UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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

Plaintiffs,

vs.

GREENIDGE GENERATION LLC,

Defendant.

CIVIL ACTION NO. 23-06063-EAW

AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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ARGUMENT

This Court is tasked with determining whether Greenidge's failure to submit information required under 40 C.F.R. part 122.21(r) in its State Pollutant Discharge Elimination System (SPDES) permit renewal application caused Greenidge to discharge pollutants without a valid SPDES permit. The implications of the Court's decision could be widespread throughout New York State's waters, and for this reason, Riverkeeper—an organization dedicated to protecting the water quality of the State's longest river, the Hudson—respectfully submits this amicus curiae brief.

When Congress passed the Clean Water Act, it was aware that power plant cooling water structures were wreaking havoc on aquatic life forms and habitats.[1] To implement Congress's objectives, the U.S Environmental Protection Agency (EPA) issued regulations on the design and operation of cooling water intake structures,[2] which were finalized in 2014. Included within these regulations are the 40 C.F.R. part 122.21(r) submission requirements for the application of a federal (NPDES) or state-issued (SPDES) permit.[3]

The information required under part 122.21(r) includes: source water physical data, 40 C.F.R. § 122.21(r)(2), source water baseline biological characterization data, *id.* § 122.21(r)(4), and entrainment performance studies, *id.* § 122.21(r)(7). Source water physical data includes "a

[1] Implementation of the Federal Water Pollution Control Act: Thermal Pollution and Other Water Impacts from Steam Electric Power Generation, Hearings Before the Subcomm. on Investigations and Review of the Committee on Public Works and Transportation, 95 Cong. 25 (1977) [hereinafter "Hearing on Clean Water Act Implementation"] ("[The inclusion of Section 316(b) in the Clean Water Act] was to assure that the effects of withdrawal of water would be considered along with its discharge as an integral part of the effluent limitations and not a separate, independent requirement.").
[2] See National Pollutant Discharge Elimination System-Final Regulations To Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg. 48299, 48304 (Aug. 15, 2014) [hereinafter "Final Rule"] ("[Today's rule] represents the culmination of EPA's efforts to implement section 316(b) and, as such, fulfills EPA's obligation under a settlement agreement entered in the United States District Court for the Southern District of New York in [Cronin v. Browner, 898 F. Supp. 1052 (S.D.N.Y. 1995)].").
[3] *See id.* at 48309.

narrative description and scaled drawings showing the physical configuration of all source water bodies used by [the] facility." *Id.* § 122.21(r)(2)(i). Source water baseline biological characterization data includes the "characteriz[ation of] the biological community in the vicinity of the cooling water intake structure and [the] characteriz[ation of] the operation of the cooling water intake structures." *Id.* § 122.21(r)(4). The entrainment performance studies must contain "a description of any biological survival studies conducted at the facility and a summary of any conclusions or results[.]"[4]

Under New York's SPDES program, permit renewal applications are to be submitted "at least 180 days prior to" the expiration of the permit. N.Y. Comp. Codes R. & Regs. tit. 6, § 750-1.16(a). In theory, the 180-day period could allow the New York State Department of Environmental Conservation (DEC) to begin processing the application, which includes: determining whether the application is complete and sufficient, determining whether supplementation is necessary, and beginning its substantive review of the application materials. N.Y. Comp. Codes R. & Regs. tit. 6, § 621.3. However, the theoretical does not always align with reality. DEC often does not have the resources to begin an assessment of a renewal application prior to the permit's expiration, which is why administrative continuation exists. It can take DEC years to begin its review of an application, at which point it may determine that the application was incomplete and supplementation necessary.

By failing to submit the requisite information on renewal, Greenidge impinges on the intent and purpose of the EPA's regulations and the Clean Water Act. Under New York's permitting system, where oftentimes no substantive review occurs at the time of submission, it is imperative that the applicant do the necessary research and analysis to submit a complete application that

[4] *Final Rule*, *supra* note 2, at 48366.

addresses all the necessary information and issues. By submitting an obviously incomplete application, Greenidge is effectively taking advantage of an overworked and understaffed DEC. While the permit renewal process places responsibility on the DEC for ensuring sufficiency at the time of reviewing and approving the permit, the actual responsibility for submitting a complete application under applicable regulations lies with the applicant alone.

Greenidge's decision to omit the data and studies required by 40 C.F.R. § 122.21(r), including the cooling water intake structure data and the entrainment performance studies, stifles the DEC's ability to make a timely decision and subverts the environmental protections mandated by the regulations. This decision also stifles public participation, something that lies at the heart of the Clean Water Act. The consequences of allowing Greenidge to act in this manner are significant, and they could leave both aquatic ecosystems and the DEC in a vulnerable position.

I. THE EPA'S REGULATION OF COOLING WATER INTAKE STRUCTURES

Cooling water intake structures are defined as "the total physical structure and any associated constructed waterways used to withdraw cooling water from waters of the United States." 40 C.F.R. § 125.92(f). Many facilities use cooling water intake structures to "withdraw large volumes of water for production and . . . to absorb waste heat from their industrial processes. . . . [W]ater withdrawals by manufacturers and electricity generators represent more than one-half of the 410 billion gallons of water withdrawn daily for various uses in the United States."[5] These water withdrawals can have devastating impacts on aquatic ecosystems.

Congress knew as much when it passed the Clean Water Act. Section 316(b) places restrictions on the location, design, construction, and capacity of cooling water intake systems. 33 U.S.C. § 1326(b). To enforce the mandates of section 316(b), the Environmental Protection

[5] Claudia Copeland, Cong. Rsch. Serv., R41786, Cooling Water Intake Structures: Summary of EPA's Proposed Rule 1 (2012).

Agency (EPA) promulgated a series of regulations. *See, e.g.*, 40 C.F.R. §§ 122.21(r), 125.90. The provisions contained in the EPA's regulations were intended to give permitting bodies enough information to determine the appropriate technological or operational controls for facilities.

A. The Clean Water Act Section 316(b)

In 1972, Congress passed the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Federal Water Pollution Control Act Amendments of 1972*, Pub. L. No. 92-500, § 101(a), 86 Stat. 816, 816 (1972). To help achieve this objective, Congress included section 316(b), which states that:

> Any standard established pursuant to section 301 or section 306 of this Act and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.

Id. at 876. At the time, Congress was concerned that "heat was the major problem associated with powerplant cooling systems."[6] However, it became clear that section 316(b) could be used to confront other issues: Congressional hearings leading up to the 1977 Amendments to the Act indicate that section 316(b) should be used to address impingement and entrainment.[7]

Impingement and entrainment stem from the immense pressure generated from the flow of large volumes of water into cooling systems. Impingement occurs when pressure "traps . . . larger organisms, like fish, against intake points," whereas entrainment occurs when pressure "draws . . . smaller [organisms], like plankton, eggs, and larvae, into the cooling mechanism, killing or injuring them." *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 181 (2d Cir. 2004). The impacts can be extreme: "A single power plant might impinge a million adult fish in just a three-week period, or

[6] Hearing on Clean Water Act Implementation, *supra* note 1, at 4.
[7] *Id.* ("Today, I am told . . . the problems associated with the entrainment of organisms appears to be much greater than Congress had envisioned in 1972.").

entrain some 3 to 4 billion smaller fish and shellfish in a year, destabilizing wildlife populations in the surrounding ecosystem." *Id.* To address the potentially devastating impacts these systems can have,[8] EPA promulgated regulations implementing the requirements of section 316(b).

B. Promulgating the EPA Regulations

EPA first attempted to promulgate regulations pursuant to section 316(b) in the mid-1970s, when it set out to issue one sole regulation "that was applicable to all categories of point sources[.]" *Cronin v. Browner*, 898 F.Supp. 1052, 1056 (S.D.N.Y. 1995). However, in 1977, the Fourth Circuit remanded this attempt to the agency "because of a procedural deficiency," and two years later, EPA withdrew its regulation. *Id.* (*citing Appalachian Power Co. v. Train*, 566 F.2d 451, 457 (4th Cir. 1977)). For more than fifteen years, EPA remained silent. That changed when a handful of environmental groups sought to compel EPA to promulgate a new regulation. *See id.* at 1055. In *Cronin*, "environmental groups . . . won a consent decree, pursuant to which the EPA agreed to promulgate regulations under section 316(b) by specified deadlines." *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 181 (2d Cir. 2004) (citing *Cronin*, 898 F.Supp. at 1064). After nearly two decades, on August 15, 2014, EPA promulgated its final rule, codified at 40 C.F.R. sections 122 and 125.[9]

In the regulations EPA reemphasized the negative effects of impingement and entrainment, and also mentioned several indirect, ecosystem-wide effects that occur from the withdrawal of cooling water: "disruption of aquatic food webs," "disruption of nutrient cycling and other biochemical processes," "alteration of species composition and overall levels of biodiversity," and "degradation of the overall aquatic environment."[10] While aquatic wildlife is the primary beneficiary of the regulations, additional "beneficiaries of fish protection at cooling water intakes

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[8] Final Rule, *supra* note 2, at 48312. ("The purpose of today's rule is to reduce impingement and entrainment of fish, shellfish and other aquatic organisms at cooling water intake structures.").
[9] *See* Final Rule, *supra* note 2, at 48300.
[10] *Id.* at 48303.

include fisherman, both recreational and commercial, and people interested in well-functioning and healthy aquatic ecosystems."[11]

At the heart of this matter is 40 C.F.R. § 122.21(r), which outlines the requirements that facilities with cooling water intake structures must comply with when applying for a SPDES permit. The requirements contained in § 122.21(r) allow permitting bodies "to assess the impingement and entrainment impacts of the cooling water intake structure and determine appropriate technological or operational controls, or both, as necessary."[12] EPA understood that the required submissions would take time to compile, "as long as 39 months to plan, collect, and compile the data and studies required to be submitted with the permit application."[13] Since it may take several years to complete studies and data collection, EPA determined that facilities seeking renewal should "submit this data well in advance in order to prevent any delays in the . . . review of permit application materials and subsequent . . . renewal of the facility's . . . permit."[14] However, if Greenidge's actions go unaddressed, other facility operators might believe that a delay of the submission requirements of 40 C.F.R. § 122.21(r) is in their best interests.

II. GREENIDGE MISTAKENLY ASSUMES THAT FEDERAL REGULATIONS DO NOT APPLY AND ARGUES THAT THE DEC ALREADY HAS ALL OF THE REQUIRED INFORMATION

Greenidge contends that state law provides the provisions and standards for continuance of SPDES permits and is not subject to the EPA regulations. Greenidge assumes that 40 C.F.R. § 122.21(r) is a regulatory provision for continuance of a permit, as opposed to a general regulatory provision. This assumption is unwarranted: the requirements of § 122.21(r) apply equally to an initial permit application as to a permit renewal application. 40 C.F.R. § 123.25(a)(4) ("All State

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[11] Id.
[12] *Id.* at 48362.
[13] *Id.*at 48359.
[14] *Id.* 48362.

Programs under this part . . . must be administered in conformance with . . . § 122.21(a)–(b), (c)(2), (e)–(k), (m)–(p), (q), and (r)[.]"). As such, applicants must comply with § 122.21(r) when applying for renewal, regardless of whether EPA or DEC is reviewing the application.

Greenidge failed to submit any of the requisite material when it applied for renewal and has yet to supplement its application. Greenidge contends that the DEC already has the information required under 122.21(r) from its 2017 application. However, 40 C.F.R. § 122.21(r) does not contain a single provision that allows a facility that properly submitted information years prior to forgo subsequent submission requirements. Such an interpretation would contravene the purpose of the Clean Water Act.

Greenidge argues that its assurances indicating nothing has changed since 2017 should suffice for ignoring the requirements of 122.21(r). This assumption would be more plausible (but still legally insufficient) if Greenidge were presently operating in a remotely similar manner to how it operated in 2017. However, Greenidge drastically altered the "primary purpose" and operation of its facility, such that the facility operated far more frequently in 2021 and 2022 than it did in prior years.[15] The increased frequency of Greenidge's operation of the facility would certainly change, for example, a facility's "potential for impingement and entrainment of aquatic organisms,"[16] since the increased frequency would increase the volume of water the facility has drawn. In changing the primary purpose of the facility and increasing the frequency of operation, Greenidge changed the circumstances underlying the 2017 information and data and, thus, Greenidge had the responsibility for updating the studies and data required under § 122.21(r).

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[15] Notice of Denial Letter from Daniel Whitehead, Division of Environmental Permits Director, N.Y. State Dep't of Env't Conservation, to Dale Irwin, President, Greenidge Generation, LLC, 12–13 (Jun. 30, 2022) [hereinafter "DEC Notice of Denial of Title V Air Permit"], https://www.dec.ny.gov/docs/administration_pdf/greenidgefinal630.pdf.
[16] Final Rule, *supra* note 2, at 48363.

III. GREENIDGE'S INADEQUATE SUBMISSION VIOLATES THE PURPOSE AND INTENT OF THE EPA REGULATIONS

In the meantime, under its administrative renewal, Greenidge is allowed to proceed with business-as-usual: the DEC would not be able to determine what technological or operational changes may be needed until it has the updated information. In promulgating its regulations creating the cooling water intake structure regulatory scheme, the EPA was aware that permits were being administratively extended while the agency.[17] However, EPA did not intend for administrative extensions to delay the implementation of the necessary technological and operational controls.[18]

Administrative extensions are meant to give decision-making bodies enough time to thoroughly process and evaluate the information presented to them. Facilities like Greenidge cannot be allowed to exploit these extensions to further delay the implementation of technological improvements. "The structure of the [Clean Water] Act makes clear that Congress expected water pollution control technology to improve, and these improvements would be written into permits as they expired, moving the nation towards the expressed goal of eliminating all discharges of pollutants."[19] By failing to examine whether it is meeting regulatory requirements and failing to do the necessary environmental review, Greenidge is short-circuiting the process.

Greenidge cannot be allowed to take advantage of an overburdened state agency to delay the implementation of proper technology and operational controls; not only do the aquatic ecosystems deserve better, but DEC does too. Tolerating this conduct would set a dangerous precedent.

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[17] *Id.* ("EPA is aware that currently many NPDES permits for facilities with a [cooling water intake structure] have been administratively continued.").

[18] *Id.* at 48303 ("[S]tates have, in some instances, administratively continued permits while awaiting final Federal action, and thus fish protection has been delayed, in some instances for decades.").

[19] Karl S. Coplan, Of Zombie Permits and Greenwash Renewal Strategies: Ten Years of New York's So-Called "Environmental Benefit Permitting Strategy", 22 Pace Env't L. Rev. 6 (2005).

IV. GREENIDGE IS RESPONSIBLE FOR ENSURING THE SUFFICIENCY OF ITS RENEWAL APPLICATION

The SPDES program is based on the understanding that applicants are aware of renewal requirements. It places significant trust in the good faith of corporate citizens. When applicants fall short of meeting these requirements, DEC should, in theory, be in a position correct applicant errors. However, this is not always administratively feasible. First, DEC is understaffed compared to the scope of its responsibilities. Issues with staffing and resource management have led to significant oversights in the regulatory process in recent years. Additionally, the SPDES program runs on applicant transparency. When polluters receive permit shields upon submitting insufficient applications, the good faith system begins to fail. Applicants must be held accountable for taking advantage of regulatory delays, especially when the stability of delicate ecosystems are at stake.

A. An Overworked and Understaffed DEC

Applicants must be held accountable for the sufficiency of their permit renewals, in part, because the DEC is understaffed compared to the breadth of its responsibilities. New York State has recognized this issue multiple times in the last several years; according to a 2021 report from the New York Office of the State Comptroller, environmental laws recently passed at the state and federal level have rapidly increased DEC's workload.[20] During that time, however, DEC's budget has fallen, while staffing has largely stagnated.[21] The DEC's implementation of state and federal clean water programs is one of the chief responsibilities that DEC continues to fall short with

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[20] *DiNapoli: Department of Environmental Conservation's Operational Spending Declines as Responsibilities Grow*, N.Y. Off. of the State Comptroller (Jan. 28, 2021) [hereinafter "DiNapoli Report"], https://www.osc.state.ny.us/press/releases/2021/01/dinapoli-department-environmental-conservations-operational-spending-declines-responsibilities-grow.

[21] *Id.* See also *Resources and Responsibilities: New York State's Environmental Funding*, N.Y. Off. of the State Comptroller (Jan. 2021), https://www.osc.state.ny.us/reports/resources-and-responsibilities-new-york-states-environmental-funding ("[T]hese additional responsibilities, which may involve substantial commitments of agency resources by DEC, have not been accompanied by additional staff or funding.").

respect to upholding.[22] Moreover, only a small portion of New York's appropriations in support of clean water have been spent, "which may be partly attributable to reduced staffing and resources in this program."[23]

According to DEC's most recent SPDES program report, it currently oversees 22,192 permits.[24] In the section discussing SPDES enforcement and implementation, the report notes that there are "staff and resource limitations" at DEC.[25] EPA has also taken note of DEC's inadequate staffing and resources for the SPDES program. In its most recent Program and Permit Quality Review of DEC, EPA noted "limited staff" as one of the primary challenges facing the agency.[26] DEC's staffing limitations have led to continued regulatory lapses in the SPDES program.

Issues with DEC's implementation of the SPDES program are not novel. Indefinite administrative renewal caused by DEC's excessive workload has been written about extensively.[27] Professor Karl Coplan, the former director of the undersigned clinic, has noted that there was a significant backlog of SPDES permits as far back as the 1980s.[28] This issue has only been exacerbated in recent years as DEC's workload continues to grow.

DEC is simply ill-equipped to adequately review all SPDES permit renewals. Limitations on staffing and resources cause DEC to extend permits in lieu of sufficient application review. This allows DEC to avoid delay and prevent permit lapses. However, this necessitates SPDES applicants to be responsible corporate citizens and submit full, compliant applications. The SPDES

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[22] DiNapoli Report, *supra* note 22 ("[F]ederally mandated . . . clean water programs [have] not kept pace with prior years, as . . . permit schedule violations under the Clean Water Act increased.").
[23] Id.
[24] N.Y. State Dep't of Env't Conservation, SPDES Compliance and Enforcement SFY 2021/2022 Annual Report 9 (2022), https://www.dec.ny.gov/docs/water_pdf/2021annualrpt.pdf.
[25] *Id.* at 15.
[26] United States EPA, Region 2 NPDES Program and Permit Quality Review New York State 3 (2019), https://www.epa.gov/sites/default/files/2019-07/documents/new_york_2019.pdf.
[27] Coplan, *supra* note 21, at 1.
[28] *Id.* at 15.

program relies on cooperation from industry, but when good faith cooperation ceases to exist, the program begins to fail. Greenidge has taken advantage of the DEC by submitting an inadequate application to indefinitely extend its expired SPDES permit absent any agency review.

B. Stifling Public Participation

In addition to good faith applicant cooperation, the SPDES program relies on public participation and transparency for environmental protection and compliance. From the very beginning of the permit process, draft SPDES applications and their supporting data are made available to the public. N.Y. Comp. Codes R. & Regs. tit. 6, §§ 621.3, 750-1.7 (requiring public disclosure of a description of the project, the existing application, draft permit, and an opportunity to submit written comments or request a public hearing on the application). These public disclosure requirements continue through the renewal period, playing a vital role in enforcement and community involvement, as well as ensuring environmental protection. *See id.* § 750-1.16.

The DEC has been criticized for limiting community involvement within the SPDES permitting program; even when applications are sufficient, DEC's use of administrative approvals for permit renewals stifles much of the public participation at the heart of the Clean Water Act. Professor Coplan highlights how DEC guts public participation from the Clean Water Act: "Rather than providing an opportunity for full public review . . . the automatic 'administrative renewal' purports to limit the right to public hearings on permit renewals and defer the issues raised in public comments to the 'full technical review' to be held at some indefinite time in the future."[29] Furthermore, "'[t]he 'benefit' of this strategy appears to be to the administrative agency, not to the environment."[30] It is one thing for the agency to cause the delay. It is entirely different for the applicant to game the system by failing to submit necessary information and wait months or even

[29] Coplan, *supra* note 21, at 3.
[30] *Id.* at 2.

years for the agency to catch the omission, during which time, the facility continues to pollute free of any agency review. If facilities were allowed to indefinitely extend their permits without providing necessary information, it would limit what little public participation is left under the Clean Water Act. In the absence of sufficient public disclosure, environmental groups and stakeholders are left in the dark, leaving all oversight to an understaffed agency.

C. Greenidge Has a History of Misleading the State and the Public

Greenidge has a habit of mischaracterizing its operations to regulators and submitting insufficient permits. Greenidge asserts on its website that it is a "leader in environmental stewardship" that "[provides] the electricity necessary to power up to 20,000 homes and businesses[.]"[31] However, the facility actually directs the overwhelming majority of energy produced for on-site crypto mining operations. In DEC's letter to Greenidge denying its application for a Title V Air Permit, DEC explained that "Greenidge did not indicate in the initial application that it intended the Facility to primarily serve increasing energy load from on-site cryptocurrency mining operations, rather than provide energy primarily to the electricity grid."[32] The letter shows that Greenidge does not provide power to the community, but rather exploits the region's water resources to fund its own crypto mining operations.[33] The letter goes on to expose the facility's lax environmental concern, stating that, instead of demonstrating a commitment to reduce GHG emissions, Greenidge has "put forth vague assurances that it would decrease GHG emissions over time[.]"[34] Greenidge's continued failure to act in accordance with environmental requirements served as a primary reason for DEC's Title V Air Permit denial.[35]

[31] *Our Operations: New York,* Greenidge Generation (2023), https://greenidge.com/our-operations/.
[32] DEC Notice of Denial of Title V Air Permit, *supra* note 17, at 2.
[33] The cryptocurrency industry does not benefit the community. It is a wildly unregulated and futile industry, subject to pump-and-dump schemes that hurt consumers. Similarly, Greenidge does not provide a tangible benefit to the community. It exploits what little water resources are there to generate its own on-site crypto mining activities.
[34] *Id.* at 18.
[35] *Id.* at 1–2.

Greenidge also maintains that it "[works] closely with the local community to ensure its operation is . . . a critical piece of infrastructure[.]"[36] Compare that with Greenidge's Title V Air Permit Application, which "d[id] not acknowledge the Facility's location in a draft Disadvantaged Community[,] . . . despite the fact that the [Climate Justice Working Group] released the draft Disadvantaged Communities maps" several weeks before Greenidge submitted supplemental papers in support of its application.[37] Considering Greenidge's history of filing insufficient permit applications, it is unsurprising that it failed to meet its obligations under the Clean Water Act.

V. CONCLUSION

Greenidge seeks to take advantage of New York's administrative continuation laws to persist in violating the Clean Water Act. The DEC is unprepared to handle such an inadequately-produced application immediately. The Clean Water Act was created to force the hands of slowly adapting facilities to update their technological and operational deficiencies. Administrative continuations are provided such that agencies can take the time to properly examine and adjudicate applications for renewal. Greenidge's actions violate the purposes of both the Clean Water Act and administrative continuations, and this Court must hold it accountable.

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[36] Greenidge, *supra* note 33.
[37] DEC Notice of Denial of Title V Air Permit, *supra* note 17, at 19.

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