SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF YATES

In the Matter of the Application of

SIERRA CLUB, COMMITTEE TO PRESERVE THE FINGER LAKES by and in the name of PETER GAMBA, its President; and COALITION TO PROTECT NEW YORK by and in the name of KATHRYN BARTHOLOMEW, its Treasurer; and SENECA LAKE GUARDIAN, A WATERKEEPER AFFILIATE by and in the name of YVONNE TAYLOR, its Vice President,

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 and LOCKWOOD HILLS, LLC,

Respondents.

ORAL ARGUMENT REQUESTED

Index No. 2017-0232

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED PETITION

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PRELIMINARY STATEMENT

This case involves two of the largest water withdrawal and discharge permits issued by Respondent New York State Department of Environmental Conservation ("DEC") for water withdrawals and discharges in Great Lakes Basin, the permits issued to Respondent Greenidge Generation LLC ("GGLLC") for its Greenidge Generating Station on Seneca Lake ("Greenidge Station"). The permits authorize GGLLC to withdraw up to 139,248,000 gallons of water per day from the lake and to discharge up to 134,000,000 gallons per day of heated condenser cooling water into the Keuka Outlet 700-feet upstream from Seneca Lake, plus additional discharges into Seneca Lake unlimited as to flow, but limited in concentrations of contaminants.

Petitioners Sierra Club, Committee to Preserve the Finger Lakes ("CPFL", Coalition to Preserve New York ("CPNY") and Seneca Lake Guardian, a Waterkeeper Affiliate (collectively "Petitioners") contend that DEC violated the requirements of the applicable permitting statutes and the State Environmental Quality Review Act ("SEQRA") in failing to impose required terms and conditions in the GGLLC withdrawal and discharge permits or to conduct adequate SEQRA reviews of the permit applications.

This is the second case Petitioners have filed challenging permits DEC has issued to GGLLC for operation of Greenidge Station. Petitioners CPFL and CPNY filed an Article 78 proceeding on October 28, 2016 in Yates County Supreme Court challenging GGLLC's air permits and DEC's review of the environmental impacts of issuing the air permits under SEQRA. Sierra Club was added as the lead petitioner on December 6, 2016. On April 21, 2017, this court issued an order granting Respondents' motions to dismiss the petition. Sierra Club, CPFL and CPNY are currently perfecting their appeal to the Appellate Division Fourth Department.

The present case is the third Article 78 proceeding in which Petitioner Sierra Club has challenged Respondent DEC's interpretation of the requirements applicable to water withdrawal permits. In December 2013 Sierra Club joined with the Hudson River Fishermen's Association ("HRFA") in challenging the first permit issued to a non-public user under the new law, the permit issued to TransCanada Ravenswood LLC for its Ravenswood Generating Station in Queens to take over 1.5 billion gallons per day from the East River in New York Harbor.[1] Sierra Club and HRFA received an adverse ruling in that case from the Queens County Supreme Court in October 2014.[2] They appealed that judgment to the Second Department in July 2015. Oral arguments were heard by the Second Department on February 6, 2017. The parties are awaiting the Second Department's ruling in the case.

In March 2015, Sierra Club and HRFA filed a challenge to the water withdrawal permit issued to Consolidated Edison for its East River Generating Station in Manhattan to take up to 373.4 million gallons per day from the East River. Sierra Club and HRFA received an adverse ruling from the New York County Supreme Court on September 29, 2016.[3] Sierra Club and HRFA appealed the trial court judgment to the First Department in July 2017. On December 12, 2017, the First Department ruled that the petition was time-barred.[4] The basis for the First Department's ruling does not apply to the present case or to the Second Department case because both these cases were filed within 60 days of the issuance of the applicable water withdrawal permit. The petition in the First Department case was not filed within 60 days of the issuance of

[1] Pursuant to an agreement among the parties, Petitioners filed a new petition in February 2014. TransCanada was represented in the proceedings by Yvonne Hennessey, the attorney representing GGLLC in the present case.

[2] *Sierra Club v. Martens*, (Sup. Ct. Queens Cty., Oct. 1, 2014), Index No. 2949/14, McDonald, J., (*Sierra Club v. Martens I (Ravenwood).* A copy of the memorandum decision issued by the court is attached as Exhibit A to the affirmation of Rachel Treicher dated December 22, 2017 ("Tr. Aff.").

[3] *Sierra Club v. Martens*, 2016 NY Slip Op 51391(U) (Sup. Ct. New York Cty., Sept. 29, 2016), *aff'd in part* 2017 NY Slip Op 08627 (1st Dep't, Dec. 12, 2017), copy attached as Exhibit B to Tr. Aff.

[4] *Sierra Club v. Martens,* 5138 100524/15, December 12, 2017, http://www.nycourts.gov/reporter/3dseries/2017/2017_08627.htm, copy attached as Exhibit C to Tr. Aff.

the permit and thus was held to be time-barred under ECL 15-0905(2). Because the First Department found that the petition was time-barred, the court did not reach the other issues in the case. The rulings of the Queens County and New York County trial courts are discussed below.

STATEMENT OF FACTS

The facts of this case are set forth in the verified petition.

ARGUMENT

POINT I

DEC VIOLATED WSL IN ISSUING A WATER WITHDRAWAL PERMIT TO GGLLC WITHOUT IMPOSING REQUIRED TERMS AND CONDITIONS

The water withdrawal permit DEC issued to GGLLC on September 11, 2017 violated the Water Supply Law, ECL Article 15, Title 15, 15-1501 *et seq.* (WSL) because it failed to contain terms and conditions required by the law. WSL was amended in 2011 by the Water Resources Protection Act of 2011, Chapters 400-402, Laws of 2011 to require that users other than public water supply systems obtain water withdrawal permits. Water withdrawal permits have been required for public water supply systems in New York since 1905.[5] The new law was enacted to conform New York's water withdrawal permitting law to the requirements of the Great Lakes–St. Lawrence River Basin Water Resources Compact (the "Compact"), ECL, Article 21, Title 10, which became state and federal law in 2008.

The legislation incorporated key elements of the Compact's decision-making standards, including the Compact requirements that water withdrawals must "result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water

[5] The Water Supply Act of 1905 (Chapter 724, Laws of 1905).

Dependent Natural Resources and the applicable Source Watershed" and "incorporate environmentally sound and economically feasible water conservation measures." ECL 21-1001, Section 4.11.2. These Compact requirements are incorporated in ECL 15-1503(2), which mandates eight factors to be determined by the DEC in making a decision whether to grant or deny a water withdrawal permit. The factors include "the proposed water withdrawal will be implemented in a manner to ensure it will result in no significant individual or cumulative adverse impacts on the quantity or quality of the water source and water dependent natural resources," ECL 15-1503(2)(f), and "the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures," ECL 15-1503(2)(g).

DEC promulgated new regulations implementing the new water permitting requirements in November 2012. 6 NYCRR Part 601. The regulations became effective April 1, 2013. 6 NYCRR 601.11(c) reinforces the mandates of ECL 15-1503(2) by requiring the same eight determinations.

When DEC was questioned during the comment period on the draft water withdrawal regulations in 2012 regarding whether there were any distinctions in the standards that applied to initial permits issued to existing users compared to the standards that apply to permits issued to new users arose, DEC responded that the standards are the same. 2012 Assessment of Public Comments on the Water Withdrawal Regulations, DEC, November 2012, pp. 41-42, Tr. Aff. Ex. D. Most notably, in response to a comment by Entergy Nuclear Operations, Inc. requesting clarification as to "whether the standards for issuance of initial permits for existing facilities are subject to the same issuance standards as new permits," DEC stated, "ECL §15-1503 establishes permit application requirements and standards for permit issuance. This Section applies to all

permits. *The statute does not authorize the Department to apply different standards for the issuance of initial permits.* [emphasis added]." *Id*. at 42.

It was not until notice for the TransCanada Ravenswood water withdrawal permit application was published in DEC's Environmental Notice Bulletin ("ENB") in August 2013 that DEC publicly stated that it was applying a distinction between the standards that applies to initial permits issued to existing users and permits issued to new users.

A. DEC Erred in Treating GGLLC's Withdrawal Permit Application as an Application for an Existing Water Use

On May 28, 2013, shortly after the new water withdrawal regulations became effective, GMMM Greenidge LLC, a previous owner of Greenidge Station, submitted an application to DEC for a water withdrawal permit for the plant. Petition ¶ 47. GMMM Greenidge's application was filed several months after it purchased Greenidge Station from AES AEE2, LLC ("AEE2"), a subsidiary of AES Eastern Energy, LP, in a chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court").

At the time GMMM Greenidge submitted its water withdrawal permit application, Greenidge Station was not operating and was not withdrawing water from Seneca Lake. The plant had been permanently retired on September 21, 2012, had been in lay-up status since March 19, 2011 and had not operated since well before that date. *Id*. ¶ 39. The purchase of Greenidge Station from AEE2 by an affiliate of GMMM Greenidge together with three other non-operating coal-fired power plants owned by AEE2 was approved by the Bankruptcy Court on October 11, 2012. *Id*. ¶ 41. After the purchase from AEE2 in 2012, GMMM Greenidge was sold to an affiliate of Atlas Holdings, LLC on February 28, 2014 and on March 3, 2014, GMMM Greenidge was renamed Greenidge Generation, LLC ("GGLLC"). *Id*. ¶ 49.

Greenidge Station was still not operating when DEC published notice in the ENB on August 12, 2015 that DEC had determined that GGLLC was eligible as an existing user for an initial water withdrawal permit under ECL 15-1501(9). ENB Notice, Tr. Aff. Ex. D.

Petitioners contend that there is no factual basis for DEC's determination that Greenidge Station should be treated as an existing user given that Greenidge Station had not operated since before the new water withdrawal permitting law was enacted and before the plant was owned by GGLLC. In these circumstances, DEC should have treated the plant as a new water user.

GGLLC did not commence operations at Greenidge Station until sometime in the spring of this year. DEC required that GGLLC obtain new air permits before restarting the plant as a result of requirements imposed by the United States Environmental Protection Agency ("EPA"). EPA required DEC to apply the standards applicable to a new air emission source to the air permits on the grounds that the plant had not operated for nearly five years, had been permanently shut down, and the previous owner had relinquished its air permits. See EPA Letter to DEC regarding the air permits for Greenidge Station dated December 7, 2015, Tr. Aff. Ex. E. In contrast to EPA's position regarding the air permits, DEC elected not to treat the new water withdrawals by Greenidge Station as new uses. Thus DEC allowed the GGLLC to begin new operations at Greenidge Station in spring 2017 without having a water withdrawal permit in place. The plant's water withdrawal permit was not issued by DEC until September 11, 2017, after new operations had already begun.

Allowing the plant to begin new water withdrawals without having a water withdrawal permit was a violation of the permitting requirements of WSL. ECL 15-1501(1) provides that "no person shall have the power "to make a water withdrawal from *an existing* or new source [emphasis added]" until that person shall have obtained a water withdrawal permit. The

appropriate terms and conditions required by WSL are specified in ECL 15-1503(4) and are based on the determinations specified in ECL 15-1503(2). ECL 15-1503(4) provides that DEC has the power "to grant or deny a permit or grant a permit with such conditions as may be necessary to provide satisfactory compliance by the applicant with the matters subject to department determination pursuant to subdivision 2 of this section." The statutory scheme requires that the determinations mandated by ECL 15-1503(2) be made as a basis for DEC to set adequate permit conditions. DEC failed to make the determinations required by ECL 15-1503(2) for operations by Greenidge Station and did not impose conditions to provide satisfactory compliance with those determinations in the GGLLC permit as required by ECL 15-1503(4). Among the determinations DEC failed to make for the GGLLC permit was a determination that the Greenidge water withdrawal will be implemented in a manner to ensure it will result in no significant individual or cumulative adverse impacts on the quantity or quality of the water source and water dependent natural resources in Seneca Lake as required by ECL 15-1503(2)(f) or a determination that the Greenidge water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures as required by ECL 15-1503(2)(g). DEC's failure to make the determinations and set the conditions required by ECL 15-1503(2) and ECL 15-1503(4) for the GGLLC water withdrawal permit violated DEC's duties under WSL.

B. Even if GGLLC is treated as an Existing User, the Requirements of ECL 15-1503(2) and ECL 15-1503(4) Still Apply

Even if GGLLC is treated as an existing user under WSL, the requirements of ECL 15-1503(2) and ECL 15-1503(4) still apply. ECL 15-1501(9) does not exempt existing users from the requirements of ECL 15-1503(2) and ECL 15-1503(4). ECL 15-1501(9) provides that DEC "shall issue an initial permit, *subject to appropriate terms and conditions as required under this*

article, to any person not exempt from the permitting requirements of this section, for the maximum water withdrawal capacity reported to the department . . . as of February 15, 2012 [emphasis added]," i.e., an existing user. ECL 15-1501(9) specifies the size of the permit to be issued to an existing user, but in other respects, leaves the terms and conditions to be imposed to be determined by DEC "subject to appropriate terms and conditions as required by [WSL]." ECL 15-1503(2) and ECL 15-1503(4) specify the terms and conditions required by WSL, and the requirements of those sections are thus incorporated into the requirements applicable under ECL 15-1501(9). Petitioners contend that this statutory language is clear and cannot be interpreted to exclude application of the requirements of ECL 15-1503(2) and ECL 15-1503(4) in setting appropriate terms and conditions in permits issued to existing users.

On the issue of whether ECL 15-1501(9) requires compliance with the requirements of ECL 15-1503(2) and ECL 15-1503(4) for existing users, the trial courts in *Sierra Club v. Martens I (Ravenswood*) and *Sierra Club v. Martens II (Con Ed*) erred in deferring to DEC's interpretation of the statute.[6] Under the applicable case law, however, because DEC's current interpretation of ECL 15-1501(9) runs counter to the clear wording of the statute, judicial deference to DEC's interpretation of ECL 15-1501(9) is not appropriate. The rules for evaluating when a court should defer to an agency interpretation of a statute are explained in the decision of the Court of Appeals in *Raritan Development Corp. v. Silva,* 91 N.Y.2d 98 (1997):

> Where "the question is one of pure legal interpretation of statutory terms, deference to the [agency] is not required" . . . . On the other hand, when applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference. [Citations omitted.] Even in those situations, however, a determination by the agency that "runs counter to the

[6] Of course, the trial court decisions in *Sierra Club v. Martens I (Ravenswood*) and *Sierra Club v. Martens II (Con Ed)*, which involved the interpretation of the requirements applicable to existing users contained in ECL 15-1501(9), did not purport to interpret the requirements applicable to permits issued to new users such as GGLLC.

> clear wording of a statutory provision" is given little weight. [Citations omitted.]

Id. 102-103. In *Raritan*, the Court declined to defer to the interpretation of a section of New York City's Zoning Resolution put forth by the Board of Standards and Appeals of the City of New York (BSA). The Court said, "The statutory language could not be clearer. . . . BSA's interpretation conflicts with the plain statutory language and may not be sustained." *Id*. at 103. Similarly, in *Matter of Brown v. NYS Racing and Wagering Board*, 60 A.D.3d 107 (2nd Dep't 2009), the court stated: "when a 'question is one of pure legal interpretation of statutory terms, deference to the [agency] is not required. . . . In such instances, courts should construe clear and unambiguous statutory language as to give effect to the plain meaning of the words used." *Id*. at 115, citations omitted. The *Brown* court found, "There being no ambiguity in the operative statutory terms, we must necessarily deem the pertinent provisions of the Education Law as subject to pure legal interpretation and give effect to their plain meaning, without necessarily deferring to the interpretation advanced by NYSED." *Id*. at 116.

In the present case there is no ambiguity in the wording of ECL 15-1501(9) regarding the requirement that permits issued to existing users contain "appropriate terms and conditions as required under this article," and this court should give effect to the plain meaning of ECL 15-1501(9) without giving deference to DEC's interpretation.

The fact that DEC interpreted ECL 15-1501(9) as requiring the imposition of the same terms and conditions in permits issued to new users and to existing users during the drafting of the regulations in 2012, as noted above, further militates against giving deference to DEC's contrary interpretation today.

The trial court's decision in *Sierra Club v. Martens II (Con Ed*) relied on the fact that the withdrawals from the East River in New York Harbor at issue in that case were not withdrawals

of freshwater. On that basis the *Con Ed* trial court stated that it "declines to consider water conservation themes underlying WSL as a basis to require further consideration of closed-cycle methods leading to vacatur of the Initial Permit." The present case is easily distinguished because Greenidge Station is withdrawing fresh, potable water from Seneca Lake, which is used as a drinking water source by many municipalities and individuals around the lake.

POINT II

DEC VIOLATED SEQRA IN ISSUING A WATER WITHDRAWAL PERMIT TO GGLLC WITHOUT CONDUCTING AN ADEQUATE REVIEW OF THE IMPACTS OF GREENIDGE OPERATIONS

Under SEQRA, preparation of an Environmental Impact Statement ("EIS") is required whenever an action *may* have a significant impact on the environment. ECL 8-0109(2). An EIS must contain all the information necessary to assure that the decision-making body, called the "lead agency," can ultimately determine to go forward or not with a project in a manner that will create the least negative impact to the environment. *Id*. The lead agency must "act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid environmental effects." ECL 8-0109(1).

In determining whether an EIS needs to be prepared, the SEQRA regulations provide that the lead agency must first determine whether or not the proposed action falls within the categories of "Type I", "Unlisted", or "Type II." 6 NYCRR 617.6. Type I actions are those actions that because of their size, scope or type, are determined to be more likely to have adverse environmental consequences, and therefore require the drafting of an EIS. As explained in 6 NYCRR 617.4(a)(1):

> The purpose of the list of type I actions in this section is to identify, for agencies, project sponsors and the public, those actions and projects that are more likely to require the preparation of an EIS than unlisted actions. All agencies are subject to this

> type I list. . . . . [T]he fact that an action or project has been listed as a type I action, carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS.

In contrast, Type II actions do not require environmental review under SEQRA. Type II actions are identified in Section 617.5 of the regulations. They have already been determined not to have an adverse effect on the environment, and therefore no further SEQRA review is required. Unlisted actions are those actions that are neither Type I nor Type II. 6 NYCRR 617.2(ak). An environmental impact statement must be prepared for an unlisted action if the proposed action "may include the potential for at least one significant adverse environmental impact." 6 NYCRR 617.7(a)(1). Conversely, to determine that an EIS will not be required for an action, "the lead agency must determine either that there will be no adverse environmental impacts or the identified adverse environmental impacts will not be significant." 6 NYCRR 617.7(a)(2).

In the present case, DEC erred in determining that issuance of the GGLLC water withdrawal permit constituted a Type II action not subject to review under SEQRA. In fact, GGLLC's water withdrawals qualify as a Type I action because they are for more than 2,000,000 million gallons per day.

A. Issuance of GGLLC's Water Withdrawal Permit Does Not Qualify as a Type II Action under SEQRA

As a result of its failure to properly characterize the GGLLC's water withdrawal permit application as an application for a new withdrawal, DEC mischaracterizes GGLLC's application as a Type II action under SEQRA. Because Greenidge Station did not operate for more than five years and was not operating at the time GGLLC purchased the plant or applied for a water withdrawal permit, GGLLC must be treated as a new water user. Water withdrawal permits issued to new users are unquestionably subject to review under SEQRA.

Even if GGLLC is treated as an existing water user, the issuance of the GGLLC water withdrawal permit does not meet any of the Type II exemptions listed in 6 NYCRR 617.5(c) of the SEQRA regulations. DEC's claim that issuance of an initial water withdrawal permit to an existing user is a purely ministerial act within the scope of 6 NYCRR 617.5(c)(19) of the SEQRA regulations is simply incorrect and is based on DEC's misreading of the requirements of ECL 15-1501(9). As discussed above, ECL 15-1501(9) requires the exercise of extensive discretion by DEC in making the determinations required by ECL 15-1503(2) and in setting appropriate terms and conditions to address those determinations as required by ECL 15-1503(4).

The reliance by the trial courts in both *Sierra Club v. Martens I (Ravenswood)* and Sierra *Club v. Martens II (Con Ed)* upon the phrase "shall issue" in ECL 15-1501(9) as evidence that DEC has no discretion in setting terms and conditions under that section makes far too much of the word "shall," a word used in many of the permitting provisions of the ECL. For example, almost every subsection of ECL 15-1501 uses the word "shall." An interpretation of the "shall issue" wording in ECL 15-1501(9) as mandating that no other conditions may be imposed in the permit is contrary to DEC's well-established interpretations of similar "shall issue" wording under the permitting requirements of ECL Article 17, the Water Pollution Control Law governing SPDES permits. ECL 17-0701(5) provides that "[a] SPDES permit shall be issued to the applicant upon such conditions as the commissioner may direct," yet DEC interprets that provision as giving DEC sufficient discretion to require numerous terms and conditions in SPDES permits and to subject SPDES permit applications to review under SEQRA.

The reliance of the trial courts in *Ravenswood* and *Con Ed* upon the decision of the Court of Appeals in *Atlantic Beach v Gavalas,* 81 N.Y.2d 322 (1993) is also misplaced. *Gavalas*

supports a determination in the present case that DEC's issuance of an initial water withdrawal permit to an existing user is not a ministerial action. In *Gavalas*, the court stated that the "pivotal inquiry" in determining whether an agency decision is ministerial or discretionary for purposes of determining the applicability of SEQRA is "whether the information contained in an EIS may 'form the basis for a decision whether or not to undertake or approve such action,'" *Id*. at 326. The court noted that an agency evaluating an EIS is required to "assess the potential impact on land, water, plants and animals, growth and character of the community and other environmental concerns." The court determined that the village ordinance at issue in *Gavalas* did not give the village building inspector the type of discretion that would allow a permit grant or denial to be based on the environmental concerns detailed in an EIS. Therefore the court determined that issuance of the building permit at issue in that case did not constitute an agency "action" within the purview of SEQRA. *Id*. at 328.

The present case presents very different factual circumstance from the circumstances before the court in *Gavalas*. In this case, DEC's evaluation of the determinations required by ECL 15-1503(2) clearly would be informed by an EIS. For example, Section 15-1503(2)(g) requires that DEC "shall determine whether . . . the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures." This determination would be informed by an EIS. Section 15-1503(2)(d) mandates that, before issuing a water withdrawal permit, DEC determine whether "the need for all or part of the proposed water withdrawal cannot be reasonably avoided through the efficient use and conservation of existing water supplies." Again, this determination would be informed by an EIS. Unlike the circumstances before the court in *Gavalas*, the statutes and

regulations at issue in this case require DEC to make determinations and set conditions that have to do with environmental concerns that are central to SEQRA.

Thus, even if GGLLC is considered as an existing water user, DEC's determination that GGLLC's water withdrawal permit application was a Type II action exempt from review under SEQRA was improper.

B. Issuance of GGLLC's Water Withdrawal Permit Is a Type I Action under SEQRA

Due to the size of the proposed water withdrawals, GGLLC's permit application qualifies as a "Type I" action under SEQRA. The SEQRA regulations provide that "a project or action that would use ground or surface water in excess of 2,000,000 gallons per day" is a Type I action. The permit issued to GGLLC was for 70 times that amount—for 139,248,000 gallons per day— and its GGLLC's water withdrawal permit application should have been reviewed as a Type I action.

POINT III

DEC VIOLATED THE SPDES LAW IN ISSUING A SPDES PERMIT TO GGLLC WITHOUT IMPOSING REQUIRED TERMS AND CONDITIONS

The New York Legislature established the State Pollutant Discharge Elimination System (SPDES) program in 1973 to comply with new Federal requirements. The federal Water Pollution Control Act of 1972,[7] commonly referred to as the Clean Water Act (CWA), authorized development of a National Pollutant Discharge Elimination System (NPDES) to regulate discharges to surface waters of the United States. Section 301 of the CWA declares a prohibition against any discharge of any pollutant into waters of the United States except in compliance with a NPDES permit. The CWA authorizes the EPA to delegate the NPDES permit

[7] 33 U.S.C. 1251 et seq. (1972).

program to state governments, enabling states to perform many of the permitting, administrative and enforcement aspects of the NPDES Program.

The SPDES law allowed New York to become eligible to receive delegated authority to regulate discharge activities covered by the federal program.[8] In 1975, New York's SPDES program was approved by the EPA.[9] In order to take advantage of this federal delegation, New York State adopted its own SPDES permitting system, which is codified in Titles 7 and 8 of the Water Pollution Control Law, ECL Article 17 (the "SPDES Law"). Under the SPDES Law, DEC is charged with issuing and enforcing SPDES permits within New York State.[10]

ECL 17-0701 and ECL 17-0703 set forth the requirements for issuance of SPDES permits. ECL 17-0701(1) provides, in pertinent part, "[i]t shall be unlawful for any person, until a written SPDES permit therefor has been granted by the commissioner, or by his designated representative, and unless such permit remains in full force and effect, to: a. Make or cause to make or use any outlet or point source for the discharge of sewage, industrial waste or other wastes or the effluent therefrom, into the waters of this state, or . . . ." ECL 17-1701(5) provides that "[a] SPDES permit shall be issued to the applicant upon such conditions as the commissioner may direct." ECL 17-0703(1) provides that "[t]he permit provided in section 17-0701 and title 8 hereof shall be issued by the commissioner or by his designated representative, pursuant to regulations of the department adopted in accordance with subdivision 3 of section 17-030(3) and title 8 hereof."

[8] Office of the State Comptroller, Clean Water Permit Process, 2001-S-18, March 13, 2003, http://osc.state.ny.us/audits/allaudits/093003/093003-h/01s18.pdf.
[9] *Id*.
[10] DEC, *SPDES Compliance and Enforcement, State Fiscal Year 2015/2016 Annual Report*, October 1, 2016, http://www.dec.ny.gov/docs/water_pdf/2015annualrpt.pdf [last accessed 07/25/17].

A. DEC Erred in Allowing GGLLC to Renew the AEE2 SPDES Permit

On August 1, 2014, GGLLC submitted an application to DEC to renew the SPDES previously held by AEE2 for Greenidge Station. Petition ¶ 51. At the time GGLLC submitted its SPDES permit application, Greenidge Station was not operating and was not withdrawing water from Seneca Lake. The plant was permanently retired on September 21, 2012, had been in lay-up status since March 19, 2011 and had not operated since well before that date. GGLLC's parent company Atlas Holdings, LLC, did not acquire Greenidge Station until February 28, 2014. *Id*. ¶ 49.

On August 12, 2015, DEC published notice in its Environmental Notice Bulletin ("ENB") giving notice that GGLLC had applied for renewal of a SPDES permit. ENB Notice, Tr. Aff. Ex. D. The notice stated that DEC had received an application for renewal of the SPDES permit for the Greenidge Station, that DEC was proposing a department-initiated modification to the SPDES permit, and that DEC as lead agency had determined under SEQRA that the project was a Type I action and would not have a significant effect on the environment. *Id*. DEC issued GGLLC's SPDES permits on September 11, 2017. Petition ¶ 87.

Applications for renewal of a SPDES permit for a facility that has not operated during the term of the permit, such as GGLLC's application for the renewal of the AEE2 SPDES permit for operation of Greenidge Station, are required by 6 NYCRR 621.11 (b)(3) to be treated as a new application and to be subject to a full technical review.[11] Because Greenidge Station did not operate during the term of the AEE2 permit, DEC erred in failing to treat GGLLC's application to renew the AEE2 SPDES permit as a new application. In these circumstances, DEC was

[11] 6 NYCRR 621.11 relating to applications for permit renewals and permit transfers provides in subsection (b)(3) that "[r]enewal of a SPDES permit where the facility that would be or is the source of the permitted discharge, but has not operated during the term of the permit, will be treated as a new application and be subject to a full technical review."

required by 6 NYCRR 621.11 (b)(3) to treat GGLLC's application as an application for a new permit and to subject it to a full technical review. DEC's failure to do so violated the requirements of 6 NYCRR 621.11 (b)(3) and the resulting permit must be annulled.

B. The SPDES Law Requires Closed Cycle Cooling upon Issuance of a New Permit

Discharges from power plant cooling systems are subject to special rules under the CWA. Pursuant to Section 402 of the CWA discharges from power plant cooling systems must be authorized by a NPDES permit or by a state permit program. Section 316(b) of the CWA requires EPA to issue regulations for cooling water intake structures to ensure "that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact."[12]

To comply with these requirements, DEC issued its most recent guidance on Best Technology Available ("BTA") for Cooling Water Intake Structures in 2011.[13] The BTA guidance requires closed cycle cooling. The BTA guidance states that cooling water intake structures will be subject to one of four "performance goals" when selecting BTA. Each of the four goals requires "closed-cycle cooling." *Id*. The guidance also states, "This policy will be implemented when: (i) an applicant seeks a new SPDES permit; (ii) a permittee seeks to renew an existing SPDES permit; or (iii) a SPDES permit is modified either by the Department or by the permittee, for a facility that operates a CWIS in connection with a point source thermal discharge." *Id*. Under the CWA requirements and DEC's BTA guidance document, closed-cycle cooling would have been implemented when a full technical review was conducted of GGLLC's SPDES permit application. Had DEC conducted the full technical review of GGLLC's SPDES

[12] 33 U.S.C. 1316(b).

[13] "BTA for Cooling Water Intake Structures," July 10, 2011, http://www.dec.ny.gov/docs/fish_marine_pdf/btapolicyfinal.pdf, Treich. Aff. Ex. I.

permit application required by 6 NYCRR 621.11 (b)(3), DEC should have required closed-cycle cooling at the Greenidge Station. DEC's failure to do so violated the requirements of the SPDES law.

POINT IV

DEC VIOLATED SEQRA BY ISSUING A SPDES PERMIT TO GGLLC WITHOUT CONDUCTING AN ADEQUATE REVIEW OF THE IMPACTS OF GREENIDGE OPERATIONS

After determining that issuance of a modified SPDES permit to GGLLC constituted a Type I action under SEQRA, DEC erred in finding "no significant adverse impacts associated with the Department's renewal and modification of the facility SPDES permit." Amended negative declaration dated June 29, 2016 (the "Negative Declaration"), Tr. Aff. Ex. G.

A. DEC Erred in Issuing a Conditioned Negative Declaration for the GGLLC SPDES Permit

DEC's Negative Declaration is invalid because it is a conditioned negative declaration for a Type I action. Under the SEQRA regulations, conditioned negative declarations are not allowed for Type I actions. Conditioned negative declarations ("CNDs") 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.

In *Myerson v. McNally*, 90 N.Y.2d 742 (1997), the court of appeals 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.

DEC's Negative Declaration for GGLLC's SPDES Permit describes major modifications that will be required in the SPDES permit to reduce fish entrainment and impingement:

> 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 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.

For these reasons, DEC's Negative Declaration is invalid because it is a conditioned negative declaration for a Type I action.

B. DEC Erred in Improperly Segmenting its Review of the Impacts of Greenidge Operations

A second reason the Negative Declaration is invalid is because DEC segmented its review of the impacts of the operations of Greenidge Station in the Negative Declaration from its review of impacts of operation of the Lockwood Ash Disposal Site (LADS) where waste from the operations of the plant are deposited. The Negative Declaration does not evaluate the impacts of the waste disposal from the plant except to say that the waste generated by the plant's new operations will be less than the waste generated by the plant's previous operations because coal will no longer be used as a fuel source.

The Negative Declaration ignores the impacts of depositing significant amounts of additional waste into LADS and fails to mention the problems with current operations at LADS or that LADS is operating under a consent order entered into between Lockwood Hills LLC and DEC on February 18, 2015. See Consent Order attached as Ex. H to Tr. Aff. The consent 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).' *Id*. In these circumstances, DEC's review of solid waste impacts of operation of Greenidge Station should have evaluated the impacts of the deposit of additional wastes on the operations of LADS. Because DEC failed to do so, DEC impermissibly segmented its review of the impacts of waste disposal from the new operations at Greenidge Station.

C. DEC Erred in Applying an Incorrect Baseline for Evaluating Impacts of Greenidge Operations

For each impact discussed in the Negative Declaration, DEC concludes that the impacts of new operations at Greenidge Station will be less than or no greater than the impacts of the plant's previous operations. This is wrong baseline to evaluate the impacts of new operations at Greenidge Station. The station was shuttered in March 2011 and has not operated since. The correct baseline for evaluating impacts of the project is no operations.

DEC applies the wrong baseline in the Negative Declaration when it describes the modifications of the cooling water intake structure at the facility and states that the modifications are designed to "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 discussion of a reduction in fish entrainment and impingement by the plant is compared to the plant's former operations when it operated without any technology to reduce fish entrainment and impingement by the plant. The Negative Declaration does not evaluate whether there are other technologies that further minimize fish entrainment and impingement and does not offer any data on what the actual fish entrainment and impingement amounts are estimated to be.

Although the Negative Declaration states that "the proposed modified [SPDES] permit for Greenidge Station contains effluent limits and conditions which ensure that the existing beneficial uses of Seneca Lake will be maintained," the Negative Declaration does not mention or evaluate the thermal impacts the plant's huge thermal discharges on the area of the lake surrounding the Keuka Outlet, including impacts on hazardous algae blooms (HABs) in the vicinity of the plant or impacts of the thermal discharges and contaminated discharges on fish spawning and nursery areas, notwithstanding the requirements of 6 NYCRR 704.2(a)(4) providing that the development and growth of nuisance organisms shall not occur in

contravention of water quality standards as a result of thermal discharges and of 6 NYCRR 704.3(c) providing that the location of mixing zones for thermal discharges shall not interfere with spawning areas, nursery areas and fish migration routes.

The Negative Declaration also fails to apply the correct baseline in its discussion of the impacts of plant's new operations on solid waste management, stating that "[n]o impacts related to solid waste management are expected to result from the re-activation of Greenidge Station." *Id*. at 4. The Negative Declaration explains that, by eliminating the use of coal as a fuel source, the generation of solid waste from the facility will be significantly reduced compared to prior operations. "If Unit 4 were reactivated with coal, approximately 78,000 tons of fly ash and 158 tons of other waste would be generated per year. However, this will be greatly reduced since coal will no longer be used as a fuel source." *Id*. But comparing the new operations of the plant to a baseline of previous operations is incorrect. The impacts of the solid waste produced by the plant need to be compared to a baseline of no solid waste production. The Negative Declaration provides no estimate of how much waste will produced by new operations at Greenidge Station, no evaluation of the impacts of this amount of waste being added to the Lockwood Hills ash disposal site and no consideration of the significant environmental issues being faced at that site.

Each of the evaluations of impacts made by DEC in the Negative Declaration is based on the assumption that because the impacts will be less than under previous operations at Greenidge Station, there will be no significant environmental impacts from new operations at the plant. It is not appropriate, however, to compare the environmental impacts of the plant's new operations to its previous operations for purposes of determining the environmental impacts of the new operations. The correct comparison is to a baseline of no operations. When compared to the

correct baseline, operations at Greenidge Station have significant impacts that must be evaluated under SEQRA.

CONCLUSION

For each of the reasons stated above, Petitioners respectfully request that the water withdrawal permit and the SPDES permit issued by DEC to GGLLC for its Greenidge Generating Station be annulled.

DATED: Hammondsport, New York
December 22, 2017

Respectfully submitted,

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