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.

Index No. 2016-0165 Hon. William F. Kocher

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE GREENIDGE RESPONDENTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Greenidge Generation, LLC, Greenidge Pipeline, LLC, Greenidge Pipeline Properties Corporation and Lockwood Hills, LLC (collectively, the "Greenidge Respondents") respectfully submit this Reply Memorandum of Law in further support of their Motion to Dismiss the Amended Verified Petition ("Amended Petition"). Petitioners' opposition papers do not alter the conclusions established in the Greenidge Respondent's initial Motion papers; namely, that the claims in the Amended Petition are subject to dismissal on multiple, independent grounds.¹

In the first instance, although the Sierra Club, the Committee to Preserve the Finger Lakes ("CPFL") and the Coalition to Protect New York ("CPNY") (collectively, the "Petitioners") attempt to establish their standing to bring this action for the first time in opposition to respondents' motions to dismiss, their member affidavits merely confirm that not one petitioner has established organizational standing. Petitioners' affidavits merely proffer a conjectural and hypothetical injury, and Petitioners' continued assertion of "information injury" has no basis in New York jurisprudence. Even assuming that each Petitioner could establish the standing of an individual member, such standing is limited to alleged water-related impacts associated with the Greenidge Station's discharges into the Keuka Outlet and does not extend to the broader environmental issues alleged in the Amended Petition or Lockwood Hills.

Furthermore, as Petitioners do not dispute that the Greenidge Project was substantially complete at the time this action was filed, and even more so when Petitioners finally moved for temporary injunctive relief almost six months after the issuance of the Negative Declaration being

Although Petitioners combined their opposition to the motions to dismiss with their reply on their motion for temporary injunctive relief, this memorandum of law is limited only to Petitioners' arguments on the motions to dismiss. The Greenidge Respondents, however, to not concede the correctness of Petitioners' arguments in further support of their motion for temporary injunctive relief and will address them during oral argument rather than including them here as a surreply.

challenged here, their claims are moot. This is further confirmed by Petitioners' tacit concession that the Greenidge Respondents' acted in good faith and under authority of law, and that their work cannot be readily undone without undue hardship.

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

ARGUMENT

POINT I

PETITIONERS HAVE CONCEDED THE LIMITED JURISDICTION OF THIS COURT

In response to the Greenidge Respondents' Motion concerning Petitioners' allegations and requests for relief concerning the Greenidge Pipeline, Petitioners concede that this Court lacks jurisdiction over the New York State Public Service Commission ("NYSPSC")-approved Greenidge Pipeline and cannot stop or delay its construction or operation. Petitioners' claims and requests for relief with respect to the Greenidge Pipeline should, therefore, be dismissed.

Petitioners, however, appear to assert that they can challenge the NYSPSC's other orders concerning the Greenidge Project ("NYSPSC Orders")² because they are subject to review under the State Environmental Quality Review Act ("SEQRA") and, in issuing them, the NYSPSC relied on the coordinated review conducted by the New York State Department of Environmental Conservation ("NYSDEC") as lead agency.

While the Greenidge Respondents do not challenge this Court's jurisdiction to hear Petitioners' claims against the NYSDEC under SEQRA, Petitioners are incorrect so far as they

Specifically, on September 16, 2016, the NYSPSC issued two separate orders respectively in Cases 15-E-0516 and 15-G-0571 wherein the NYSPSC authorized Greenidge Generation to operate the Greenidge Station, authorized the Greenidge Pipeline Entities to exercise the rights granted to them under certain municipal road crossing agreements, and granted lightened and/or incidental regulation under Part IV of the Public Service Law to Greenidge Generation and the Greenidge Pipeline Entities.

insinuate that this Court can review or annul the NYSPSCs Orders. First and foremost, Yates County is not the proper forum for such a challenge. See CPLR § 506(b)(2) ("a proceeding against ... the public service commission . . . shall be commenced in the supreme court, Albany county."). Second, the Amended Verified Petition in this matter is void of any discussion of the NYSPSC Orders that Petitioners now take issue with in their motion papers. See, generally, Amended Petition; see also Affirmation of Rachel Treichler in Support of Petitioners' Memorandum of Law in Opposition to the Motions to Dismiss, dated January 16, 2017, at ¶ 2 (recognizing that the NYSPSC Orders were mentioned only in a prior affirmation of hers in support of Petitioners' request for temporary injunctive relief); CPLR §§ 3013, 7804(d); Oliver v. Donovan, 32 A.D.2d 1036, 1037 (3d Dep't 1969) (noting that CPLR § 7804(d) requires that an Article 78 petition must comply with the rules for a complaint in an action, which require statements be sufficiently particular to give the court and the parties notice of the material elements of each cause of action or defense).

Accordingly, any newly minted claims by Petitioners regarding the NYSPSC Orders should be rejected.

POINT II

PETITIONERS' BELATED ATTEMPT TO ESTABLISH STANDING FAILS AND, AT BEST, IS LIMITED ONLY TO ISSUES CONCERNING THEIR ALLEGED WATER-RELATED IMPACTS TO SENECA LAKE FROM FACILITY DISCHARGES TO THE KEUKA OUTLET

Petitioners bear the burden of establishing that at least one individual member from each organization has suffered an "injury-in-fact" that is separate from the public at large, and that the injury of that member is within the "zone of interests" covered by SEQRA, otherwise no standing exists. *See* Memorandum of Law in Support of the Greenidge Respondents' Motion to Dismiss, dated January 5, 2017 ("Greenidge MOL"), Point II (and cases cited therein). Here, the Petitioners have utterly failed to meet their burden in their Verified Petition and again, in their Amended

Petition. It was only in response to the respondents' motions to dismiss that Petitioners offered any affidavits attempting to establish organizational standing.

Rather than establish standing, Petitioners' affidavits confirm the lack of any "injury-in-fact." Indeed, each and every affiant³ alleges that their "everyday use and enjoyment of Seneca Lake will be diminished and [their] health may be harmed by contamination or other harmful changes to the water [they] use for brushing [their] teeth, showering, washing dishes, washing clothes, cooking and swimming caused by the *new* operations of the Greenidge Generating Station." *See* Bracht Aff., ¶ 8 (emphasis added); *see also* Moreland Aff., ¶ 11; Downs Aff., ¶ 11; McAllister Aff., ¶ 8; Crumlish Aff., ¶ 11; Davie Aff., ¶ 11, Buddington Aff., ¶ 9; *contrast with* NYSDEC's Negative Declaration, Affirmation of Yvonne E. Hennessey in Support of the Greenidge Respondents' Motion to Dismiss, dated January 5, 2017 ("Hennessey Aff."), Exhibit A (recognizing the facility's long-standing operation and its existing SPDES permit which authorizes water withdrawals from and discharges to the Keuka Outlet). Not one affiant, all of whom appear to have owned their property when the Greenidge Station previously operated, and some for a significant period, alleges that they suffered *amy* injury from the facility's prior operations and discharge of water into the Keuka Outlet. *See*, *e.g.*, Moreland Aff., ¶ 2 (stating that they have owned their property "for the past 46 years"). Indeed,

³

The affidavits of Peter Gamba and Kathryn Bartholomew do not alter this conclusion. Rather, these affidavits discuss only the organizational petitioners and do not allege any facts which would substantiate the standing of any individual member. Similarly, the affidavit of Gregory Boyer also fails to substantiate the standing of any individual member of a petitioner organization and merely introduces purported expert testimony to establish the existence of thermal impacts to Seneca Lake from operation of the Greenidge Station. This outside the record affidavit is impermissible in an Article 78 proceeding. Finger Lakes Preserv. Assn. v. Town Bd. of Italy, 25 Misc. 3d 1115, 1119 (N.Y. Sup. Ct., Yates Co. 2009) (finding that the affidavit could not be considered in the Article 78 proceeding because it was additional evidence, outside the record). Furthermore, Mr. Boyer's affidavit is highly prejudicial and inappropriate as his expertise and the basis for his conclusions cannot be properly questioned on a motion to dismiss, which is particularly glaring here as his affidavit is not based on any specific information concerning, or firsthand knowledge of, the Greenidge Station, NYSDEC's review of the facility's discharges or the facility's existing and proposed renewal SPDES permit. Matott v. Ward, 48 N.Y.2d 455, 459 (1979) (an expert "should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable"); see also Molinari v. Conforti & Eisele, 54 A.D.2d 1113 (4th Dep't 1976) (finding that an expert witness did not have sufficient skill, knowledge or experience to testify as an expert).

their purported evidence of outbreaks of HABs that concern Petitioners' members all occurred when the Greenidge Station was in protective lay-up and not operating.

As such, their purported injury and concern regarding the release of heated water when operation of the Greenidge Station resumes is conjectural, hypothetical and nothing more than mere speculation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (requiring that to prove injury-in-fact, the individual must show there has been an invasion of a legally protected interest that is (i) concrete and particularized; and (ii) *actual or imminent, not conjectural or hypothetical*); *State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 214 (2004) (noting that "tenuous and ephemeral harm is insufficient to trigger judicial intervention."); *Kindred v. Monroe Cty.*, 119 A.D.3d 1347, 1348 (4th Dep't 2014) (concluding that the alleged environmentally-related injuries were too speculative and conjectural to prove an actual and specific injury-in-fact.).⁴

Furthermore, Petitioners have not cured their failure to join those member(s) that it claims would be harmed by the respondent's actions as petitioners to the proceeding. *Citizens Organized to Protect the Environment v. Planning Bd. of Town of Irondequoit*, 50 A.D.3d 1460, 1461 (4th Dep't 2008) (finding that non-participation by the individual members was fatal and that, for the organization to have standing, it should have joined as petitioners those member(s) that it claimed would be harmed by the respondent's actions); *see also Wind Power Ethics Group v. Planning Bd. of Town of Cape Vincent*, No. 2010-2882, Slip Op. at 5 (N.Y. Sup. Ct., Jefferson Co. Jan. 26, 2011) (dismissing Article 78 petition on grounds that petitioner failed to establish organizational standing due to its failure to name or join individual members in petition).

Petitioners must offer probative evidence, as allegations without evidentiary support are patently insufficient. Soc'y of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 778 (1991). Here, Petitioners' affidavits lack any foundation for their purported expertise in thermal impacts to Seneca Lake. Any attempt to rely on the Affidavit of Gregory Boyer also fails as it is based on pure speculation and conjecture and no firsthand knowledge regarding the Greenidge Station or its expected continued discharges into Keuka Outlet. See fin. 3, supra.

Finally, Petitioners' persistent claim that they have suffered an "informational injury" because a full environmental impact statement was not completed finds no basis in law or fact. To support their alleged "informational injury," Petitioners rely on *Assoc. for a Better Long Island v. New York Dep't of Envt'l Conser.*, 23 N.Y.2d 1 (2014). A full reading of the case, however, reveals that the Court did not find that informational injury was sufficient to establish standing in a SEQRA challenge. Rather, the Court of Appeals in *Assoc. for a Better Long Island* affirmed the lower court's ruling that the petitioners in that action lacked standing to challenge NYSDEC's negative declaration under SEQRA. *Id.* at 8-9.

Even assuming that Petitioners' belatedly filed affidavits establish standing, they can do so only with respect to water-related issues associated with the Greenidge Station's discharges into the Keuka Outlet. The affidavits, while numerous, are all basically the same. In particular, they are all sworn to by owners of real property on Seneca Lake, all of whom live approximately one-mile from the Greenidge Station, who claim that their use of the water from the lake, either for household or recreational use, will be injured by operation of the Greenidge Station. *See also* Petitioners' Memorandum of Law in Opposition to Respondents' Motions to Dismiss and in Reply in Support of Petitioners' Motion for Temporary Injunctive Relief, dated January 16, 2017 ("Petitioners' MOL"), Point II(A) (asserting standing based only on alleged water-related injuries from the discharge of heated water into the Keuka Outlet).

To the extent that Petitioners seek to allege broader standing, such an attempt should be rejected. Notably, not one affiant even attempts to allege an injury with respect to the Lockwood Hills Landfill, which is now the only basis for Petitioners' segmentation claim. *See also* Amended Petition, ¶ 97 (also completely void of any injury from the Lockwood Hills Landfill). Furthermore, the only other alleged environmental harms – air and health impacts – is mentioned in just one of

Petitioners' member affidavits. See Moreland Aff., ¶¶ 30, 31. In particular, the Moreland Affidavit attempts to articulate an injury based on concerns about insufficient air monitoring and their recollection of smog from the facility's prior operation on coal, which will no longer be permitted to be burned under the September 8, 2016 air permits. See Affirmation of Yvonne E. Hennessey dated January 5, 2017, at Exhibit A ("The reactivated unit would not burn coal, but instead be fully converted to use primarily natural-gas, with the ability to co-fire up to 19% biomass[.]"). Such allegations are woefully insufficient as they are unrelated to the NYSDEC's SEQRA review being challenged in this action. They also are not different in kind from the public at large, particularly as the Morelands reside over a mile from the Greenidge Station. See Moreland Aff., ¶ 2 & Exhibit A (noting that they live at 1292 Arrowhead Beach Road); Noslen Corporation v. Ontario County Board of Supervisors, 295 A.D.2d 924, 925 (4th Dept. 2002) (inn owned by petitioners located at least three quarters of a mile from the project "is insufficient, without more, to confer standing") (citing Many v. Village of Sharon Springs Bd. of Trustees, 218 A.D.2d 845, 845 (3d Dep't 1995)).

In sum, Petitioners have failed to meet their irrefutable burden of establishing standing to challenge NYSDEC's Negative Declaration. Their claims, therefore, fail and should be dismissed. To the extent, however, that this Court finds Petitioners' affidavits sufficient to establish standing, their standing should be limited to the only injury they detail in their member affidavits – namely, water-related injuries to Seneca Lake associated with discharges of water into the Keuka Outlet – and their remaining claims should be rejected in whole or in part.⁵

These include, but are not necessarily limited to, Petitioners' claims as they relate to air quality, plants, animals, historic and archaeological resources, energy, solid waste management, liquid wastes, methane emissions, truck traffic, odors, groundwater, herbicides, excavation, ecosystem services, fish entrapment and general water issues. See, e.g., Amended Petition, §§ 37-39, 40, 41, 42, 49, 50, 55-59, 73-75, 77, 79, 97. It also includes Petitioners' request that this Court annul the September 8, 2016 air permits issued by NYSDEC. See id at 25. Furthermore, as Petitioner Sierra Club did not raise any SEQRA issues before the NYSDEC, let alone any specific issues concerning impacts from the Greenidge Station's discharges into the Keuka Outlet, all of its claims should be dismissed for

POINT III

THE DOCTRINE OF MOOTNESS BARS PETITIONERS CLAIMS IRRESPECTIVE OF THEIR PURPORTED ATTEMPT TO RECHARACTERIZE THEIR DELAYED REQUESTS FOR INJUNCTIVE RELIEF AND THEIR NEW FOCUS ON ALLEGED ENVIRONMENTAL HARMS FROM OPERATIONS

Petitioners' attempts to recast the timing of their actions in this proceeding do not alter the simple conclusion established by the Greenidge Respondents' Motion that Petitioners' claims are moot and, thus, subject to dismissal. In response to the Greenidge Respondents' mootness argument, Petitioners allege only that they timely filed this action and sought injunctive relief. They also now assert that, despite the broad array of harms alleged in the Amended Petition, the prospective environmental harms they seek to prevent ("[t]he potential adverse effects on the quality of water on Seneca lake and toxic and green-house air emissions from operation of the generating station") have yet to occur. Petitioners' MOL, at 7-8.

Significantly, Petitioners do not refute that the Greenidge Project was substantially complete when the Greenidge Respondents were served with the original Verified Petition in this action on November 3, 2016 and thereafter on December 23, 2016 when Petitioners, in fact, first sought to preserve the status quo in this action by bringing a motion for temporary injunctive relief. They also do not dispute that the Greenidge Respondents moved forward in good faith and under authority of law, or that the work cannot be readily undone without undue hardship. *See* Affidavit of Dale Irwin in Opposition to Petitioners' Motion for Temporary Injunctive Relief, dated January 5, 2017, ¶¶ 8, 39.

Factors considered under the doctrine of mootness include: (1) whether the challenger timely sought a preliminary injunction or otherwise sought to preserve the status quo or prevent

failure to exhaust administrative remedies, a point that remains unchallenged by Petitioners. See Greenidge MOL, 3 n.3.

construction from commencing or continuing, (2) whether the work was completed in good faith and under authority of law, and (3) whether work could be readily undone without undue hardship. Citineighbors Coal. of Historic Carnegie Hill v. N.Y. City Landmarks Pres. Comm'n, 2 N.Y.3d 727, 729 (2004); Dreikausen v. Zoning Bd. of Appeals of City of Long Beach, 98 N.Y.2d 165 (2002).

Here, as the proceedings in this action confirm and Petitioners effectively concede. Petitioners did not immediately seek a preliminary injunction or otherwise seek to preserve the status quo when the NYSDEC issued the Negative Declaration on June 28, 2016⁶ – the key NYSDEC determination at the heart of Petitioners' claims (*see, generally, Amended Petition)* – or critically, before construction commenced on October 17, 2016. Instead, Petitioners waited until the statute of limitations had all but expired and after construction had commenced to file this action. *Save the Pine Bush Inc. v. N.Y. State Dep't of Envtl. Conserv.*, 289 A.D.2d 636 (3d Dep't 2001) (noting that petitioners delayed commencement of the proceeding for as long as the law would permit, and that no stay was sought prior to the respondent expending significant sums associated with the project). Petitioners then waited almost another full week to serve the Greenidge Respondents. *See* Affidavit of Dale Irwin in Support of the Greenidge Respondents' Motion to Dismiss, dated January 5, 2017 ("Irwin Aff."), ¶ 8 (noting service on November 3, 2017). And, even giving Petitioners the benefit of the doubt, they waited two months from NYSDEC's issuance of the challenged air permits to file and serve this action.

Petitioners' delay, therefore, is inexplicable. Whether the delay was two or four months, it followed Petitioner CPFL's on-going and continual opposition to the Greenidge Project before NYSDEC. Petitioners actively participated in NYSDEC's multi-year environmental review of the

Moreover, this was not the first time that NYSDEC issued its determination of significance under SEQRA, making Petitioners' delay even more vexing. The June 28, 2016 Negative Declaration actually amended an earlier Negative Declaration for the Greenidge Station that NYSDEC issued on July 30, 2015, the sum and substance of which did not change.

Greenidge Project and repeatedly filed comments opposing the project and questioning the sufficiency of the environmental review. *See*, *e.g.*, Affidavit of Peter Gamba in Support of Petitioners' Memorandum of Law in Opposition to the Motions to Dismiss, dated January 13, 2017, ¶ 8-10; Affidavit of Kathryn Bartholomew in Support of Petitioners' Memorandum of Law in Opposition to the Motions to Dismiss, dated January 16, 2017, ¶ 6. They also had actual knowledge that the Greenidge Respondents were quickly moving forward with construction following receipt of all required approvals. Amended Petition ¶ 84 ("GGLLC held a groundbreaking ceremony for the repowering of the Greenidge Station at the facility on October 18, 2016"); *see also* Irwin Aff., ¶ 23 & Exhibit A (sample media report of groundbreaking ceremony); Hennessey Aff., Exhibit C) ("It is the Pipeline Companies intent to commence construction soon after the Certificate is granted and all the appropriate permits and permission have been obtained.").

Despite this, Petitioners did not, as they now attempt to argue, promptly seek a preliminary injunction, as is required to defeat dismissal based on mootness. *Citineighbors Coal..*, 2 N.Y.3d at 730 ("those objecting to [an action] on SEQRA grounds may safeguard their challenge against mootness by *promptly* requesting injunctive relief") (emphasis added). Rather, the October 31, 2016 Order to Show Cause merely set a return date for the court to consider whether to grant the relief in the Verified Petition. There was no motion made for a preliminary injunction, let alone a temporary restraining order, even though construction had already commenced in earnest. The only thing Petitioners point to is the relief requested in the Verified Petition, which includes a request for a "preliminary" injunction following entry of judgment in their favor at the conclusion of this action.

This return date was later extended to December 5, 2016 by mutual agreement of the parties and then delayed even further until January 24, 2017 at Petitioners' request so that Sierra Club could be added to this action.

This request, however, did not seek to preserve the status quo during the pendency of the action. See Petitioners' MOL, at 7; Verified Petition, dated October 28, 2016, at 24 ("Petitioners respectfully request that this Court enter judgment against Respondents ... "[i]mposing a preliminary injunction[.]"). Moreover, the requested "preliminary" injunction did not seek to enjoin operations, which is now Petitioners' focus, but rather sought only to enjoin the Greenidge Respondents "from taking steps to repower the Greenidge Station or construct a gas pipeline to the generating station." Verified Petition, dated October 28, 2016, at 24.

Furthermore, if Petitioners truly believed that they had sought a preliminary injunction, then why did they file a motion for temporary injunctive relief on December 23, 2016? The answer is obvious – they knew that they had not yet sought a preliminary injunction and realized that their claims would be deemed moot. *See, e.g.,* Affirmation of Rachel Treichler in Support of Petitioners' Motion for Temporary Injunctive Relief, dated December 23, 2016, ¶ 5 ("Such construction could raise a colorable claim of mootness of the pending proceeding which could render ineffectual any judgment ultimately obtained by Petitioners thereby causing them irreparable harm."); Memorandum of Law in Support of Petitioners' Motion for Temporary Injunctive Relief, at 11 (citing *Dreikausen v. Zoning Bd. of Appeals of City of Long Beach,* 98 N.Y.2d 165 (2002); *Graf v. Livonia,* 120 A.D.3d 944 (4th Dep't 2014)). As such, Petitioners' delay is not just two months, but rather, no less than three and a half months and more akin to six months. During this time, and with Petitioners' full knowledge, the Greenidge Respondents spent millions moving forward with the Greenidge Project,

A preliminary injunction is not the ultimate relief sought by an action. Rather, a preliminary injunction is *interim* relief granted during the pendency of the action. See CPLR 6301. A permanent injunction is what may be awarded in appropriate circumstances after a final judgment by the court has been rendered. Gambar Enters., Inc. v. Kelly Servs., Inc., 69 A.D.2d 297, 307 (4th Dep't 1979). As such, even though styled as a request for a "preliminary" injunction in their original Verified Petition, the relief sought by Petitioners was effectively a permanent injunction and not as they attempt to recast here.

all in good faith reliance on their regulatory approvals and the lack of any request from Petitioners to preserve the status quo during this action. *See* Irwin Aff., ¶ 7 and Exhibit B.

With construction of the Project nearly completed by the time Petitioners realized they needed to file a preliminary injunction to avoid a mootness claim, coupled with their self-imposed delay in bringing this action, Petitioners cannot now claim they expeditiously sought to preserve the status quo. See Save the Pine Bush Inc., 289 A.D.2d at 638-39 (finding that petitioners' claims were moot, in part, because they intentionally delayed or stalled proceedings by waiting until the last day of the statute of limitations to commence the proceeding and fixing a return date over a month after their notice of motion). Petitioners' suggestion that the Greenidge Respondents proceeded with construction at their own risk with knowledge of the Petitioners' intention to seek a preliminary injunction is wholly misplaced as the Greenidge Respondents had already purchased all the necessary equipment, held a groundbreaking ceremony, and began construction well before the Greenidge Respondents were served in this action. See Irwin Aff., ¶¶ 24-34 & Exhibit B.

The mere fact that Petitioners have now strategically decided to focus on preventing only environmental harms tied to operations is beside the point. *Compare Riverkeeper, Inc. v. Johnson*, 52 A.D.3d 1072 (3d Dep't 2008) (finding action moot irrespective of whether operations had commenced, focusing solely on purchase and installation of necessary materials). The *Riverkeeper* case concerned an Article 78 challenge to the NYSDEC's determination to renew the Danskammer electric generating facility's existing SPDES permit. *Id.* at 1073. Similar to the claims here, the petitioners in *Riverkeeper* argued that NYSDEC failed to sufficiently minimize the environmental impacts of the facility's discharge of water into the Hudson River. *Id.* On transfer from the Supreme Court, the Third Department granted the respondent's motion for dismissal on mootness

grounds because all the necessary equipment had already been purchased and installed. *Id.* In doing so, the court noted:

petitioners do not dispute that Dynegy's renewed permit required modification of its existing cooling system, that the required modification has been completed by installation of variable speed pumps at a cost of over \$1 million, and that petitioners failed to move in Supreme Court or this Court for a preliminary injunction or stay that would enjoin the requirements of the permit or otherwise preserve the status quo while this matter was pending.

Id.

Here, the Greenidge Respondents similarly purchased all the necessary construction materials required to restart the Greenidge Station and had substantially completed construction of the in-plant upgrades (and pipeline) by the time Petitioners filed this action, and even more so when Petitioners first moved for a preliminary injunction and finally sought to preserve the status quo. *See* Irwin Aff., ¶¶ 24-34 & Exhibit B. The same conclusion as in *Riverkeeper* is therefore warranted here; namely, dismissal of the Amended Petition.

Petitioners reliance on *Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 N.Y.2d 165 (2002) and *Allison v. New York City Landmarks Preservation Comm.*, 35 Misc. 3d 500 (N.Y. Sup. Ct, New York Co. 2011) does not alter this conclusion.

In *Dreikausen*, the court found that the petitioners' failure to timely seek a preliminary injunction rendered their claims moot. Particularly, the court noted that even though the petition was filed less than two weeks from the Board's issuance of the challenged variance (significantly, more expeditious than here), the petitioners failed to move for a preliminary injunction. 98 N.Y.2d at 171. In that case, petitioners waited five and a half months to move for a preliminary injunction by order to show cause after observing that the respondent had begun work on the project and was about to receive the necessary building permit. *Id.* As such, the court rejected the petitioners' assertions that their claims were not moot merely because they promptly filed an Article 78 proceeding and sought

a preliminary injunction prior to the start of construction. *Id.* at 172. Accordingly, *Dreikausen* actually supports the Greenidge Respondents' claim of mootness because as even Petitioners recognize, the chief factor in determining whether a party's claims are moot is the "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 173; *see also* Petitioners' MOL, at 7. And, here, as in *Dreikausen*, Petitioners waited almost six months from the Negative Declaration and over two months after construction commenced before moving for a preliminary injunction.

The *Allison* case concerns laches and held that the petitioners' claims in that case were not barred because the "petitioners did not unreasonably delay initiating their claims." *Allison*, 35 Misc. 3d at 512. Importantly, the *Allison* petitioners filed a motion for a preliminary injunction with their petition, which was *prompt* and *predated* issuance of the final construction approval as well as any construction activities by the respondents. *See id.* at 513 ("they sought the injunction even before the actual construction, as the Vornado respondents conceded at oral argument July 26, 2011, that in fact, even at that point, they still had not obtained the requisite construction permits that would allow them to proceed past the demolition phase."). Also important to the *Allison* court's ruling was the fact that the petitioners did not believe that the respondents would immediately commence construction and its determination that the work could be undone without undue hardship. *Id.* at 512-13.

In contrast, here, Petitioners did not file a motion for preliminary injunction with their Verified Petition, which itself was filed *after* construction was substantially complete. Instead, they waited to move for a preliminary injunction until almost six months had passed from issuance of the Negative Declaration, and more than three and a half months had elapsed from NYSDEC's issuance

of air permits authorizing in-plant construction activities and the resumption of operations. Petitioners knew construction was imminent and the unrefuted sworn statements of Dale Irwin establish the significant undue hardship to the Greenidge Respondents. Given the foregoing, the *Allison* case is readily distinguishable from the instant matter and in no way supports Petitioners' arguments here.

Accordingly, because Petitioners waited months to commence this action and then caused the proceeding to be delayed even longer before finally seeking to preserve the status quo on December 23, 2016, the Greenidge Respondents continued construction in good faith and under authority of law. As construction cannot be readily undone without undue hardship to the Greenidge Respondents, Petitioners' claims are moot and warrant dismissal.

CONCLUSION

For all of the reasons set forth herein as well as in the Greenidge Respondents' Motion to Dismiss and supporting papers, the Greenidge Respondents respectfully submit that the Amended Petition should be dismissed *in toto* with prejudice. If the court denies their Motion to Dismiss, the Greenidge Respondents request thirty days to answer the Amended Petition.

Dated: January 19, 2017

Albany, New York

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