initial water withdrawal permit. Petitioner Seneca Lake Guardian did not provide comments on the draft SPDES renewal permit or the draft initial water withdrawal permit.

SIXTH AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW

120. The review conducted by the NYSDEC as summarized within its Amended Negative Declaration demonstrates that the NYSDEC conducted a careful, thorough, and complete review of the relevant areas of environmental concern, took the required "hard look" at all relevant areas, and provided a written, reasoned elaboration for its determination.

SEVENTH AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW

121. The record of proceedings before the NYSDEC, submitted as the Administrative Return and incorporated by reference herein, establishes that the NYSDEC's findings and determinations were supported by substantial evidence in the record, were not affected by any error of law, were not arbitrary and capricious, and do not constitute an abuse of discretion.

EIGHTH AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW

122. Because the NYSDEC's thorough and well-reasoned SEQRA findings supported issuance of the Amended Negative Declaration, Petitioners' argument that an environmental impact statement was required is erroneous and should be rejected.

NINTH AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW

123. NYSDEC's interpretation of the relevant provisions of the Environmental Conservation Law as they relate to SEQRA and the renewal SPDES and initial water withdrawal permits issued for the Greenidge Generating Station, is lawful and entitled to judicial deference as NYSDEC is the administrative agency charged with administration and implementation of the Environmental Conservation Law and also vested with the appropriate technical expertise.

TENTH AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW

124. NYSDEC did not issue a Conditioned Negative Declaration and did not segment its environmental review. The new impingement and entrainment reduction requirements included in the SPDES renewal permit by NYSDEC do not turn the Amended Negative Declaration into a Conditioned Negative Declaration, since, among other reasons, NYSDEC was the SEQRA lead agency and is the agency with sole authority to issue SPDES permits. The clear language of the Amended Negative Declaration shows that the environmental impacts of the solid waste generated by the Greenidge Generating Station were indeed considered by NYSDEC as the Amended Negative Declaration states that "No impacts related to solid waste management are expected to result from the re-activation of Greenidge Generating Station. By

eliminating the use of coal as a fuel source, the generation of solid waste from the facility will be significantly reduced compared to prior operations."

ELEVENTH AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW

125. Because NYSDEC lacked discretion and Greenidge Generating Station was entitled to an initial water withdrawal permit under the 2011 WRPA and implementing regulations, NYSDEC's action was ministerial and its Type II designation was lawful. Regardless, despite its Type II designation for the water withdrawal permit application, NYSDEC indicated that "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."

TWELFTH AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW

126. Neither Section 704.5 of 6 NYCRR or Section 316(b) of the federal Clean Water Act require the installation of closed-cycle cooling on an existing cooling water intake structure. As such, NYSDEC's July 10, 2011 *Commissioner's Policy – 52 Best Technology Available (BTA) For Cooling Water Intake Structures* ("CP-52"), identifies closed-cycle cooling or the "equivalent" as the performance goal for BTA to minimize adverse environmental impacts pursuant to Section 704.5 of 6 NYCRR and Section 316(b) of the federal Clean Water Act in a State Pollutant Discharge Elimination System (SPDES) permit for an existing cooling water intake structure. CP-52 defines "equivalent" as the reductions, obtainable by a suite of technologies that are not closed-cycle cooling, in impingement mortality and entrainment that are 90 percent or greater of that which would be achieved by a wet closed-cycle cooling system.

THIRTEENTH AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW

127. Petitioners claims as they relate to Lockwood Hills, LLC fail to state a claim upon which relief can be granted. NYSDEC did not issue Lockwood Hills LLC any approvals and it is not the applicant for any of the environmental permits challenged in the Verified Petition. Furthermore, Lockwood Hills, LLC is not involved in the operation of the Greenidge Generating Station.

FOURTEENTH AFFIRMATIVE DEFENSE AND OBJECTION IN POINT OF LAW

128. The Verified Petition was improperly verified by their counsel, particularly with respect to Paragraphs 6 through 9 concerning Petitioners' alleged interests and injury.

129. The Greenidge Respondents reserve the right to assert additional affirmative defenses in the event discovery indicates such defenses may be appropriate.

WHEREFORE, the Greenidge Respondents respectfully request that this Court:

(a) dismiss the Verified Petition in its entirety with prejudice;

(b) deny the Petitioners all relief they seek; and

(c) for such other and further relief as may be just, equitable and proper.

Dated: March 2, 2018

BARCLAY DAMON LLP

By: Yvonne E. Hennessey

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ATTORNEY AFFIRMATION/VERIFICATION

The undersigned, an attorney admitted to practice in the courts of the State of New York, hereby affirms under the penalties of perjury that deponent is a partner with the firm of Barclay Damon LLP, attorneys for Respondents Greenidge Generation, LLC and Lockwood Hills, LLC, that deponent has read the foregoing Verified Answer and Objections in Point of Law and knows the contents thereof, that the same is true upon information and belief, and that deponent believes it to be true. Deponent further states that the reason that this affirmation is made by deponent and not by Respondents is because Respondents do not have an office in the County of Albany where the undersigned has an office.

The grounds of deponent's belief as to all matters stated herein include deponent's representation of Respondents in the prior litigation referenced in the Verified Petition, communications with officers, employees, and agents of Respondents, business records of Respondents and relevant administrative documents and permits.

DATED: March 2, 2018

YVONNE E. HENNESSEY

14396648

EXHIBIT D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF YATES

In the Matter of the Application of

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

Petitioners,

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

-against-

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

Respondents.

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

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

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PRELIMINARY STATEMENT

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

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

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

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

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

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

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

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

FACTUAL AND PROCEDURAL BACKGROUND

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

The Greenidge Project

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

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

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

Id.

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

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

NYSDEC Permitting

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

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

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

On September 11, 2015, Petitioner CPFL submitted comments to NYSDEC on the draft permits and the SEQRA Negative Declaration. *Id.*, ¶ 29. Also on September 11, 2015, Petitioner Sierra Club submitted comments to NYSDEC on the draft air permits only; it did not submit any SEQRA related comments or comments on the draft SPDES Renewal or WWP. *Id.*, ¶ 30. Neither Petitioner CPNY, nor Petitioner Seneca Lake Guardian submitted any comments to NYSDEC on either its Negative Declaration or draft permits. *Id.*, ¶ 31.

On October 26, 2015, NYSDEC submitted the proposed Title V air permit and a public comment responsiveness summary ("Responsiveness Summary") to the United States Environmental Protection Agency ("USEPA") for review, as required by Section 505(a) of the Clean Air Act. *Id.*, ¶ 32. NYSDEC also provided a copy of the Responsiveness Summary and the proposed Title V permit to Petitioners CPFL and Sierra Club. *Id.*

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

On June 28, 2016, NYSDEC issued an Amended Negative Declaration based on revisions made to the draft Title V air permit, which concluded once again that the resumption of operations at the Greenidge Station would not have a significant adverse impact on the environment. *Id.*, ¶ 35; Amended Negative Declaration (Hennessey Aff., Exh. D). While the Amended Negative Declaration included changes to the "Impacts on Air" section, the remainder of the Amended Negative Declaration, including the discussion on "Impacts to Surface Water," remained the same as the July 30, 2015 Negative Declaration. *See* Amended Negative Declaration (Hennessey Aff., Exh. D).

NYSDEC published notice of its Amended Negative Declaration in the June 29, 2016 ENB. Hennessey Aff., ¶ 36; June 29, 2016 ENB Notice (Hennessey Aff., Exh. E). Also on June 29, 2016, NYSDEC published notice in the ENB of the availability of revised draft Title IV and Title V air permits for the Greenidge Station for public review and comment. *Id.*, ¶ 37; June 29, 2016 ENB Notice (Hennessey Aff., Exh. E). On August 5, 2016, Petitioner CPFL submitted comments on the draft Title IV and Title V permits and the Amended Negative Declaration, which Petitioner Seneca Lake Guardian signed onto. *Id.*, ¶ 38. Petitioners Sierra Club and CPNY did not submit any comments to NYSDEC. *Id.*, ¶ 39. On September 8, 2016, NYSDEC issued the final Title IV and Tile V air permits which authorized the in-plant construction work necessary to convert the Greenidge Station to natural gas and the subsequent operation of the Greenidge Station. *Id.*, ¶ 40.

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

Prior Litigation

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

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

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

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

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

ARGUMENT

POINT I

PETITIONERS' CLAIMS ARE PROCEDURALLY DEFECTIVE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Petitioners Lack Standing

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

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

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

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

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

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

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

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

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

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

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

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

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

POINT II

NYSDEC IS ENTITLED TO SUBSTANTIAL DEFERENCE

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

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

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

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

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

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

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

POINT III

PETITIONERS' CLAIMS LACK MERIT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Amended Negative Declaration states in relevant part:

> Although the Department has classified the issuance of an initial permit under 6 NYCRR Part 601 as a Type II action under SEQR (6 NYCRR 617.5[c][19]) and, therefore not subject to SEQR, substantively, in this instance - *because the initial water withdrawal permit is proposed to be issued along with permits that are subject to SEQR - the impact or impact of any change in withdrawal has been considered alongside the impacts of the air and SPDES permits.*

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

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

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

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

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

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

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

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

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

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

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

The WRPA states in no uncertain terms:

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

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

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

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

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

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

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

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

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

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

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

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

4. meter calibration;

5. development of a leak detection and repair program;

6. water audits;

7. reporting; and recordkeeping.

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

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

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

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

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

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

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

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

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

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

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

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

Part 621.11 provides in relevant part:

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

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

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

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

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

(c) The Greenidge SPDES Permit Meets All BTA Requirements

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

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

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

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

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

> reductions in impingement mortality and entrainment from calculation baseline that are 90 percent or greater of that which would be achieved by a wet closed-cycle cooling system. *Id.* at p. 3.

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

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

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

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

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

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

CONCLUSION

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

Dated: March 2, 2018
Albany, New York

BARCLAY DAMON, LLP

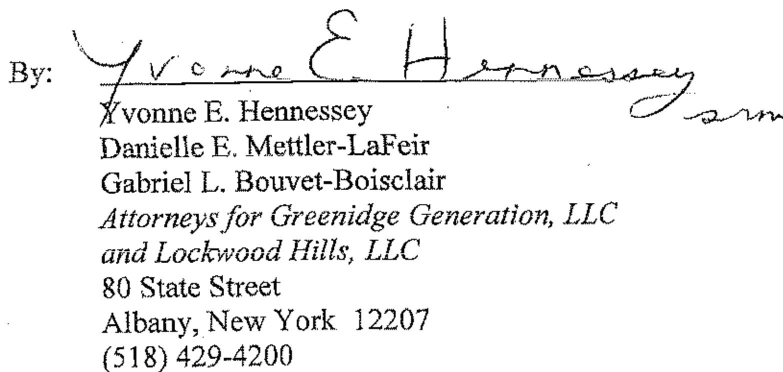
By: 

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EXHIBIT E

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,

Index No. 2017-0232

Petitioners,

Hon. William F. Kocher

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.

PETITIONERS' REPLY MEMORANDUM OF LAW

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PRELIMINARY STATEMENT

This reply memorandum of law for the Petitioners is submitted in reply to issues raised by the Respondents in their objections in point of law and memoranda of law. This reply memorandum of law will also clarify and support the arguments made in Petitioners' initial memorandum of law, as they relate to the arguments made by Respondents in their responses. Therefore, as will be seen, their arguments regarding procedural issues are not applicable to the facts of this case, and Respondents' arguments regarding the merits of Petitioners' claims do not affect the failure of Respondent New York State Department of Environmental Conservation ("DEC") in fulfilling its legal obligations under the New York State Water Supply Law, Environmental Conservation Law, Article 15, Title 15 (the "WSL"); the New York State Pollutant Discharge Elimination System Law, Environmental Conservation Law, Article 17, Title 8 (the "SPDES Law"); and the New York State Environmental Quality Review Act, Environmental Conservation Law, Article 8 ("SEQRA").

ARGUMENT IN REPLY

POINT I

PETITIONERS' HAVE STANDING

Based on the criteria for organizational standing set forth in *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297 (2009); *Society of the Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761 (1991); *Matter of Dental Society. V. Carey*, 61 N.Y.2d 330 (1984) and *Douglaston Civic Ass'n, Inc. v. Galvin,* 36 N.Y.2d 1 (1974). Petitioners each demonstrate organizational standing in this proceeding.

In support of their claims to standing, Petitioners provide herewith the affidavits of eight individuals who are members of Petitioners Sierra Club and Committee to Preserve the Finger Lakes ("CPFL") demonstrating injury-in-fact from the proposed operations of the Greenidge Generating Station ("Greenidge Station"). Three of the individuals, Linda Downs, Carolyn McAllister, and Jane Crumlish, are members of both Sierra Club and CPFL. Eileen and John Moreland, Linda Bracht and Abi and Winton Buddington are members of CPFL only. Each of these individuals resides on the shore of Seneca Lake just north of the location where the discharges from Greenidge Station flow into the Keuka Outlet. Ms. Downs, Ms. Crumlish, Ms. Bracht and Mr. and Mrs. Moreland 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. All the affiants swim in the lake and use the lake for other recreational activities such as fishing and boating.

Each affiant alleges that he or she will be exposed to harms that are greater than other residents of the region because they reside on the shores of Seneca Lake and make more use of the lake than other residents. Their proximity and use of the lake exposes them to the harms that are likely to result now that Greenidge Station has resumed operations and has begun to pump hot water into the lake in their vicinity. The modified State Pollution Discharge Elimination System ("SPDES") permit issued to the owner of Greenidge Station by DEC allows huge discharges of water from the plant's cooling system, up to 134,000,000 gallons per day of water up to 108 degrees in temperature during the summer. Higher water temperatures in the area of the lake on which Petitioners' members live are likely to result from these discharges. Higher water temperatures in their area of the lake increases the likelihood of outbreaks of toxic algae blooms next to their shore lines and docks that will injure their health and impair their ability to

use water from the lake for swimming, boating or fishing. Therefore, their injury-in-fact is different than other members of the community who live farther away from the high temperatures created by the Greenidge water discharges and are not exposed to the same risks of toxic algae blooms. Ms. Downs, Ms. Crumlish, Ms. Bracht and Mr. and Mrs. Moreland allege an additional and compelling special injury because they pipe water from the lake for most of their water needs, including brushing teeth, cooking, showering, washing dishes, and washing clothes. Their use of water from the lake for household purposes is significantly different than the use most residents in their area make of the lake. Most residents use water piped from the Village of Penn Yan or the City of Geneva for household purposes. Because of their use of lake water for household purposes, Ms. Downs, Ms. Crumlish, Ms. Bracht and Mr. and Mrs. Moreland and their families will be exposed to significantly higher levels of toxic algae than other residents in the area if blooms occur on their shorefronts near the discharge outfall of Greenidge Station.

This past September, Ms. Downs and Ms. Moreland discovered a harmful algae bloom on their shoreline that ran along the shoreline all the way from Ms. Downs' house to Ms. McAllister's house. This bloom tested at 30x the threshold level of 25 micrograms of alpha-chlorophyll New York is using to classify algae blooms and a level of microcystin that was 3x the threshold value used by New York to classify an algae bloom sample as high toxin. L. Downs Aff. ¶ 34.

Petitioners also submit the affidavit of Mary Anne Kowalski. Ms. Kowalski is a member of Petitioners Seneca Lake Guardian, Sierra Club and CPFL. She lives across the lake from Greenidge Station in the Town of Romulus. She lives in a homeowners association that has a beach, boat launch and pavilions on Seneca Lake. She alleges that she and others who live on

the shore of the lake near Greenidge Station will be harmed by huge discharges of warmed water from Greenidge Station that may raise the surface temperature of the lake and increase the likelihood of harmful algae blooms and result their exposure to the risks of breathing droplets of water with toxic algae into their lungs or absorbing toxic algae through their skin.

In support of Petitioners' member affidavits alleging special and specific harms from the Greenidge discharges, Petitioners' submit the affidavit of Dr. Gregory Boyer, an expert on harmful algae blooms ("HABs"). Dr. Boyer provides his expert opinion that increasing water temperatures in the lake near the outflow of the Greenidge Generating Station will increase the likelihood of HABs in that area of the lake.

These affidavits show that Sierra Club, CPFL and Seneca Lake Guardian have members who meet the zone of interest test of *Society of Plastics* as well as the broader standing rules set forth in *Save the Pine Bush, Sierra Club v. Village of Painted Post,* 26 N.Y.3d 301 (2015) and *Association for a Better Long Island v. DEC*, 23 N.Y.3d 1, (2014).

Because CPFL has organizational standing, it follows that the coalition of which it is a member, the Coalition to Preserve New York ("CPNY") also has standing to join as a petitioner in this case.

For these reasons, Petitioner organizations have standing to challenge Respondent DEC's actions in issuing a water withdrawal permit and a modified SPDES permit to Respondent Greenidge Generation LLC ("GGLLC") for operation of its Greenidge Generating Station.

POINT II

PETITIONERS' CLAIMS ARE NOT MOOT

Petitioners' claims are not moot. The environmental harms sought to be prevented by this proceeding have only begun to occur. These environmental harms are cumulative and occur

each day Greenidge Station operates. Although the plant allegedly began operations last spring, as far as Petitioners have been able to ascertain, Greenidge Station has not yet generated any electricity. The generation figures for Greenidge Station on the electricity data browser (EDB) of the US Energy Information Agency ("EIA") show that no electricity has been generated at Greenidge from 2011 to January 2018. See https://tinyurl.com/y772zujg [last accessed April 26, 2018]. If the plant is not actually generating electricity at this time, the plant's water withdrawals and water discharges have so far been minimal. When and if water withdrawals and water discharges begin at the levels authorized in GGLLC's water withdrawal and modified SPDES permit, up to 139,248,000 gallons per day and 134,000,000 gallons per day respectively, these withdrawals and discharges are likely to have a significant effect on Seneca Lake and these impacts need to be reviewed in a full Environmental Impact Statement.

For these reasons, Petitioners' claims are not moot.

POINT III

PETITIONERS' CLAIMS ARE NOT TIME-BARRED

The verified petition challenges the issuance of a water withdrawal permit and a modified SPDES permit to GGLLC on September 11, 2017. Petitioners' also challenge DEC's SEQRA review that accompanied these two permits, both its determination that issuance of the water withdrawal permit was a Type II action not subject to SEQRA review, issued August 12, 2015, and its amended negative declaration that there would be no significant environmental impact from issuing a modified SPDES permit, issued June 28, 2016. Petitioners' claims are not time-barred because DEC's SEQRA determinations did not become ripe for review until the permits were issued. *Matter of Eadie v. North Greenbush Town Board* 7 N.Y.3d 306 (2006).

The verified petition does not challenge the transfers of the SPDES permits issued to previous owners of Greenidge Station that took place in 2013 and 2014.

POINT IV

PETITIONERS' CLAIMS ARE NOT BARRED BY RES JUDICATA OR CLAIM PRECLUSION

Petitioners' claims are not barred by the doctrine of *res judicata* or claim preclusion. There has been no prior decision involving the claims Petitioners raise in this proceeding. Petitioners' claims regarding the water withdrawal permit and the modified SPDES permit issued to GGLLC on September 11, 2017 were not addressed in the earlier case between Petitioners and Respondents, *Matter of Sierra Club v. DEC* ("*Greenidge I*"), Yates County Supreme Court, Index No. 2016-0165, currently on appeal to the Fourth Department. *Greenidge I* involves Petitioners' claims regarding the Title IV and Title V air emission permits issued to GGLLC on September 8, 2016. Because the claims in the earlier proceeding involved different permits, and because Petitioners could not have raised their claims regarding the water withdrawal permit and the modified SPDES permit in the earlier proceeding, the doctrine of *res judicata* does not apply. "Under the doctrine of *res judicata*, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation." *Matter of Hunter*, 4 N.Y.3d 260, 269 (2005). Accord *City of New York v. Welsbach Electric*, 9 N.Y.3d 124 (2007); *Parker v. Blauvelt Fire Co.*, 93 N.Y.2d 343 (1999); *Plumley v. Erie Boulevard Hydropower*, 114 A.D.3d 1249, (4th Dept. 2014). If for no other reason, *res judicata* does not apply in this case because there is an additional party. Petitioner Seneca Lake Guardian was not a party to *Greenidge I*. Also, Petitioners could not have raised their claims regarding DEC's issuance of GGLLC's water withdrawal and modified SPDES

permits in *Greenidge I* because these permits were not issued until September 11, 2017, five months after this court rendered its decision in *Greenidge I* on April 21, 2017. In order to raise their claims regarding these permits, Petitioners have been forced to bring this second proceeding.

Petitioners' challenge to the second set of GGLLC permits is similar to an example given in the *Hunter* case involving challenges to Trust A and Trust B. The court stated that a party's opportunity to raise objections regarding Trust A do not bar that party from continuing to litigate their claims with regard to Trust B. "Pamela's opportunities to raise objections regarding the estate and Trust A accounts do not bar objectants from continuing to litigate their claims with respect to the Bank's management of Trust B." 4 N.Y.3d at 271. Similarly, Petitioners' claims regarding GGLLC's water withdrawal permit and modified SPDES permit were not previously litigated and decided against Petitioners in a prior action.

For these reasons, Petitioners are not barred from bringing this proceeding by the doctrine of *res judicata* or claim preclusion.

POINT V

PETITIONERS' HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDIES

Petitioners have exhausted their administrative remedies. Petitioner Committee to Preserve the Finger Lakes ("CPFL") presented its concerns regarding the conditions set forth in water withdrawal and modified SPDES permits proposed to be issued to GGLLC and the adequacy of DEC's SEQRA review of the Greenidge permits in two comment letters on the permits, one filed September 11, 2015, A.R. 1196-1204, and one filed August 5, 2016, A.R. 1271-1280. The first letter objected to DEC's failure to include appropriate terms and conditions in the water withdrawal permit, to DEC's Type II classification for the water withdrawal permit

and to DEC's Best Technology Available ("BTA") determination for the cooling water intake structures at Greenidge Station. The second letter expressed concern that "the amended negative declaration issued by DEC on June 28, 2016 . . . fails to comply with SEQRA in many respects," a number of which were itemized in the letter. A.R. 1271. No further specificity is required for CPFL to have exhausted its administrative remedies. As the Court of Appeals stated in *Walton v. New York State Department of Correctional Services*, 8 N.Y.3d 186 (2007), "The focus of the 'exhaustion' requirement . . . is not on the challenged action itself, but on whether administrative procedures are available to review that action and whether those procedures have been exhausted. [citations omitted]." *Id.* at 195. In this proceeding CPFL's comment letters objected to DEC's water withdrawal permit conditions and Type II determination and to DEC's BTA determination and the adequacy of DEC's amended negative declaration and asserted that DEC should have conducted a full Environmental Impact Review of GGLLC's project to repower Greenidge Station. These comments were sufficient to exhaust CPFL's administrative remedies. DEC held no other administrative proceedings on the GGLLC permits in which CPFL could have participated. DEC did not hold a public hearing on the permits and DEC did not hold an issues conference to identify issues with the permits.

Because Petitioner CPFL filed comments on the GGLLC permits with DEC raising the issues that are raised in this proceeding and because the other Petitioners alleged direct harm and injury to their members that is different from that of the public at large and provided affidavits from their members to support those allegations, all the Petitioners should be deemed to have exhausted their administrative remedies under the rule established in *Matter of Shepherd v. Maddaloni*, 103 A.D.3d 901 (2nd Dept. 2013). In the *Shepherd* case, the court held that the petitioners were not precluded from challenging a site plan approval on the ground that they did

not actively participate in the administrative proceeding where others had advanced their objections in the proceeding and where they alleged direct harm and injury that is in some way different from that of the public at large in their petition.

For these reasons, Petitioners have established that they exhausted their administrative remedies.

POINT VI

PETITIONERS ESTABLISH THAT DEC FAILED TO COMPLY WITH THE WSL IN ISSUING GGLLC's WATER WITHDRAWAL PERMIT

A. Appropriate Conditions Were Not Imposed in GGLLC's Water Withdrawal Permit

Respondents' assertions that the conditions contained in GGLLC's water withdrawal permit comply with the requirements of the water withdrawal permitting provisions of the WSL are demonstrably incorrect. ECL 15-1503(2) requires that DEC assess the impacts of a proposed permit and ECL 15-1503(4) requires that DEC set appropriate conditions in the permit to address the impacts identified. ECL 15-1503(2) mandates eight factors to be determined by the DEC in making a decision whether to grant or deny a water withdrawal permit. These factors include:

- the proposed water withdrawal takes proper consideration of other sources of supply that are or may become available;
- the quantity of supply will be adequate for the proposed use; . . .
- the need for all or part of the proposed water withdrawal cannot be reasonably avoided through the efficient use and conservation of existing water supplies;
- the proposed water withdrawal is limited to quantities that are considered reasonable for the purposes for which the water use is proposed;
- 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;

- the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures; . . .

Nothing in the administrative record shows that DEC made these determinations for GGLLC's water withdrawal permit application. As the Second Department stated in its recent decision interpreting the water withdrawal permit issued to the Ravenswood Generating Station in Queens County to take over 1.5 billion gallons per day from the East River in New York Harbor, *Matter of Sierra Club v. Martens*, 2018 NY Slip Op 153 (2nd Dept. January 10, 2018), a copy of which is attached hereto for the court's convenience, these determinations must be made individually for each operator and each water source:

> 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 N.Y.C.R.R. 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 [citations omitted].

Id. There is absolutely no indication in the conditions contained in GGLLC's water withdrawal permit or in the administrative record that the conditions in GGLLC's permit were tailored to the circumstances of the Greenidge facility or to the unique circumstances of Seneca Lake. The only conditions included in GGLLC's permit are generic conditions that DEC is including in all water withdrawal permits.

One factor that should have been evaluated in determining whether GGLLC's proposed water withdrawal "will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures" as required by ECL 15-1503(2)(g) was the

open-cycle cooling system at Greenidge Station. The alternative of closed-cycle cooling is an obvious water conservation measure and should have been evaluated for a facility seeking a permit to use the massive volumes of water GGLLC was seeking permission to take from Seneca Lake. A comparison of the water use of Greenidge Station with the water use of the Athens Generating Station in Greene County provides a stunning illustration of the water conservation benefits of closed cycle cooling. GGLLC applied for a withdrawal permit in the amount of 159,897,000 gallons per day to provide once-through cooling of its 107 MW generating station. A.R. 836. For reasons that are not explained in the administrative record, DEC reduced the amount of 159,897,000 gallons per day requested in GGLLC's application to 139,248,000 gallons per day in the issued permit. A.R. 1412. In contrast, the Athens Station is permitted to take 1,500,000 gallons of water per day from the Hudson River for the facility's air-cooled condensers (according to DEC's Permit Applications database, https://www.dec.ny.gov/cfmx/extapps/envapps/). These air-cooled closed-cycle condensers provide cooling for the operations of the 1,080 MW Athens Station. Thus closed-cycle cooling at the Athens Station requires only 1% of the 139,248,000 gallons per day Greenidge Station is permitted to take from Seneca Lake. Yet the generating capacity of Athens Station is 10 times greater than the generating capacity of Greenidge Station! Given the tremendous water conservation benefits of closed-cycle cooling, DEC's failure to evaluate whether closed-cycle cooling for Greenidge Station was an environmentally sound and economically feasible water conservation measure violated the WSL.

The fact that DEC included a condition in GGLLC's water withdrawal permit incorporating the biological monitoring requirements of GGLLC's SPDES permit is not a substitute for DEC making the determinations required by ECL 15-1503(2). Although

6 N.Y.C.R.R. 601.7(f) provides that DEC will review an initial water withdrawal permit application "in coordination with the SPDES or other permit program, particularly with respect to any pending permit renewals," neither this section nor any other section of the WRL or the regulations authorize incorporating provisions from a SPDES permit as a way of fulfilling DEC's duties to make the determinations required in ECL 15-1503(2) and to incorporate appropriate conditions to implement those determinations in the water withdrawal permit as required by in ECL 15-1503(4). Whatever determinations DEC has made regarding the adequacy of GGLLC's once-through cooling system under the SPDES law and regulations, those determinations do not substitute for the necessity of determining whether GGLLC's once-through cooling system represents an "environmentally sound and economically feasible water conservation measure" under the WSL. The standards to be applied is issuing a SPDES permit under the SPDES law and regulations are not the same as the standards that apply under the WSL and water permitting regulations, and a separate *de novo* determination needs to be made pursuant to the requirements of the WSL.

In *Sierra Club v. Martens*, cited above, the court gave a detailed description of the cooling water intake system of Ravenswood Station and the impacts this system has on fish in the East River:

> In connection with electrical generation by three of the station's four steam generators, Ravenswood Station withdraws large amounts of water from the East River to cool the station's boiler equipment, turbines, and auxiliary equipment. The water is used only once and then discharged back into the East River. This "once-through cooling" system is the original cooling system that has been used by Ravenswood Station since it began operating in 1963. The station's fourth generator uses a multi-celled air-cooled condenser system that does not require the withdrawal of water from the river. When operating at full load, the station has a maximum withdrawal capacity of 1.5 billion gallons of water per day, although the actual amount of water used to operate the station is typically less, and varies depending upon the station's operating needs. This sizable water

> withdrawal has environmental consequences, most notably to fish and other local aquatic life. When the cooling water is drawn in, larger fish are killed when they become "impinged" on the screens that cover the intake structures to prevent debris in the water from entering. Juvenile fish, larvae, and eggs that are small enough to pass through the intake screens are killed when they become "entrained" in the cooling system. Additionally, the discharge of heated water back into the East River also has an impact on the aquatic environment. In the early 1990s, studies by ConEdison, the station's prior owner, demonstrated that, each year, approximately 83,000 fish became impinged and an average of 220 million eggs, larvae, and juvenile fish became entrained by the station's cooling system. Technology installed at the station in 2005 reduced annual impingement to approximately 25,000 fish and entrainment to 150 million organisms and eggs. Additional measures implemented in 2012 resulted in further reductions in impingement and entrainment.

Id. No equivalent discussion of the impact of the cooling water intake structure at Greenidge Station on fish impingement and entrainment is contained in the administrative record. The engineer's report attached to GGLLC's application makes no reference to fish impingement and entrainment, A.R. 846-861, and there is no indication in the administrative record that fish impingement and entrainment or any other potential impacts on Seneca Lake were considered by DEC as GGLLC's water withdrawal application was processed.

For these reasons, DEC's review of GGLLC water withdrawal permit application did not meet the standard for review set forth in ECL 15-1503(2).

B. The Phrase "Shall Issue" in ECL 15–1501(9) Does Not Preclude DEC from Exercising Discretion in Setting Appropriate Permit Conditions

The interpretation of the phrase "shall issue" in ECL 15–1501(9) was addressed at length in *Sierra Club v. Martens*, cited above. In that case, the Second Department determined that while it was mandatory under ECL 15–1501(9) that "an operator receiving an initial permit is authorized to withdraw, i.e., its pre-[WSL] maximum withdrawal capacity" the statutory factors DEC is required to consider in issuing a permit pursuant to ECL 15–1503(2) "do not lend themselves to mechanical application" and therefore determined that "the statute clearly

authorizes the DEC to act in a discretionary manner with respect to the imposition of appropriate terms and conditions." *Id.* p. 8. The court concluded that the clarity with which DEC's obligation to impose appropriate terms and conditions is set forth in ECL 15–1501(9) and 15–1503(2) outweighs any implication that the phrase "shall issue" implies a nondiscretionary act. The court's full reasoning is as follows:

> 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 N.Y.C.R.R. 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 N.Y.2d at 41; see also *Tarter v. State of New York*, 68 N.Y.2d at 518–519).
>
> While ECL 15–1501(9) may be mandatory with respect to the maximum volume of water an operator receiving an initial permit is authorized to withdraw, i.e., its pre-WRPA maximum withdrawal capacity, the statute clearly authorizes the DEC to act in a discretionary manner with respect to the imposition of "appropriate terms and conditions as required under [ECL article 15]." Thus, while the phrase "shall issue" implies a nondiscretionary act, "[s]tatutory language, however strong, must yield to what appears to be intention and that is to be found not in the words of a particular section alone but by comparing it with other parts or provisions of the general scheme of which it is part" (McKinney's Cons Laws of NY, Book 1, Statutes § 97, Comment at 213 [1971 ed]).

Id.

Furthermore, an interpretation of the "shall issue" wording in ECL 15-1501(9) as mandating that no other conditions may be imposed in the permit is contrary to DEC's well-established interpretations of similar "shall issue" wording under the permitting provisions of ECL Article 17, the Water Pollution Control Law governing SPDES permits and ECL Article 23, the Oil, Gas and Solution Mining Law. ECL 17-0701(5) provides that "[a] SPDES permit shall be issued to the applicant upon such conditions as the commissioner may direct," yet DEC interprets that provision as giving them sufficient discretion to require numerous terms and conditions in SPDES permits and to subject SPDES permit applications to review under SEQRA. ECL 23-0503(2) provides that DEC "shall issue a permit to drill, deepen, plug back or convert a well, if the proposed spacing unit [conforms to ECL requirements]," yet DEC interprets that provision as giving them sufficient discretion to require numerous terms and conditions in oil and gas well drilling permits and to subject oil and gas well drilling permit applications to review under SEQRA. There is no basis for interpreting the "shall issue" language in ECL 15-1501(9) any differently.

C. Deference to DEC's Interpretation of ECL 15-1501(9) Is Not Appropriate when the Question Is One of Pure Legal Interpretation of Statutory Terms

Petitioners discussed the case law applicable to the issue of when a court should defer to an agency interpretation of its statutory powers in their initial memorandum of law. Pet. MOL, pp. 8-10. As explained in that memorandum, the rules for evaluating when a court should defer to an agency interpretation of a statute are explained in the decision of the Court of Appeals in *Raritan Development Corp. v. Silva,* 91 N.Y.2d 98 (1997):

> Where "the question is one of pure legal interpretation of statutory terms, deference to the [agency] is not required" . . . . On the other hand, when applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference. [Citations omitted.] Even in those situations,

> however, a determination by the agency that "runs counter to the clear wording of a statutory provision" is given little weight. [Citations omitted.]

Id. 102-103. The cases cited by Respondent GGLLC in its memorandum of law are cases in which the agencies' determinations did not run counter to the statutory language. In the present case, DEC's interpretation of its powers to exercise discretion in setting the terms of an initial water withdrawal permit issued pursuant to ECL 15-1501(9), as set forth in its response to comments on GGLLC's water withdrawal application, A.R. 1167, does run counter to the statutory language and deference is not appropriate.

Petitioners note that DEC appears to have recently altered its interpretation of its powers to exercise discretion in setting terms and conditions in water withdrawal permits. In the most recent announcements of water withdrawal permit applications in DEC's Environmental Notice Bulletin ("ENB"), starting with the ENB issued February 21, 2018, DEC no longer claims that issuance of a water withdrawal permit to an existing non-public user is a Type II action under SEQRA, but instead categorizes them as unlisted. See e.g., the notice of the completed application of the Woods Valley Ski Area in Oneida County in the April 11, 2017 ENB, http://www.dec.ny.gov/enb/20180411_reg6.html#630660000800001 ["Project is an Unlisted Action and will not have a significant impact on the environment. A Negative Declaration is on file. A coordinated review was not performed."].

For these reasons, deference to the interpretation of DEC's discretion in issuing water withdrawal permits pursuant to ECL 15-1501(9) set forth in DEC's response to comments on GGLLC's water withdrawal permit application is not appropriate.

POINT VII

PETITIONERS ESTABLISH THAT DEC FAILED TO COMPLY WITH SEQRA IN ISSUING GGLLC's WATER WITHDRAWAL PERMIT

Based on its interpretation of DEC's obligations under WSL to exercise discretion in setting appropriate terms and conditions for water withdrawal permits issued pursuant to ECL 15-1501(9), the court in *Sierra Club v. Martens*, cited above, held that "the issuance of an 'initial permit' for making water withdrawals pursuant to Environmental Conservation Law § 15-1501(9) is not a ministerial act that is excluded from the definition of 'action' under the State Environmental Quality Review Act (hereinafter SEQRA; see ECL 8-0105[5][ii])." *Id.* at 2. For this reason, the court held that the initial water withdrawal permit issued to TC Ravenswood for operation of the Ravenswood Generating Station "must be annulled, and the matter remitted to the DEC for further proceedings on TC Ravenswood's permit application in accordance with SEQRA." *Id.* at 9. This court should do likewise and annul GGLLC's water withdrawal permit.

Respondents' claim that it does not matter that GGLLC's water withdrawal permit was classified as a Type II action under SEQRA because consideration of the water withdrawal permit was included in DEC's SEQRA review of the air permits and the SPDES permit ignores the fact that DEC's amended negative declaration was invalid. See discussion below at Point IX.

POINT VIII

PETITIONERS ESTABLISH THAT DEC FAILED TO COMPLY WITH THE SPDES LAW IN NOT REQUIRING CLOSED-CYCLE COOLING

A. Review of GGLLC's SPDES Permit Application as a New Application under 6 N.Y.C.R.R. 621.11(b)(3) Means that Closed-Cycle Cooling Must Be Required

Respondents acknowledge that the SPDES regulations require that applications for renewal of a SPDES permit for a facility that has not operated during the term of the permit, such as GGLLC's application for the renewal of the AEE2 SPDES permit for operation of Greenidge

Station, are to be treated as a new application and be subject to a full technical review. 6 N.Y.C.R.R. 621.11 (b)(3). Respondents assert that GGLLC's renewal application was treated as a new application and was subject to a full technical review. DEC's failure to require the implementation of closed-cycle cooling at Greenidge Station, however, demonstrates that GGLLC's renewal application was not treated as a new application. DEC's policy document CP-#52 / Best Technology Available (BTA) for Cooling Water Intake Structures ("BTA Policy"), A.R. 724-731, requires closed-cycle cooling for new facilities and repowered facilities, and this policy should have been implemented if GGLLC's renewal application was treated as a new application in compliance with 6 N.Y.C.R.R. 621.11 (b)(3).

B. DEC's Best Available Technology Policy for a Repowered Facility Requires Closed-Cycle Cooling

Respondents assert that DEC's BTA Policy allows DEC to establish "closed-cycle cooling or the equivalent" as the best available technology for Greenidge Station. The BTA Policy, however, requires closed-cycle cooling at a repowered facility such Greenidge Station. Equivalent technology is only allowed at an existing facility. The policy states:

> One of the most efficient and effective ways to minimize or eliminate the number of and mortality to aquatic organisms impinged and entrained during industrial cooling is to minimize or eliminate the use of once-through, non-contact cooling water from the surface waters of New York. The demonstrated technology that achieves the greatest reduction in non-contact cooling water use is closed-cycle cooling. Under the U.S. EPA CWA 316(b) Phase I Rule (40 C.F.R. Part 125, subpart I), wet closed-cycle cooling was identified as the best technology available for new facilities to minimize impingement and entrainment and New York has already required closed-cycle cooling technology to be employed on new facilities and for electric generating facilities being repowered. *Given the effectiveness of closed-cycle cooling at reducing adverse environmental impact caused by a CWIS, the biological significance of New York's surface waterbodies and their importance for commercial and recreational uses, particularly in* the marine and coastal district, the tidal reach of the Hudson River and *the Great Lakes, this policy establishes closed-cycle cooling as the performance goal for all new and repowered*

> *industrial facilities in New York*. The performance goal for all existing industrial facilities in New York is closed-cycle cooling or the equivalent. [Emphasis added].

A.R. 727-728. In her affidavit dated February 28, 2018, Colleen Kimble, Energy Unit Leader at DEC's Division of Fish and Wildlife, states that she participated in DEC's BTA determination for Greenidge Station and that the review given to Greenidge Station was as an existing facility and not as a repowered facility. Kimble Aff. ¶ 12. She states, "Greenidge Station has been in operation for many years and is defined as an existing facility with a cooling water intake structure design capacity greater than 20 MGD." *Id.* Her affidavit makes clear that the wrong standard was applied in evaluating BTA for Greenidge Station. Because Greenidge Station was permanently retired in 2012, Pet. ¶ 39, it should have been evaluated as a repowered facility under the BTA Policy and closed-cycle cooling should have been required.

POINT IX

PETITIONERS ESTABLISH THAT DEC FAILED TO COMPLY WITH SEQRA IN ISSUING GGLLC's SPDES PERMIT

A. The Amended Negative Declaration Is a Conditioned Negative Declaration

Respondent DEC acknowledges that conditioned negative declarations may not be issued for Type I actions, but asserts in its memorandum of law that "DEC did not violate the prohibition against issuing a conditioned negative declaration for a Type I action because DEC imposed no conditions in its amended negative declaration. Instead, DEC issued an amended negative declaration for a project that involved modifying a SPDES permit to impose more stringent conditions." DEC MOL at 32. Respondent GGLLC makes a similar argument. Greenidge MOL at 19. These assertions, however, rely on a distinction that does not exist between conditions in the negative declaration itself and distinctions in the underlying permit

covered by the negative declaration. As the Court of Appeals stated in *Matter of Merson v. McNally*, 90 N.Y.2d 742 (1997):

> [A] lead agency clearly may not issue a negative declaration on the basis of conditions contained in the declaration itself. *Nor could the lead agency achieve the same end by other means, such as supporting the negative declaration with a statement that conditions would be imposed only on an underlying special use permit to reduce environmental impacts;* extracting concessions from the developer as necessary prerequisites to the issuance of the negative declaration [citation omitted]; or requiring specific mitigation measures, and then approving a proposal that has been revised in compliance with the mandate of the lead agency [emphasis added].

Id. at 753. In the present case, DEC's decision to require conditions in the underlying SPDES permit is attempting to "achieve the same ends by other means," and is not permitted for Type I actions. As Petitioners noted in their initial memorandum of law, "Inherent in these conditions is the recognition by DEC that significant environmental impacts are posed by the Greenidge Project without imposition of the conditions." Pet. Initial MOL at 19.

For these reasons, Petitioners have demonstrated that DEC's amended negative declaration is invalid because it is a conditioned negative declaration of a Type I action.

It is of great concern to Petitioners that, notwithstanding the conditions set forth in DEC's amended negative declaration and in GGLLC's modified SPDES permit requiring new equipment to protect against fish impingement and entrainment, DEC is allowing Greenidge Station to operate without having installed that equipment, despite the fact the plant's current "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 § 316(b) Phase II Rule (40 CFR Parts 122 and 125). [emphasis added.]" Biological Fact Sheet - Cooling Water Intake Structure, prepared by William C. Nieder and last revised on 17 March 2017. A.R. 1475. Petitioners note with dismay that no specific date is provided in GGLLC's modified SPDES permit for when technology to prevent fish impingement and entrainment must

be installed at Greenidge Station. The time requirements in the permit related to the installation of cylindrical wedge wire screening are complicated and subject to numerous DEC approvals. First is a requirement that "[w]ithin six months of the effective date of the permit (EDP +6 months), the permittee must submit an approvable Cylindrical Wedge-Wire Screen (CWWS) Pilot Study Plan." A.R. 1429. Second is a requirement that "[w]ithin 3 months of receiving Department approval of the final CWWS Study Report, the permittee must submit an approvable Technology Installation and Operation Plan (TIOP) to meet the best technology available requirements under 6 N.Y.C.R.R. Part 704.5 and Section 316(b) of the Clean Water Act (CWA). This plan must include: . . . Complete installation of CWWS by the Effective Date of the Permit (EDP) + 5 years." A.R. 1430. Third is the requirement that "[w]ithin 3 months of Department approval of the Technology Installation and Operation Plan, the permittee must submit an approvable Verification Monitoring Plan. This plan must include details of procedures to confirm that the necessary reductions in impingement and entrainment required by this permit are being achieved, and must include the following: a. At a minimum, two years of in-plant entrainment monitoring over a five-year averaging period to verify the full-scale performance of BTA measures; . . . c. A schedule of implementation; . . . ." *Id.* The completion of these requirements could take many years.

B. It is Clear that DEC Did Segment Its Review of the Greenidge Project

Respondent DEC claims that DEC did not segment its review of impacts of waste disposal at the Lockwood coal ash landfill from its review of the impacts of new operations at Greenidge Station. The grounds for DEC's assertion are: 1. "[t]he Landfill holds a SPDES permit that is not at issue in this proceeding;" and 2, "[b]oth the Landfill and Greenidge Station already exist; neither is proposed, and neither is a component of the other." Neither of these

grounds, however, supports a finding the DEC did not segment its review of reopening the landfill and reopening Greenidge Station. The landfill was placed in protective layup at the same time as Greenidge Station. The lay-up plan for the landfill prepared by Daigler Engineering and submitted to DEC in May 2011 makes clear the close connection in operations between Greenidge Station and the landfill. The layup plan states:

> AES Greenidge, L.L.C. (AES) owns a coal fired electrical generating plant on the west shore of Seneca Lake near the Village of Dresden in the Town in the Town of Torrey, Yates County, New York. In support of the power plant operation, AES also owns the Lockwood Ash Disposal Site located on Swarthout Road, across NYS Route 14 from the power plant. . . .
>
> The Greenidge Power Generating Station is in the process of entering a protective layup status. . . . As an integral element of power station operations, the Lockwood Ash Disposal Site is also being prepared for protective layup.

Affidavit of Mary Anne Kowalski dated April 25, 2018 (Kowal. Aff."), Ex. A, p. 1-1. Greenidge Station and the landfill remain under common ownership. Pet. ¶ 12.

Segmentation has occurred because problems at the Lockwood landfill were under investigation by DEC at the same time the GGLLC's permit applications for new operations at Greenidge Station were being considered. On February 18, 2015, DEC and the owner of the landfill executed a consent order. The consent order states that DEC "has determined that groundwater at the site contains substances in excess of the duly promulgated water quality standards for, inter alia, total dissolved solids, boron, manganese, magnesium, iron, sodium and sulfate," and that DEC "believes that the Leachate Pond is a source of the substances and has contributed and continues to contribute to a contravention of duly promulgated water quality standards in violation of ECL § 17-0501 and 6 N.Y.C.R.R. § 360-1.14(b)(2)." Kowal. Aff., Ex. B. p. 3. Thus the problems at the landfill were well known to DEC before DEC issued its initial negative declaration under SEQRA for the GGLLC permit applications on July 30, 2015.

The fact that there are two separate SPDES permits for two facilities is irrelevant to the issue of segmentation. The cumulative impacts of operations under both permits must be considered under SEQRA. 6 N.Y.C.R.R. 617.3(g)(1); 6 N.Y.C.R.R. 617.2(ag).

At the time the consent order was entered into the landfill was being brought out of protective lay-up status and was being prepared to accept new wastes coming from operations at Greenidge Station. Reopening the landfill was an integral component of the overall project to restart Greenidge Station.

The Court of Appeals made clear in *Matter of Village of Westbury v. Dept. of Transp.*, 75 N.Y.2d 62 (1989) that the impacts of two closely related projects must be considered together:

> We conclude that the widening of Northern State Parkway is the type of subsequent action contemplated by the regulations and that the environmental effects of the two projects should be considered together. The interchange construction is one part of a plan to alleviate the traffic congestion and capacity deficiencies of the Northern State Parkway at its interchange with Meadowbrook State Parkway and east of it. The other part of that plan is the widening project. The two are complementary components of the remedy for the Northern State Parkway's traffic flow problems, sharing a common purpose, integrated and scheduled for consecutive construction. Thus, design of each is dependent on the other in that lane construction which will be undertaken as part of the interchange project has no independent utility without the subsequent widening of Northern State Parkway to the east. That being so, the regulations require the consideration of their combined effects even though they are not part of a single formalized plan [citations omitted].
>
> DOT's reliance on the future widening of the Northern State Parkway in planning the interchange project establishes that the widening is, in the words of the regulations, a "subsequent action" "included in any long-range plan", "likely to be undertaken as a result" of the interchange construction or "dependent" on it (see, 6 N.Y.C.R.R. 617.11 [b]; 17 N.Y.C.R.R. 15.11 [b]).

75 N.Y.2d at 71. Unlike the two projects under consideration in *Westbury*, the reopening of the Lockwood landfill was undertaken at the same time as GGLLC prepared for the reopening of Greenidge Station, so the arguments in the present case are even stronger that these two projects

constituted impermissible segmentation under the SEQRA regulations. 6 N.Y.C.R.R. 617.3(g)(1); 6 N.Y.C.R.R. 617.2(ag). Accord *Matter of Sierra Club v. Village of Painted Post*, 134 A.D.3d 1475 (4th Dept. 2015); *Sun Co. v. Syracuse Industrial Development Agency*, 209 A.D.2d 34 (4th Dept. 1995), app. dis'd, 86 N.Y.2d 776 (1995),

For these reasons, Petitioners establish that DEC's amended negative declaration is invalid because it segments review of the impacts of reopening the Lockwood landfill from its review of the impacts of repowering Greenidge Station.

C. Because Greenidge Station Did Not Operate during the Term of the SPDES Permit GGLLC Sought to Renew, DEC's SEQRA Review Must Use a Baseline of No Operations

As noted above, Respondents acknowledge that the SPDES regulations require that applications for renewal of a SPDES permit for a facility that has not operated during the term of the permit, such as GGLLC's application for the renewal of the AEE2 SPDES permit for operation of Greenidge Station, are to be treated as a new application and to be subject to a full technical review. 6 N.Y.C.R.R. 621.11 (b)(3). A consequence of this requirement is that the accompanying SEQRA review of the permit application must also treat the application as a new permit. This means that the review of impacts conducted under SEQRA must be compared to a baseline of no operations. The need to use a baseline of no operations in evaluating the impacts of a repowered facility under SEQRA is supported by DEC's BTA policy, which requires that closed-cycle cooling is required for new and repowered facilities. See discussion above at Point VIII. The fact that the standard that applies to repowered facilities under the BTA policy is the standard that applies to new facilities is a further indication repowered facilities are to be treated as new facilities for purposes of SEQRA review.

The necessity for requiring that the SEQRA review of new operations at a repowered facility be conducted against a baseline of no operations is shown by the slight-of-hand that is taking place with DEC's conditioned negative declaration for GGLLC's modified SPDES permit. DEC used the statement of conditions for new technology to protect against fish impingement and entrainment in the amended negative declaration as a basis for concluding that there would be no significant environmental impacts from new operations at Greenidge Station despite the fact that the plant had absolutely no technology in place to prevent fish impingement and entrainment. DEC used these conditions to circumvent SEQRA requirements for a full Environmental Impact Statement. The various studies required in GGLLC's modified SPDES permit should have been conducted prior to issuance of the permit as part of an EIS process.

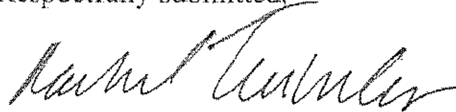
For these reasons, Petitioners have demonstrated that the SEQRA review of the impacts of a repowered facility must be compared to a baseline of no operations.

CONCLUSION

For each of the reasons discussed above, Petitioners respectfully request that the water withdrawal permit and the modified SPDES permit issued by DEC to GGLLC for operations at Greenidge Generating Station and DEC's accompanying negative declaration be annulled.

DATED: Hammondsport, New York
April 27, 2018

Respectfully submitted,



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Appellate Division: Second Judicial Department

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Argued - February 6, 2017

L. PRISCILLA HALL, J.P.
LEONARD B. AUSTIN
SANDRA L. SGROI
FRANCESCA E. CONNOLLY, JJ.

2015-02317

OPINION & ORDER

In the Matter of Sierra Club, et al., appellants, v Joseph Martens, Commissioner, New York State Department of Environmental Conservation, et al., respondents.

(Index No. 2949/14)

APPEAL by the petitioners, in a proceeding pursuant to CPLR article 78 to review a determination of the New York State Department of Environmental Conservation dated November 15, 2013, as amended March 7, 2014, which granted the application of the respondent Trans Canada Ravenswood, LLC, for a water withdrawal permit pursuant to Environmental Conservation Law § 15-1501(9), from a judgment of the Supreme Court (Robert J. McDonald, J.), entered December 10, 2014, in Queens County, which, upon decisions of the same court dated October 1, 2014, and October 2, 2014, respectively, denied the petition and dismissed the proceeding

Lippes & Lippes, Buffalo, NY (Richard J. Lippes of counsel), Rachel Treichler, Hammondsport, NY, Gary Abraham, Allegany, NY, and Jonathan L. Geballe, New York, NY, for appellants (one brief filed).

Eric T. Schneiderman, Attorney General, New York, NY (Anisha S. Dasgupta and Bethany A. Davis Noll of counsel), for respondent Joseph Martens, Commissioner, New York State Department of Environmental Conservation.

Barclay Damon, LLP, Albany, NY (Yvonne E. Hennessey, Danielle E. Mettler-LaFeir, and Laura L. Mona of counsel), for respondent Trans Canada Ravenswood,

LLC.

CONNOLLY, J.

We hold that the issuance of an "initial permit" for making water withdrawals pursuant to Environmental Conservation Law § 15-1501(9) is not a ministerial act that is excluded from the definition of "action" under the State Environmental Quality Review Act (hereinafter SEQRA; *see* ECL 8-0105[5][ii]).

I

The respondent Trans Canada Ravenswood, LLC (hereinafter TC Ravenswood), operates the Ravenswood thermoelectric generating station (hereinafter Ravenswood Station or the station) in Long Island City, Queens, which produces energy for the City of New York. In connection with electrical generation by three of the station's four steam generators, Ravenswood Station withdraws large amounts of water from the East River to cool the station's boiler equipment, turbines, and auxiliary equipment. The water is used only once and then discharged back into the East River. This "once-through cooling" system is the original cooling system that has been used by Ravenswood Station since it began operating in 1963. The station's fourth generator uses a multi-celled air-cooled condenser system that does not require the withdrawal of water from the river. When operating at full load, the station has a maximum withdrawal capacity of 1.5 billion gallons of water per day, although the actual amount of water used to operate the station is typically less, and varies depending upon the station's operating needs. This sizable water withdrawal has environmental consequences, most notably to fish and other local aquatic life. When the cooling water is drawn in, larger fish are killed when they become "impinged" on the screens that cover the intake structures to prevent debris in the water from entering. Juvenile fish, larvae, and eggs that are small enough to pass through the intake screens are killed when they become "entrained" in the cooling system. Additionally, the discharge of heated water back into the East River also has an impact on the aquatic environment. In the early 1990s, studies by ConEdison, the station's prior owner, demonstrated that, each year, approximately 83,000 fish became impinged and an average of 220 million eggs, larvae, and juvenile fish became entrained by the station's cooling system. Technology installed at the station in 2005 reduced annual impingement to approximately 25,000 fish and entrainment to 150 million organisms and eggs. Additional measures implemented in 2012

resulted in further reductions in impingement and entrainment.

II

Since the 1970s, Ravenswood Station has been regulated by the Federal Clean Water Act (*see* 33 USC § 1251 *et seq.*), and required to maintain a State Pollutant Discharge Elimination System (hereinafter SPDES) discharge permit (*see* ECL 17-0801 *et seq.*; *see also* 33 USC § 1342[b]). The SPDES permitting system, which the New York State Department of Environmental Conservation (hereinafter the DEC) administers at the state level, regulates the discharge of pollutants from point sources (*see* 33 USC § 1311[a]). With respect to cooling water intake structures, the Clean Water Act provides that effluent standards for discharges "shall require that the location, design, construction, and capacity of cooling water intake structures reflect the *best technology available* for minimizing adverse environmental impact" (33 USC § 1326[b] [emphasis added]). "Best technology available," or "BTA," is a standard of performance established through detailed regulations promulgated by the United States Environmental Protection Agency (40 CFR 125.94[a]; *see Entergy Corp. v Riverkeeper, Inc.*, 556 US 208). The Clean Water Act expressly provides that states may adopt and enforce more stringent effluent limitations or standards of performance than required by federal law (*see* 33 USC § 1370; *Islander E. Pipeline Co., LLC v Connecticut Dept. of Envtl. Protection*, 482 F3d 79, 90 n 9 [2d Cir]).

While the SPDES permitting system generally authorized the DEC to regulate entities that *discharge* into water, under prior law (*see* former ECL 15-1501), the DEC also had separate authority to regulate *withdrawals* of water, i.e., the removal or taking of water from the waters of the state, but only with respect to withdrawals made by public water suppliers (*see* Assembly Sponsor's Mem in Support, Bill Jacket, L 2011, ch 401; *see also* ECL 15-1502[16]). However, the "*consumptive* uses of water for agricultural, commercial, and industrial purposes remain[ed] largely unregulated" (Assembly Sponsor's Mem in Support, Bill Jacket, L 2011, ch 401 [emphasis added]). Neighboring states, including "Connecticut, New Jersey, Rhode Island, and Massachusetts all ha[d] programs that regulate[d] industrial, commercial and agricultural water withdrawals" (*id.*; *see* Conn Gen Stat §§ 22a-365 to 22a-379; NJ Stat § 58:1A-1 *et seq.*; RI Gen Laws tit 46, ch 15.7; Mass Gen Laws ch 21G).

Accordingly, in 2011, the State Legislature amended ECL article 15 by enacting the Water Resources Protection Act (*see* ECL 15-1501 *et seq.* [hereinafter the WRPA]), which directed

the DEC to implement a water withdrawal permitting program to regulate the use of the state's water resources. Pursuant to the WRPA, all commercial and industrial operators of water withdrawal systems with a capacity to withdraw more than 100,000 gallons per day are required to obtain a water withdrawal permit (*see* ECL 15-1501[1]; 15-1502[14]). Applicants for water withdrawal permits are required to submit a "proposed near term and long range water conservation program that incorporates environmentally sound and economically feasible water conservation measures" (ECL 15-1503[1][f]). The DEC has the power to grant or deny a permit, or to grant a permit with conditions, and in doing so, must consider a number of statutory factors, including 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]).

As pertinent to this appeal, with respect to existing operators of water withdrawal systems, the WRPA provides for the issuance of an "initial permit" based upon an operator's self-reported "maximum water withdrawal capacity" prior to the statute's effective date (ECL 15-1501[9]). Specifically, the statute states: "[the DEC] *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 DEC] . . . on or before February [15, 2012]" (ECL 15-1501[9] [emphasis added]; *see* 6 NYCRR 601.7[d]). The DEC's regulations implementing the WRPA state that an "initial permit . . . includes all terms and conditions of a water withdrawal permit, including environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies, and is subject to modification, suspension and revocation" (6 NYCRR 601.7[e]).

III

In order to comply with the WRPA, in 2013, TC Ravenswood applied for an initial permit. The DEC determined that the permit application was not subject to SEQRA. In response to public comments that the application should be reclassified as a Type I action under SEQRA, the DEC asserted that the issuance of the permit was ministerial, because it "has no discretion but to issue 'initial permits' for the amount of the water withdrawals for users that were in operation and

properly reported their withdrawals to [the DEC] as of February 15, 2012." On November 15, 2013, the DEC issued TC Ravenswood an initial permit authorizing the withdrawal of 1.39 billion gallons of water per day. The initial permit incorporated monitoring requirements from TC Ravenswood's SPDES permit, and imposed several additional conditions related to the installation of meters and the collection of data regarding water withdrawals. Subsequent to the issuance of the initial permit, the DEC amended the initial permit to authorize the withdrawal of just over 1.5 billion gallons of water per day.

The petitioners, who are nonprofit organizations dedicated to the protection of the environment and conservation of water resources, commenced this proceeding pursuant to CPLR article 78, arguing that the DEC erroneously classified the issuance of the permit as a ministerial action not subject to SEQRA. The Supreme Court denied the petition and dismissed the proceeding, concluding that the WRPA and its implementing regulations did not leave the DEC with any discretion to deny TC Ravenswood an initial permit, and that it was thus required to issue the initial permit regardless of environmental concerns. The petitioners appeal, and we reverse.

IV

"In a CPLR article 78 proceeding to review a determination of an administrative agency, the standard of judicial review is 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 Wilson v New York City Dept. of Hous. Preserv. & Dev.*, 145 AD3d 905, 907; *see* CPLR 7803[3]). For the reasons that follow, we find that the issuance of an initial permit pursuant to ECL 15-1501(9) is not a ministerial act and, therefore, the DEC's determination was affected by an error of law (*see* CPLR 7803[3]; *Matter of 149 Glen St. Corp. v Jefferson*, 140 AD3d 742, 743; *cf. Matter of Long Is. Pine Barrens Socy., Inc. v Central Pine Barrens Joint Planning & Policy Commn.*, 138 AD3d 996, 998).

"SEQRA's fundamental policy is to inject environmental considerations directly into governmental decision making; thus the statute mandates that '[social], economic, and environmental factors shall be considered together in reaching decisions on proposed activities'" (*Matter of Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of N.Y.*, 72 NY2d 674, 679, quoting ECL 8-0103[7]). "The procedures necessary to fulfill SEQRA review are carefully detailed

in the statute and its implementing regulations, and [courts] have recognized the need for strict compliance with SEQRA requirements" (*Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie*, 3 NY3d 508, 515 [citations omitted]; *see Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 347).

"To promote the Legislature's goals, and to provide an informational tool to aid in the decision-making process, SEQRA requires agencies to prepare an [environmental impact statement] 'on any *action* they propose or approve which may have a significant effect on the environment'" (*Incorporated Vil. of Atl. Beach v Gavalas*, 81 NY2d 322, 325, quoting ECL 8-0109[2]). "[SEQRA] broadly defines the term 'action' to include projects or activities that the agency either directly undertakes or funds, policy and procedure-making and *the issuance of permits*, licenses or leases" (*Incorporated Vil. of Atl. Beach v Gavalas*, 81 NY2d at 325 [emphasis added]; *see* ECL 8-0105[4]). When undertaking an action, a governmental agency (or designated "lead agency" where more than one agency is involved in the decision-making process) must initially determine whether a proposed action "may have a significant effect on the environment" (*Matter of Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of N.Y.*, 72 NY2d at 680; *see* ECL 8-0109[2]; *see also* ECL 8-0111[6]). "If no significant effect is found, the lead agency may issue a 'negative declaration,' identifying areas of environmental concern, and providing a reasoned elaboration explaining why the proposed action will not significantly affect the environment" (*Matter of Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of N.Y.*, 72 NY2d at 680; *see* 6 NYCRR former 617.6[g]). However, "[i]f the lead agency determines that there may be significant environmental impact, it must see to it that an environmental impact statement [hereinafter EIS] is prepared, which fully evaluates the potential environmental effects, assesses mitigation measures, and considers alternatives to the proposed action" (*Matter of Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of N.Y.*, 72 NY2d at 680; *see* ECL 8-0109[2], [4]).

To assist agencies in determining whether a proposed action may have a significant effect on the environment, SEQRA directs the DEC to promulgate regulations identifying, inter alia, "[a]ctions or classes of actions that are likely to require preparation of environmental impact statements," and "[a]ctions or classes of actions which have been determined not to have a significant effect on the environment and which do not require environmental impact statements" (ECL 8-0113[2][c]). In furtherance of this mandate, the DEC classifies actions as Type I, Type II,

or Unlisted (*see Matter of South Bronx Unite! v New York City Indus. Dev. Agency*, 115 AD3d 607, 609 n 4). "[A] Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS" (6 NYCRR 617.4[a][1]). Type II "actions have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under [SEQRA]" (6 NYCRR 617.5[a]). "[A]ll remaining actions are classified as 'unlisted' actions" (*Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie*, 3 NY3d at 518 n 8). "Type I and unlisted actions are subject to SEQRA review, and Type I actions 'are more likely to require the preparation of an EIS than Unlisted actions'" (*id.*, quoting 6 NYCRR 617.4[a]).

As relevant to the case at bar, the DEC classifies "a project or action that would use ground or surface water in excess of 2,000,000 gallons per day" as a Type I action (6 NYCRR 617.4[b][6][ii]). Ravenswood Station has the capacity to withdraw over 1.5 billion gallons of water per day, an amount approximately 750 times greater than the DEC's Type I threshold.

However, SEQRA also expressly excludes from the definition of "action," "official acts of a ministerial nature, involving no exercise of discretion" (ECL 8-0105[5][ii]). The DEC construes the words "shall issue" in ECL 15-1501(9) to mean that the issuance of an initial permit to an existing operator is mandatory and involves no agency discretion, and is, therefore, a ministerial act. The petitioners argue that the words "subject to appropriate terms and conditions as required under this article" in ECL 15-1501(9) give the DEC the discretion to impose conditions on the initial permit and, therefore, the issuance of an initial permit is not excluded from the definition of "action" under SEQRA. We agree with the petitioners' interpretation of the statute.

Whether a particular action is ministerial or discretionary depends upon the underlying statute or regulatory scheme (*see Incorporated Vil. of Atl. Beach v Gavalas*, 81 NY2d at 325; *Matter of Ziemba v City of Troy*, 37 AD3d 68, 73). "Discretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (*Tango v Tulevech*, 61 NY2d 34, 41; *see Matter of Filmways Communications of Syracuse v Douglas*, 106 AD2d 185, 186, *affd* 65 NY2d 878). Generally, determinations that involve an agency's expertise, the application of law, and exercise of judgment are nonministerial (*see New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184; *Tango v Tulevech*, 61

NY2d 34, 41; *see also Tarter v State of New York*, 68 NY2d 511, 518-519). "[W]hen an agency has some discretion, but that discretion is circumscribed by a narrow set of criteria which do not bear any relationship to the environmental concerns that may be raised in an EIS, its decisions will not be considered 'actions' for purposes of SEQRA's EIS requirements" (*Incorporated Vil. of Atlantic Beach v Gavalas*, 81 NY2d at 326).

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).

While ECL 15-1501(9) may be mandatory with respect to the maximum volume of water an operator receiving an initial permit is authorized to withdraw, i.e., its pre-WRPA maximum withdrawal capacity, the statute clearly authorizes the DEC to act in a discretionary manner with respect to the imposition of "appropriate terms and conditions as required under [ECL article 15]." Thus, while the phrase "shall issue" implies a nondiscretionary act, "[s]tatutory language, however strong, must yield to what appears to be intention and that is to be found not in the words of a particular section alone but by comparing it with other parts or provisions of the general scheme of which it is part" (McKinney's Cons Laws of NY, Book 1, Statutes § 97, Comment at 213 [1971 ed]).

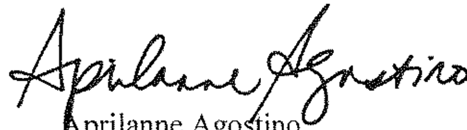
In light of our determination, the parties' remaining contentions have been rendered

academic.

Accordingly, the initial permit, as amended, must be annulled, and the matter remitted to the DEC for further proceedings on TC Ravenswood's permit application in accordance with SEQRA. Therefore, the judgment is reversed, on the law, that branch of the petition which was to annul the determination dated November 15, 2013, as amended March 7, 2014, is granted, the petition is otherwise denied as academic, and the matter is remitted to the DEC for further proceedings in accordance herewith.

HALL, J.P., AUSTIN and SGROI, JJ., concur.

ORDERED that the judgment is reversed, on the law, with one bill of costs, that branch of the petition which was to annul the determination dated November 15, 2013, as amended March 7, 2014, is granted, the petition is otherwise denied as academic, and the matter is remitted to the New York State Department of Environmental Conservation for further proceedings in accordance herewith.

ENTER: 

Aprilanne Agostino
Clerk of the Court