

**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.

**REPLY DECLARATION
OF YVONNE E.
HENNESSEY**

Civil Action No. 23-cv-6063
Hon. Elizabeth A. Wolford

YVONNE E. HENNESSEY, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am a member of the law firm Barclay Damon LLP, attorneys for Defendant, Greenidge Generation LLC (“Greenidge” or “Defendant”). I am admitted to practice law in New York State and in this Court.
2. I submit this Reply Declaration in support of Greenidge’s Response to Plaintiffs’ Motion for Summary Judgment.
3. This Reply Declaration is based upon my review of the Complaint and relevant documents, including Greenidge’s pending application to renew its existing State Pollutant Discharge Elimination System (“SPDES”) permit, and my representation of Greenidge in connection with its pending SPDES permit renewal.
4. It is also based upon my more than 20 year experience as an environmental attorney in New York State, specializing in environmental permitting before the NYSDEC.

NYSDEC's SPDES Permitting Program

5. New York State Department of Environmental Conservation (“NYSDEC”) Division of Water has a Technical and Operational Guidance Series (“T.O.G.S.”) memorandum that governs the processing and issuance of SPDES permits, including renewal of SPDES permits, titled *Administrative Procedures and the Environmental Benefit Permit Strategy for Individual SPDES Permits* (dated June 2003, last rev’d. Jan. 2012). A true and accurate copy of NYSDEC Program Policy DOW 1.2.2 is attached hereto as **Exhibit A**.

6. Specifically, NYSDEC Division of Water T.O.G.S. 1.2.2 “describes the administrative steps for developing new, renewed and modified permits under the SPDES permit program.” *See* Program Policy DOW 1.2.2, p. 1; *see also id.*, p. 5 (“This guidance is to be used for implementing the requirements for discharges authorized under the State Pollutant Discharge Elimination System (SPDES); developing new SPDES permits; and renewing, modifying, priority ranking and tracking existing SPDES permits using the EBPS system.”).

7. T.O.G.S. 1.2.2 implements Article 17 of the New York Environmental Conservation Law (“ECL”) which authorizes NYSDEC to develop and utilize an administrative renewal system and priority ranking system to process SPDES Permits. *See* ECL § 17-0817(2) (“All SPDES permits may be administratively renewed in accordance with article seventy of this chapter.”); ECL § 17-0817(4) (“The department shall develop a priority ranking system of SPDES permits. The ranking system shall prioritize permits for full technical review and, when necessary, modification.”); 6 N.Y.C.R.R. §§ 750-1.16, 750-1.19; *see also* Program Policy DOW 1.2.2, p. 5.

8. This management system, which became effective August 2, 1991, is known as the Environmental Benefit Permit Strategy (“EBPS”). *See* Program Policy DOW 1.2.2, p. 5.

9. As explained by NYSDEC,

The EBPS is designed to achieve two crucial objectives: 1) establish a system that provides for timely renewal of SPDES permits and avoid a backlog of pending permit renewal applications; and 2) identify and prioritize permits that have the greatest potential for causing significant environmental harm. Thus, the EBPS is a program designed for maximizing the efficiency of developing and managing permits in accordance with the Department's SPDES program, while attaining the highest levels of environmental protection.

Id.

10. As such, the EBPS has three parts. *Id.* The first part governs new SPDES permits and requires that they “follow the existing permit application procedures in accordance with 6 N.Y.C.R.R. Part 750 (Obtaining a SPDES Permit) and Part 621 (Uniform Procedures Act) regulations.” *Id.*

11. The second part governs administrative renewals and dictates that “[a]dministrative renewal of all permits will be based on a short application form filed by the permittee prior to the permit expiration date.” *Id.* (emphasis added).

12. “Permits that cannot be administratively renewed due to identified deficiencies will be placed on the No Administrative Renewal List and must be modified prior to renewal.” *Id.*

13. The third part of the EBPS covers the technical review of the SPDES permit by DOW technical staff “in priority order based on a ranking system developed for the EBPS to determine whether any modifications are needed.” *Id.*

14. According to NYSDEC, “[t]he EBPS system enhances the DOW’s ability to improve water quality by directing staff resources to make permit modifications with the greatest potential environmental benefits.” *Id.*

15. Specific to renewal applications, T.O.G.S. 1.2.2 sets forth a detailed procedure for DOW staff to follow. *See* Exh. A, Permit Processing Procedures, Section V(B), p. 23.

16. First, “[a]pproximately 10 months before the Expiration Date of Permit (ExDP), the BWP [Bureau of Water Permits] sends a short form application packet containing the following forms to the permittee:

- SPDES Notice/Renewal Application/Permit (Part 1 is completed by the BWP before sending);
- Questionnaire (Part 4 of the application);
- Wastewater Characteristics Form (WCF; only for significant permits and non-significant permits to surface water);
- Request for SPDES Application Forms; and
- Instructions, Background, and a Permit Self Evaluation List.”

Program Policy DOW 1.2.2, p. 23.

17. As part of this first step in the renewal process, NYSDEC “*may* choose to require the applicant to complete a full application for permit renewal. *Id.* (emphasis added).

18. Next, “[t]he permittee returns the Notice/Renewal Application/Permit to the DEP Central Office, with Part 2 (SPDES Renewal Application) and Part 4 (SPDES Renewal Application Questionnaire) of the packet completed and signed, and the sampling information required by Wastewater Characteristics Form attached to the signed application.” *Id.*

19. Upon receipt, “DEP reviews Parts 2 and 4 of the renewal application, forwards a copy of the application and sampling information to the permit writer for review, and following this review makes a determination of application sufficiency. If the forms are not complete, a Notice of Incomplete Application is transmitted to the permittee requesting the missing information.” *Id.*

20. As part of its review, DEP also checks the No Administrative Renewal List and reviews the renewal application and questionnaire to determine whether the permit is a significant class permit. *Id.*

21. If the facility seeking a permit renewal is on the No Administrative Renewal List, “DEP sends a letter to the facility indicating that the permit needs a full technical review prior to renewal and that the DOW will contact the facility” and “also explain[ing] the status of the renewal request and states that the current permit will remain operative past the expiration date in accordance with SAPA.” *Id.*

22. If the permit is determined to be non-significant, the permit is renewed. *Id.* If the permit is determined to be significant, “the application is sent to the BWP who processes it for review and approval prior to administrative renewal moving forward.” *Id.* The BWP then undertakes further review of the application. *Id.*, pp. 23-24.

23. Where an administrative renewal cannot proceed, DEP notifies the permittee and informs them of the required next steps. *Id.*, p. 24. “The procedure would then be the same as that for permittee-initiated permit modifications, which would require a full application and technical review.” *Id.*

24. I have practiced environmental law in New York State for almost twenty-five years.

25. I am not aware of any SPDES permit renewal where NYSDEC did not follow T.O.G.S. 1.2.2 and required the applicant to initially submit more than a short form renewal application.

NYSDEC’s Processing of Greenidge’s SPDES Renewal Application

26. In accordance with T.O.G.S. 1.2.2, NYSDEC is processing Greenidge’s SPDES renewal.

27. Since 1975, the Greenidge Facility has operated under a SPDES permit that has been consistently renewed by NYSDEC.

28. The most recent renewal was issued by NYSDEC on September 11, 2017, with an effective date of October 1, 2017 (“SPDES Permit”). *See also* Declaration of Yvonne Hennessey (Dkt. No. 13-2), ¶ 12.

29. During the SPDES Permit renewal process, NYSDEC conducted a Full Technical Review pursuant to Program Policy DOW 1.2.2. *See* Exh. 1 to Declaration of Yvonne Hennessey, dated March 22, 2023 (Dkt. 24-3).

30. On November 9, 2021, NYSDEC sent Greenidge Generation LLC a renewal application (“SPDES Renewal Application”) to complete. *See* Exh. 3 to Declaration of Yvonne Hennessey, dated March 22, 2023 (Dkt. No. 24-5); *see also* Program Policy DOW 1.2.2, V(B)(1) (“Approximately 10 months before the Expiration Date of Permit (ExDP), the BWP sends a short form application packet”).

31. NYSDEC did not request that Greenidge complete a full application for permit renewal. *Compare* Program Policy DOW 1.2.2, p. 23.

32. By letter dated January 12, 2022, Greenidge returned a completed SPDES Renewal Application to NYSDEC. *See id.*, Exh. 4; *see also* Program Policy DOW 1.2.2, V(B)(2) (“The permittee returns the Notice/Renewal Application/Permit to the DEP Central Office”).

33. By email dated March 26, 2022, NYSDEC’s Bureau of Water Permits Section Chief notified Greenidge that NYSDEC had determined Greenidge’s renewal application to be “timely and sufficient” for coverage under the State Administrative Procedures Act. *See id.*, Exh. 5; *see also* Program Policy DOW 1.2.2, V(B)(3) (“DEP reviews Parts 2 and 4 of the renewal application, forwards a copy of the application and sampling information to the permit writer for review, and following this review makes a determination of application sufficiency. If the forms

are not complete, a Notice of Incomplete Application is transmitted to the permittee requesting the missing information.”).

34. NYSDEC did not send Greenidge a Notice of Incomplete Application. *Compare* Program Policy DOW 1.2.2, p. 23.

35. NYSDEC did not notify Greenidge that it was on the No Administrative Renewal List. *Compare* Program Policy DOW 1.2.2, p. 23.

36. Thereafter, on August 30, 2022, as required by its existing SPDES Permit, Greenidge submitted the results of its study to assess the thermal components of the cooling water discharge with the relevant New York water quality thermal criteria (the “Study”).

37. The Study was required by the Facility’s SPDES permit and is an important component of its renewal application. *See* Exh. 4 to Declaration of Yvonne Hennessey, dated March 22, 2023 (Dkt. No. 24-6) (renewal application noting that “[i]n conformance with 40 CFR 125.72, the Greenidge current SPDES permit contains a §316(a) thermal variance; therefore, Greenidge requests the thermal variance be continued in the permit renewal.”).

38. By letter dated January 13, 2023, NYSDEC requested additional information from Greenidge, including a Form NY-2C as well as other information concerning Greenidge’s request for a thermal variance. A true and accurate copy of NYSDEC’s January 13, 2023 request is attached hereto as **Exhibit B**.

39. Greenidge provided NYSDEC with the requested information, including a complete Form NY-2C, by letter dated April 13, 2023. A true and accurate copy of Greenidge’s April 13, 2023 submission is attached hereto as **Exhibit C**.

40. To date, NYSDEC has not requested any further information from Greenidge and continues to process Greenidge's SPDES renewal application in accordance with Program Policy DOW 1.2.2.

NYSDEC's Website

41. NYSDEC's website includes a discussion titled "Renewing Your Permit" on its webpage related to its SPDES permit program.

42. As Plaintiffs point out, it states:

"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> (emphasis added).

43. It then states that [i]f you have not received a renewal application, please contact [NYSDEC]" *Id.*

44. It also provides a link to a October 7, 2021 NYSDEC presentation titled "*State Pollutant Discharge Elimination System (SPDES): SPDES permit renewals, reviews, and municipal application updates.*" *Id.* A true and accurate copy of the NYSDEC SPDES presentation is attached hereto as **Exhibit D**.

45. NYSDEC's SPDES presentation explains how SPDES permits are renewed.

46. Page 9 of the NYSDEC SPDES presentation states that the short form administrative renewal is "[r]equired for all permittees." *See also id.*, 11 ("[p]ermittee receives, **completes**, and **returns** short form renewal application and questionnaire.").

47. The NYSDEC SPDES presentation then distinguishes which permits will be administratively renewed (permits with Class 01, 02, 04, 07, 09 and 10) and those that will be extended under the State Administrative Procedures Act (permits with Class 03 and 05). *Id.*, p. 10.

48. For Class 03 permits, like Greenidge's SPDES permit, once a short form application is submitted, the permit is SAPA extended and the "[p]ermit continues indefinitely until full technical review" is undertaken by NYSDEC. *Id.*, pp. 10-11.

USEPA Withdrawal Petitions

49. The crux of Plaintiffs' claim is that even though Greenidge timely submitted everything NYSDEC required as a matter of state law to administratively continue its SPDES permit and NYSDEC determined that Greenidge had done so, federal law required Greenidge to submit information not requested by NYSDEC.

50. And while Plaintiffs try to dispute this point, as detailed on Greenidge's various memoranda of law before the Court and confirmed by Riverkeeper's proposed *amicus* filing, Plaintiffs' challenge is that the NYSDEC is failing to administer its delegated permit program in accordance with federal law, specifically the information NYSDEC requires for a renewal application to be found "sufficient."

51. Under federal regulations, citizens may petition the United States Environmental Protection Agency ("EPA") to withdraw a state's authority to administer the NPDES program. *See* 40 CFR § 123.64(b)(1) (authorizing proceedings to withdraw a state permit program either at the initiative of the EPA Administrator, "*or in response to a petition from an interested person*" alleging that the State program fails to comply with requirements as set forth in 40 C.F.R. § 123.63).

52. The criteria for withdrawal of State programs are found in 40 C.F.R. § 123.63 and include "where the operation of the State program fails to comply with the requirements of [Part 123]."

53. Petitions to withdraw a state's authority to administer the NPDES program are made to the EPA, which then conducts an appropriate investigation and issues a decision.

54. Examples of this process can be found on EPA's website at <https://www.epa.gov/npdes/npdes-state-program-withdrawal-petitions>.

Dated: May 5, 2023
Albany, New York

A handwritten signature in black ink, appearing to read "Yvonne E. Hennessey", written over a horizontal line.

YVONNE E. HENNESSEY, ESQ.