

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' MEMORANDUM OF LAW IN OPPOSITION TO
RESPONDENT DEC'S MOTION TO STRIKE**

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**PETITIONERS ARE ENTITLED TO SUBMIT EVIDENCE IN RESPONSE TO
RESPONDENTS' OBJECTIONS TO STANDING AND ANSWERS**

The affidavits submitted by Petitioners with their reply memorandum of law on April 27, 2018 are entitled to be considered in their entirety.

A. Petitioners' Affidavits Provide Evidence to Show Standing

Petitioners submitted member affidavits to show standing because Respondents challenged standing. Although Respondent New York State Department of Environmental Conservation ("DEC") now withdraws its objection to Petitioners' standing (see DEC's memorandum of law in support of its motion to strike, p. 4, "Based on the belated submission of the member affidavits, the State withdraws its objection to petitioners' standing"), Respondent DEC nevertheless seeks to limit the amount of evidence Petitioners may submit in support of their claims of standing through its motion to strike. Respondents Greenidge Generation, LLC and Lockwood Hills, LLC (the "Greenidge Respondents") have not withdrawn their objection to Petitioners' standing.

Contrary to Respondents' assertions, it is perfectly appropriate for Petitioners to submit affidavits providing evidence of standing after Respondents raise standing as a defense. It is not necessary to plead standing. Standing is not an element of Petitioners' claims in this proceeding. See e.g., *BAC Home Loan LP v. Bertram*, 51 Misc.3d 770, 779 (Suffolk Cty 2016), "the general precept [is] that the standing of a plaintiff is not an element of his or her claim." Accord, *Wells Fargo v. Mastropaolo*, 42 A.D.3d 239, 242, (2nd Dept. 2007), "Where standing is put into issue by a defendant's answer, a plaintiff must prove its standing if it is to be entitled to relief. . . . [W]here a defendant does not challenge a plaintiff's standing, the plaintiff may be relieved of its obligation to prove that it is the proper party to seek the requested relief."

Furthermore, once Respondents' raise standing as a defense, there no basis for limiting the amount of evidence Petitioners may submit in support of their claims of standing.

Respondent DEC seeks to strike a number of paragraphs and exhibits from each of Petitioners' affidavits submitted on April 27, 2018, and the entire affidavit of Dr. Gregory Boyer. But the paragraphs DEC seeks to strike provide necessary evidence in support of Petitioners' claims of standing. Petitioners are entitled to submit this evidence to demonstrate the harms their members may experience when Respondents' have challenged standing.

Petitioners' claims of standing are based on their members' claims that a number of factors combine to give them a higher risk of experiencing harmful algae blooms (HABs) than the public at large. These factors are:

1. The uses Petitioners' members make of the lake waters,
2. The proximity of Petitioners' members to the shoreline of Seneca Lake near the point where the Keuka Outlet discharges into the lake,
3. The depth of the lake at the mouth of the Outlet,
4. The prevailing currents in the lake,
5. The high nutrient content of Keuka Outlet,
6. The volume and the heat of the discharges Greenidge Station is permitted to put into the Outlet,
7. The scientific fact that HABs are more likely to occur in the presence of high nutrients and high temperatures.

Each of these factors combine to give Petitioners' members' a higher risk of experiencing harmful algae blooms (HABs) than the public at large. Evidence of each of these factors is relevant to Petitioners' claims of standing. There is no basis therefore for striking any portion of

Petitioners' affidavits presenting evidence of any of these factors. The affidavit of Dr. Boyer is submitted to substantiate the scientific fact that HABs are more likely to occur in the presence of high nutrients and high temperatures. This fact is a key component in establishing Petitioners' claims of standing and Petitioners are entitled to have Dr. Boyer's affidavit in evidence to support these claims.

Petitioners are also entitled to present evidence to show that certain of their members experienced high noise levels from operations at the plant as part of their standing claims. The paragraphs and exhibits to the affidavits presenting the noise evidence should not be stricken.

B. Petitioners' Affidavits Provide Evidence in Response to Respondents' Answers

DEC's motion seeks to strike Paragraphs 14-30 of the affidavit of Peter Gamba and Paragraphs 4, 6-27 of the affidavit of Mary Anne Kowalski. These portions of their affidavits contain exhibits that respond to the verified answers given by Respondents. It is perfectly appropriate for Petitioners' to submit evidence to rebut statements in Respondents' answers and these portions of Petitioners' affidavits should not be stricken.

Paragraph 19 of the Gamba Affidavit references Exhibits A and B to the affidavit. These exhibits, the AES Greenidge Generating Station Impingement and Entrainment Characterization Study, prepared by Henningson, Durham & Richardson, April 29, 2010 attached as Exhibit A and Appendix III to the study attached as Exhibit B are provided in response to the answers given by Respondents to the description of the study given in Paragraphs 28 and 29 of the Petition. The answers provided by Respondents to these paragraphs of the Petition deny certain aspects of the characterization of the study in the Petition and refer the Court to the study as the best evidence of its terms. Respondent DEC states:

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.* [Emphasis added].

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. [Emphasis added].

The answers provided by the Greenidge Respondents are:

28. With respect to the allegations in ¶ 28, *admit that AES Greenidge LLC filed an Impingement and Entrainment Characterization Study, and refer to that study for its full text and meaning.* To the extent a further response is required, deny petitioners' characterization of the study. [Emphasis added].

29. With respect to the allegations in 129, *admit that AES Greenidge LLC filed an Impingement and Entrainment Study and refer to that study for its full text and meaning.* To the extent a further response is required, deny petitioners' characterization of the study. [Emphasis added].

In these circumstances, and because the study is not included in the administrative record, it is appropriate for Petitioners' to attach the study and Appendix III to the study as Exhibits A and B to the Gamba Affidavit. These exhibits and the accompanying paragraphs of the Gamba affidavit describing these exhibits should not be stricken.

Similarly, Paragraph 11 of the Kowalski Affidavit references Exhibit A, a copy of the layup plan prepared for the Lockwood landfill by Daigler Engineering. This layup plan is described in Paragraph 33 of the Petition. The answer provided by the Greenidge Respondents to Paragraph 33 of the Petition is:

33. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of ¶ 33. With respect to the allegations in the second sentence of ¶ 33, admit that a lay-up plan for LADS dated May 2011 was submitted to DEC, but deny knowledge or information sufficient to form a belief regarding the date that the lay-up plan was submitted or who submitted it. Affirmatively state that the lay-up plan states that it was prepared on behalf of AES Greenidge, LLC.

Given the vagueness of this answer, it is appropriate for Petitioners' to attach a copy of the layup plan as Exhibit A to the Kowalski Affidavit. This exhibit and the accompanying paragraphs of the Kowalski affidavit describing this exhibit should not be stricken.

Paragraph 15 of the Kowalski Affidavit references Exhibit B, a copy of the consent order entered into between DEC and Respondent Lockwood Hills LLC and described in Paragraph 52 of the Petition. The answer to this paragraph of the Petition provided by Respondent DEC is:

52. With respect to the allegations in ¶ 52, admit that DEC entered into Consent Order No R8-20140710 with Lockwood Hills LLC on February 18, 2015. *Refer to that Consent Order for its full text and meaning. To the extent a further response is required, deny petitioners' characterization of the Consent Order.* [Emphasis added].

The answer to this paragraph of the Petition provided by the Greenidge Respondents is:

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. [Emphasis added].

Because Respondents' answers refer the Court to the consent order as the best evidence of its terms, and because the order is not included in the administrative record, it is appropriate for Petitioners' to attach a copy of the order as Exhibit B to the Kowalski Affidavit. This exhibit and the accompanying paragraphs of the Kowalski affidavit describing this exhibit should not be stricken.

CONCLUSION

For each of the reasons discussed above, Petitioners respectfully request that the motion to strike be denied.

DATED: Hammondsport, New York
 May 18, 2018

Respectfully submitted,



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