

STATE OF NEW YORK
SUPREME COURT : 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; COALITION TO
PROTECT NEW YORK by and in the name of
KATHRYN BARTHOMEW, 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,

Index No. 2017-0232

-against-

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

Respondents.

**STATE RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION TO STRIKE**

BARBARA UNDERWOOD
Acting Attorney General
of the State of New York
*Attorney for the New York state Department
of Environmental Conservation and Basil
Seggos, Commissioner*
Environmental Protection Bureau
New York State Department of Law
The Capitol
Albany, New York 12224-0341

NICHOLAS C. BUTTINO
SUSAN L. TAYLOR
Assistant Attorneys General
Of Counsel

Dated: May 11, 2018

THE COURT SHOULD NOT CONSIDER EVIDENCE THAT PETITIONERS FAILED TO INCLUDE WITH THEIR PETITION

The Court should strike portions of several affidavits that petitioners submitted as part of their reply brief, and the Boyer affidavit in its entirety. This proceeding is not a plenary action. Petitioners must carry their burden at the time that they file their petition; they may not supplement the evidence after reviewing the State's response. Nor may they rely on evidence, even if timely submitted, that was not before the Department when it made the decision to issue the challenged permits. The State moves to strike in light of petitioners' persistent pattern of attempting to submit untimely and new evidence after they file their petition.

In this proceeding, petitioners challenge two permits that respondent New York State Department of Environmental Conservation (DEC) issued to respondent Greenidge Generation, LLC to operate Greenidge Station, a power plant on Seneca Lake. On November 8, 2017, petitioners filed their petition, and, on December 22, 2017, petitioners served a memorandum of law in support of their petition and an affirmation of Rachel Treichler attaching exhibits. On March 2, 2018, the State respondents served a verified answer, affidavits, and a memorandum of law opposing those papers. In its memorandum of law, the State asserted that it was improper for petitioners to include additional materials after they served their petition (State's Memo at 13, fn 1). The State also objected that petitioners lack standing.

On April 28, 2018, petitioners served their response papers, including additional affidavits. The affidavits purport to show that petitioners have standing. However, the affidavits go further than showing standing and offer evidentiary support for petitioners' claims, which the Court should not consider. In the alternative, the Court should consider these materials only to establish standing, and not for the evidentiary statements in the affidavits.

A. The Affidavits of Dr. Gregory Boyer Are Inappropriate

The affidavits of Dr. Gregory Boyer, dated April 26, 2018 and January 14, 2017,¹ assert that operation of Greenidge Station would harm Seneca Lake. Petitioners offer these affidavits as a quasi-expert statement about harms, and attach articles written by Dr. Boyer concerning algal blooms. It is too late for petitioners to submit evidence; it is also improper because Dr. Boyer's opinions were not submitted to the Department during the public comment period (*see Concetta T. Cerame Irrevocable Family Tr. v Town of Perinton Zoning Bd. of Appeals*, 6 AD3d 1091, 1091 [4th Dept 2004] [noting judicial review “is limited to the record before the agency and proof outside the administrative record should not be considered”]).

The Uniform Rules of Trial Courts require Article 78 petitioners to carry their burden of proof when they serve the petition. This is so because an article 78 petition is akin to a motion for summary judgment. Under the rules, “[t]he moving party shall serve copies of all affidavits and briefs upon all other parties at the time of service of the notice of motion” (22 NYCRR 202.8[c]). Rule 202.9 applies Rule 202.8 to special proceedings (22 NYCRR 202.9 [“Special proceedings shall be commenced and heard in the same manner as motions that have not yet been assigned to a judge as set forth in section 202.8”]). “[B]riefs of the moving party must be served at the time of service of a notice of motion if the moving party elects to serve briefs” (*Sutherland v Glennon*, 157 Misc 2d 547, 549 [Sup Ct, Hamilton County 1993], *appeal dismissed* 209 AD2d 898 [3d Dept 1994]).

Dr. Boyer's affidavits are solely evidentiary. He does not purport to suffer any personal harm from DEC's issuance of permits to Greenidge Generation. Submission of Dr. Boyer's affidavits are all the more egregious because the Court instructed these same petitioners in a

¹ The January 14, 2017 affidavit is the same affidavit that petitioners submitted in an earlier proceeding.

prior proceeding that it would not consider Dr. Boyer's January 14, 2017 affidavit because it was not filed with the petition. (*Sierra Club v. DEC*, 2016-0165, *6 [Sup Ct, Yates County, April 21, 2017] [attached as Exhibit A to the Affirmation of Nicholas Buttino, dated May 11, 2018] ["Those affidavits contain additional evidence which as submitted violate 22 NYCRR 202.2(c) and 202.9."]). The Court should not allow petitioners to violate rules 202.8 and 202.9, and should strike Dr. Boyer's affidavits, including the exhibits.

B. The Member Affidavits Present Improper New Evidence

The affidavits submitted by petitioners' members are also untimely and inappropriate. Based on the belated submission of the member affidavits, the State withdraws its objection to petitioners' standing.² Nevertheless, petitioners' affidavits go well beyond showing standing. For example, Linda Downs not only describes her membership in the Committee to Preserve the Finger Lakes and her use of Seneca Lake, but also the terms of the State Pollutant Discharge Elimination System (SPDES) permit and alleged harms from operation of Greenidge Station (*see* Affidavit of Linda Downs, dated April 28, 2018, ¶¶ 11-44). She also attaches exhibits purporting to give more information about the characteristics of Seneca Lake and algal blooms on Seneca Lake.

Other affidavits also make statements that have nothing to do with standing. Carolyn McAllister describes "currents in the lake flow" and volume measurements she took with a decibel meter (Affidavit of Carolyn McAllister, dated April 25, 2018, ¶¶ 15, 31-38). Mary Anne

² The State continues to object to petitioners trying to establish standing based on a purported informational injury because informational injuries are not recognized in New York and these are not appropriate circumstances to allege an informational injury. The Court need not reach that issue in this proceeding; but, if it does, the Department urges the Court not to recognize "informational" injury, which would essentially strip any meaningful injury requirement from SEQRA petitioners.

Kowalski describes her experience with participating in investigations with district attorneys and the Federal Bureau of Investigation (Affidavit of Mary Anne Kowalski, dated April 25, 2018, ¶ 8). Some of the affidavits even make statements regarding the affiants' membership in organizations, such as the Seneca Lake Pure Waters Association and Gas Free Seneca, that are not even parties to this action (*see* Downs Aff. ¶ 1; Affidavit of Eileen and John Moreland, dated April 23, 2018, ¶ 1). These eleven affidavits go well beyond showing standing, attempting to make up for petitioners decision not to submit evidence along with their petition.

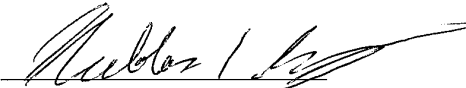
Beyond showing the structure of petitioners' organizations and the proximity of petitioners' members to Greenidge Station, the Court should not consider the additional untimely evidence offered by petitioners in their reply brief (*see* 22 NYCRR 202.8[c], 202.9). The Court must decide the merits of the petition based on what petitioners served with the petition and the State's record (*see* CPLR 7804[e] [requiring respondents to submit a record with their answer; *Concetta*, 6 AD3d at 1091). Given that submission of the member affidavits violate the Uniform Rules of Trial Courts, the Court should not consider them as evidence.

CONCLUSION

For the reasons stated above, the State respondents request that the Court strike the affidavit of Dr. Gregory Boyer and the portions of the member affidavits that offer additional and untimely evidence.

Dated: May 11, 2018
Albany, New York

BARBARA UNDERWOOD
Acting Attorney General of the State of New York
Attorney for Respondents

By: 

Nicholas C. Buttino
Assistant Attorney General
Environmental Protection Bureau
New York State Department of Law
The Capitol
Albany, New York 12224-0341
(518) 776-2406
Nicholas.Buttino@ag.ny.gov