SUPREME COURT OF THE STATE OF NEW YORK.
APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

In the Matter of the Application of SIERRA CLUB, PEOPLE FOR A HEALTHY ENVIRONMENT, INC., COALITION TO PROTECT NEW YORK; JEAN WOSINSKI; THERESA and MICHAEL FINNERAN; and VIRGINIA HAUFF,	)	
Petitioners-Respondents,	)	Docket # CA 13-01558
-against-	)	
THE VILLAGE OF PAINTED POST; PAINTED POST DEVELOPMENT, LLC; SHELL WESTERN EXPLORATION AND PRODUCTION, LP;	)	
Respondents-Appellants,	)	
and the WELLSBORO AND CORNING RAILROAD, LLC;	)	
Respondent-Respondent.	)	

BRIEF OF *AMICI CURIAE*

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PRELIMINARY STATEMENT

At issue in this appeal is whether municipalities will be permitted to avoid environmental review under SEQRA, N.Y. Envtl. Conserv. Law ("ECL") §§ 8-0101–8-0117, for actions involving the use of community water resources. Specifically, this appeal concerns a bulk water sales agreement between Respondents-Appellants Village of Painted Post ("Village") and Shell Western Exploration and Production LP ("SWEPI") granting the company the ability to extract between 1,000,000 and 1,500,000 gpd of public water for use in Pennsylvania gas drilling operations. Contrary to Respondents-Appellants' arguments in this appeal, the Steuben County Supreme Court ("Supreme Court") properly held that "the Village's designation of the [bulk water sales agreement] as Type II was arbitrary and capricious." *Sierra Club v. Vill. of Painted Post*, Index No. 2012/00810 at 24-5 (Sup. Ct. Steuben Cnty., Mar. 25, 2013).

Further, contrary to the arguments offered by proposed amicus the New York Conference of Mayors ("NYCOM"), the Supreme Court's straightforward application of SEQRA law does not constitute a judicial attempt to "create actions that are unlisted," which would, if followed by other courts, subject municipalities to "heightened scrutiny and liability beyond what is required by state laws and regulations." *See* NYCOM Motion for Leave to File a Brief *Amicus Curiae* ("Motion for Leave") at ¶¶ 7-8. Indeed, it is the proposed arguments of NYCOM that contemplate a radical departure from existing SEQRA law by arguing for municipal discretion to completely exempt a class of government actions from SEQRA review, regardless of their potential impact on the environment.

The appropriate use of public water and other natural resources is an issue of importance to all New Yorkers. As natural gas drilling operations using high-volume horizontal hydraulic fracturing—which involves the use of large amounts of water—continue in neighboring states

and are contemplated in New York State, municipalities may face increasing pressure to sell public resources, as the Village did in this case. Compliance with the State's environmental laws and regulations, including SEQRA, is a vital component of ensuring that New York's water resources are protected.

For these reasons, *Amici Curiae*, the Natural Resources Defense Council, Inc. and Riverkeeper, Inc. ("*Amici*") respectfully request that this Court affirm the decision of the Supreme Court at issue in this appeal.

COUNTER-STATEMENT OF FACTS

Amici adopt and incorporate the Counter-Statement of Facts in the Brief of Petitioners-Respondents. Brief of Petitioners-Respondents at 2-12.

ARGUMENT

POINT I

THE SUPREME COURT'S HOLDING THAT WATER USES OF LESS THAN 2,000,000 GPD ARE UNLISTED ACTIONS UNDER SEQRA DOES NOT UNDULY BURDEN MUNICIPALITIES

Contrary to the position urged by NYCOM, *see* NYCOM Motion for Leave at ¶¶ 7-8, upholding the Supreme Court's ruling that actions approving water uses involving less than 2,000,000 gpd are Unlisted actions under SEQRA will not unduly burden New York's municipalities. In fact, the Supreme Court merely applied existing law already applicable to municipal actions regarding the use of ground or surface water resources, including water withdrawals for the purposes of sale to a third party. This application of existing law creates neither additional standards nor additional burdens, and should have no effect on municipalities seeking to comply with SEQRA.

A. Under SEQRA, Actions that Are Not Enumerated as Type I or Type II Actions are Unlisted Actions Requiring an Agency Determination of Environmental Significance

SEQRA applies to all actions directly undertaken, funded, or approved by an agency that "may affect the environment," including "projects or physical activities . . . changing the use, appearance or condition of any natural resource . . . ." *See* N.Y. Comp. Codes R. & Regs. tit. 6 ("6 NYCRR") §§ 617.2(b)(1), 617.3. Where an agency action "may have a significant effect on the environment," preparation of an environmental impact statement ("EIS") is mandatory. S*ee* ECL § 8-0109(2).

To assist in determining when an EIS must be prepared, the New York Department of Environmental Conservation's ("DEC") regulations implementing SEQRA classify all agency actions as Type I, Type II, or Unlisted actions. *See* 6 NYCRR § 617.2(ai)-(ak). Type I and Type II actions are specifically enumerated in the regulatory code, with the separate Type I and Type II lists cataloguing actions at the opposite ends of the environmental impact spectrum. *See* 6 NYCRR §§ 617.4, 617.5. Actions listed as Type I carry the presumption that they are "likely to have a significant adverse impact on the environment" and therefore are "more likely to require the preparation of an EIS than Unlisted actions," 6 NYCRR § 617.4(a)(1), while actions listed as Type II are categorically exempted from review as those which "have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review." 6 NYCRR § 617.5(a). In contrast, Unlisted actions are not enumerated by DEC. Rather, as the name suggests, all actions that are listed neither as Type I nor Type II actions are, by definition, Unlisted actions. 6 NYCRR § 617.2(ak) (defining "Unlisted action" as "all actions not identified as a Type I or Type II action").

With both Type I and Unlisted actions, the reviewing agency must make a determination of the significance of the action's potential impact on the environment. 6 NYCRR § 617.7. To provide clarity, many listed Type I actions involve numeric thresholds, over which an otherwise Unlisted action would be presumed to have a significant impact. *See* 6 NYCRR §§ 617.4(b)(2), (4), (5), (6), (7); 617.4(b)(8), (10) (setting forth circumstances under which Unlisted actions that exceed 25% of previously referenced Type I thresholds would be considered Type I actions). Type II actions are unique in that they are the only types of actions for which the determination of environmental significance is not required, and thus, for which no environmental review is mandated. *See* 6 NYCRR § 617.5(a).

B. The Village's Approval of the Bulk Water Sales Agreement is an Unlisted Action

The Village's bulk water sales agreement is clearly neither a Type I action nor a Type II action, and is therefore an Unlisted Action that requires an agency determination of significance. *See* 6 NYCRR § 617.2(ak). Actions approving water uses of up to 1,500,000 gpd fall short of the 2,000,000 gpd threshold for Type I actions. 6 NYCRR § 617.4(b)(6)(ii). (As noted by Petitioners-Respondents, this threshold drops to 500,000 gpd for projects or actions "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). *Amici* do not address the issue of whether—when considered in conjunction with the Village's approval of the lease of public land for the construction of a rail loading facility designed to transport the water extracted by SWEPI—the sales agreement is subject to this lower threshold and, therefore, a Type I action.).

Neither, as argued by Respondents-Appellants, is the agreement a Type II action. The arguments of Petitioners-Respondents, which *Amici* adopt, refute the claims of Respondents-

Appellants that the water sales agreement was either not an "action" under SEQRA or otherwise qualified as the sale of "surplus government property," a Type II action. *See* Brief of Petitioners-Respondents at 36-47. *Amici* also note that SEQRA's definition of "action" clearly encompasses sales agreements entitling a private party to use public resources. ECL § 8-0105(4)(i) (non-exhaustive definition of "action" includes "projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act . . . .").

Accordingly, as a non-Type II action just under the Type I threshold, the bulk water sales agreement was (and is) by definition an Unlisted action requiring the Village to issue a determination as to the significance of its environmental impact. *See Wertheim v. Albertson Water Dist.*, 207 A.D.2d 896, 898 (2d Dep't 1994) (finding that a water use not meeting the Type I threshold was properly categorized as an Unlisted action); *City Council of Watervliet v. Town Bd. of Colonie*, 3 N.Y.3d 508, 517-18 (2004) (citing to *Cross Westchester Devel. Corp. v. Town Bd. of Greenburgh*, 141 A.D. 2d 796,797 (2d Dep't 1988)) (holding that the annexation of land less than the Type I threshold of 100 acres is an Unlisted action).

C. The Supreme Court's Straightforward Application of Existing SEQRA Law Does Not Place New Burdens on Municipalities

Because the Supreme Court—in holding that an agreement allowing the export of up to 1,500,000 gallons of public water per day is an Unlisted action—did no more than apply existing black-letter SEQRA law, the lower court's decision does not "add[] to those actions that are expressly enumerated as unlisted," NYCOM Motion for Leave at ¶ 7, nor does it impose any additional burden or liability on municipalities than currently exists.

Given that SEQRA requires review of nearly all governmental decisions that may affect the environment, New York municipalities routinely perform SEQRA review on a variety of

municipal actions, the first small step of which is the determination of whether the action may have a significant adverse effect on the environment. For Unlisted actions, determination of environmental significance requires the preparation of short environmental assessment form ("EAF"), which briefly describes the proposed action. 6 NYCRR §§ 617.6(a)(3), 617.20, Appendix B (providing a template for the short form EAF). After evaluating the information submitted on the short EAF, preparation of an EIS is only required when the agency determines that the proposed action has the potential for "at least one significant adverse environmental impact." 6 NYCRR § 617.7(a)(1). Otherwise, the agency may issue a brief negative declaration, thereby ending the SEQRA process. *See* 6 NYCRR §§ 617.3(c), 617.7.

These familiar procedural requirements are applicable both to the approval of the bulk water sales agreement by the Village, and to all municipal approvals of water uses below 2,000,000 gpd. In the present case, adequate consideration of the environmental impacts of the sales agreement (in conjunction with the Village's decision to lease public land to facilitate the transport the water sold under the agreement) may lead to the conclusion that a negative declaration is appropriate, or that a full EIS is required. Neither, however, constitutes any additional burden above and beyond what SEQRA already mandates.

POINT II

A CATEGORICAL SEQRA EXEMPTION FOR WATER USES OF LESS THAN TWO MILLION GPD COULD HAVE SIGNIFICANT, STATE-WIDE ADVERSE ENVIRONMENTAL AND COMMUNITY IMPACTS

NYCOM asserts that the lower court's holding constitutes an impermissible attempt to judicially "create actions that are unlisted," NYCOM Motion for Leave at ¶ 7, and that upholding the lower court verdict will encourage other courts to likewise "create [their] own standard for SEQRA actions." *Id.* at ¶ 8. However, it is actually NYCOM's interpretation that would turn the

SEQRA regulations on their head by allowing municipalities, or other reviewing agencies, to freely read additional actions into the Type II list without making the required determination that those actions will not result in significant environmental harm.

The stated "purpose of the list of Type I actions" is not to outline a definitive minimum threshold for significant adverse impacts on the environment, but rather "to identify . . . those actions and projects that are *more likely* to require the preparation of an EIS than Unlisted actions." 6 NYCRR § 617.4(a) (emphasis added); *see also Kravetz v. Plenge*, 424 N.Y.S.2d 312, 315-16 (Sup. Ct. Monroe Cnty. 1979) ("The list of Type I actions is not exhaustive and the fact that an action has not been listed as a Type I action does not give rise to a presumption that it will not have a significant effect on the environment."). Accordingly, the rules allow state and municipal agencies to adopt their own supplemental Type I lists or "adjust the [numeric] thresholds" of the Type I list "to make them more inclusive," such as where local conditions demand greater environmental scrutiny. 6 NYCRR § 617.4(a)(2).

Agencies may also adopt their own Type II lists, but in contrast to the relatively unconstrained authority of agencies to supplement their own Type I lists, an agency may only create their own additional Type II actions where the actions would "in no case, have a significant adverse impact on the environment" based upon SEQRA's regulatory criteria for determining significance. 6 NYCRR §§ 617.5(b)(1), 617.7(c). Despite this clear limitation on agency discretion to create Type II actions, NYCOM advocates for an interpretation of SEQRA law that would encourage agencies to remove actions not expressly listed as Type II from SEQRA's review requirements, without providing the necessary showing that a particular action would not potentially harm the environment.

The logical consequences of NYCOM's argument produce absurd results. For example, as a Type I action, a permit to extract 2,000,000 gpd of public water for use in out-of-state drilling operations is presumed to require the preparation of an EIS unless the reviewing agency demonstrates that granting the permit would have no significant adverse impact on the environment by completing a *long form* EAF, thoroughly analyzing the areas of environmental concern, and setting forth a written determination containing a "reasoned elaboration" for its decision with supporting references. *See* 6 NYCRR §§ 617.6(a)(2), 617.7(b). On the other hand, following NYCOM's logic, were the permit only for 1,999,999 gpd, the reviewing agency would have the discretion to presume the activity a Type II action, thereby obviating the need for the preparation of even a short form EAF or one-paragraph negative declaration.

In sum, NYCOM urges an interpretation of SEQRA that would encourage municipalities, and other agencies implementing SEQRA, to read into the Type II list actions which implicate the use of natural resources just below the thresholds of the Type I list—ironically converting a set of protective standards for when an action is *more likely* to require the preparation of an EIS into a set of minimum thresholds for when any SEQRA review at all would be required. That some of these actions would have significant adverse effects on the environment is obvious—particularly in the context of water withdrawals, where the explosive growth of water-intensive gas drilling utilizing high-volume hydraulic fracturing in neighboring states has escalated the regional demand for fresh water, creating potential incentives for New York municipalities to sell local water without careful consideration of the likely damage to local aquifers. Because adequate SEQRA review of all government actions that may adversely affect the environment is vital to protecting of the state's natural resources and the health and well-being of communities who depend on them, *Amici* urge this court to reject this interpretation.

CONCLUSION

For the reasons stated herein, and for those stated in the Brief of Petitioners-Respondents, *Amici* respectfully request that this Court affirm the decision of the Supreme Court.

Dated: December 20, 2013

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SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

DOCKET NO. CA 13-01558

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF 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,

V

VILLAGE OF PAINTED POST, PAINTED POST DEVELOPMENT, LLC AND SWEPI, LP, RESPONDENTS-APPELLANTS,
AND WELLSBORO & CORNING RAILROAD, LLC,
RESPONDENT-RESPONDENT.

The National Resources Defense Council, Inc., and Riverkeeper, Inc., having moved for permission to file and serve a brief amicus curiae on the appeal taken herein from an order of the Supreme Court entered in the Office of the Clerk of the County of Steuben on April 8, 2013,

Now, upon reading and filing the affidavit of Katherine Sinding, Esq., sworn to November 26, 2013, and the notice of motion with proof of service thereof, and due deliberation having been had thereon,

It is hereby ORDERED that the motion is granted on the condition that the brief is filed and served in accordance with the Court's rules on or before January 10, 2014, and the Clerk is directed to accept the brief for filing.

Entered: December 11, 2013 **FRANCES E. CAFARELL, Clerk**

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, **FRANCES E. CAFARELL,** *Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.*

SUPREME COURT APPELLATE DIVISION • FOURTH DEPARTMENT •

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this* DEC 11 2013

Frances E. Cafarell

Clerk

SUPREME COURT OF THE STATE OF NEW YORK.
APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

In the Matter of the Application of SIERRA CLUB, PEOPLE FOR A HEALTHY ENVIRONMENT, INC., COALITION TO PROTECT NEW YORK; JEAN WOSINSKI; THERESA and MICHAEL FINNERAN; and VIRGINIA HAUFF, *Petitioners-Respondents*, -against- THE VILLAGE OF PAINTED POST; PAINTED POST DEVELOPMENT, LLC; SHELL WESTERN EXPLORATION AND PRODUCTION, LP; *Respondents-Appellants*, and the WELLSBORO AND CORNING RAILROAD, LLC; *Respondent-Respondent.*	**AFFIDAVIT OF SERVICE BY MAIL** Docket # CA 13-01558

STATE OF NEW YORK
COUNTY OF NEW YORK ss.:

I, Paulina Muratore, being duly sworn, say:

I am over eighteen years of age and not a party to this action. On December 20, 2013, I served a copy of the foregoing Brief of *Amici Curiae*, by mailing two true copies, enclosed and properly sealed in a postpaid envelope, which I delivered into the exclusive care and custody of a delivery service for delivery by mail, correctly addressed to the following recipients:

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Sworn to before me this 20th day
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