CA 18-00648

To be argued by:
CLAIBORNE E. WALTHALL
Time requested: 10 minutes

Yates County Clerk's Index No. 2016-0165

Supreme Court of the State of New York
Appellate Division – Fourth Department

In the Matter of

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

Petitioners-Appellants,

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

-against-

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

Respondents-Respondents.

BRIEF FOR RESPONDENTS NYS DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND COMMISSIONER BASIL SEGGOS

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Dated: July 5, 2018

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PRELIMINARY STATEMENT

Petitioners, a coalition of environmental groups and their individual officers, commenced this article 78 proceeding to challenge a construction project undertaken by Respondents Greenidge Generation, LLC, Greenidge Pipeline, LLC, Greenidge Pipeline Properties Corporation and Lockwood Hills, LLC ("Greenidge") for the purpose of repowering an electric generating facility. Among other claims, Petitioners contend that Respondents Department of Environmental Conservation and Commissioner Basil Seggos (together "DEC" or "State Respondents") acted irrationally when DEC determined that the project would have no adverse environmental impacts and accordingly issued Greenidge permits to complete the construction. DEC and Greenidge each moved to dismiss the petition on various grounds, including mootness. In a judgment entered in Yates County on June 20, 2017, Supreme Court (Kocher, A.S.C.J.) dismissed the petition on the merits, holding that DEC's determination was not arbitrary or capricious (Record ["R"] 7-9).

The Court should dismiss the appeal as moot. All of the construction activities that Petitioners challenge were completed over a year ago and the facility has been fully operating since May 2017. Additionally, Petitioners did not timely act to keep the matter from becoming moot: They sought injunctive relief in Supreme Court only belatedly, they did not promptly perfect this appeal, and they failed to move for injunctive relief while their appeal was pending in this Court. But if the Court declines to dismiss the appeal as moot and reinstates the petition, it should remit the matter to Supreme Court and afford DEC the opportunity to file and serve an answer and administrative return establishing that DEC's actions were lawful and rational.

QUESTIONS PRESENTED

1. Should the appeal be dismissed as moot, when the project Petitioners challenge has long been completed and Petitioners have failed to take action to preserve the status quo?

2. Alternatively, should DEC be entitled to answer the petition and submit a certified transcript of the administrative record, as required by C.P.L.R. § 7804?

STATEMENT OF THE CASE

A. History of the Greenidge Station

The Greenidge Generating Station (the "plant" or "Greenidge Station") is an electric generating facility located in the Town of Torrey, New York in Yates County (R 215). The plant was initially constructed in the 1930s, and the only remaining generating unit, the 107-megawatt "Unit 4," was installed in 1953 (*id.*). Historically, Unit 4 operated using coal as a fuel source (*id.*). In 2011, the plant went into "temporary protective layup status," meaning that plant did not operate and generate electricity, but was prepared so that the equipment would not be damaged during the non-operational period, and maintained so that it could quickly begin operating and producing electricity again (*id.*). Greenidge purchased the plant in 2014 and sought to resume operations using 100 percent natural gas, with up to 19 percent bio-mass co-firing (and to no longer burn coal) (R 215-216). Resuming operations required in-plant construction to permit the change in fuel and construction of a 4.6-mile natural gas pipeline to fuel the plant, along with auxiliary services, including a regulation station, metering station, and interconnection (the "Greenidge Project") (R 216).

B. Statutory and Regulatory Background

1. DEC Permits Required for the Project

DEC regulates air emissions from certain electric generating facilities, including Greenidge Station, under Titles IV and V of the Clean Air Act, issuing permits under 40 C.F.R. § 70.4 and 6 N.Y.C.R.R. Part 201-6, among others (R 132). In 2014, Greenidge applied to DEC for Title IV and Title V permits to resume generating electricity at the plant (*id.*). Greenidge also applied to DEC for renewal of an existing State Pollutant Discharge Elimination System ("SPDES") permit and for a permit to withdraw cooling water from Seneca Lake (*id.*).

In August 2015, DEC published notice of Greenidge's permit applications in the Environmental Notice Bulletin (R 132). The notice advised that Greenidge had applied for permits under Titles IV and V of the Clean Air Act, as well the SPDES and water withdrawal permits. Also in August 2015, DEC issued the following draft permits for public notice and comment: Title IV and V air permits, SPDES renewal permit, and an initial water withdrawal permit (R 133).

2. State Environmental Quality Review Act

The State Environmental Quality Review Act (Environmental Conservation Law ["ECL"] Art. 8 and 6 N.Y.C.R.R. § 617) ("SEQRA") requires the public body designated as "lead agency" to take a "hard look" at relevant areas of environmental concern and make a "reasoned elaboration of the basis for its determination." *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986) (internal quotation marks omitted). For the Greenidge Project, DEC declared itself SEQRA lead agency, determined that the applications constituted a Type I action for SEQRA

purposes, announced that a coordinated environmental review had occurred, and concluded that the project would have no significant adverse impacts on the environment.

Subsequently, the U.S. Environmental Protection Agency ("EPA") sent DEC a letter raising concerns about the draft Clean Air Act permits (R 224). DEC revised the permits to address these issues (*id.*). After revising the draft air permits, in June 2016, DEC issued an amended SEQRA negative declaration, which identified six areas of environmental concern: surface water, air, plants and animals, historic and archeological resources, energy, and solid waste management (R 103-106). For each area of concern, the amended negative declaration discussed why no potentially significant adverse environmental impacts would result from the proposed action (*id.*).

In September 2016, DEC issued Greenidge two air permits for the project (R 145-148). After commencement of this proceeding, DEC in September 2017 issued the SPDES renewal permit and water withdrawal permits. Petitioners have challenged the SPDES and water withdrawal permits in a separate article 78 proceeding, currently pending in Supreme Court, Yates County. *See* Verified Petition, *Matter of Sierra Club v. N.Y. State Dep't of Envtl. Conservation*, Index No. 2017-0232 (Sup Ct, Yates County Nov. 8, 2017).

3. New York State Public Service Commission Proceedings

In September 2015, Greenidge applied to the New York State Public Service Commission ("PSC") for a certificate of public convenience and necessity to resume operation of the existing Greenidge Station (R 323). In October 2015, Greenidge

applied for a certificate of environmental compatibility and public need from PSC for construction and operation of the pipeline. (R 149, 225). In September 2016, PSC issued an order granting a certificate of convenience and necessity for the pipeline (R 149-210), as well as a separate order providing approval to resume operation of the existing Greenidge Station and exercise a road-use agreement (R 323-356). In October 2016, PSC issued a notice authorizing Greenidge to begin construction for the pipeline (R 211).

Actions requiring a certificate of environmental compatibility and public need under articles VII, VIII or X of the Public Service Law ("PSL") are exempt from SEQRA review, ECL § 8-0111(5)(b); 6 N.Y.C.R.R. § 617.5(c)(35), but are instead reviewed in the PSC proceeding. Furthermore, any challenge to the PSC order issued for the pipeline under PSL § 128 was required to have been brought in the Appellate Division within 30 days, and Petitioners would have lacked standing in any event to bring such challenge as they were not parties to the PSC Article VII proceeding. *See* PSL § 129 (1); *Matter of Incorporated Vil. of E. Williston v. Public Serv. Comm'n of State of N.Y.*, 153 A.D.2d 943, 945-946 (2d Dep't 1989). Accordingly, allegations related to the pipeline are not part of this proceeding, as conceded by Petitioners (R 378-379).

C. Construction of the Greenidge Project Proceeds

With its receipt of the DEC air permits for the plant and PSC authorization to proceed with pipeline construction, Greenidge began in-plant and pipeline construction in October 2016, seeking to complete pipeline construction expeditiously and begin recouping a return on its substantial investments in the project. (R 216-

217). The SPDES and water withdrawal permits, which were granted in September 2017, were not necessary before resuming plant operations because Greenidge timely applied for renewal of its existing SPDES permit and was entitled to continue operations thereunder while its applications were pending. On October 18, 2016, Greenidge held a publicly announced groundbreaking ceremony. (R 76, 127-129, 217). Due to the difficulty of excavation and pipeline construction in winter weather conditions, Greenidge planned to commence construction immediately (R 153) and complete construction work on the pipeline by January 2017. (R 216-217).

D. This Proceeding

On October 28, 2016, Petitioners commenced this proceeding (R 48). The petition sought to annul the air permits and included an ambiguous request for injunctive relief, which appeared to seek an injunction upon Supreme Court's determination of the merits of the petition (R 48). Petitioners did not seek any provisional relief. Before responses were due by agreement, Petitioners filed and served an amended petition, which added the Sierra Club as an additional petitioner (R 52-53, 54-80). In December 2016, the parties stipulated to a January 24, 2017 return date, with service of Respondents' papers by January 6, 2017 (R 115). That same day, Petitioners filed a notice of amended petition (R 52-53, 115).

E. Petitioners' Post-Petition Application for Injunctive Relief

On December 23, 2016, nearly two months after Petitioners commenced this proceeding, they moved for a preliminary injunction (R 82-110, 115). This motion did not seek any relief from the State Respondents, but sought to prohibit Greenidge from

taking steps to repower the plant until further environmental review was completed. Accordingly, the State Respondents did not address the merits of the motion.

F. Substantial Completion of the Greenidge Project

As mentioned, Greenidge commenced in-plant construction in mid-October 2016. By early-November 2016, when Greenidge was served with the petition in this proceeding, Greenidge had purchased all the necessary materials and completed 30 percent of the in-plant construction work (R 121, 130). The cost of the materials purchased and in-plant construction work completed between the issuance of the DEC air permits on September 8 and service of the petition on November 3 was approximately $838,153, more than half of the entire anticipated cost of the in-plant construction (R 123, 130), and not including additional costs for materials purchased prior to September 8, 2016, but after DEC's issuance of the SEQRA negative declaration. (R 123, 130).

On October 17, 2016, Greenidge also commenced construction on the pipeline pursuant to the PSC certificate order and notice to proceed (R 123). By early November 2016, Greenidge had purchased all necessary materials for the pipeline and completed significant work on the pipeline and auxiliary facilities, including : (1) completing 50 percent of site clearing activities; (2) constructing 20 percent of the natural gas pipeline, including trenching, welding, piping laid in the trench and soil backfilled ($705,561); (3) completing 15 percent of the regulation station work ($79,304); (4) completing 30 percent of the meter station work ($846,222); and (5) completing 50 percent of the interconnection work ($551,646) (R 123-124, 130, 217). Total expenditures on the project between September 8, 2016 and November 3, 2016

were $3,020,866, representing approximately 25 percent of the project construction (R 124, 130, 218).

By December 23, 2016, when Petitioners finally moved for a preliminary injunction, approximately $7,688,467—or 60 percent of the project costs—had been incurred and 91 percent of the in-plant construction work authorized under the air permit was complete (R 19, 124, 130). As of January 6, 2017, when Respondents moved to dismiss the petition, and more than two weeks prior to the return date of Petitioners' motion for a preliminary injunction, Greenidge had incurred $11,418,624, or 94 percent, of total project costs (R 124, 130). This included the purchase of all necessary materials, 98 percent of the in-plant construction work completed at a cost of $1,724,053 and over 90 percent of pipeline and related construction completed at a cost of $9,694,570 (R 219, 130). Work necessary to repower the Greenidge Station, including pipeline construction, was completed in March 2017. Unit 4 resumed operations during the week ending March 31, 2017 (R 393).

G. Respondents' Motions to Dismiss

The State Respondents and Greenidge separately moved to dismiss the petition in January 2017. The State Respondents sought dismissal on the grounds of lack of standing and mootness, though they later withdrew their standing objection after Petitioners submitted additional affidavits (R 112-116, 238-284, 313-320, 362). Greenidge moved to dismiss (R 117-118, 213-237), and opposed Petitioners' motion for a preliminary injunction (R 119-212).

While these motions were pending, by letter dated March 31, 2017, Greenidge informed Supreme Court that "construction of the Greenidge pipeline and all in-plant

construction to repower the Greenidge Station has been completed and, following extensive and costly testing, the Greenidge Station resumed operations this week" (R 393-394). In response, Petitioners conceded this fact, but argued that the matter was not moot because their motion for temporary injunctive relief also "encompass[ed] the operations of the plant once the plant is repowered" (R 395-396).

H. Supreme Court Dismisses the Petition

On April 21, 2017, Supreme Court, Yates County (Kocher, A.S.C.J.) issued a decision denying Petitioners a preliminary injunction and dismissing the petition on the merits (R 14-20). The Court discussed the dates of the negative declaration and approvals, and recited the substantial progress of project completion prior to the filing and service of the petition and prior to Petitioners' motion for a preliminary injunction (R 19). The court refused to consider several late-filed affidavits from Petitioners for any purposes other than standing, and found that Petitioners had failed to establish entitlement to a preliminary injunction (R 19). Finding that the papers submitted did not demonstrate that DEC had acted in an arbitrary and capricious manner, Supreme Court denied Petitioners' requests to annul the air permits or DEC's SEQRA negative declaration. Supreme Court dismissed the petition (R 20), in an order and judgment entered June 20, 2017 (R 7-9).

Petitioners took this appeal in mid-July 2017 (R 3), and then waited the full nine months before perfecting their appeal in April 2018. Though more than a year has elapsed since their motion for a preliminary injunction was denied, Petitioners have not sought a stay or injunctive relief from this Court.

I. Greenidge's Motion to Dismiss the Appeal

In June 2018, Greenidge moved to dismiss the appeal as moot, demonstrating that it has completed all work necessary to repower the Greenidge Station, including construction of the natural gas pipeline (*see* Affidavit of Dale Irwin in Support of the Greenidge Respondents' Motion to Dismiss, sworn to June 21, 2018 [Irwin Aff,] at ¶¶ 42-51 & Ex. B). Indeed, this work has been entirely complete as of March 1, 2017, and following extensive shakedown and testing of the boiler, generator and other equipment during March and April 2017, the Greenidge Station has continued to operate and provide electricity to the electric grid on a regular basis since May 2017 (Irwin Aff. ¶¶ 43-45). The State Respondents support Greenidge's motion to dismiss the appeal as moot. (*See* Affirmation of Claiborne E. Walthall in Support of Greenidge Respondents' Motion to Dismiss Appeal, dated June 27, 2018, at ¶¶ 22-35).

ARGUMENT

POINT I

PETITIONERS' APPEAL SHOULD BE DISMISSED AS MOOT BECAUSE CONSTRUCTION OF THE CHALLENGED PROJECT IS COMPLETE

Petitioners' appeal should be dismissed as moot. As the record and Greenidge's pending motion to dismiss the appeal establish, the challenged construction project is now complete, and the newly renovated plant has been fully operating since May 2017, more than a year ago. The mootness doctrine applies when, as here, "a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy." *Matter of Dreikhausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 N.Y.2d 165, 172 (2002).

Because mootness deprives the court of subject matter jurisdiction, it is an issue that can be raised at any time and the court may consider materials de hors the record to determine whether an appeal is moot. *Gabriel v. Prime*, 30 A.D.3d 955, 956 (3d Dep't 2006); *Matter of Galvin & Morgan v. McCall*, 251 A.D.2d 869, 870 n.1 (3d Dep't 1998). Consequently, it matters not that the completion of the challenged project is not reflected in the record. *Weeks Woodlands Assn., Inc. v. Dormitory Auth. of State of New York*, 95 A.D.3d 747, 753 (1st Dept), *aff'd* 20 N.Y.3d 919 (2012) (dismissing appeals as moot where challenged construction was complete and holding that the fact "[t]hat the current stage of the construction is not reflected in the record is irrelevant"). Consistent with counsel's "obligation to inform the court of changed circumstances which render a matter moot," *Matter of Cerniglia v. Ambach*, 145 A.D.2d 893, 894 (3d Dep't 1988), *lv. denied*, 74 N.Y.2d 603 (1989), Greenidge apprised Supreme Court in a March 31, 2017 letter (R 393-394) that the pipeline and all in-plant construction to repower the plant had been completed and that Greenidge Station had resumed operations. And the information furnished in Greenidge's pending motion to dismiss the appeal removes any doubt that this appeal is moot.

Courts have considered two factors when determining whether a proceeding challenging construction under a permit is moot. Courts examine the progress of work towards completion. *See Citineighbors Coal. of Historic Carnegie Hill v. N.Y. City Landmarks Pres. Comm'n*, 2 N.Y.3d 727, 729 (2004) (substantial completion rendered challenge moot). Courts also examine whether the party challenging a project has appropriately sought to preserve the status quo, such as by timely moving for

preliminary injunctive relief. *Dreikhausen*, 98 N.Y.2d at 173. Both factors favor a finding of mootness here.

First, the challenged project is now entirely complete and has been for some time. In fact, the project was substantially complete even before Petitioners commenced this proceeding in late October 2016 (R 121-124, 130). There was no "race to completion," but rather a good faith, duly authorized construction effort to construct the pipeline and complete in-plant upgrades before winter set in and to start recouping the significant investments in repowering the Greenidge Station. (R 122-123).

This case is thus similar to *Citineighbors*, 2 N.Y.3d at 729, where neighbors challenged the height of a building in a historic district, but failed to enjoin obviously progressing construction. In finding the challenge moot, the Court observed that "[a]fter obtaining the approvals necessary to commence construction—a time-consuming endeavor—the property owner and developer had every business incentive to complete the building as quickly as possible so as to profit from their investment and avoid paying interest on construction loans." *Id.* Similarly here, DEC placed no conditions on its permit approvals that would have delayed an immediate start to construction work. Accordingly, Greenidge publicly represented that it intended to commence construction as soon as the PSC granted it a certificate and it obtained the required DEC permits (R 153), to avoid winter construction and repower the plant expeditiously (R 124-125). Upon receipt of the DEC approvals on September

8, 2016, its PSC certificate orders on September 16, 2016, and the PSC notice to proceed on October 17, 2016, Greenidge promptly commenced work.

In its motion to dismiss the petition, Greenidge demonstrated that it had completed significant work on the project by the time the petition was filed, and that the project was substantially complete by the time Petitioners moved for a preliminary injunction. (R 124-125, 216-220). Requiring them to undo or delay operations of these completed facilities would have caused Greenidge severe and undue hardship, including costly demobilization of on-site construction crews and materials (R 124), delay in resumption of operations at the Greenidge Station, at a loss of $15,000 to $50,000 per day (R 125), and potential removal of four miles of installed pipeline and installed in-plant upgrades (R 125). Therefore, the project's completion weighs heavily in favor of dismissing this appeal as moot. *See Citineighbors*, 2 N.Y.3d at 729-730.

Second, Petitioners failed to take adequate steps to preserve the status quo. They have employed a strategy of delay at each step, placing all risks on Respondents. Petitioners waited until the end of the statute of limitations period before commencing this proceeding, nearly four months after DEC issued the amended SEQRA negative declaration and two months after DEC approved the air permits. Although Petitioners eventually moved for a preliminary injunction, they waited more than two months after construction began to make the motion, by which point the project was substantially complete. They then failed to move promptly after Supreme Court denied their request for a preliminary injunction. Supreme Court

denied the motion in its April 2017 decision, reduced to an order entered in June 2017. While Petitioners appealed to this Court in July 2017, to date they have not sought injunctive relief in this Court, and they waited the full nine months before perfecting the appeal. Meanwhile, the pipeline and in-plant work to repower were completed and the Greenidge Station resumed operations in the week ending March 31, 2017 (R 393; Irwin Aff. ¶¶ 42-45).

Petitioners' lackadaisical approach to this litigation, including their failure to preserve the status quo, weighs heavily in favor of a finding of mootness. *See Matter of Save the Pine Bush v. New York State Dep't of Envtl. Conservation*, 289 A.D.2d 636, 638-639 (3d Dep't 2001), *lv. denied* 97 N.Y.2d 611 (2002) (petition moot where petitioners delayed filing their challenge until the last day of the statute of limitations); *Matter of Graf v. Town of Livonia*, 120 A.D.3d 944, 944 (4th Dep't 2014) (proceeding moot where petitioner failed to preserve status quo and project was complete); *Weeks*, 95 A.D.3d at 747 (same).

To the extent Petitioners may argue they are challenging the operation of the Greenidge Station, not simply its construction, any such claim is not properly before the court. The petition did not seek to enjoin the ongoing operation of the plant. Rather, the petition sought to prohibit Greenidge from "taking steps to repower Greenidge Generating Station or construct a gas pipeline to the generating station" (R 56 [amended petition ¶ 3]). As the State Respondents explained at oral argument, the petition and motion for a preliminary injunction challenge "repowering" the

Greenidge Station, which indisputably involves construction within the plant and the 4.6-mile natural gas pipeline to supply the plant. (R 390).

This Court has rejected a similar attempt by a petitioner to revive a moot proceeding by arguing that it was challenging operations under a permit, not the construction of the building to house those operations. *See Matter of Graf v. Town of Livonia*, 120 A.D.3d at 945 (rejecting contention that "the appeal is not moot because the controversy does not concern the propriety of the building, but rather the use of FLTC's land to operate a sawmill."); *see also Matter of Many v. Vill. of Sharon Springs Bd. of Trustees*, 234 A.D.2d 643, 644 (3d Dep't 1996), *lv. denied* 89 N.Y.2d 811 (1997) (concluding that the proceeding was moot, the court rejected petitioner's assertion that "it is the operation of the facility, not its construction per se, that poses a risk to the environment"). Similarly here, Petitioners' clear purpose was to prevent DEC from issuing permits to keep the Greenidge Station from repowering and resuming operations, including the completed in-plant and pipeline construction. It is now too late for Petitioners to change their theory of the case.

Finally, no exception to the mootness doctrine applies here. Courts have recognized a narrow exception to the mootness doctrine where "recurring novel or substantial issues are sufficiently evanescent to evade review otherwise." *Citineighbors*, 2 N.Y.3d at 729; *see also Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 717 (1980). But no such exception applies in proceedings such as here, where "there is a realistic likelihood that the issues presented here will recur with an adequately developed record and with a timely opportunity for review." *Citineighbors*,

2 N.Y.3d at 730, quoting *Matter of Gold-Greenberger v. Human Res. Admin. of City of N.Y.*, 77 N.Y.2d 973, 974-975 (1991). Any environmental issues Petitioners raise, even if recurring, will not likely evade review because the challenged permits are subject to periodic renewal. *See Matter of Riverkeeper, Inc. v. Johnson*, 52 A.D.3d 1072, 1074 (3d Dep't 2008), *lv. denied* 11 N.Y.3d 718 (2009) (finding no exception to mootness doctrine for environmental issues at power plant because challenged permit subject to renewal every five years). Therefore, the appeal should be dismissed.

POINT II

IF THE COURT REINSTATES THE PETITION, RESPONDENTS ARE ENTITLED TO ANSWER

If this Court determines the proceeding is not moot and reinstates the petition, rather than addressing the merits, it should remit the proceeding to Supreme Court and allow Respondents to submit the administrative record and answer the petition. *See* C.P.L.R. § 7804(f) (if a Respondent's motion to dismiss is denied, "the court shall permit the Respondent to answer, upon such terms as may be just"); *Matter of Wood v. Glass*, 226 A.D.2d 387, 388 (2d Dep't 1996) (error for Supreme Court to grant an article 78 petition on the merits after denying Respondents' motion to dismiss); *Hawk Sales Co. v. Dieteman*, 42 A.D.2d 817, 818 (4th Dep't 1973) (proper procedure is to consider only the motion to dismiss and, "if it is denied, to delay any other determinations until after an answer has been served"); *Matter of Nassau BOCES Cent. Council of Teachers v Bd. of Coop. Educ. Servs. of Nassau County*, 63 N.Y.2d 100, 101-102 (1984) (error to decide petition on the merits prior to service of Respondents' answer).

There is no reason to depart from this established practice here. Petitioners seek to annul DEC permits on the basis of several fact-specific theories of alleged SEQRA noncompliance—particularly the failure to take a "hard look" at potentially significant environmental impacts—which challenge the substance of numerous factual conclusions DEC reached in its SEQRA review. But the State Respondents have not responded to the merits of those claims on the basis of a full administrative record. If required to address the merits of Petitioners' claims, the State Respondents are prepared to show that their SEQRA review and issuance of the challenged air permits was not unlawful, arbitrary and capricious, or an abuse of discretion, but rather complied fully with all procedural and substantive requirements.

CONCLUSION

The Court should dismiss the appeal as moot. In the alternative, if the Court reinstates the petition, it should remit the matter to Supreme Court with directions to permit Respondents to answer the petition.

Dated: Albany, New York
July 5, 2018

Respectfully submitted,

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