UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA LAKE GUARDIAN, COMMITTEE TO PRESERVE THE FINGER LAKES, AND SIERRA CLUB

Plaintiffs,

v.

GREENIDGE GENERATION LLC

Defendant.

NOTICE OF MOTION TO DISMISS

Civil Action No.

23-cv-6063
Hon. Elizabeth A. Wolford

PLEASE TAKE NOTICE that, upon the annexed Declaration of Yvonne E. Hennessey dated February 21, 2023, with Exhibits A to C annexed thereto, the Memorandum of Law in Support of Defendant's Motion to Dismiss, dated February 21, 2023, and upon all prior papers and pleadings in this matter, the Defendant will move this Court at a time to be later specified by the Court, or as soon thereafter as counsel can be heard, before the Honorable Elizabeth A. Wolford, Chief United States District Judge, Western District of New York, Kenneth B. Keating Federal Building, 100 State Street, Rochester, New York 14614, for an Order granting Defendant's motion to dismiss Plaintiffs' Complaint, dated January 23, 2023, pursuant to Rule 12(b)(1), Rule 12(b)(6) and Rule 12(b)(7) of the Federal Rules of Civil Procedure, and granting such other and further relief as this Court deems just and/or appropriate.

Dated: February 21, 2023

Respectfully Submitted,

/s/ Yvonne E. Hennessey

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GREENIDGE GENERATION LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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PRELIMINARY STATEMENT

Greenidge Generation LLC ("Greenidge") submits this Memorandum of Law in support of its Motion to Dismiss Plaintiffs' Seneca Lake Guardian, Committee to Preserve the Finger Lakes and Sierra Club ("Plaintiffs") Complaint which seeks to have this Court overturn the New York State Department of Environmental Conservation's ("NYSDEC") written determination that Greenidge submitted a "timely and sufficient" renewal application ("NYSDEC Decision"). The instant proceeding challenging Greenidge Generating Facility's State Pollutant Discharge Elimination System ("SPDES") permit renewal application lacks any good faith basis and is just the most recent attempt by Plaintiffs to harass Greenidge.

Having lost every case they have brought to date in state court, Plaintiffs are now engaged in forum-shopping through their improper attempt to collaterally attack the NYSDEC Decision that Greenidge submitted a "timely and sufficient" renewal application. Indeed, this is not a case where Plaintiffs are arguing that Greenidge failed to seek a SPDES permit before operating. It also is not a case about whether Greenidge's permit complies with the Clean Water Act ("CWA") (Plaintiffs have already lost that case) or whether Greenidge is operating outside the contours of its permit. This case is simply a challenge to the sufficiency of Greenidge's renewal application *at the time* it triggered an extension of its existing permit during NYSDEC's administrative review of the renewal application. That Plaintiffs disagree with the NYSDEC Decision that Greenidge submitted a "timely and sufficient" renewal application does not implicate the CWA or confer subject matter jurisdiction on this Court under 33 U.S.C. §1365. This is particularly true where Plaintiffs' claim arises under state law and their Notice of Intent was deficient.

Furthermore, Plaintiffs' failure to even acknowledge in their Complaint that the agency charged with determining the sufficiency of permit applications has in fact made a determination

directly at odds with their allegations is misleading at best and evidences a complete lack of candor with this Court. It is also apparently why they failed to join the NYSDEC as a necessary party.

Last, but not least, Plaintiffs lack standing to bring their claim and assuming arguendo that this Court has subject matter jurisdiction, they have failed to state a claim upon which relief may be granted due to their attempt to conflate the requirements for a "complete" renewal application with a "timely and sufficient" renewal application.

Given the foregoing, the Complaint should be dismissed with prejudice.

STATEMENT OF RELEVANT FACTS

A. NYSDEC's Determination that Greenidge's Renewal Application Was Timely and Sufficient

The SPDES permit as issue here was issued by the NYSDEC on September 11, 2017, with an effective date of October 1, 2017. *See* Declaration of Yvonne E. Hennessey ("Hennessey Dec."), ¶ 12. Greenidge's SPDES permit's term was for 5 years. Hennessey Dec., ¶ 13. In accordance with Section 750-1.16(a) of Title 6 of the New York Code of Rules & Regulations, Greenidge submitted an application to renew its SPDES permit on January 12, 2022. In doing so, Greenidge used the forms provided by the NYSDEC. *Id.*, ¶ 14.

By email dated March 26, 2022, NYSDEC's Bureau of Water Permits Section Chief notified Greenidge that its renewal application was "timely and sufficient" for coverage under the State Administrative Procedures Act ("SAPA"). *Id.*, ¶ 15 & Exh. A. NYSDEC confirmed that it had made this determination when it issued its Fact Sheet as part of a Department initiated modification of Greenidge's SPDES permit on September 27, 2022. *See* Exh. B (NYSDEC noting that, on January 12, 2022, it received a "timely and sufficient SPDES Renewal Application from the permittee").[1]

B. Plaintiffs' Notice of Intent

On November 17, 2022, Plaintiffs' served their amended Notice of Intent ("NOI") on Greenidge as well as the NYSDEC and USEPA. *See* Complaint, Exh. A.

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[1] This Court may take judicial notice of the NYSDEC Decision. *Lewis v. M&T Bank*, No. 21-933, 2022 U.S. App. LEXIS 6596, 2022 WL 775758, at *1 (2d Cir. Mar. 15, 2022) ("Courts may take judicial notice of facts that 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'") (quoting Fed. R. Evid. 201(b)(2)); *New York v. P.A. Indus.*, No. 17-CV-1146 (DRH)(SIL), 2021 U.S. Dist. LEXIS 261381, at *22 (E.D.N.Y. July 14, 2021) (taking judicial notice of NYSDEC documents); *see also Carias v. Monsanto Co.*, No. 15-CV-3677 (JMA) (GRB), 2016 U.S. Dist. LEXIS 139883, at *16 n.3 (E.D.N.Y. Sep. 30, 2016) (taking judicial notice of USEPA documents "to establish that EPA made certain determinations and findings.").

Plaintiffs' NOI, as it relates to the allegations in the Complaint, states only that:

> Greenidge failed to supply legally-required information about its cooling water intake structure as a part of its renewal application. Federal regulations require an "owner or operator of [such an existing] facility … whose currently effective permit expires after July 14, 2018," to submit [sic] "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. § 122.95(a).

Id., p. 3.

SPDES PERMITTING IN NEW YORK

NYSDEC has sole responsibility for the issuance of National Pollution Discharge Elimination System Permit ("NPDES") permits in New York State pursuant to NYSDEC's State Pollution Discharge Elimination System ("SPDES") program contained in New York Environmental Conservation Law ("ECL") Article 17. NYSDEC has been delegated this authority by the United States Environmental Protection Agency ("USEPA") in accordance with Section 402 of the Federal Water Pollution Control Act, since October 1975. *See* Letter from USEPA to Governor Carey approving New York's request for approval to conduct a State Permit Program, dated October 28, 1975;[2] *see also* NYSDEC and USEPA Memorandum of Agreement (as amended).[3] The USEPA does not have authority to issue NPDES permits in New York State, except on tribal lands.

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[2] Available at https://www.epa.gov/sites/default/files/2013-09/documents/ny-moa-npdes.pdf

[3] Available at https://www.epa.gov/sites/default/files/2013-09/documents/ny-moa-npdes.pdf

ARGUMENT

POINT I

THE COURT LACKS JURISDICTION

A. Standard of Review

Dismissal is proper under Rule 12(b)(1) for lack of subject matter jurisdiction "when the district court lacks the statutory or constitutional power to adjudicate" the claim, such as when Article III standing is not met. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000); *see also McNeil v. Yale Chptr.*, No. 21-639-cv, 2021 U.S. App. LEXIS 33750, at *2 (2d Cir. Nov. 15, 2021).

The plaintiff bears the burden of "showing by a preponderance of the evidence that subject matter jurisdiction exists." *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003). In turn, "a motion to dismiss for want of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) is reviewed under the same standards as a motion to dismiss for failure to state a claim under Rule 12(b)(6)."[4] *Pennacchio ex rel. Old World Brewing* Co., *Inc. v. Powers*, 05-CV-0985, 2007 U.S. Dist. LEXIS 8051, at *6 (E.D.N.Y. Feb. 5, 2007). Although the Court must accept as true all material factual allegations in the complaint, "jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Schneider v. Hastings*, 2020 U.S. Dist. LEXIS 110908, WL 3447786, at *6 (W.D.N.Y. 2020).

"Indeed, a challenge to the jurisdictional elements of a plaintiff's claim allows the [c]ourt 'to weigh the evidence and satisfy itself as to the existence of its power to hear the case[.]'" *Celestine v. Mt. Vernon Neighborhood Health Ctr.*, 289 F. Supp. 2d 392, 399 (S.D.N.Y.

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[4] To withstand dismissal under Rule 12(b)(6), a plaintiff must set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *see also Jiles v. Rochester Genesee Reg'l Transp. Auth.*, 217 F. Supp. 3d 688, 690 (W.D.N.Y. 2016).

2003) (citation omitted), *aff'd*, 403 F.3d 76 (2d Cir. 2005); *see also Nat'l Fuel Gas Distribution Corp. v. N.Y. State Energy Research & Dev. Auth.*, 265 F. Supp. 3d 286, 291-92 (W.D.N.Y. 2017).

In resolving the question of subject matter jurisdiction, the Court "can refer to evidence outside the pleadings and the plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Luckett v. Bure*, 290 F.3d 493, 496-97 (2d Cir. 2002) (citing *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)); *see also Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir. 1996).

B. Because Plaintiffs' Claims Do Not Arise Under Federal Law, the Court Lacks Subject Matter Jurisdiction

Federal question jurisdiction under 28 U.S.C. § 1331 requires that Plaintiffs' claim "aris[e] under the Constitution, laws or treaties of the United States." Here, Plaintiffs purport to bring a citizens suit under the Federal Water Pollution Control Act (the "Clean Water Act") as the basis for this Court's subject matter jurisdiction. In doing so, they seek to create a citizens suit under the Clean Water Act, where there is none.

Plaintiffs claim that the Greenidge is in violation of effluent standards or limitations because Greenidge is operating without a valid SPDES permit. *See* Complaint, ¶ 73, 134. The purported basis for their claim is their assertion that Greenidge did not timely submit a complete renewal application. This is not a basis for a Clean Water Act citizens suit, particularly here where, as the Complaint acknowledges, state law governs the sufficiency of Greenidge's renewal application for purposes of extending its existing SPDES permit.

As Plaintiffs concede, for continuation of SPDES permits where a State, as opposed to the USEPA is the permit issuer, state law applies. *See* Complaint, ¶ 72. In this regard, the Clean Water Act explicitly distinguishes between EPA-issued permits and those, as is the undisputed case here, issued by the State. 40 C.F.R. § 122.6 (titled "Continuation of expiring permits").

Where

> EPA is the permit-issuing authority, the conditions of an expired permit continue in force under 5 U.S.C. 558(c) until the effective date of a new permit (see § 124.15) if: (1) The permittee has submitted a timely application under § 122.21 which is a complete (under § 122.21(e)) application for a new permit; and (2) The Regional Administrator, through no fault of the permittee does not issue a new permit with an effective date under § 124.15 on or before the expiration date of the previous permit (for example, when issuance is impracticable due to time or resource constraints).

40 C.F.R. § 122.6(a).[5] In contrast, for State-issued permits, the State may continue a permit beyond its expiration date "until the effective date of the new permits, *if State law allows*." 40 C.F.R. § 122.6(d)(1) (emphasis added).

The operative state laws are Section 401 of the State Administrative Procedures Act ("SAPA"), the Environmental Conservation Law and Part 750 of Title 6 of the New York Code of Rules and Regulations.

Pertinent here, SAPA § 401(2) states that "when a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature*, the existing license does not expire until the application has been finally determined by the agency* . . . ." (emphasis added). Furthermore, Article 70 of the ECL states that:

> A permit holder may make written request to the department for the renewal, reissuance, recertification or modification of an existing permit. *Such a request shall be accompanied by sufficient information supporting the request for the departmental action sought*.

ECL § 70-0115(2) (emphasis added); *see also* Complaint, ¶ 80.

Specific to SPDES permits, state law provides that:

[5] State delegated programs are not required to be "administered in conformance with" Part 122.6. *See* 40 C.F.R. § 123.25(a) (listing those provisions of 40 C.F.R. that a state delated program must require conformance, which does not include Part 122.6 for continuation of permits).

> The department shall, by rule and regulation, require that *every applicant for a permit to discharge pollutants into the waters of the state shall file such information at such times and in such form as the department may reasonably require* to execute the provisions of this article.

ECL § 17-0803 (emphasis added) ; *see also* Complaint, ¶ 79.

This is further articulated in NYSDEC's implementing regulations:

> Any permittee who intends to continue to discharge beyond the period of time covered in the applicable SPDES permit must file for renewal of the permit at least 180 days prior to its expiration. Filing for renewal shall be made by the permittee on forms provided by the department.

6 N.Y.C.R.R. § 750-1.16(a); *see also* Complaint, ¶ 85.[6]

Although acknowledging the applicable state law, Plaintiffs' claim effectively ignores it. Plaintiffs correctly allege that Greenidge timely submitted a renewal application package, using forms provided by the NYSDEC. However, they then assert that Greenidge was required but failed to submit information contemplated by 40 C.F.R. § 122.21(g) and (r) as well as EPA NPDES Forms 1 and 2C. Complaint, ¶¶ 104-08. Plaintiffs do not allege, indeed because they cannot, that NYSDEC required such forms. They are also not required for State-issued permits. *Compare* 40 C.F.R. § 122.6(a)(1), *with*, 40 C.F.R. § 122.6(d)(2).

Moreover, the Clean Water Act's citizen suit provision does not provide subject matter jurisdiction over the interpretation of state law, particularly where the agency authorized to apply the state law at issue already made the permitting decision.

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[6] The Complaint cites 40 C.F.R. § 122.21(d)(2) which also includes the requirement that a renewal application be submitted 180 days before an existing permit expires. This provisions only speaks to timeliness, which is not at issue here. Plaintiffs acknowledge that Greenidge submitted its SPDES renewal application in January 2022, more than 180 days prior to the expiration of its SPDES permit term.

C. The Court Lacks Jurisdiction Over Plaintiffs' Collateral on NYSDEC's Permitting Decision

A close examination of the substance of the Complaint confirms that Plaintiffs' claim is nothing more than an improper collateral attack on the NYSDEC's permitting decision. This is true even if you assume, for purposes of argument, that federal law dictates the sufficiency of Greenidge's renewal application. Technical violations in the permitting process, do not give rise to subject matter jurisdiction under the Clean Water Act.

Here, Greenidge has been operating under an effective SPDES permit for decades, the most recent permit issued in 2017 (*see* Complaint, ¶¶ 95-96), and submitted a renewal application to NYSDEC for continuation of that permit on January 12, 2022 (*see* Complaint, ¶ 102). NYSDEC acknowledged receipt of the renewal on March 26, 2022, and stated that the renewal was timely and sufficient for coverage under SAPA. Hennessey Dec., Exh. A; *see also id.*, Exh. B. In short, Greenidge has operated under its currently effective SPDES permit since 2017 and continues to do so.

Tellingly, Plaintiffs do not allege any violation of Greenidge's SPDES permit. Plaintiffs' disagreement is also not with the Greenidge's actions but with NYSDEC's decision that Greenidge's renewal submission was "timely and sufficient" under SAPA.[7] Disagreement with a state permitting authority's permit renewal procedures is not the basis for a CWA lawsuit under § 1365.[8] *See Sierra Club v. Va. Elec. & Power Co.*, 145 F. Supp. 3d 601, 606 (E.D. Va. 2015) (noting that "[t]he ultimate question regarding whether this is a collateral attack is whether Plaintiff

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[7] *See* Hennessey Dec., ¶ 15.

[8] Tellingly, Greenidge is not aware of any case whereby a court has allowed a collateral attack on a State or EPA's determination as to the sufficiency of a SPDES renewal application.

is essentially challenging the validity of the permit. If that were the case, Plaintiff would necessarily fail.").

"The collateral attack doctrine is in place to prohibit a plaintiff in a civil case from directly attacking an underlying permit decision." *Sierra Club*, 145 F. Supp. 3d at 605-06. "A citizen suit alleging a violation of a valid permit is a separate and distinct action from one that challenges the very validity of the permit. The former is permissible in our federal courts. The latter constitutes an impermissible collateral attack." *Id.* at 606; *see also Sw. Org. Project v. United States Dep't of the Air Force*, 526 F. Supp. 3d 1017, 1064 (D.N.M. 2021) (dismissing claim for lack of subject matter jurisdiction as improper collateral attack); *contrast Ohio Valley Envtl. Coal, Inc*, 531 F. Supp. 2d at 759 (stating that, unlike here, "[w]hen the challenge is not to a permitting decision but a violation of an effluent limitation, a citizen-suit in federal court is the proper avenue for relief."); *W. Va. Highlands Conservancy v. Monongahela Power Co.*, 2012 U.S. Dist. LEXIS 744, 2012 WL 11122, at *9 (N.D.W. Va. Jan. 3, 2012) (rejecting a collateral attack argument because, unlike here, the complaint did not argue against or seek relief against the ongoing permit process).

While Plaintiffs may disagree with NYSDEC's permitting decision, such disagreement does not create subject matter jurisdiction. Indeed, Plaintiffs' claim is nothing more than a state court proceeding under Article 78 of New York's Civil Practice Laws & Rules ("CPLR") masquerading as a federal CWA citizen suit.

D. Plaintiffs Failed to Provide Adequate Notice of Their Claim

Plaintiffs' NOI, which concludes in general terms that Greenidge's renewal application was insufficient, lacks the requite sufficiency.

The USEPA regulations require that an NOI letter "include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated,

[and] the activity alleged to constitute a violation." 40 C.F.R. § 135.3(a).[9] The purpose of the NOI requirements is to "allow a potential defendant to identify its own violations and bring itself into compliance voluntarily, thus making a costly lawsuit unnecessary." *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 488 (2d Cir. 2001); *see also Atl. States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 819-20 (7th Cir. 1997) ("In practical terms, the notice must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit. . . . The key to notice is to give the accused company the opportunity to correct the problem.").

"'The notice and delay requirements are also designed to allow the enforcer of first resort, the EPA or the appropriate state agency, to bring its own enforcement action,' which would preempt the citizen lawsuit, *see* 33 U.S.C. § 1365(b)(1)(B)." *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 488 (2d Cir. 2001) (internal quotations omitted); see also *CARS v. United States Army Corps of Eng'rs*, No. 04-CV-0328E(Sr), 2005 U.S. Dist. LEXIS 38404, at *26 (W.D.N.Y. Dec. 23, 2005) ("The content requirements for the notice letter are intended to facilitate the objectives of the CWA – to wit, to allow government agencies to take responsibility for enforcing environmental regulations and thus obviating the need for citizen suits and to give the alleged violator an opportunity to come into compliance with the CWA and thus likewise render unnecessary a citizen suit.").

Here, Plaintiffs' NOI, as it relates to the allegations in the Complaint, states only that:

> Greenidge failed to supply legally-required information about its cooling water intake structure as a part of its renewal application. Federal regulations require an "owner or operator of [such an existing] facility …

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[9] The plain language of the notice requirements (i*.e.,* requirement to "identify the specific standard, limitation, or order") further confirms that challenges to a duly authorized state agency's permitting decision cannot serve the basis for a Clean Water Act citizens. 40 C.F.R. § 135.3(a).

> whose currently effective permit expires after July 14, 2018," to submit [sic] "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. § 122.95(a) (emphasis added).

Plaintiffs' NOI failed to include any allegation that Greenidge's renewal application did not comply with 40 C.F.R. § 122.21(g) or that it failed to include NPDES Form 1 or NPDES Form 2C. *Compare* Complaint, ¶¶125-28, with Hennessey, Dec., Exh. A. As for the one alleged deficiency identified in Plaintiffs' NOI, 40 C.F.R. §122.21(r), Plaintiffs failed to provide any specificity as to the allegedly missing information that was "applicable" and that they contend was missing from Greenidge's renewal application. In short, Plaintiffs' NOI fails to comply with the Clean Water Act's notice requirements.

Accordingly, for a separate and distinct reason, the Court lacks subject matter jurisdiction over Plaintiffs' claim.

POINT II

PLAINTIFFS LACK STANDING

Congress' power to authorize citizen suits and draft citizens as private attorneys general is inherently limited by the "case or controversy" clause of Article III of the Constitution. *See Pub. Interest Research Grp. v. Magnesium Elektron*, 123 F.3d 111, 119-20 (3d Cir. 1997). "Congress' provision for citizens suits does not, in itself, establish Article III standing . . . ." *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988).

"To establish Article III standing, 'a plaintiff must show (1) it has suffered an injury in fact . . . ; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000))

"[A]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 704 (2000) (citing *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977)).

As for burden of proof, "[t]his triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Kern v. Wal-Mart Stores, Inc.*, 804 F. Supp. 2d 119, 128 (W.D.N.Y. 2011) (quoting *Steel Co. v. Citizens for a Better Envtl*, 523 U.S. 83, 103-04, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)).

A. There Can Be No Injury in Fact

For a plaintiff to have suffered an 'injury in fact," there must be "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Kern v. Wal-Mart Stores, Inc.*, 804 F. Supp. 2d 119, 128 (W.D.N.Y. 2011). Generalized, vague or speculative grievances are not sufficient. *United States* v. *Richardson*, 418 U.S. 166, 179-80, 41 L. Ed. 2d 678, 94 S. Ct. 2940 (1974).

Here, there can be no injury in fact because there is not a "concrete and particularized" injury. The Complaint is devoid of any specific injury in fact by any specific member of any Plaintiff. Rather, each Plaintiff alleges only generalized, conclusory assertions that it's members are "concerned" that Greenidge's "unpermitted discharges" threaten their health, safety and recreational enjoyment of Seneca Lake. *See* Complaint, ¶¶ 14, 20, 26. This is insufficient as a matter of law.

Further, there can be no injury in fact because there is no actual or imminent harm. Greenidge continues to operate in full compliance with its SPDES permit and the Complaint is devoid of any allegations to the contrary. Indeed, the Complaint lacks *any* allegation that Greenidge is in violation of *any* condition of its SPDES permit, which was issued to be protective of the human health and the environment. Greenidge's compliance with its SPDES permit negates any potential injury in fact. Indeed, Greenidge's SPDES permit has been judicially upheld over Plaintiffs' claims to the contrary. *See* Hennessey Dec., ¶ 23.

B. The Alleged Injury Is Not Traceable to the Challenged Action of Greenidge

The second requirement of standing is that "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Kern*, 804 F. Supp. 2d at 128.

Here, there can be no causal connection. The alleged injury is not traceable to Greenidge's January 12, 2022, renewal application. Rather, even assuming some injury in fact (which Greenidge disputes), it stems from NYSDEC's decision that Greenidge submitted a timely and sufficient renewal application.

POINT III

PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Even assuming that this Court has subject matter jurisdiction over Plaintiffs' claim (which Greenidge disputes), they cannot state a claim upon which relief may be granted.

A. Standard of Review

"A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the party's claim for relief." *Zucco v. Auto Zone, Inc.*, 800 F. Supp. 2d 473, 475

(W.D.N.Y. 2011). A court should consider the motion "accepting all factual allegations in the complaint and drawing all reasonable inferences in the plaintiff's favor." *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008) (quoting *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007)). "To withstand dismissal, a plaintiff must set forth 'enough facts to state a claim to relief that is plausible on its face.'" *Miccio v. ConAgra Foods, Inc.*, 224 F. Supp. 3d 200, 203 (W.D.N.Y. 2016) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

"[A]t a bare minimum, the operative standard requires the plaintiff to provide the grounds upon which his claim rests through factual allegations sufficient to raise a right to relief above the speculative level." *Goldstein v. Pataki*, 516 F.3d 50, 56-57 (2d Cir. 2008) (citations omitted).

B. Plaintiffs' Claim Lacks Plausibility

Here, Plaintiffs admit that Greenidge had a valid SPDES permit for a five year term that was effective October 1, 2017. Complaint, ¶ 95. They also admit that Greenidge submitted a timely renewal application. Complaint, ¶ 102. Plaintiffs, however, argue that Greenidge's application was deficient, or using the applicable statutory language, not "sufficient." Complaint, ¶¶ 104-07. In doing so, Plaintiffs focus only on requirements for a EPA-issued permit,[10] not a State-issued permit. *See id.*; *see also* Point I(B), *supra*.

Applicable law requires that Greenidge submit a "timely and sufficient application" 180 days prior to the expiration of its SPDES permit's current term. 6 N.Y.C.R.R. § 750-1.16(a); SAPA § 401(2). *See* Point I, *supra*.

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[10] Even assuming 40 C.F.R. § 122.6(a)(1) applies (which it does not), completeness is left to the discretion of the permit issuer. *See* 40 C.F.R. § 122.21(e) ("An application for a permit is complete when the Director receives an application form and any supplemental information *which are completed to his or her satisfaction*.") (emphasis added).

Taking the allegations in the Complaint as true, which Greenidge must on a Rule 12(b)(6) motion to dismiss, Plaintiffs' claim fails. Indeed, the Complaint lacks any allegation that Greenidge did not use the forms provided by NYSDEC. 6 N.Y.C.R.R. § 750-1.16(a). There is also no allegation that Greenidge did not include in its January 12, 2022 renewal application "sufficient information" supporting its application (ECL § 70-0115(2)) or that it failed to submit any "information at such times and in such form as the department may reasonably require" (ECL § 17-0803).

Not only do Plaintiffs not allege any violation of State law or that Greenidge ignored a request of the NYSDEC, their Complaint neglects to even acknowledge that NYSDEC expressly found Greenidge's renewal application to be "timely and sufficient." Hennessey Dec., Exhs. A, and B.

Accordingly, to the extent that this Court has subject matter jurisdiction, Plaintiffs' claim must be dismissed under Rule 12(b)(6).

POINT IV

ASSUMING ARGUENDO THAT PLAINTIFFS HAVE BROUGHT A PROPER CITIZENS SUIT (WHICH THEY HAVE NOT), PLAINTIFFS HAVE FAILED TO NAME A NECESSARY PARTY

The crux of Plaintiffs' claim is simply that the NYSDEC Decision is wrong. NYSDEC is therefore a necessary party.

A party that "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may … as a practical matter impair or impede the person's ability to protect the interest" must be joined as a necessary party. Fed. R. Civ. P. 19(a)(1)(B)(i).

Although the general rule is that "federal and state agencies administering federal environmental laws are not necessary parties in citizen suits to enforce the federal environmental laws," this case is not your typical citizens suit, assuming it is in fact a proper citizens suit. *Ass'n to Protect Hammersley v. Taylor Res.*, 299 F.3d 1007, 1014 (9th Cir. 2002) (citing *Friends of Earth v. Carey*, 535 F.2d 165, 173 (2d Cir. 1976) (EPA not a necessary party in Clean Air Act citizen suit).

Indeed, Plaintiffs' claim here is a *direct* challenge to NYSDEC's permitting decision that Greenidge submitted a timely and sufficient renewal application. Their claim goes to the heart of the manner in which NYSDEC processes SPDES renewal applications, which is specifically spelled out in a DEC Program Policy.[11] *See Hudson Riverkeeper Fund v. Orange & Rockland Utils*., 835 F. Supp. 160, 167 (S.D.N.Y. 1993) (finding that DEC was a necessary party concerning best available technology of intake structures under a SPDES permit).

Because Plaintiffs failed to join NYSDEC as a necessary party, their claim should be dismissed. *See* Fed. R. Civ. P. 12(b)(7).

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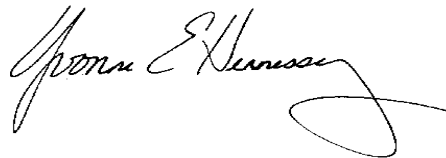
[11] *See* DEC Program Policy, Administrative Procedures and Environmental Benefit Permit Strategy For Individual SPDES Permits (last modified Jan. 25, 2012), accessed at https://www.dec.ny.gov/docs/water_pdf/togs122.pdf. For the reasons set forth in fn. 1, *supra*, the Court may take judicial notice of this DEC Program Policy.

CONCLUSION

For all of the reasons set forth herein, Greenidge respectfully submits that the Complaint should be dismissed *in toto* with prejudice.

Dated: February 21, 2023
Albany, New York

BARCLAY DAMON, LLP



By: ______________________________

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EXHIBIT A