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,

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, GREENIDGE PIPELINE, LLC, GREENIDGE PIPELINE PROPERTIES CORPORATION and LOCKWOOD HILLS, LLC,

Respondents.

NOTICE OF MOTION TO DISMISS

Index No. 2016-0165

PLEASE TAKE NOTICE that on January 24, 2017, Respondents New York State Department of Environmental Conservation (DEC) and its Commissioner, Basil Seggos will move this court at 415 Liberty Street, Penn Yan, NY 14527, on the affirmation of Nicholas C. Buttino and an accompanying memorandum of law, for an Order:

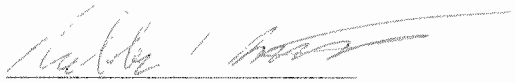
(1) Dismissing this petition under CPLR 3211 for lack of standing and mootness;

(2) Any further relief that the court deems just.

In the event the court denies the State's motion to dismiss in whole or in part, the State requests thirty days after service of notice of entry of the order denying this motion to answer the petition.

Dated: January 5, 2016
Albany, New York

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for Respondents

By: 
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Respondents.

MEMORANDUM OF LAW IN SUPPORT OF STATE RESPONDENTS' MOTION TO DISMISS

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Dated: January 5, 2017

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PRELIMINARY STATEMENT

Petitioners are three environmental organizations seeking to invalidate air emissions permits issued by the Department of Environmental Conservation (DEC) to respondent Greenidge Generation LLC (Greenidge). Greenidge seeks to reactivate an existing electric generating facility in Torrey, New York, using natural gas rather than the coal that once powered the facility. Petitioners challenge DEC's environmental review under the State Environmental Quality Review Act (SEQRA). Specifically, they claim that DEC failed to take the "hard look" required by that law, and they ask the court to invalidate DEC's two air permits on that ground.

The State moves to dismiss the petition for lack of standing and mootness. Petitioners neither plead nor prove standing by one or more individual members, and thus lack organizational standing. Petitioners also lack standing for an alleged "informational injury," which is not recognized in New York and, in any event, they have not satisfied the federal standard. Moreover, even if petitioners had standing, their challenge is moot because Greenidge spent millions of dollars building a natural gas pipeline to reach its permitted facility, yet petitioners failed to seek to enjoin the company's activity until November 3, 2016. Case law holds that failure to seek an injunction and allowing a permitted project to conduct significant construction moots a proceeding. The court should dismiss the amended petition in its entirety because petitioners lack standing and failed to seek timely injunctive relief.

STATEMENT OF FACTS

Procedural History

On October 28, 2016, by order to show cause, petitioners set a return date for the petition of November 17, 2016. (Buttino Affirmation ¶ 5.) Before responses were due by agreement, petitioners filed and served an amended petition, which added the Sierra Club as an additional

petitioner. (*Id.* ¶ 7.) On December 13, 2016, the parties stipulated to a January 24, 2017 return date, with service of respondents' papers by January 6, 2017. (*Id.* ¶ 8.) That same day, petitioners filed a notice of amended petition. (*Id.* ¶ 9.) Ten days later, on December 23, 2016, petitioners served their notice of motion of a preliminary injunction, with its accompanying attorney affirmation and memorandum of law. [1] (*Id.* ¶ 11.)

Statement of Facts

The petition seeks to invalidate air permits issued by DEC to Greenidge pursuant to 40 CFR § 70.4 and 6 NYCRR Pt. 201-6.[2] (Amended Petition ¶ 1.) Greenidge requires these Clean Air Act Title IV and Title V permits to resume generating electricity at the Greenidge Generating Station (the plant), which it seeks to convert from coal to natural gas. (*Id.* ¶¶ 12-13.) To fuel the repowered plant, Greenidge requires a 4.6-mile gas pipeline. (*Id.* ¶ 51.)

On August 12, 2015, DEC published notice of Greenidge's permit application in the Environmental Notice Bulletin. (*Id.* ¶ 12.) The notice advised that Greenidge had applied for permits pursuant to Titles IV and V of the Clean Air Act, as well as a State Pollutant Discharge Elimination System (SPDES) permit and a permit allowing the plant to withdraw cooling water from Seneca Lake. (*Id.* ¶¶ 12, 17.) DEC declared itself lead agency, determined that the applications constituted a Type I project for SEQRA purposes, announced that a coordinated environmental review had occurred, and concluded that the project would have no significant effects on the environment. (*Id.* ¶ 16.) Accordingly, DEC issued a negative declaration. (*Id.*)

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[1] The notice of motion for the preliminary injunction does not purport to apply to DEC. Accordingly, the State does not address the merits of the motion. To the extent that the preliminary injunction seeks to enjoin DEC from issuing a permit, petitioners' challenge is unripe and they cannot stop DEC from performing a statutorily mandated duty.

[2] For the purposes of this motion to dismiss only, the State accepts the allegations in the amended petition as true.

Subsequently, the U.S. Environmental Protection Agency (EPA) sent DEC a letter raising concerns about the draft Clean Air Act permits. (*Id.* ¶ 29.) DEC revised the permits to address EPA's issues. On September 8, 2016, after having published notice of the revised permits in the Environmental Notice Bulletin and an amended negative declaration, DEC issued Greenidge two air permits for the project. (*Id.* ¶¶ 1, 31.)

The petition asserts a single cause of action: DEC violated SEQRA when it issued the amended negative declaration. (*Id.* ¶ 88.) Petitioners argue that the Greenidge project will have a significant environmental impact, and claim that DEC failed to take the hard look required by SEQRA. (*Id.* ¶¶ 47-78, 93.)

Description of Petitioners

Petitioners are three nonprofit organizations. The Sierra Club is based in California. (Amended Petition ¶ 4.) It has members in New York, including members who live near the Greenidge Station and Seneca Lake. (*Id.*) The Sierra Club states that it will be injured by the project because of the pipeline construction, the waste generation, and the role that gas-powered plants play in climate change. (*Id.*) It further alleges that it suffers an "informational injury" because DEC should have required a full environmental impact statement for the project. (*Id.*) The Sierra Club names none of its members.

The Committee to Preserve the Finger Lakes (Committee) is a voluntary association formed to preserve the beauty of the Finger Lakes. (*Id.* ¶ 5.) Its members live in the Seneca Lake watershed in the Village of Dresden and the Towns of Torrey and Milo. The petition identifies one member of the Committee, President Peter Gamba. (*Id.*) Similarly, the Coalition to Protect New York (Coalition) is an unincorporated association comprised of local environmental groups, which seeks to protect natural resources and opposes natural gas drilling and infrastructure. (*Id.* ¶ 6.) The amended petition identifies one Coalition member, Treasurer Kathryn Bartholomew.

(*Id.*) Like Sierra Club, the Committee and the Coalition each claim to suffer an informational injury based on the lack of a full environmental impact statement for the project. (*Id.*)

ARGUMENT

POINT I

PETITIONERS LACK STANDING

Standard of Review for a Motion to Dismiss

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction[.]" (*ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 227 [2011] [internal quotation marks omitted].) "Courts must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory[.]" (*Id.* [internal quotation marks omitted].)

Petitioners Have Failed to Identify an Individual Member of the Sierra Club, the Coalition, or the Committee Who Has Standing

To have standing, "an organizational plaintiff must demonstrate a harmful effect on at least one of its members; it must show that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests; and it must establish that the case would not require the participation of individual members[.]" (*Rudder v Pataki*, 93 NY2d 273, 278 [1999] [internal quotation marks and citations omitted].)

"[P]arties seeking to establish standing must establish that the injury of which they complain falls within the zone of interests, or concerns, sought to be promoted or protected, and that they would suffer direct harm, injury that is in some way different from that of the public at large[.]" (*Matter of Kindred v Monroe County*, 119 AD3d 1347, 1348 [4th Dept 2014] [internal quotation marks and citations omitted].) For an individual to have standing to sue on behalf of

an organization for an environmental harm, the petition must show that "[o]ne of the petitioners owned property near the project site and [must] allege[] that his property would suffer noneconomic harm from the environmental impacts of the project." (*LaDelfa v Vil. of Mt. Morris*, 213 AD2d 1024, 1024 [4th Dept 1995].) No petitioner has established that it has organizational standing.

Showing standing depends on the standing of the named members. (*Socy. of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 776 [1991] [noting "Plaintiffs' standing therefore depends wholly on [a named member]—the only named party with a presence in" the area].) The Amended Petition identifies no members of the Sierra Club and only one member each of the Coalition and the Committee. (Amended Petition ¶¶ 4-6). The Sierra Club's failure to identify a single local member dooms any claim to standing.

Neither the Coalition nor the Committee have pleaded facts tending to show a member's standing. (*See, e.g., Matter of Clean Water Advocates of N.Y., Inc. v N.Y. State Dept. of Envtl. Conservation*, 103 AD3d 1006, 1007-08 [3d Dept 2013]) [dismissing petition for lack of standing where petitioner submitted an affidavit of only one member]; *Matter of Finger Lakes Zero Waste Coalition, Inc. v Martens*, 95 AD3d 1420, 1420-21 [3d Dept 2012] [dismissing petition where affidavit failed to carry burden of showing individual had standing and therefore organization lacked standing].) Absent allegations that specific individual members of each organization have standing, and proof to support those allegations, petitioners have failed to carry their burden to establish their entitlement to sue. (*See Kindred*, 119 AD3d at 1347.)

The amended petition also fails to show that the proceeding does not require the participation of petitioner's individual members. (*See Rudder*, 93 NY2d at 278.) Because the petition contains little description of the members or any putative harm, some of the members may suffer disproportionate harm and may be necessary parties. (*See Matter of Citizens*

Organized to Protect Envt. (ex rel. Brinkman) v Planning Bd. of Town of Irondequoit, 50 AD3d 1460, 1460-61 [4th Dept 2008] [holding that an organization lacked standing because "the petition [was] primarily concerned with the environmental effects on property owned by" two members].) Therefore, the court should also dismiss for lack of standing because petitioners fail to meet their burden on this ground. (*See Matter of Niagara Preserv. Coalition, Inc. v New York Power Auth.*, 121 AD3d 1507, 1510-11 [4th Dept 2014], *lv denied*, 124 AD3d 1419 [4th Dept 2015], and *lv denied*, 25 NY3d 902 [2015] [holding petitioners failed to meet their burden to show standing to challenge a SEQRA determination].)

Petitioners Also Lack Standing Because They Are Not Harmed by the Greenidge Project

Even if petitioners had individual members who had standing, the organizations have failed to plead or prove specific allegations of environmental harm attributable to the permits. "Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria[.]" (*Matter of Assn. for a Better Long Is., Inc. v NY State Dept. of Envtl. Conservation*, 23 NY3d 1, 6 [2014] [internal quotation marks omitted].) "Petitioner has the burden of establishing both an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated[.]" (*Id.* at 6.) The injury-in-fact requirement means a petitioner must show "that [petitioner] will actually be harmed by the challenged administrative action." (*NY State Ass'n of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004].) "The zone of interests test, tying the in-fact injury asserted to the governmental act challenged, circumscribes the universe of persons who may challenge administrative action." (*Socy. of Plastics,* 77 NY2d at 773.)

"To qualify for standing to raise a SEQRA challenge, a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature[.]" (*Mobil Oil Corp.*

v Syracuse Indus. Dev. Agency, 76 NY2d 428, 433 [1990].) "[I]n cases involving environmental harm, the standing of an organization could be established by proof that agency action will directly harm association members in their use and enjoyment of the affected natural resources[.]" (*Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 304 [2009] [internal quotation marks omitted].) For example, members using land "for recreation and to study and [to] enjoy the unique habitat" gives the organization standing. (*Id.* at 305.)

In this case, petitioners challenge DEC's negative declaration under SEQRA.[3] Petitioners make no attempt to show that the Greenidge project will harm them. Petitioners do not even attempt to plead any harm, other than a general desire to protect the environment (Amended Petition ¶ 4) and the water of the region (*id.* ¶ 5) and to oppose the unspecified harms of "gas drilling, gas drilling wastes and fossil fuel infrastructure." (*Id.* ¶ 6.) "[P]erfunctory allegations of harm[,]" however, are insufficient to satisfy the standing requirements. (*Save the Pine Bush*, 13 NY3d at 306; *see also Matter of Tuxedo Land Trust Inc. v Town of Tuxedo*, 34 Misc 3d 1235[A], *1 [Sup Ct, Orange County 2012] [denying standing for perfunctory allegations of harm]).

Nor do petitioners offer any allegations or affidavits that show that their members will be harmed in a way that differs from the general public. (*See* Amended Petition ¶¶ 4-6; Buttino Affirmation ¶¶ 6, 10.) They fail even to allege that their members use and enjoy Seneca Lake. (*See* Amended Petition ¶¶ 4-6; Buttino Affirmation ¶¶ 6, 10.) Without pleading a particular harm, petitioners fail to show that they have standing to challenge DEC's negative declaration.

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[3] All state agencies must implement SEQRA (ECL 8-0107) by preparing an environmental impact statement for all actions that "may have a significant effect on the environment." (ECL 8-0109[2].) If the agency determines that there is not a significant effect on the environment, it issues a negative declaration. (*See* 6 NYCRR § 617.3[b].)

(*See Save the Pine Bush*, 13 NY3d at 304; *Kindred*, 119 AD3d at 1348.) For these reasons, the court must dismiss the petition. (*See Socy. of Plastics*, 77 NY2d at 764, 781 [dismissing for lack of standing].)

New York Courts Do Not Recognize Informational Standing and Petitioners Fail to Show an Informational Injury

In their amended petition, petitioners now assert that they suffer an informational injury because DEC did not prepare an environmental impact statement. (Amended Petition ¶¶ 4-6). "The concept of informational standing originates from a footnote in a 1973 opinion from [the] Court of Appeals for the District of Columbia." (*Atl. States Legal Found. v Babbitt*, 140 F Supp 2d 185, 193 [NDNY 2001] [citing *Scientists' Inst. For Pub. Info. v Atomic Energy Comm'n,* 481 F.2d 1079, 1086–87, n 29 (DC Cir 1973)].) No New York State court has found standing on the basis of an informational injury. The court should not recognize this novel theory of standing based on petitioners' bare assertion, which fails even to describe the alleged injury.

Even if the court were to recognize the lack of information as an injury, petitioners have failed to meet the requirements for informational standing. Standing from an informational injury occurs "only in very specific circumstances where a statutory provision explicitly creates a right to information." (*Id.* at 192.) Here, petitioners have no right to an environmental impact statement.

The D.C. Circuit considered a case where petitioners alleged an informational injury based on not receiving an environmental impact statement under the National Environmental Policy Act (NEPA). (*See Found. on Economic Trends v Lyng*, 943 F2d 79, 85 [DC Cir 1991]; *see also Aldrich v Pattison*, 107 AD2d 258, 267 [2d Dept 1985] [noting that New York courts apply "[a]n analogous standard" under SEQRA as the federal courts under NEPA].) It criticized the idea of an organization obtaining standing by alleging an entitlement to an environmental

impact statement because "[i]t would potentially eliminate any standing requirement in NEPA cases[.]" (*See Lyng*, 943 F2d at 84.) "If such injury alone were sufficient, a prospective plaintiff could bestow standing upon itself in every case merely by requesting the agency to prepare the detailed statement NEPA contemplates[.]" (*Id.* at 85) The D.C. Circuit found it did not have to decide the informational injury standing question because the petitioners failed to meet the requirements of the Administrative Procedures Act. (*Id.*)

The Northern District of New York rejected a similar standing claim based on a purported informational injury. (*See Atl. States Legal Found.*, 140 F Supp 2d at 194.) It held "that the notion of informational harm, without more, does not confer standing in a NEPA case as it is inconsistent with the requirement of establishing concrete and particularized harm." (*Id.*) "To hold otherwise would allow organizational plaintiffs . . . to undermine the established principals of standing in NEPA cases by simply requesting that an agency prepare an" environmental impact statement. (*Id.*)

Petitioners neither show standing based on an informational injury nor plead a specific injury from the absence of an environmental impact statement. Their desire for the information does not set them apart from the public at large. Without more, they cannot be harmed by the desire for the information in an environmental impact statement. (*See Lyng*, 943 F2d at 84-85; *Atl. States Legal Found.*, 140 F Supp 2d at 194.) If the court recognized informational standing on these facts, it would eliminate the standing requirements for SEQRA cases. Therefore, the purported informational injury, even if recognized by the court, does not confer petitioners standing.

POINT II

PETITIONERS' CLAIMS ARE MOOT

Even if petitioners had standing to challenge DEC's negative declaration,[4] their claims are moot because they allowed Greenidge to invest significant time and resources to effectuate their air permits and eventual operations without seeking an injunction. It was unfair to allow Greenidge to proceed with the project at significant expense, only to have petitioners bring this late challenge in November 2016.

"[T]he doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy[.]" (*Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172 [2002].) "Where the change in circumstances involves a construction project, [the court] must consider how far the work has progressed towards completion." (*Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 2 NY3d 727, 729 [2004].) "Chief among [the considerations] . . . has been a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation[.]" (*Dreikausen*, 98 NY2d at 173.)

Petitioners have been aware of the proposed Greenidge project since at least August 12, 2015, when DEC published notice in the Environmental Notice Bulletin that Greenidge had applied for air permits. (Amended Petition ¶ 24.) The Committee commented on the proposed

[4] To the extent that petitioners seek to challenge the air permits for reasons other than a claimed SEQRA violation, they have failed to state a claim. The amended petition appears to raise questions regarding the validity of the air permits on the merits. (*See* Amended Petition ¶ 1.) However, their sole cause of action attacks the air permits only for a claimed SEQRA deficiency. (*Id.* ¶¶ 87-101.)

Greenidge project less than one month later. (*Id.* ¶ 26.) DEC issued the amended negative declaration on June 28, 2016 (*id.* ¶ 33) and the air permits on September 8, 2016 (*id.* ¶ 1).

Petitioners knew about Greenidge's plans, and had publicly opposed them, but did not file their petition until October 28, 2016 (*id.* at 1, 25). Petitioners did not serve the State until November 2, 2016, did not serve Greenidge until November 3, 2016, and did not serve a notice of amended petition until December 13, 2016. (Buttino Affirmation ¶¶ 4, 9; Affidavit of Dale Irwin ¶ 8.) Despite knowing about Greenidge's permit applications for over a year, petitioners made no attempt to seek an injunction until serving this petition on November 3, 2016. (Amended Petition at 1, 25.)

Between June 28, 2016 and November 3, 2016, Greenidge planned and implemented phases of the project. Between September 16, 2016 and November 3, 2016, Greenidge spent $2,187,492 to further its project. (Irwin Affidavit ¶ 29.) As of November 3, 2016, Greenidge had: (1) completed 50% of the clearing activities; (2) constructed 20% of the pipeline (cost of $705,561); (3) completed 15% of the regulation station work (cost of $79,304); (4) completed 30% of the meter station work (cost of $846,222); and (5) completed 50% of the interconnection work (cost of $551,646). (*Id.* ¶ 28.) Total expenditures by November 3, 2016 were $3,020,866. (*Id.* ¶ 31.)

Petitioners were aware of Greenidge's permit applications and DEC's negative declaration since August 2015, but failed to challenge the action until October 2016. Petitioners could have sought a temporary restraining order, and it would have been reasonable to do so after DEC issued the air permits on September 8, 2016. But they did not, and their failure to take reasonable steps to seek an injunction and preserve the *status quo* renders moot their claim

against DEC. (*See Dreikausen*, 98 NY2d at 173.) The court should dismiss this proceeding because petitioners failed to take those basic and equitable steps.

CONCLUSION

For the reasons stated above, the State requests that the court dismiss the amended petition. If the court denies the motion to dismiss, then the State requests thirty days from service of the notice of entry to answer the amended petition. (*See* CPLR 7804(f) [allowing the State time to answer if a motion to dismiss is denied].)

Dated: January 5, 2017
Albany, New York

ERIC T. SCHNEIDERMAN
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Respondents.

AFFIRMATION OF NICHOLAS C. BUTTINO IN SUPPORT OF MOTION TO DISMISS

Index No. 2016-0165

NICHOLAS C. BUTTINO, an attorney admitted to practice in the State of New York, affirms, under penalties of perjury under CPLR 2106, as follows:

1. I am an Assistant Attorney General employed by the New York State Department of Law. In that capacity, I represent the New York State Department of Environmental Conservation (DEC) and its Commissioner, Basil Seggos, (collectively, the Department) in this proceeding.

2. I make this affirmation based on personal knowledge, my review of documents maintained in the ordinary course of business by DEC, and my representation of the Department.

3. I submit this affirmation in support of the Department's motion to dismiss.

4. On November 2, 2016, petitioners served the Department with their petition, an attorney affirmation, and an order to show cause dated October 28, 2016. Petitioners also served the Office of the Attorney General on November 2, 2016.

5. The order to show cause set the return date as November 17, 2016. The parties later negotiated for a return date of December 22, 2016, with respondents' papers due on December 8, 2016.

6. Petitioners did not serve any affidavits or affirmations from individuals, including members of the two organizations. The accompanying attorney affirmation was submitted only in support of the order to show cause.

7. On December 6, 2016, petitioners served the Office of the Attorney General with an amended petition. The amended petition adds the Sierra Club as a petitioner.

8. On December 13, 2016, the parties entered into a scheduling stipulation. The stipulation provides a return date of January 24, 2017 and that respondents' papers are due January 6, 2017.

9. On December 13, 2016, petitioners served the Office of the Attorney General with a notice of amended petition and another copy of the amended petition. The notice of amended petition sets a return date of January 24, 2017.

10. Petitioners did not include any affidavits or affirmations with their amended petition.

11. On December 23, 2016, petitioners served a notice of motion for a preliminary injunction against respondent Greenidge Generation LLC (Greenidge), an accompanying attorney affirmation, and a memorandum of law. The attorney affirmation does not establish or address petitioners' standing.

12. Absent specific allegations of a harmful effect on at least one of its members, a statement of germane organizational interests, and proof that the petition does not require the participation of individual members, an organization lacks standing. Petitioners have not carried this burden. Petitioners also fail to establish both an injury in fact and an injury within their zone of interests. Petitioners cannot gain standing through an informational injury and fail to show an informational injury.

13. Moreover, on information and belief, as described in the Affidavit of Dale Irwin, for Greenidge Generation LLC, petitioners' claims are moot because petitioners' delay in commencing this litigation allowed respondent Greenidge to spend millions of dollars on activities necessary to the project, which is nearing completion. (*See* Irwin Affidavit.)

14. To the extent petitioners attempt to seek an injunction against DEC regarding the remaining SPDES and water withdrawal permit applications under agency review, petitioners are not entitled to that relief. Petitioners may not prevent DEC from performing a statutorily mandated duty. In addition, petitioners' challenges are not ripe, there is no irreparable injury, and the balance of the equities do not favor petitioners.

Dated: January 5, 2017
Albany, New York

Nicholas C. Buttino