Appellate Division Docket No. CA 13-01558
Steuben County Clerk's Index No. 2012-0810

New York Supreme Court

Appellate Division—Fourth Department

In the Matter of the Application of the SIERRA CLUB; PEOPLE FOR A HEALTHY ENVIRONMENT, INC.; COALITION TO PROTECT NEW YORK; JOHN MARVIN; THERESA FINNERAN; MICHAEL FINNERAN; VIRGINIA HAUFF; and JEAN WOSINSKI,

Petitioners-Respondents,

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules

-against-

THE VILLAGE OF PAINTED POST; PAINTED POST DEVELOPMENT, LLC; SWEPI, LP;

Respondents-Appellants,

and the WELLSBORO AND CORNING RAILROAD, LLC,

Respondent-Respondent.

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AMICUS CURIAE BRIEF
IN SUPPORT OF PETITIONERS-RESPONDENTS

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PRELIMINARY STATEMENT

This appeal concerns whether the respondent-appellant Village of Painted Post's ("VOPP") decision to drain and sell 314 million gallons of water from the Corning aquifer is a Type II action as defined by the State Environmental Quality Review Act ("SEQRA") requiring no environmental review. (Environmental Conservation Law Article 8 and implementing regulations at 6 NYCRR §617).

For the following reasons, the lower court ruling should be affirmed as it correctly determined that the VOPP's determination to sell up to 1,500,000 gallons per day ("gpd") over a five-year period to respondent-appellant Shell Western Exploration and Production LP ("SWEPI") was not a Type II action and therefore required analysis pursuant to SEQRA's requirements.

COUNTER-STATEMENT OF THE FACTS

The Corning aquifer spans a 28-square mile area generally following the river valleys around the City of Corning in New York's Southern Tier. It is one of 18 primary source aquifers in New York and serves a population of over 29,000. (New York State Department of Environmental Conservation ["DEC"] Technical Operational & Guidance Series ["TOGS"] 2.1.3 at Table 1.; Available at http://www.dec.ny.gov/regulations/2652.html). The aquifer is a highly productive system yet also "vulnerable to contamination from the land surface." *Id.* at pg. 3.

In 2011, Appellants retained Hunt Engineers, Architects & Land Surveyors to study an abandoned hazardous waste site in VOPP for potential reuse as a water supply loading facility accessed by a new railroad spur ("transloading facility" or "project site"). The Hunt report (R. 212) discloses that beginning in 1985, DEC discovered that the site's soils and groundwater were contaminated with hazardous wastes, including lead, polychlorinated biphenyls, toluene, benzene, petroleum products and other carcinogens, such as polynuclear aromatic hydrocarbons. The project site became the subject of extensive clean-up efforts and monitoring for decades in order to stabilize the contamination, limit future soil disturbance and reduce health risks. The Hunt report states that in 1986, a 7.5 acre parcel from the original 57.4 acres was conveyed to the VOPP for use as a recreational park named Hodgman Park. (The Hunt report misidentifies Hodgman Park as "Hogmen Park."). Hodgman Park now includes several sports fields for lacrosse and softball. R. 187.

Also in 2011, the VOPP entered into negotiations to sell a significant amount of water from the Corning aquifer to SWEPI. On February 23, 2012, the VOPP adopted four resolutions collectively determining that under SEQRA the sale of more than a million gallons of water (a day) to SWEPI over a five year period (R.145) was a Type II action. (Petitioners-Respondents' brief at *Appendix A*). Thus, the VOPP determined that no environmental review was necessary for the sale or use of water. The VOPP determined to "voluntarily comply" with SEQRA by drafting an Environmental Assessment Form ("EAF") and including as

one of the four resolutions, a negative declaration. The negative declaration identified the approval of the lease as a Type I action but determined that the resulting construction of a transloading facility presented no potential for a significant environmental impact. R. 113. The transloading facility is comprised of pumping stations spaced evenly over 2,400 feet allowing 42 tanker cars to be filled in 16 hours. R. 218.

Petitioners- respondents ("Respondents") brought an Order to Show Cause seeking a preliminary injunction (R. 41) and filed a Petition resulting in the lower court's annulment of the February 23, 2012 resolutions. R. 6. This appeal ensued. This brief addresses particular issues concerning SEQRA and Respondent John Marvin's standing.

POINT I

APPELLANTS FAILED TO TAKE THE REQUISITE "HARD LOOK" REQUIRED UNDER SEQRA

SEQRA is a set of procedures that encourage municipalities to take a "hard look" at an action's potentially significant environmental impacts and craft appropriate mitigation strategies.

"The primary purpose of SEQRA is 'to inject environmental considerations directly into governmental decision making.' " *Akpan v Koch*, 75 NY2d 561, 569 (1990); *Matter of Coca-Cola Bottling Co. of New York v Board of Estimate*, 72 NY2d 674, 679 (1988). Agencies must strictly adhere to the procedures set forth

in the statute and regulations. *N.Y.C. Coalition to End Lead Poisoning. v Vallone,* 100 NY2d 337, 348 (2003); *King v Saratoga County Bd. of Supervisors,* 89 NY2d 341, 348 (1996).

In reviewing the sufficiency of a municipality's environmental review, courts uniformly apply the "hard look" test first set forth by this Department in *H.O.M.E.S. v New York State Development Corp.*, 69 AD2d 222, 231-232 (4th Dept. 1979). A court must determine whether the lead agency: 1) identified relevant issues, 2) took a "hard look" at the environmental impacts, and 3) gave a reasoned elaboration of the basis for its determinations. *Save the Pine Bush, Inc. v Planning Bd. of the City of Albany*, 96 AD2d 986, 987, (3d Dept. 1981), *appeal dismissed* 61 NY2d 668, (1983).

One of the first duties of a municipality reviewing a project's impacts is to determine whether it is defined under SEQRA as a Type I, Type II or Unlisted action. Type I actions carry the presumption that they will require further environmental review by the production of an Environmental Impact Statement ("EIS").

> There is a relatively low threshold for requiring an EIS before approving such actions because the designation of a proposed action as 'Type I' 'carries with it the presumption that it is likely to have a significant effect on the environment.

Matter of Miller v City of Lockport, 210 AD2d 955, 957 (4th Dept 1994) *lv to app den*, 85 NY2d 807 (1995).

> In order to overcome the presumption, the government must properly identify the potential adverse environmental impacts, take a

> hard look at all of the evidence concerning them, conclude that—under the circumstances of that project—there really are no adverse impacts, and articulate in a written statement (called a negative declaration) a reasoned elaboration supporting that determination.

Id. citing *Merson v McNally*, 90 NY2d 742 (1997), *Spitzer v Farrell*, 100 NY2d 186 (2003) and *Mobil Oil Corporation v City of Syracuse Industrial Development Agency*, 224 AD2d 15 (4th Dept 1996). A Type I action must be subjected to a "coordinated review," a process whereby the "lead" agency must transmit the EAF and information regarding the project to other agencies with approval or permitting authority ("involved agencies"). See *Matter of Town of Coeymans v City of Albany*, 284 AD2d 830, 831 (3d Dept 2001); "[A] Type I action under [SEQRA] . . . requir[es] coordinated review among all of the involved agencies").

Type II actions require no further review. Unlisted action are by definition those actions not specifically listed as Type I or Type II actions and agencies must assess whether such actions present the potential to result in significant adverse environmental impacts requiring an EIS. 6 NYCRR §617.2(ak).

A. The VOPP's Improper Segmentation

In defining an action and thus the scope of an agency's environmental review, it is understood that "[a]ctions commonly consist of a set of activities or steps." *Town of Coeymans v City of Albany*, 284 AD2d 830, 834 (3d Dept 2001). The entire set of activities or steps must be considered the action (6 NYCRR 617.3[g])."

Here, the VOPP's decision to sell water from the Corning aquifer is part of an overall project comprised of withdrawing water from the Corning aquifer, leasing the project site and building and operating the transloading facility. Without water, there is no transloading facility and thus the water withdrawal is "an integral part of a single project rather than an independent action" and therefore cannot be considered separately as a Type II action. (*Town of Coeymans*, 284 AD2d at 835 citing *Sun Co. v City of Syracuse Indus. Dev. Agency*, 209 AD2d 34, 48-49, [4th Dept 1995], *appeal dismissed* 86 NY2d 776 [1995]).

Here, the VOPP determined that a segment of the action – leasing the land for the transloading facility was a Type I action (R. 113) while the contract to sell up to 314 million gallons of water was a Type II action. (Respondents' brief at *Appendix A*).

The lower court correctly ruled that the VOPP's decision to assess segments of the overall action (property lease/water withdrawal) was improper. R. 33. Indeed, determining separate elements of a single action are both Type I and Type II actions violates DEC's clear regulatory requirement that "[t]he entire set of activities or steps must be considered the action." 6 NYCRR 617.3[g].

B. Bulk Water Sales are not Type II actions

It is beyond dispute that the sale or use of more than 2 million gallons a day is a Type I action:

> [A]ctivities, other than the construction of residential facilities, that meet or exceed any of the following thresholds… a project or action that would use ground or surface water in excess of 2,000,000 gallons per day.

6 NYCRR §617.4, (b)(6)(i),(ii). It is also beyond dispute that Unlisted actions may be converted to a Type I action. For example:

> [A]ny Unlisted action, that exceeds 25 percent of any threshold in this section, occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area or designated open space.

6 NYCRR §617.4(b)(10). Consequently, the bulk sale of water is an Unlisted action by virtue of the fact that only Unlisted actions may be converted to a Type I action. Thus, the VOPP's designation of the bulk sale of water as a Type II action is unsupported. Indeed, "Surplus property," is identified in the SEQRA Handbook (p. 40, 3d ed. 2010) as items such as furniture, equipment, vehicles, office supplies, etc. There is no authority indicating the sale of those items – or any other Type II action - converts to a Type I action under any circumstances, including bulk sales.

Unlike the sale of "surplus property," the bulk sale of water resulting in the use of more than 2 million gallons per day is specifically identified as one of the actions susceptible to conversion from an Unlisted action to a Type I action.

Indeed here, because the transloading facility is immediately adjacent to Hodgman Park, the Unlisted/Type I conversion is triggered.

In sum, the VOPP made no effort to consider the "close proximity" of Hodgman Park to the project site. That close proximity converted the bulk sale of water (an Unlisted action) to a Type I action as the action exceeded the threshold of 500,000 gpd – 25% of 2 million gpd. The lower court pinpointed that the proximity of Hodgman Park required the VOPP to address whether the project was a Type I action. Its failure to recognize the park's proximity evinced a failure to take a "hard look" at the project's potentially significant environmental impacts. R. 35-36.

C. The VOPP's Insufficient Environmental Assessment Form

The VOPP's Environmental Assessment Form ("EAF") concerned only the transloading facility site lease. R. 148. Incredibly, the EAF stated that the site was not located over "a primary, principal, or sole source aquifer." R. 150. As above, the site is directly over the Corning aquifer, one of 18 primary source aquifers in New York. Moreover, the VOPP claimed that the EAF's inquiry as to the action's affect on groundwater quality or quantity was "not applicable." R. 160. These errors alone support annulment of the resulting negative declaration.

As an example, in *Matter of Kirk-Astor Dr. Neighborhood Assn., v Town Bd. of Pittsford*, 106 AD2d 868 (4th Dept. 1984), this Court reversed the lower court and annulled the negative declaration as the EAF:

> [F]ailed to provide complete information relating to water table, soil, surface water runoff, plant and animal life and other aspects of the proposed development… [and] did not include the detail required of an EAF; specific questions in the model form were not answered and incomplete information was provided.

This Court concluded:

> [The lead agency's] conclusions are not supported by the record due to the limited information before it and its failure to evaluate the potential impacts in the detailed, systematic fashion envisioned in Part II of the model EAF. In view of these deficiencies we conclude that the decision of the [lead agency] to issue a negative declaration was arbitrary and capricious. (*Id.* at 870).

Here, the errors in the project's EAF support affirming the lower court's ruling.

D. Failure of the VOPP to Identify all Involved Agencies

The SEQRA regulations define "involved agency" in part as:

> [A]n agency that has jurisdiction by law to fund, approve or directly undertake an action. If an agency will ultimately make a discretionary decision to fund, approve or undertake an action, then it is an 'involved agency,' notwithstanding that it has not received an application for funding or approval at the time the SEQR process is commenced.

6 NYCRR §617.2(s). The regulations further contain a number of provisions to ensure that involved agencies have an opportunity to comment on the SEQRA review of environmental impact, including the plenary requirement that "[t]he lead agency will make every reasonable effort to involve project sponsors, other agencies and the public in the SEQR process." 6 NYCRR § 617.3(d).

Failure to identify involved agencies leads to a faulty SEQRA process. *Munash v Town Bd. of the Town of East Hampton*, 297 AD2d 345 (2d Dept 2002); annulling negative declaration where agency "failed to comply with SEQRA regulations which mandate that an agency responsible for the approval of

a Type I action forward the EAF to all other involved agencies, so that agreement can be reached as to designation of a lead agency, and a coordinated review undertaken); See also 6 NYCRR §617.4(b)(3)(i) requiring same.)

Here, the Steuben County Planning Department was an involved agency under SEQRA because it had the discretion to approve the project's site plan pursuant to General Municipal Law §239-m. Specifically:

> In any… village… which has a county planning agency… each referring body shall, before taking final action on proposed actions… refer the same to such county planning agency. *Id.* at (2).

Actions subject to referral include "approval of site plans." *Id.* at 3(a)(iv). The referral must occur if the site plan "appl[ies] to real property within five hundred feet of… the boundary of any… town; the boundary… of any other recreation area;… the right-of-way of any existing… state parkway, thruway, expressway, road or highway. *Id.* at 3(b)(i), (ii) and (iii). Following "receipt of a full statement of such proposed action" the County has thirty days to report its recommendations. *Id.* at 4(b). If the County recommends modification or disapproval of the action, "the referring body shall not act contrary to such recommendation except by a vote of a majority plus one of all the members thereof." *Id.* at (5).

Here, the site is within 500 feet of the Town of Erwin, immediately borders Hodgman Park and is within 500 feet of a major highway - State Route 17. R. 187. The record shows no correspondence by VOPP to the County Planning Department, which should have included the EAF. R. 169-188. The VOPP 's

failure to conduct a proper coordinated review similarly supports this Court affirming the judgment below.

E. Improper Deference to Outside Agencies

While a lead agency may rely on outside sources, such as the Basin Commission, for expertise assisting the lead agency's SEQRA review, it is the lead agency itself that "must exercise its critical judgment on all of the issues presented." *Penfield Panorama Area Community, Inc. v Town of Penfield Planning Bd.* 253 AD2d 342, (4th Dept 1999). (See also *Matter of Coca Cola Bottling Co.*, 72 NY2d at 682-683 [1998] and *Department of Environmental Protection v Department of Environmental Conservation*, 120 AD2d 166 [3rd Dept 1986] where compliance with another agency's regulations does not absolve the lead agency from reviewing the project's impacts.)

Here, Appellants claim "the Village relied upon the Basin Commission review of the pertinent water withdrawals instead of conducting a duplicate review pursuant to SEQRA." (Appellants' Reply Brief at page 17). This is precisely the type of wholesale deference a lead agency must avoid. The matter of *County of Orange v Village of Kiryas Joel*, 44 AD3d 765, 768 (2d Dept 2007) is on point:

> Where an agency fails or refuses to undertake necessary analyses, improperly defers or delays a full and complete consideration of relevant areas of environmental concern, or does not support its conclusions with rationally-based assumptions and studies, the SEQRA findings statement approving the FEIS must be vacated as arbitrary and irrational.

Indeed, Appellants admit that the Commission Basin's review is inadequate for SEQRA purposes as the Commission, "does not evaluate environmental impacts associated with matters other than water withdrawals." (Appellants' Reply Brief at page 14.) By contrast, that is precisely what a lead agency must do under SEQRA; 1) identify *all* relevant issues, 2) take a "hard look" at potential environmental impacts, and 3) give a reasoned elaboration of the basis for its determinations. *H.O.M.E.S. v New York State Development Corp.*, 69 AD2d 222, 231-232 (4th Dept 1979).

Thus, there is no preemption of SEQRA by the Susquehanna River Basin Commission, (notwithstanding that Appellants explicitly advised the lower court they were not raising this issue). R. 39.

In sum, the VOPP's multiplicity of SEQRA errors support this Court affirming the lower court's judgment.

POINT II

APPELLANTS MISCONSTRUE JOHN MARVIN'S STANDING

Appellants mischaracterize both Respondents' position and the lower court's ruling in claiming that Mr. Marvin's standing is based upon proximity alone. (Appellant's Reply Brief at pages 6-8.).

In fact, the lower court painstakingly analyzed the standing of each individual Respondent comparing and contrasting the "proximity" standing rules applied to zoning challenges as opposed to the "proximity-plus" standing rules for

SEQRA challenges. R. 13-25. Upon 12 pages of analysis, the lower court stated that "[t]he court is left, therefore, with Marvin's proximity and complaint of train noise newly introduced into his neighborhood, which he maintains, and the court finds, is different than the noise suffered by the public in general. In other words, this is not a proximity 'without more' case; Marvin has standing." R.25. The lower court's "proximity-plus" finding is borne out by the record.

In terms of proximity, Mr. Marvin lives approximately 500 feet from the transloading facility. (The map accompanying his affidavit includes a scale of 100 feet legible in the lower left hand corner. R. 434.) The map shows his residence at 240 Charles Street and the location of the transloading facility building site on West Chemung Street (behind the long row of trees).

Regarding the "proximity-plus" impacts, Mr. Marvin's affidavit details how noise increased when the "water trains started running" in mid-August 2012 at the new facility. R. 432. Mr. Marvin indicated that "increased train noise will adversely impact my quality of life and home value." The distance between the project site and Mr. Marvin's home is separated, in part, by open fields identified as part of the "Corning/Painted Post School." R. 434. Thus, there are no intervening buildings to buffer the train noise generated at the facility. The lower court specifically recognized that it was the resumption of railroad traffic in an area that had not been used "for a considerable period of time." (R. 21). That change in circumstances raised Mr. Marvin's level of harm above that suffered by

the general public and satisfied the “proximity-plus” standing requirements allowing a SEQRA challenge.

Appellants wrongly contend that the trains are to blame for the noise rather than the facility. Obviously, the water loading facility is the source that introduced new levels of train traffic and noise into the Village negatively impacting residents in the immediate vicinity such as Mr. Marvin.

Finally, the fact that the facility has been built does not moot the appeal. Upon commencing this action Respondents moved for a preliminary injunction to preserve the status quo thus placing Appellants on notice that if they proceeded to build, they did so at their own risk. *Pyramid Co. of Watertown v Planning Bd. of Town of Watertown*, 24 AD3d 1312, (4th Dept 2005). Moreover, it is the intensity of use of the transloading facility and quantity of water to be removed from the Corning aquifer that is at issue. Thus, the variable use is similar to the building modifications sought by petitioners in *Yaeger v Town of Lockport Planning Bd*., 62 AD3d 1250, (4th Dept 2009) where the Court determined the controversy was not mooted by the completion of construction.

CONCLUSION

For the above reasons, the Community Watersheds Clean Water Coalition respectfully requests that this Court affirm the lower court's judgment.

Respectfully submitted,

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