UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

SENECA LAKE GUARDIAN, COMMITTEE TO PRESERVE THE FINGER LAKES, and SIERRA CLUB Plaintiffs, v. GREENIDGE GENERATION LLC, Defendant.	CIVIL ACTION NO. 23-06063-EAW

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The narrow legal question before this Court is whether an owner or operator of a facility using once-through cooling is unlawfully discharging under its expired permit when it has failed to comply with federal regulations that detail information it must submit in its renewal application. Specifically, did Greenidge Generation LLC's ("Greenidge") "permit and authorization to discharge" from Greenidge Power Generating Station (the "Facility") "expire at midnight on the expiration date shown" in the permit because the permit was not "renewed, or extended pursuant to law"? 2017 Permit at 1, ECF No. 10-5.

Yes. Greenidge's ongoing pollutant discharges into Seneca Lake and Keuka Lake Outlet violate the Clean Water Act. Greenidge's permit expired at midnight on September 30, 2022, because Greenidge failed to meet the minimum legal requirements for a renewal application. Under the Clean Water Act, the owner or operator of a facility using once-through cooling must submit a detailed renewal application to regulators every five years. Because Greenidge did not submit the minimum legally required information in its renewal application, the permit was not extended pursuant to law and Greenidge's authorization to discharge under the Permit expired on the Permit's stated expiration date.

Greenidge does not argue that it submitted the information required in federal regulations to the New York State Department of Environmental Conservation ("DEC") as part of the renewal application for the Facility's discharge. Rather, Greenidge's defense rests on DEC's actions—the fact DEC did not specifically request that detailed information coupled with and a cursory email from DEC representing Greenidge's renewal application was sufficient. Greenidge's theory that the Facility is lawfully discharging despite not submitting the minimum information for a permit renewal rests on two false premises. First, that a discharger is only bound to comply with the Clean Water Act if a state permitting agency requires it to do so. And

second, that a state permitting agency is free to ignore binding federal regulations regarding permit renewals and allow a permittee to continue to discharge without meeting the minimum federal requirements.

This court should flatly reject Greenidge's proposed justification for ignoring binding regulations. DEC's failure to enforce these requirements does not excuse Greenidge's failure to comply with the law. Further, Greenidge's prior renewal application does not constitute compliance with federal renewal application requirement. Because Greenidge failed to follow federal regulations detailing what must be submitted in a renewal application, Greenidge's ongoing discharges from the Facility after its permit expired on September 30, 2022 violate the Clean Water Act.

ARGUMENT

I. GREENIDGE'S RENEWAL APPLICATION IS LEGALLY INSUFFICIENT BECAUSE GREENIDGE FAILED TO SUBMIT INFORMATION FEDERAL REGULATIONS REQUIRE FOR ONCE-THROUGH COOLING FACILITIES LIKE THE FACILITY.

A. The Federal Permitting Requirements in 40 C.F.R. § 125.95 Apply Directly to Greenidge and Mandate It Submit Information Listed in 40 C.F.R. § 122.21(r) as Part of Its Renewal Application.

The permit renewal application requirements for once-through cooling facilities, such as the Facility,[1] are found in 40 C.F.R. § 125.95. The regulation mandates that "**the owner or operator** of a facility subject to this subpart whose currently effective permit expires after July 14, 2018, **must submit** to the Director[2] the information required in the applicable provisions of 40 C.F.R. § 122.21(r) when applying for a subsequent permit …" 40 C.F.R. § 125.95(a)(1) (emphasis added). In addition, when EPA finalized the regulation, it specified that this rule

[1] Greenidge has admitted to each of the elements that trigger application of 40 C.F.R. § 125.95. *See* Def.'s Resp. to Pls.' Undisputed Facts ¶¶ 7–11, ECF No. 25.
[2] The term "Director" means the EPA Regional Administrator or the Director of the State program in a delegated state. 40 C.F.R. § 122.2.

"applies to existing facilities that use cooling water intake structures to withdraw water from waters of the United States and have or require … [a] permit issued under section 402 of the CWA (Clean Water Act)." National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures, 79 Fed. Reg. 48,300, 48,300 (Aug. 15. 2014). The Federal Register summary explains that "in the case of any permit expiring after July 14, 2018, under § 125.95 the facility must submit permit application materials required in § 122.21(r) with its next … permit renewal application." *Id.* at 48,358. Neither the regulation itself nor the explanation of the regulation in the Federal Register suggests that an owner or operator only needs to comply with the regulations if a state agency explicitly demands that they do so.

B. It Is Undisputed that Greenidge Did Not Submit to DEC Information Listed in 40 C.F.R. § 122.21(r) with Its Renewal Application.

Federal regulations at 40 C.F.R. § 122.21(r) require existing once-through cooling facilities to submit with their renewal application:

- (r)(2): source water physical data;
- (r)(3): cooling water intake structure data;
- (r)(4): source water baseline biological characterization data;
- (r)(5): cooling water system data;
- (r)(6): the chosen method(s) of compliance with [the] impingement mortality standard;
- (r)(7): entrainment performance studies; and
- (r)(8): the description of the operational status of each generating, production, or process unit that uses cooling water.

Plaintiffs and Defendant agree that the document entitled "State Pollutant Discharge Elimination System (SPDES) NOTICE / RENEWAL APPLICATION" contains all the materials Greenidge submitted in support of its renewal application. *See* ECF Nos. 10-10; 24-6; 25-5 ("Greenidge Renewal Application"). A comparison of the Greenidge Renewal Application with the requirements in 40 C.F.R. § 122.21(r) shows that Greenidge did not submit the materials that 40 C.F.R. § 122.21(r) requires as part of its renewal application. Greenidge's renewal application is legally insufficient because it did not submit the materials required in 40 C.F.R. § 122.21(r), which federal law at 40 C.F.R. § 125.95 mandates that owners and operators of once-through cooling facilities must provide in their renewal applications for permits that expire after 2018.

C. Greenidge Cannot Lawfully Discharge Under Its Expired 2017 Permit When Its Permit Renewal Application Was Legally Insufficient Under Federal Regulations Incorporated into New York State Law.

1. Federal Clean Water Act requirements are minimum requirements for state permitting programs such as New York's.

The Clean Water Act's cooperative federalism scheme allows states to apply to administer the Act's Section 402 permitting program, provided that the state program meets minimum federal requirements and is administered according to those requirements. 33 U.S.C. § 1342(b); 40 C.F.R. § 123.25. Where a state implements the Clean Water Act's permitting system, the Clean Water Act and its regulations "provide[] a federal floor, not a ceiling, on environmental protection." *Dubois v. U.S. Dep't of Agric.,* 102 F.3d 1273, 1300 (1st Cir. 1996). This means that a state cannot lawfully administer the Clean Water Act permitting program in a way that is inconsistent with or less stringent than the federal permitting requirements. 40 C.F.R. § 123.25 (state programs "must be administered in conformance with [the listed regulations], except that States are not precluded from … impos[ing] more stringent requirements").

2. Dischargers seeking to renew state-issued Clean Water Act permits must meet the minimum federal requirements for permit renewal applications.

The Clean Water Act directed EPA to develop application requirements that apply to owners and operators of point sources discharging in states with delegated programs. Specifically, Section 304 of the Clean Water Act directed EPA to "promulgate guidelines for the purpose of establishing uniform application forms and other *minimum requirements* for the acquisition of information from owners and operators of point-sources of discharge subject to any State program under section 1342 of this title." 33 U.S.C. § 1314(i) (emphasis added).

EPA complied with this statutory requirement when it promulgated the requirements codified at 40 C.F.R. § 122.21. EPA also provided specific direction in 40 C.F.R. § 123.25 as to which of the federal requirements must be incorporated into a delegated state program. These requirements include provisions of 40 C.F.R. § 122.21 as well as 40 C.F.R. § 125.95. 40 C.F.R. § 123.25(a).

Indeed, EPA's most recent update to its application regulations recognizes that "[a]n authorized state program may choose to use the EPA's forms or develop its own application forms; however, an authorized program's forms must collect all of the information that the [EPA's] regulations require." National Pollutant Discharge Elimination System (NPDES): Applications and Program Updates, 84 Fed. Reg. 3324, 3326 (Feb. 12, 2019) (citing 40 C.F.R. § 122.21(a)(2)(iv)). Therefore, the Clean Water Act statute and its regulations make clear that applicants seeking to renew permits issued by state programs must comply with federal application requirements. Dischargers are not exempt from the federal application requirements incorporated into state law merely because a state agency failed to enforce them. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987) (acknowledging Congress created the citizen suit to achieve the Clean Water Act's goals by protecting the

environment and abating pollution "when the government cannot or will not command compliance").

3. Clean Water Act regulations governing when permittees can discharge under an expired EPA-issued permit establish the floor for when permittees can discharge under an expired state-issued permit.

The Clean Water Act requires state programs to be at least as stringent as federal programs. Therefore, the federal regulations dictating the situations in which a permittee may lawfully discharge under an expired permit establish the "floor" for state-delegated programs. Specifically, the federal regulations in 40 C.F.R. § 122.6(a) limiting when a federally issued permit may be administratively continued illustrate the *minimum* requirements that must be met before a state-issued permit may be administratively continued under 40 C.F.R. § 122.6(d). In other words, a state may choose to not allow permits to be administratively continued, but if a state allows permits to be administratively continued, it cannot adopt requirements less stringent than the federal rules.

a. Regulatory history confirms that a state's process for allowing a facility to discharge under an expired permit must be at least as stringent as the federal requirements.

The regulatory history for 40 C.F.R. § 122.6 reveals that EPA intended the provision regarding administrative continuances for state-issued permits to operate the same way as for EPA-issued permits. EPA explained that the regulation allowing a state-issued permit to be continued "if state law allows" means a state can continue a permit if there is "a State equivalent to the Federal Administrative Procedure Act." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,300–01 (May 19, 1980).[3]

[3] In 1980, the regulation regarding continuation of expiring permits was found in 40 C.F.R. § 122.5.

Commenters on the proposed regulation suggested that EPA mandate that states have an administrative continuance mechanism. In rejecting that suggestion, EPA evaluated whether a state-level administrative continuance requirement was necessary "to provide (1) equivalent environmental protection, (2) consistency with Federal regulations, (3) adequate enforceability, and (4) public participation." *Id*. EPA rejected a mandatory state administrative continuance because it determined that a state that did not allow permittees to discharge under an expired permit would be "more stringent" than the federal requirement. *Id*. This regulatory history reflects EPA's intent that 40 C.F.R. § 122.6(d) should be at least as stringent as federal requirements.

The administrative continuance regulation was not designed to give states the power to allow permittees to continue to discharge under an expired permit regardless of a permittee's compliance with Federal permit renewal regulations. Indeed, Defendant's suggestion that DEC has complete discretion to determine when a state-issued permit may be administratively continued is contrary to EPA's stated intent for 40 C.F.R. § 122.6(d). *See* Def.'s Mem. Supp. Cross-Mot. Summ. J. at 6, ECF No. 24-8. There is no law or history to support Greenidge's suggestion that 40 C.F.R. § 122.6(d) gives states *carte blanche* to allow permittees to continue to discharge under an expired permit where the permittee failed to meet minimum federal requirements for a permit renewal application.

b. Federal regulations establish the "floor" for a complete renewal application.

The federal Administrative Procedure Act states: "When a licensee has made timely and sufficient application for a renewal … in accordance with agency rules," the license does not

expire until the agency makes a final determination on the application. 5 U.S.C. § 558(c).[4] Clean Water Act regulations explain how the Administrative Procedure Act's "timely and sufficient" requirement applies to Section 402 Permits. 40 C.F.R. § 122.6(a). The regulation allows an EPA-issued permit to "continue in force under 5 U.S.C. § 558(c) until the effective date of a new permit … if: [t]he permittee has submitted a timely application under § 122.21 which is a complete (under § 122.21(e)) application for a new permit." 40 C.F.R. § 122.6(a). Therefore, the Clean Water Act establishes the "federal floor" that a permit renewal application is "sufficient" only if it is "a complete (under § 122.21(e)) application for a new permit." 40 C.F.R. § 122.6.

Clean Water Act regulations set standards for a complete application; "[a]n application[5] for a permit is complete when the Director receives an application form and any supplemental information which are completed to his or her satisfaction." 40 C.F.R. § 122.21(e)(1). Federal regulations direct that applicants need to use specific forms to submit their renewal applications. 40 C.F.R. § 122.21(a)(2). For EPA-issued permits, "[a]pplicants for existing industrial facilities … must submit [EPA] Form 2C," 40 C.F.R. § 122.21(a)(2)(i)(D), while "[a]pplicants for State-issued permits must use State forms which must require at a minimum the information listed" in the regulation. *id.* § 122.21(a)(2)(iv).

While the regulation provides that the application must be completed to the Director's satisfaction, it does not mean the Director—either the EPA Administrator or the head of a state permitting agency—has complete discretion to determine whether an application is "complete." On the contrary, the regulations specify that a permit application "shall not be considered

[4] This language mirrors the New York State Administrative Procedure Act, which states: "When a licensee has made timely and sufficient application for the renewal of a license" the existing license does not expire "until the application has been finally determined by the agency." N.Y. A.P.A. § 401(2). *See also* Section I.C.4 *below*.

[5] The regulations define an "application" to mean "the EPA standard national forms for applying for a permit … or forms approved by EPA for use in 'approved States.'" 40 C.F.R. § 122.2.

complete unless all required quantitative data are collected in accordance with sufficiently sensitive analytical methods." *Id*. § 122.21(e)(3). The regulations require that "[e]very applicant must report quantitative data for every outfall for the following pollutants: Biochemical Oxygen Demand (BOD5), Chemical Oxygen Demand, Total Organic Carbon, Total Suspended Solids, Ammonia (as N), Temperature (both winter and summer), [and] pH." *Id*. § 122.21(g)(7)(iii). Federal permit application regulations also require steam electric generating facilities, like the Facility, to report quantitative data for organic toxic pollutants in each outfall containing process wastewater.[6] *Id*. § 122.21(g)(7)(v); App. A to 40 C.F.R. pt. 122.

c. Greenidge did not submit a complete renewal application under the federal minimum requirements.

It is undisputed that Greenidge did not submit NY Form 2C—or the information it solicits—when seeking to renew its expiring permit. *See* Greenidge Renewal Application, ECF No. 24-6. It is also undisputed that Greenidge's Renewal Application did not include the submission of quantitative data for Biochemical Oxygen Demand, Chemical Oxygen Demand, Total Organic Carbon, Total Suspended Solids, Ammonia, Temperature (both winter and summer), pH or for any organic toxic pollutants. *See* Greenidge Renewal Application, ECF 24-6. Therefore, the Greenidge Renewal Application did not meet the minimum requirements for a "complete" application under the federal regulations and therefore was not "sufficient" to authorize Greenidge to continue discharging pollutants from the Facility after its permit expired.

[6] *See* 40 C.F.R § 122.2 (defining "process wastewater" as any water "during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product"). Greenidge discharges process wastewater from Outfall 2. 2017 Permit at 31, ECF No. 10-5.

4. New York's law and regulations require Greenidge to comply with the Clean Water Act regulations.

Federal Clean Water Act regulations applicable to New York's permitting program authorize permittees to continue to discharge under an expired permit only "if State law allows." 40 C.F.R. § 122.6(d). Here, New York state law does *not* allow Greenidge to continue to discharge from the Facility after the expiration of the permit. Greenidge's renewal application was not "sufficient" because New York state law *must* and *does* incorporate the federal permit renewal application requirements described in 40 C.F.R. § 125.95 and select provisions of 40 C.F.R. § 122.21. *See In re Riverkeeper, Inc. v. Seggos*, 75 N.Y.S.3d 854, 862 (N.Y. Sup. Ct., Albany Cnty. 2018) (New York's permitting program "must 'meet all applicable requirements' of the [Clean Water Act] and all 'rules, regulations, guidelines, criteria, standards and limitations adopted pursuant thereto'" (quoting N.Y. Env't Conserv. Law § 17-0801)).

Applying the law as stated in *Riverkeeper* to the facts of this case, 40 C.F.R. § 123.25 requires New York to incorporate the requirements of 40 C.F.R. § 125.95, as well as 40 C.F.R. §§ 122.21(a), (e), (g), and (r) into its permitting program. *See* 40 C.F.R. § 123.25(a)(4), (36). New York State law incorporates those regulations into its permitting program through Section 17-0801 of New York's Environmental Conservation Law. Because New York's Environmental Conservation Law recognizes that the state's water permitting program must be administered in conformance with the Clean Water Act, Greenidge's argument that New York law governing administrative continuance can by federal permitting requirements fails.

a. New York's law and regulations require Greenidge to submit information Clean Water Act regulations require for permit renewal application.

Like the federal Administrative Procedure Act, New York's State Administrative Procedure Act provides that when "a licensee has made timely and sufficient application for the

renewal of a license … the existing license does not expire until the application has been finally determined by the agency." N.Y. A.P.A. § 401(2). DEC's regulations governing uniform procedures for permitting acknowledge that an existing permit does not expire when a permittee has submitted a timely and "sufficient application for renewal or a permit." N.Y. Comp. Codes R. & Regs. tit. 6, § 621.11(*l*). The regulations define a "*Sufficient application for renewal*" to mean "properly completed application forms, supplemental information and plans required by specific program regulations for renewing permits." *Id.* § 621.2(ad).

The "specific program regulations" for a New York state-issued Clean Water Act permit include 40 C.F.R. § 125.95 and 40 C.F.R. §§ 122.21(a), (e), (g), and (r), because they are federal Clean Water Act regulations that must be incorporated into all state permitting programs. 40 C.F.R. § 123.25. Similarly, for Clean Water Act permits that New York issues to industrial dischargers "completed application forms" means either EPA Form 2C or Form NY-2C, which is the "State form[] which… require[s] at a minimum the information" required by EPA Form 2C. 40 C.F.R. § 122.21(a)(2)(i)(D); *id.* § 122.21(a)(2)(iv). Therefore, in order for Greenidge to lawfully continue to discharge under its expired permit, it should have completed EPA Form 2C or NY Form 2C and supplemented that form with all the information required in 40 C.F.R. § 122.21(r)(2)–(r)(8).

b. Courts defer to DEC's determination of "sufficiency" only to the extent that it is consistent with the federal requirements.

Greenidge asserts that DEC is "the arbiter of sufficiency" here. Def.'s Mem. Supp. Cross-Mot. Summ. J. at 6, ECF No. 24-8. Yet this interpretation is contrary to settled law that an "expired permit is continued, not by affirmative agency action, but by operation of law." *Nat. Res. Def. Council, Inc. v. EPA,* 859 F.2d 156, 214 (D.C. Cir. 1988). The legal requirements—not agency discretion—determine whether a permit application is sufficient.

Federal regulations specify the minimum permitting requirements and specifically identify the limited requirements a permitting authority may waive in the permit renewal application process. *See* 40 C.F.R. §§ 122.21; 125.95. For example, for some facilities that discharge only non-process wastewater,[7] the Director may "waive the testing and reporting requirements for any of the pollutants or flow listed … if the applicant submits a request for such a waiver before or with his application which demonstrates that information adequate to support issuance of a permit can be obtained through less stringent requirements." 40 C.F.R. § 122.21(h). Other than the places where the federal regulation specifically authorizes the permitting authority to waive requirements, a state agency has discretion to request *more* information in renewal applications, but not less.

Courts have found "no reason to defer to [DEC's] construction of federal regulations" and recognize that courts must "determine[e] whether DEC's interpretation runs contrary to the specific language promulgated by the EPA." *See Riverkeeper*, 75 N.Y.S.3d at 866–67 (N.Y. Sup. Ct., Albany Cnty. 2018). A court will only uphold DEC's determination of "sufficiency" to the extent it is consistent with Clean Water Act regulations and the specific language promulgated by EPA. To find otherwise risks running afoul of the Supremacy Clause. *See Clean Air Markets Grp. v. Pataki*, 194 F. Supp. 2d 147, 157 (N.D.N.Y. 2002) ("The Supremacy Clause 'invalidates state laws that "interfere with, or are contrary to," federal law.'" (quoting *Hillsborough Cnty. v. Automated Med. Labs, Inc.,* 471 U.S. 707, 712 (1985))). Indeed, courts advise that "[w]herever possible, statutory or administrative provisions should be construed to avoid constitutional problems." *Sulzer v. Env't Control Bd. of New York*, 566 N.Y.S.2d 595, 600 (1991).

[7] This section does not apply to the Facility because it discharges process wastewater from Outfall 2. *See supra* note 5.

Courts defer to EPA, not DEC, when interpreting federal regulations. *Riverkeeper*, 75 N.Y.S.3d at 866 ("[W]here the regime at issue is one of 'cooperative federalism,' which requires a state or locality to 'comply with the Federal administrative agency's regulations and rulings,' it is the federal agency that is entitled to deference—when such is appropriate—in interpreting its own regulations." (quoting *Rodriguez v. Perales*, 657 N.E.2d 247, 250 (N.Y. 1995))).

EPA has determined that a permittee must submit a complete application—not a short application form—before a permit is administratively continued under the Clean Water Act. *See* EPA, Region 2 NPDES Program and Permit Quality Review: New York State (June 2019), ECF No. 10-15. When reviewing DEC's permitting program for compliance with the Clean Water Act in 2019, EPA Region 2 specifically found that "[i]n order to comply with federal regulations regarding the timeliness of renewal applications (40 CFR § 122.21(d)(1)) and complete applications (40 CFR § 122.21(e)), … a complete application, rather than a short application form, [must be] submitted by the permittee prior to the administrative continuance of any permit." *Id*. at 15. Similarly, in 2012, EPA Region 2 had concluded that DEC's "streamlined administrative permit renewal process is not consistent with federal application requirements at 40 CFR 122.21 since it allows permittees to submit abbreviated application information during permit renewal." *See* EPA, Region 2 NPDES Program and Permit Quality Review: New York State at 35 (Dec. 2012), https://www.epa.gov/sites/default/files/2015-09/documents/pqr_newyork_report.pdf (attached as Exhibit 1).

c. DEC's actions do not shield Greenidge from liability for its Clean Water Act violations.

Greenidge claims its permit did not expire because Greenidge filled out the short form DEC sent it. *See* Def.'s Mem. Supp. Cross-Mot. Summ. J. at 6-10, ECF No. 24-8. Specifically, Greenidge points to DEC's regulation which states, "Filing for renewal shall be made by the

permittee on forms provided by the department." N.Y. Comp. Codes R. & Regs. tit. 6, § 750-1.16(a); *see* Def.'s Mem. Supp. Cross-Mot. Summ. J. at 7, ECF No. 24-8. Greenidge argues that because DEC sent Greenidge a "SPDES Notice/Renewal Application" and "Renewal Questionnaire" that did not ask for information required by the federal regulations, Greenidge was not obligated to comply with the federal regulations and could continue to discharge under its expired permit. *See* Def.'s Mem. Supp. Cross-Mot. Summ. J. at 12, ECF No. 24-8.

This argument fails for three reasons. First, a state agency's failure to force a discharger to comply with the law does not shield the discharger from a Clean Water Act citizens suit. *See Ctr. for Env't Law & Policy v. U.S. Fish & Wildlife Serv.*, 228 F. Supp. 3d 1152, 1157–59 (E.D. Wash. 2017) (finding discharger liable for discharging without a permit even though the permitting agency issued a letter advising the discharger that the previous permit had been administratively continued past its expiration date). Even DEC's own website acknowledges, "The permittee is responsible for submitting a timely renewal application regardless of whether DEC sent you a renewal application." DEC, *State Pollutant Discharge Elimination System (SPDES) Permit Program*, https://www.dec.ny.gov/permits/6054.html (last visited Apr. 19, 2023) (attached as Exhibit 2). This statement confirms that a permittee's compliance with legal requirements is not contingent on DEC demanding or facilitating that compliance. Clearly, "provided by" in the regulation does not mean that the agency must literally give the form to the permittee. Therefore, the regulation directing permittees to file for renewal on "forms provided by the department" does not shield Greenidge from liability.

Second, DEC's website offers forms allowing for the submission of complete renewal applications in line with federal regulations. *See* DEC, *SPDES Application Procedures and Forms*, https://www.dec.ny.gov/permits/6304.html (last visited Apr. 19, 2023) (attached as

Exhibit 3). In effect, these forms are provided to all regulated parties, including Greenidge. One of these is Form NY-2C. The instructions to that form explain that DEC "has designated, per Title 6 of the New York Codes, Rules, and Regulations (6 NYCRR) 750-1.6(e), that all new and existing dischargers must complete a designated application form to obtain a State Pollution Discharge Elimination System (SPDES) permit. [DEC] has designated this Form NY-2C for industrial dischargers." Form NY-2C at 2, ECF No. 10-14.

Third, as explained earlier, the Court must construe New York's delegated permit program in a manner that is consistent with the federal regulations to avoid Supremacy Clause concerns. Greenidge's proposed interpretation of New York's laws would, in effect, require the Court to find that DEC's regulations are contrary to federal Clean Water Act requirements binding on state permit programs. *See* 40 C.F.R. § 123.25. Such a construction of DEC's regulations would raise a constitutional Supremacy Clause problem. *See, e.g., Clean Air Mkts. Grp.* 194 F. Supp. 2d at 157. Instead, this Court should avoid Constitutional concerns by interpreting the Environmental Conservation Law in a way that is consistent with federal law. For example, the Court should interpret Section 17-0803 of the Environmental Conservation Law such that the federally required permit renewal information is "reasonably require[d] to execute" New York's permitting program in compliance with the Clean Water Act.

II. GREENIDGE IS NOT EXCUSED FROM COMPLYING WITH FEDERAL LAW.

A. Materials DEC Considered in 2017 Do Not Excuse Greenidge from Complying with Permit Renewal Application Requirements.

Greenidge argues that it should not have to comply with federal permit renewal application requirements because DEC reviewed some information about the facility in 2017 and issued a permit. *See* Def.'s Mem. Supp. Cross-Mot. Summ. J. at 10-12, ECF No. 24-8. But Clean Water Act Section 402 Permits are only issued for a term of five years; after that time, anyone

seeking to continue to discharge must submit a new application and seek a new permit. *See* 40 C.F.R. § 122.41(b) ("Duty to reapply. If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit."); *see also* 40 C.F.R. § 123.25(a)(12) (requiring states to comply with 40 C.F.R. § 122.41(b)).

Greenidge argues that it should not have to "re-date and resubmit the same forms (*e.g.*, NY-2C) with the same information (*e.g.*, the information Plaintiffs complain is lacking) that NYSDEC already possesses just to continue a permit pending renewal." Def.'s Mem. Supp. Cross-Mot. Summ. J. at 8, ECF No. 24-8. This argument fails for several reasons. First, Greenidge has not submitted the information federal regulations require in a renewal application. Greenidge did not submit that information in January 2022 when it submitted the Greenidge Renewal Application. *See* ECF No. 10-10. Nor did Greenidge submit this information before DEC issued the 2017 Permit.

Indeed, Greenidge's own submissions demonstrate that documents submitted in support of its 2017 Permit were both incomplete and already outdated at that time.[8] For example, Greenidge submitted an affidavit from DEC which admits that the Form NY-2C it considered in 2017 was incomplete: "Four pages of the NY-2C application materials are missing. … These pages are not in DEC's files and cannot be located." Aff. of Michael Caseiras ¶ 16 n.1, ECF No. 24-3. Furthermore, the Form NY-2C was from 2007 and was submitted by AES Eastern Energy, the prior owner of the Facility. *Id.* ¶ 16(a). DEC also relied on various monitoring data from

[8] Plaintiffs include this information not to re-litigate the 2017 Permit, but to show that the information DEC relied on in issuing the 2017 Permit does not satisfy minimum legal requirements for a permit renewal application.

2010 and 2011 and a thermal discharge study work plan approved in 2011 but never completed. *Id*. ¶ 16.

Second, EPA has explicitly rejected the idea that "a permittee should be able to refer to the application for its expired permit rather than submit a new one if none of the information has changed." 45 Fed. Reg. at 33,299. In the final rulemaking adopting the permit renewal regulations, EPA stressed that "[i]t is essential to obtain an updated certification of the accuracy of the information before issuing a new permit" and confirmed that "[r]esubmittal is necessary to prevent any confusion and to ensure active awareness of the information that is being certified." *Id*.

B. Greenidge Has Not Demonstrated that it Submitted All the Federally Required Information for a Permit Renewal.

Greenidge suggests that DEC has all the information it needs about the Facility's operations already and relies heavily on the premise that there are no changes in the Facility since 2017. Def.'s Mem. Supp. Cross-Mot. Summ. J. at 13, ECF No. 24-8. But both of these assertions are false.

First, Greenidge does not identify any materials submitted that show it has complied with the requirements in 40 C.F.R. § 122.21(r) about the facility's once-through cooling system and its impacts on Keuka Lake Outlet and Seneca Lake, as summarized above in Section I.B.

For example, 40 C.F.R. § 122.21(r)(4) requires submission of "[s]ource water baseline biological characterization data." The data that must be submitted includes:

> (ii) A list of species (or relevant taxa) for all life stages and their relative abundance in the vicinity of the cooling water intake structure;
>
> (iii) Identification of the species and life stages that would be most susceptible to impingement and entrainment. Species evaluated should include the forage base as well as those most important in terms of significance to commercial and recreational fisheries;

> (iv) Identification and evaluation of the primary period of reproduction, larval recruitment, and period of peak abundance for relevant taxa;
>
> (v) Data representative of the seasonal and daily activities (e.g., feeding and water column migration) of biological organisms in the vicinity of the cooling water intake structure;
>
> (vi) Identification of all threatened, endangered, and other protected species that might be susceptible to impingement and entrainment at your cooling water intake structures.

40 C.F.R. § 122.21(r)(4). EPA confirmed that this material would need to be submitted every five years as part of the permit renewal process. *See* 79 Fed. Reg. at 48,361 ("Anticipating that … permits are renewed when they expire, the update to the facility's biological characterization and any corresponding biological performance evaluations would be conducted approximately every five years."). Yet this biological characterization is nowhere in the Greenidge Renewal Application.

Similarly, 40 C.F.R. § 122.21(r)(3)(iii) requires the owner or operator of a once-through cooling facility to disclose in its permit application the "number of days of the year in operation." The Greenidge Renewal Application does not contain this information, yet Greenidge admits that "the Facility operates more frequently now than it did in 2017." Hennessey Decl. ¶ 23, ECF No. 24-2.

Second, the record does not include evidence to support Greenidge's assertion that there have not been changes to "its discharges [or] its receiving waters" since 2017. Def.'s Mem. Supp. Cross-Mot. Summ. J. at 13, ECF No. 24-8. In fact, the permit renewal requirements that Greenidge failed to satisfy are designed to determine whether or not there have been any changes to the Facility's discharges or its impact on receiving waters. *See, e.g.,* 40 C.F.R. § 122.21(r)(4). Federal permit application regulations require steam electric generating power plants, like the Facility, to report quantitative data for organic toxic pollutants in each outfall containing process

wastewater.[9] 40 C.F.R. § 122.21(g)(7)(v).[10] The Facility discharges process wastewater from Outfall 2. 2017 Permit at 31, ECF No. 10-5. Therefore, Greenidge should have reported quantitative data for organic toxic pollutants and pollutants listed in Table III of Appendix D to 40 C.F.R. pt. 122. Collection of this data is often referred to as a "priority pollutant scan." *See* EPA, Priority Pollutant List (Dec. 2014), https://www.epa.gov/sites/default/files/2015-09/documents/priority-pollutant-list-epa.pdf. Form NY-2C, the form Greenidge was required to submit but failed to do so, solicits the information required by 40 C.F.R. § 122.21(g)(7)(v) for the priority pollutant scan. Form NY-2C at 33-43, ECF No. 10-14.

According to evidence Greenidge submitted, the 2007 Form NY-2C that DEC reviewed before issuing the 2017 Permit included a "priority pollutant scan." Caseiras Affid. ¶ 16(a), ECF No. 24-3. However, that data is too old to be used in Greenidge's 2022 permit renewal. Clean Water Act regulations specify: "[w]here quantitative data are required in paragraphs (g)(7)(i) through (viii) of this section, existing data may be used … in lieu of sampling done solely for the purpose of the application, provided that … sampling was performed, collected, and ***analyzed no more than four and one-half years prior to submission***." 40 C.F.R. § 122.21(g)(7)(ix) (emphasis added).

C. The Court Should Disregard Various Incorrect and Irrelevant Assertions Greenidge Made to Support Its Argument.

1. Greenidge mischaracterizes its Renewal Application.

Greenidge's assertion that there was no change in the facility's operations to justify permit modification is incorrect. *See* Def.'s Mem. Supp. Cross-Mot. Summ. J. at 13, ECF No.

[9] *See* 40 C.F.R § 122.2 (defining "process wastewater" as any water "during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product").
[10] *See* App. A to 40 C.F.R. pt. 122 (defining "Steam electric power plant" as a "primary industry category" covered by the monitoring requirements in 40 C.F.R. § 122.21(g)(7)(v)).

24-8; Hennessey Decl. ¶ 20, ECF No. 24-2 (representing that "Greenidge's SPDES Renewal Application seeks *no* modifications to its SPDES Permit"). Greenidge actually indicated on its SPDES Renewal Application that it was "unable to conclude whether [its] permit need[ed] to be modified at this time."[11] ECF No. 10-10 at 5. Defendant's counsel also admits that "the Facility operates more frequently now than it did in 2017." *See* Hennessey Decl. ¶ 23, ECF No. 24-2.

Additionally, Greenidge's assertion that DEC has all the information necessary to process the renewal is not correct. For example, the evidence Greenidge submitted demonstrates that DEC did not have information about the facility's thermal discharges when it issued the 2017 permit: "During most of the time that the 2010 SPDES permit was effective, there was no discharge from Outfall 001. Without an active condenser cooling water outfall, any information for a thermal study would not have been representative." Caseiras Affid. ¶ 17, ECF No. 24-3 (citation omitted). The lack of meaningful data about the impacts of the Facility's thermal discharges in 2017, coupled with Greenidge's admission that "the Facility operates more frequently now than it did in 2017," means that the Greenidge Renewal Application and the documents considered in 2017 did not provide a complete picture of the Facility and its impacts on Keuka Lake Outlet and Seneca Lake. Hennessey Decl. ¶ 23, ECF No. 24-2.

2. The lawsuit challenging the 2017 Permit is irrelevant to this litigation.

Litigation surrounding the 2017 Permit decision is irrelevant to this case. This case does not challenge DEC's 2017 Permit decision or seek to overturn a New York state court order from 2018. The prior case was a state Article 78 lawsuit challenging *DEC's* issuance of the 2017

[11] One option available on the SPDES Renewal Application was the statement "None of the concerns on the "Self-Evaluation List" (see page 2) apply to my facility at this time and I will not be applying for a modification of the SPDES permit in the foreseeable future." ECF No. 10-10 at 5. Greenidge did not check that box.

Permit. *See* ECF No. 13-2 ¶¶ 21–22. By contrast, here Plaintiffs have brought a citizen suit enforcement case in federal court against *Greenidge* for violating the Clean Water Act through its ongoing discharges into Seneca Lake and Keuka Lake Outlet without a valid permit. *See* Compl. ¶¶ 116–134, ECF No. 1; *compare Riverkeeper*, 75 N.Y.S.3d 854 (N.Y. Sup. Ct., Albany Cnty. 2018) (challenging DEC's issuance of a permit) *with Soundkeeper, Inc. v. A & B Auto Salvage, Inc.*, 19 F. Supp. 3d 426 (D. Conn. 2014) (Clean Water Act enforcement action against a facility's discharge without a permit where the state agency determined a permit was not required).

The validity of the 2017 Permit is also irrelevant here because Clean Water Act permits have a five-year duration. 33 U.S.C. § 1342(b)(1)(B). The question is not whether the 2017 Permit was valid when issued, but whether Greenidge's authorization to discharge under that permit ended when the permit expired on September 30, 2022.

3. Plaintiffs seek relief only with regard to Greenidge's discharges.

Greenidge, in a turn of pure hyperbole, suggests that "Plaintiffs ask this Court to invalidate the continuance of Greenidge's permit, and apparently decades of other administrative renewals." Def.'s Mem. Supp. Cross-Mot. Summ. J. at 15, ECF No. 24-8. Plaintiffs have simply asked the Court for relief related only to Greenidge's discharges since its permit expired on September 30, 2022. Compl. at 18, ECF No. 1.

CONCLUSION

Plaintiffs respectfully request that the Court grant summary judgment to Plaintiffs and issue a finding that Greenidge is discharging in violation of the Clean Water Act. Plaintiffs also request that the Court enjoin Greenidge from future discharges until Greenidge receives a new

Clean Water Act permit from DEC. Plaintiffs also request attorneys' fees and costs and any additional relief the Court deems proper.

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