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,

Index No. 2016-0165

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.

PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' MOTIONS TO DISMISS AND IN REPLY IN SUPPORT OF PETITIONERS' MOTION FOR TEMPORARY INJUNCTIVE RELIEF

RICHARD J. LIPPES, ESQ.
Lippes & Lippes
1109 Delaware Avenue
Buffalo, NY 14209-1601
Telephone: (716) 884-4800
Email: rlippes@lippeslaw.com

RACHEL TREICHLER, ESQ.
7988 Van Amburg Road
Hammondsport, New York 14840
Telephone: (607) 569-2114
Email: treichlerlaw@frontiernet.net

Attorneys for Petitioners

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PRELIMINARY STATEMENT

Petitioners' respectfully submit this memorandum of law in response to the arguments presented by Respondent New York State Department of Environmental Conservation ("DEC") and Respondents Greenidge Generation LLC ("GGLLC"), Greenidge Pipeline LLC ("GPLLC"), Greenidge Pipeline Properties Corporation ("GPPC") (collectively the "Greenidge Respondents") concerning Respondents' motions to dismiss and in reply to Respondents' arguments concerning Petitioners' motion for temporary injunctive relief.

ARGUMENT

I. This Court Has Jurisdiction to Hear Petitioners' Challenge to DEC's Review of the Greenidge Repowering Project under SEQRA

A. SEQRA Does Not Exempt Projects under Article 4 of the Public Service Law

The Greenidge Respondents claim this court does not have jurisdiction to hear Petitioners' claims under the State Environmental Quality Review Act ("SEQRA"), Article 8 of the Environmental Conservation Law ("ECL") because ECL Section 8-0111(5)(b) exempts projects subject to Article 7 and Article 10 of the Public Service Law ("PSL") from review under SEQRA. However, the application Greenidge Generation LLC ("GGLLC") made to the Public Service Commission ("PSC") for a certificate of public convenience and necessity ("CPCN") to repower the Greenidge Generating Station was made pursuant to Section 68 of PSL Article 4, not Article 7 or Article 10. Projects subject to review under PSL section 68 are subject to review under SEQRA, as the PSC recognized in its order granting a CPCN to GGLLC to repower the Greenidge plant. PSC Order dated September 16, 2016 in Cases 15-E-0516 and 15-G-0571 (the

"PSC Order"), pp. 19-20, attached as Exhibit A to the accompanying affirmation of Rachel Treichler ("Treichler Aff.").

The PSC Order noted that Respondent New York State Department of Environmental Conservation was the lead agency for the SEQRA review of the Greenidge Repowering Project, that the PSC's "SEQRA responsibilities are limited to the role of an involved agency," and that "DEC as lead agency conducted a coordinated review [and] made the required determination of significance on behalf of all involved agencies." *Id.*, p. 18.

Unlike Article 7 of the PSL which contains a provision limiting judicial review of PSC proceedings conducted under Article 7, Article 4 of the PSL contains are no equivalent provisions.

For these reasons, this court has jurisdiction to hear Petitioners' challenge to DEC's SEQRA review of the project of the Greenidge Respondents to repower the Greenidge Generating Station (the "Greenidge Project") and to issue an order to stop or delay the operation of the Greenidge Generating Station should it see fit to do so.

B. Petitioners Concede that Review of the Pipeline is Pre-empted under SEQRA

Petitioners' concede that, because the application of Greenidge Pipeline LLC (GPLLC") and Greenidge Pipeline Properties Corporation ("GPPC") to the PSC for a certificate of environmental compatibility and public need (CECPN) to operate the pipeline was made pursuant to Article 7 of the PSL, which applies to the siting of major utility transmission facilities, the pipeline component of the Greenidge Repowering Project is exempt from SEQRA review and that, pursuant to section 129 of Article 7 relating to judicial review of proceedings

under that article, this court does not have jurisdiction to stop or delay the construction or operation of the pipeline.

II. Petitioners Have Standing to Challenge DEC's Compliance with SEQRA

A. Petitioners Meet the Requirements for Organizational Standing

Petitioners Sierra Club and Committee to Preserve the Finger Lakes ("CPFL") each demonstrate organizational standing in this proceeding 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 NY2d 330 (1984) and *Douglaston Civic Ass'n, Inc. v. Galvin,* 36 NY2d 1 (1974).

In support of their claims to standing, Petitioners provide herewith the affidavits of nine individuals who are members of the organizations, demonstrating injury-in-fact from the proposed operations of the Greenidge Generating Station. Five of the individuals, Linda Downs, Carolyn McAllister, Susan Davie, Jane Crumlish and Eileen Moreland, are members of both the Sierra Club and CPFL. 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 the Greenidge plant flow into the Keuka Outlet. Ms. Downs, Ms. Davie, 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 when the Greenidge Generating Station resumes operations and begins pumping fairly hot water into the lake in their vicinity. The modified State Pollution Discharge Elimination System ("SPDES") permit proposed to be issued by DEC allows huge discharges of water from the plant's cooling system, up to 190,000,000 gallons per day of water up to 108 degrees in temperature during the summer. Higher water temperatures in the area of the lake in which they 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. Davie, 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. Davie, 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 the shorefronts near the discharge outfall of the Greenidge Generating Station.

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 and CPFL 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.

B. Informational Injury Is an Appropriate Claim of the Petitioner Organizations

Petitioners' provide the affidavits of Peter Gamba, president of CPFL, and Kate Bartholomew, chair of the Sierra Club's Finger Lakes Group and treasurer of CPNY, alleging that the members of the Petitioner organizations have suffered an informational injury from DEC's failure to conduct a full EIS of the repowering of the Greenidge Generating Station. These affidavits show the long standing interests and activities of Sierra Club, CPFL and CPNY and their members in protecting New York's air and water and the natural resources dependent thereon.

Respondents indicate that they can find no cases holding the right to sue for informational injury. However, this Court need look no further than the decision of the Court of Appeals in the *Association for a Better Long Island v DEC*, 23 N.Y.3d 1, (2014) where the court observed:

> Petitioners further allege that the violation of these procedural statutes deprived them of an adequate 'airing' of the relevant issues and impacts of the proposed amendments, as well as an accurate assessment of the projected costs involved. The asserted statutory provisions set forth certain procedural steps to be followed when promulgating rules or regulations. The alleged violations, including the deprivation of an opportunity to be heard, constitute injuries to petitioners within the zone of interests sought to be protected by the statutes.

The informational injury suffered by the members of Sierra Club, CPFL and CPNY is within the zone of interests protected by SEQRA. DEC has stated that "SEQRA is intended to protect the public's opportunity to participate in environmental decisionmaking." *DEC Comm'r Interim Decision, In re 628 Land Assoc.* (Sept. 12, 1994), http://www.dec.ny.gov/hearings/10932.html. Importantly, the Court of Appeals has stated that "the Legislature's clear intent [is] that an EIS be used as an informational tool to aid in the planning process*." Incorporated Village of Atlantic Beach v. Gavalas* (81 N.Y.2d 322, 326 (1993). Thus where, as here, DEC elects not to do an EIS, as Petitioners contend DEC was required to do so, Petitioners' interest in participating in that decision is clearly harmed in a manner that is squarely within the zone of interests protected by SEQRA.

For these reasons, Petitioner organizations have standing to pursue this proceeding.

III. The Proceeding is Not Moot

A. Petitioners Do Not Concede that Their Claims are Moot

Petitioners' do not concede that their claims are moot. Rather, Petitioners' reason for seeking temporary injunctive relief is to forestall assertions of mootness pursuant to the case of

Dreikausen v. Zoning Bd. of Appeals of City of Long Beach, 98 N.Y.2d 165 (2002). In *Dreikausen*, the court held that the case was moot after determining that petitioners had failed to seek a preliminary injunction. The court stated, "the chief factor in evaluating claims of mootness 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." *Id*. at 172-73. In the present case, Petitioners proceeded by Order to Show Cause, and the Show Cause Order signed by Justice Bender ordered the Respondents to show cause "why a judgment should not be made herein granting the relief sought in the Verified Petition and in particular grant a preliminary injunction enjoining Respondents GGLLC, GPLLC and GPPC from taking steps to repower the Greenidge Generating Station or construct a gas pipeline to the station until such time as Respondents shall have complied with all applicable federal and state laws, which is referenced in the attached Petition." Therefore, the chief factor relied upon by the court in *Dreikausen* is lacking in the instant case, since Petitioners have sought preliminary injunctive relief.

B. The Environmental Harms Sought To Be Prevented Have Not Yet Occurred

Petitioners' claims have not been mooted by construction of the pipeline. The potential adverse effects on the quality of water on Seneca Lake and toxic and green-house gas air emissions from operation of the generating station and sought to be avoided by Petitioners have not yet taken place. An injunctive relief order by the trial court remains necessary to avoid such environmental damage in the future.

The central issue complained of in this case is not the construction of the pipeline, but rather the failure of DEC to conduct an adequate review of the impacts of operating the

generating station and the withdrawal and discharge of huge amounts of water, up to 190 million gallons per day, in connection with those operations. The generating station has not yet begun operations, and indeed is not yet permitted to do so because the modifications to the plant's SPDES permit set forth as conditions in the Negative Declaration have not yet been issued.

For these reasons, the environmental harms to Seneca Lake and to those individuals who use the lake waters for household and recreational uses that Petitioners seek to prevent by bringing this proceeding have not yet occurred.

C. Petitioners Did Not Delay in Filing or Prosecuting their Case

Respondents tacitly acknowledge that Petitioners filed this proceeding within the four month statute of limitations applicable in Article 78 proceedings. In fact, the case was filed on October 28, 2016, less than two months after DEC issued the air permits to GGLLC on September 8, 2016, and only eleven days after GPLLC and GPPC received from the PSC authorization on October 17, 2016, to begin construction of the pipeline. In these circumstances, it cannot be said that Petitioners delayed in filing their case. As observed by the Court in *Allison v. New York City Landmarks Preservation Commission*, 35 Misc.3d 500 (NY Cty 2011) "[t]he short, four months statute of limitations applicable to this proceeding, CPLR § 217(1), itself almost defies a laches defense. It ensures in the first instance against stale claims." *Id*. at 514.

Also, it cannot be denied that the Greenidge Respondents continued their construction efforts with full knowledge that the Petitioners were seeking preliminary injunctive relief, and therefore, proceeded at their own risk. See *Allison v. New York Landmarks Preservation Commission*, *supra* at 514, where the court stated: "Although that period [of limitations] is now close to expiration, Respondents weighed the risk against their business incentive not to wait for

that period to expire, but to proceed immediately, at their own risk, to undertake costly work, despite the obvious opposition by members of the public, including Grunewald and petitioner organization's members, at LPC's hearings and meetings. Respondents continued the work despite petitioners' motion for a preliminary injunction and its partial and potential further success. (citations omitted)." *Id.*

IV. Petitioners' Prima Facie Claims Have Not Been Rebutted by Respondents

A. Petitioners Are Likely to Succeed on Their Claim of an Impermissible Conditioned Negative Declaration for a Type I Action

Petitioners are likely to succeed on their claim that DEC's revised negative declaration for the Greenidge Project (the "Negative Declaration") is invalid because it is a conditioned negative declaration of a Type I action. Type I actions presumptively require an EIS under the SEQRA regulations. 6 N.Y.C.R.R. § 617.4(a). Despite that presumption, DEC issued a negative declaration for the Greenidge Project. Under the SEQRA regulations, conditioned negative declarations are not allowed for Type I actions. Conditioned negative declarations 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.

Myerson v. McNally, 90 N.Y.2d 742 (1997) sets forth certain tests for when modifications to a negative declaration may be permissible for Type I actions, but 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. The Negative Declaration at issue in this case describes major modifications that will be required in the proposed modified SPDES permit to be issued to GGLLC to reduce fish entrainment and impingement: "The project will ultimately involve a modification of the cooling water intake structure (CWIS) at the facility. The modification will include the installation of 'Best Technology Available' (BTA) measures in accordance with Commissioner's Policy CP-52 to reduce fish entrainment and impingement. This will involve construction/attachment of intake screens at the end of the intake below the mean high water line of Seneca Lake." Amended Petition ¶ 38. As of the date of this MOL, the proposed modified SPDES permit still has not been issued.

It is clear from the wording of the Negative Declaration that DEC's determination of "no significant adverse impacts associated with the Department's renewal and modification of the facility SPDES permit" was based on conditions stated in the negative declaration:

> 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 the 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 and must be annulled.

The Greenidge Respondents completely misconstrue a statement in the SEQR Handbook that a lead agency may include "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" in a negative declaration. It is clear from context in which this statement is made that the type of negative declaration referenced is a negative declaration for an unlisted action.

To construe the Handbook statement otherwise would result in a conflict between the statement and the prohibition against conditioned negative declarations for Type I actions, which is clearly stated in the 6 N.Y.C.R.R. § 617.7(d) of the SEQRA regulations and does not have any exceptions. See *Myerson v. McNally, Ferrari v. Penfield Planning*.

Furthermore, the conditions included in the Greenidge negative declaration do not meet DEC's explicitly-articulated standards for protecting against fish impingement and entrainment set forth in DEC policy CP #52 on "Best Technology Available BTA for Cooling Water Intake Structures," http://www.dec.ny.gov/docs/fish_marine_pdf/btapolicyfinal.pdf. Policy CP #52 specifies closed-cycle cooling or the equivalent to minimize injury and mortality to fish and

shellfish drawn into cooling water intake structures (CWIS) in connection with a point source thermal discharge, and the conditions included in the Greenidge Negative Declaration do not require closed-cycle cooling or the equivalent.

For these reasons, Petitioners are likely to succeed on their claim that DEC's Negative Declaration is invalid because it is a conditioned negative declaration of a Type I action.

B. Petitioners Are Likely to Succeed on Their Claim of Impermissible Segmentation

Petitioners are likely to succeed on their claim that DEC's Negative Declaration is invalid because it segmented review of the disposition of waste into the adjoining Lockwood Coal Ash landfill from the review of the operations of the Greenidge generating station. Although Petitioners concede that the pipeline impacts were properly segmented due to the exemption for projects considered under Article VII of the PSL, there was still improper segmentation of the Greenidge Project from DEC's ongoing reviews of the Lockwood landfill. As noted in the Petition, "[t]he Lockwood Hills landfill is operating under a consent order entered into between Lockwood Hills LLC and DEC on February 18, 2015. The consent order indicates that the landfill is a source of groundwater contamination. The 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).' Amended Petition ¶ 22. In these circumstances, DEC's review of possible impacts of the Greenidge Project should

have evaluated the impacts of the projected disposal of new wastes from the generating station in the context of the ongoing problems at the landfill. The Negative Declaration did not do this.

For this reason, Petitioners are likely to succeed on their claim that DEC's Negative Declaration is impermissibly segmented review of the ongoing problems at the Lockwood Hills landfill.

C. Petitioners Are Likely to Succeed on Their Claim that DEC Failed to Take a Hard Look at the Issues Identified and Failed to Make a Reasoned Elaboration of the Basis for its Determination

Because DEC arbitrarily and capriciously used an incorrect baseline to evaluate possible impacts of the Greenidge Project when it evaluated impacts by comparing potential impacts to thepre-2011 operations of the Greenidge Generating Station as a coal-fired plant rather than comparing restarted operations to no operations as would have been proper, DEC failed to take a hard look at the environmental issues identified in the Negative Declaration and failed to make a reasoned elaboration of the basis for its determination of no significant environmental impacts from the project. For each impact identified, DEC's summary conclusion that the impacts of the Greenidge Project would be less than under the previous operations contained no analysis or reasoned elaboration as to why that might be so. The summary nature of DEC's explanations was described in Petitioners' initial MOL in support of its motion for temporary injunctive relief.

The only circumstance in which the Negative Declaration acknowledges any impact from the restarted operations is with regard to surface water impacts, as quoted above. The conditions contained in the Negative Declaration to mitigate these impacts constitute an impermissible conditioned negative declaration for a Type I action as outlined above and demonstrate that DEC recognized that there would in fact be significant environmental impacts from the project.

It would appear that the issue of whether DEC used the correct baseline to evaluate the impacts of the project is a factual issue that should not be resolved on a motion to dismiss.

For all these reasons, Petitioners have made a *prima facie* case for their claim that Respondent DEC failed to comply with the requirements of SEQRA in issuing the Negative Declaration.

V. The Balance of Equities Tips in Petitioners' Favor Because There Is No Demonstrated Need for the Power to Be Supplied by the Project

Petitioners argue that the public has a strong interest in this case in seeing that an adequate environmental review of the Greenidge Project is conducted. To counter this argument, the Greenidge Respondents argue that there is a need for the power to be supplied by the project. The NYISO report cited by Greenidge attorney Yvonne Hennessey in her affirmation dated January 6, 2017, does not support her claim that that the diagram attached as Exhibit E shows a need for additional generating capacity in the Finger Lakes region. The NYISO report is concerned with transmission issues and identifies a transmission need, not a generation need. In fact, as Petitioner CPFL argued in the Greenidge PSC cases, the Finger Lakes region of the New York State electric grid has more generating capacity than needed, especially now that plans are being made to keep the upstate nuclear plants in operation and to repower the Dunkirk and Cayuga Generating Stations. Furthermore, the Greenidge Generating Station is an old-fashioned single-cycle power plant that is likely to be relatively expensive to operate and will have difficulty competing in the market with more efficient electric generating facilities.

In these circumstances, the environmental harms that will be created if the Greenidge Generating Station restarts operations without significant additional environmental mitigations

will outweigh the benefits of allowing the plant to restart without a full environmental review of the impacts of the repowering.

CONCLUSION

For these reasons, Petitioners' respectfully request that the Court deny Respondents' motions to dismiss and grant a temporary restraining order or preliminary injunction restraining Respondent GGLLC, its agents, employees, and all persons acting on its behalf, from engaging in acts to repower the Greenidge Generating Station in Dresden, New York until the Court decides the claims raised in the petition, and, if the Court resolves these claims in Petitioners' favor, until DEC has completed the environmental review required by SEQRA.

DATED: Hammondsport, New York
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Respectfully submitted,

RACHEL TREICHLER, ESQ.
7988 Van Amburg Road
Hammondsport, New York 14840
Telephone: (607) 569-2114
Email: treichlerlaw@frontiernet.net

RICHARD J. LIPPES, ESQ.
Lippes & Lippes
1109 Delaware Avenue
Buffalo, NY 14209-1601
Telephone: (716) 884-4800
Email: rlippes@lippeslaw.com

Attorneys for Petitioners