To be Argued by:
JOSEPH D. PICCIOTTI, ESQ.
(Time Requested: 15 Minutes)

Appellate Division Docket No. CA 13-01558
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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; THERESE FINNERAN; MICHAEL FINNERAN; VIRGINIA HAUFF; and JEAN WOSINSKI,

Petitioners-Respondents,

For a Judgment Pursuant to Article 78 of the Civil Practice Law 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.

REPLY BRIEF FOR RESPONDENTS-APPELLANTS

HARRIS BEACH PLLC
Attorneys for Respondents-Appellants The Village of Painted Post, Painted Post Development, LLC and Swepi, LP
99 Garnsey Road
Pittsford, New York 14534
(585) 419-8800

Of Counsel:
Joseph D. Picciotti, Esq.
John A. Mancuso, Esq.
A. Vincent Buzard, Esq.

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PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

In opposition to the arguments raised by the Village and SWEPI, Petitioners have made several arguments that are not supported by the Record, as well as several concessions and omissions that completely undermine their own arguments. Concerning Petitioner Marvin's standing, on which this entire proceeding hinges, Petitioners have not cited any facts in the Record establishing that the purported train noise impacts him differently than any other member of the general public. Petitioners instead rely on "common sense" and ask this Court to take judicial notice of train noise from the Facility. The Record is to the contrary. Petitioner Marvin does not allege harm from train noise based on proximity to the Facility, but rather from trains running through the Village. Because the impacts of such noise are not particular to Petitioner Marvin, the allegations are insufficient to establish standing.

Even if Petitioners had shown a particularized harm (which they did not), Petitioner Marvin still lacks standing because Petitioners have not disputed (or even discussed) that the regulation of train operations, including train noise, is preempted by the Interstate Commerce Termination Act (*see* Resp.'s Br. Point I.B). Petitioners have thus effectively conceded that SEQRA cannot as a matter of law be applied to regulate train noise or the rail operations associated with the Facility. Because Petitioner Marvin's asserted injury for standing relates solely to train noise — a matter regulated exclusively by federal law — it cannot fall within the zone of interests protected by SEQRA. Thus, Petitioner Marvin's standing does not exist and this proceeding should be dismissed on this ground alone.

Petitioners seek to avoid preemption by repeatedly relying on the Basin Commission's so-called "conditional" approvals. That the Basin Commission Approvals may be subject to further state and local approvals does not subject previously authorized water withdrawals to SEQRA. The Compact regulations cited by Petitioners simply clarify that the Compact's preemptive effect does not extend to environmental impacts unrelated to water withdrawal. Petitioners also claim that they are not attacking the Basin Commission Approvals, but the issue of water withdrawal dominates their brief and the issues in this case. Put simply, the Compact is

a federal law that is unequivocally concerned with the regulation of water withdrawals in the Basin and, therefore, preempts and state law, including SEQRA.

Further, Petitioners' laches should not be excused, and the fact that the Facility was substantially complete by the first return date in July 2012 moots this proceeding. Petitioners were well aware of the Basin Commission Approvals more than a year before they filed this proceeding. Even then, Petitioners failed and refused to pursue the available legal remedies against the Basin Commission and instead chose to collaterally attack the Basin Commission Approvals through a challenge to the Village's SEQRA review. At every opportunity, Petitioners sat on their hands while the Facility was constructed. The Facility is now complete and cannot be used to the detriment of the Village and the community.

Petitioners' substantive challenge to the Village's SEQRA review fails to recognize the limits of SEQRA's reach in light of the preemptive effect of the Compact and the Interstate Commerce Termination Act. SEQRA cannot be used to challenge the development and operation of the Facility and associated rail operations by a federally regulated railroad or collaterally attack the Basin Commission Approvals. In fact, Petitioners concede that the "issue complained of in this case is not the construction of the water loading facility" (*see* Pet.'s Br. at 20). In any event, when the Village's SEQRA review is properly evaluated in the context of the jurisdictional reach of SEQRA, and its interplay with federal law, the Record makes abundantly clear that the Village took a hard look at all of the *relevant* areas of environmental concern and provided a reasoned elaboration of its findings.

In particular, the Village's SEQRA review of the action at issue — the construction and operation of the Facility) — comprehensively identified and analyzed, among other impacts, potential impacts associated with its construction and operation, including potential impacts associated with: (i) the Village system and water pressure from operation of the Facility, except potential impacts associated with matters preempted by federal law (*see* R. 111-16, 212-55); (ii) potential stormwater runoff during construction and operation of the Facility (*see* R. 111-16, 148-58, 218, 220); (iii) past uses of the Property and its previous remediation (*see* R. 212-17,

256-327); and (iv) the character of the neighborhood in light of past uses on the Facility site and current zoning (*see* R. 111-14; 156-57, 256-91). The Village's SEQRA review is evidenced by a several hundred page record that includes detailed responses to the Full Environmental Assessment Form, reports, analyses, and other documents (R. 111-16, 120-40, 148-334). Through this process, the Village satisfied its obligations under SEQRA.

Despite the extensive SEQRA record, Petitioners insist the Village improperly segmented its SEQRA review by not reviewing the Surplus Water Agreement. The Surplus Water Agreement, however, was a Type II action and thus not subject to SEQRA because the agreement merely set the economic terms of the sale of surplus water but did not authorize (or purport to authorize) the withdrawal of water, or the construction, lease, or operation of the Facility. Petitioners also ignore the fact that the Village undertook a SEQRA review of the Lease as a Type I action. In any event, regardless of how Petitioners characterize the Surplus Water Agreement, Petitioners (and the trial court) have failed to identify what additional review the Village could have properly conducted pursuant to SEQRA for the Surplus Water Agreement that was not encompassed by the Village's review of the Lease and Facility.

Moreover, Petitioners have effectively attempted to rewrite SEQRA to conform it to the trial court's holding that the use of one million of gallons of water per day is subject to SEQRA review. Petitioners have cited no authority (under SEQRA or otherwise) requiring the review of the bulk sale of water from wells that have been previously permitted for over a century (in this case since 1903). In fact, Petitioners have conceded that the bulk water sale contemplated by the Surplus Water Agreement did not require modification of the existing water withdrawal permits issued by NYSDEC (*see* Pet.'s Br. at 37). This admission is critical because it underscores the inevitable conclusion that the withdrawal of water from *existing, permitted wells* is not an action subject to review under SEQRA. In any event, production data was submitted with the application to the Basin Commission and was used during the approval process (*see* R. 560-64).

Petitioners deny in their brief that the goal of this case is not to stop hydrofracking in Pennsylvania, but nevertheless demand that the Village's environmental review must reach the

"other end of the rail line in Wellsboro, Pennsylvania [to look at] the environmental consequences of using water for hydrocracking purposes in Pennsylvania . . ." (*see* Pet.'s Br. at 50). Petitioners have cited no authority standing for the proposition that SEQRA requires an analysis of impacts associated with the use of resources in other states. Petitioners' statement again highlights their true motivation to stop hydrofracking at every turn and at the expense of a small municipality attempting, through the authority expressly granted under New York Village Law, to raise much-needed revenue for infrastructure improvements and to avoid tax increases for Village residents.

Finally, Petitioners also improperly attach to their brief additional resolutions that were not part of the Certified Administrative Record or the Record on Appeal to which the Village and SWEPI object and thus requests that the documents be disregarded by this Court.

ARGUMENT

POINT I

NOTHING IN THE RECORD SUPPORTS PETITIONER MARVIN'S STANDING AND PETITIONERS HAVE EFFECTIVELY CONCEDED THAT TRAIN NOISE IS REGULATED EXCLUSIVELY BY FEDERAL LAW AND THUS FALLS OUTSIDE THE ZONE OF INTERESTS PROTECTED BY SEQRA.

A. Petitioners' Contentions Regarding Petitioner Marvin's Standing Are Unsupported By The Record And Fail To Meet The Requirements For SEQRA Standing.

Petitioners have essentially conceded that the trial court properly rejected every conceivable basis for standing alleged by Petitioners (R. 13-25) by not raising any argument to the contrary in their brief. With respect to Petitioner Marvin's complaint of train noise, which the trial court relied on to find standing, Petitioners' only response to the inescapable conclusion that the train noise complained of by Petitioner Marvin was no different than the noise heard by others throughout the Village (*see* Resp.'s Br. Point I.A.1), is that "this claim has no support in

the record and is contrary to common sense" (Pet.'s Br. at 14). In fact, the Record belies Petitioners' contention as discussed at length in the Village and SWEPI's initial brief (*see* R. 54-55, 432; Resp.'s Br. at 16-17).

The only evidence in the Record concerning Petitioner Marvin hearing train noise consists of two paragraphs in his affidavit, which allege that he heard train noise that woke him up at night and he is concerned about how increased train noise will adversely impact him (*see* R. 432). This is a textbook example of general impacts of increased noise throughout a wide area, and the law makes clear that "generalized assertions that the project will increase . . . exposure to noise . . . are insufficient to demonstrate that [Petitioner Marvin] will suffer damages that are distinct from those suffered by the public at large" (*see Finger Lakes Zero Waste Coalition, Inc. v Martens*, 95 AD3d 1420, 1422-23 [3d Dept 2012]). Petitioner Marvin's standing "cannot be based on the claim that a project would indirectly affect . . . noise levels . . . throughout a wide area" (*see Save Our Main Street Buildings v Greene County Legislature*, 293 AD2d 907, 909 [3d Dept 2002], *citing Oates v Vil. of Watkins Glen*, 290 AD2d 758, 760-61 [3d Dept 2002] [internal quotations omitted]; *see also Gallahan v Planning Bd. of City of Ithaca*, 307 AD2d 684, 685 [3d Dept 2003]).

Conversely, Petitioners have not cited a single page of the Record on this point (*see* Pet.'s Br. at 14). Petitioners instead rely on "common sense" and ask this Court to take "judicial notice of the fact that the closer you are to a noise creator the louder it will be, the further away you are the less likely you are to hear the noise" (*see id.*). The Record contradicts this statement and thus fails to support the trial court's conclusion that Petitioner Marvin suffered a particularized harm due to train noise. Again, Petitioner Marvin alleges that he "heard train noises" that were "much louder than the noise from other trains *that run through the village*" (*see* R. 432 [emphasis added]). The "noise creator" is a train running through the Village. The "noise creator" is not

the Facility, and Petitioner Marvin does not allege that the Facility is generating noise, or that noise from train whistles or engines are emanating from the Facility.

In other words, Petitioner Marvin has not "articulated any specific harm that he would suffer based on his proximity to the [Facility] . . ." (*see Oates*, 290 AD2d at 761), or that the Facility otherwise had anything to do with the train noise he heard. In fact, the Record makes clear that the noise Petitioner Marvin complains of was heard in different parts of the Village by different residents without regard to their proximity to the Facility (R. 627-29). Thus, any person residing near rail tracks on which trains are operating — regardless of proximity to the Facility — could make the same allegations as Petitioner Marvin. If "common sense" governs this determination, then it dictates that the only harm suffered by Petitioner Marvin is the same as the general public. The Court of Appeals has recently reaffirmed that standing requires proof, not conjecture, and that the burden of proving each element of standing falls squarely on Petitioners (*see Save the Pine Bush, Inc. v Common Council of the City of Albany*, 13 NY3d 297, 306 [2009]). Petitioners failed to meet this burden and thus this proceeding should be dismissed.

B. Proximity Alone Is Insufficient To Establish SEQRA Standing, And Petitioner Marvin's Complaint Of Train Noise Is Not Based On Proximity To The Facility, But Trains Running Through The Village.

Petitioners, unable to demonstrate any particularized injury from train noise emanating from the Facility, instead focus their arguments on Petitioner Marvin's alleged proximity to the Facility, asserting that "proximity alone in fact will create a presumption of standing" under SEQRA (*see* Pet.'s Br. at 12-14). As demonstrated above, Petitioners' argument fails because Petitioner Marvin's harm is not based on his proximity to the Facility, but rather on noise from a train running through the Village (R. 432; *see Oates*, 290 AD2d at 761). Further, Petitioners incorrectly calculate the distance of Petitioner Marvin's residence from the Facility, since even

utilizing the aerial map provided by Petitioners, the distance is somewhat less than 1,000 feet (but more than 500 feet) as held by the trial court (*see* R. 22-23, 434; *see also* Resp.'s Br. at 20).

In any event, Petitioners' claim that proximity alone is sufficient to establish standing under SEQRA is contrary to the law. The law is clear that "when no zoning-related issue is involved, there is no presumption of standing to raise a SEQRA challenge based on a party's close proximity alone" (*see Save Our Main Street Buildings,* 293 AD2d at 908). Thus, "[s]ince the instant case does not involve a zoning enactment, petitioners are not entitled to the presumption that they have suffered harm" (*Rent Stabilization Assn. of N.Y.C., Inc. v Miller*, 15 AD3d 194, 194-95 [1st Dept 2005]; *see also Clean Water Advocates of New York, Inc. v New York State Dept of Envtl. Conservation*, 103 AD3d 1006, 1008 [3d Dept 2013]; *Boyle v Town of Woodstock*, 257 AD2d 702, 704 [3d Dept 1999]).

The cases cited by Petitioners for the proposition that proximity alone is sufficient to create standing (*see* Pet.'s Br. at 13-14) do not so hold. In every case cited by Petitioner, although proximity was a factor in causing the injury, a specific environmental injury was still required. Thus, in *Ziemba v City of Troy*, 37 AD3d 68 [3d Dept 2006], the court found standing based upon scenic view because "the individually-named petitioners live within two blocks of the proposed demolition and can see the historic buildings from their homes" (*see Ziemba*, 37 AD3d at 71). Similarly, in *Long Is. Contractors' Assn. v Town of Riverhead*, 17 AD3d 590 [2d Dept 2005], the Court found the petitioner's alleged environmental harm different from that suffered by the public at large because he owned property adjacent to an asphalt plant that would have exposed "nearby residents to hazardous air emissions, noxious odors, increased noise, and increased truck traffic" (*see Long Is. Contractors' Assn.*, 17 AD3d at 594). In each case, the particularized environmental harm flowed from the proximity to the project site.

The remaining cases cited by Petitioners similarly do not stand for the proposition that proximity alone is sufficient to establish standing in a SEQRA case. Instead, those cases hold that an allegation of particularized environmental harm caused by the proximity to the subject property is required (*see Town of Coeymans v City of Albany*, 284 AD2d 830 [3d Dept 2001] [proximity coupled with allegations of environmental injuries from proposed landfill]; *Lo Lordo v Board of Trustees of Inc. Vil. of Munsey Park*, 202 AD2d 506, 507 [2d Dept 1994] [proximity coupled with allegations of traffic impacts from the project]; *East Fifties Neighborhood Coalition v Lloyd*, 13 Misc 3d 1243[A], 2006 NY Slip Op 52301[U] [Sup Ct, NY County 2006] [proximity coupled with allegations of in fact injuries from the project]). Contrary to Petitioners' contention, courts have not eliminated the requirement that a petitioner establish a particularized injury different from the public at large in order to establish standing under SEQRA.

Petitioner also cites *Ontario Heights Homeowners Assn. v Town of Oswego Planning Bd.*, 77 AD3d 1465 [4th Dept 2010], but the trial court in this case correctly found the case distinguishable (*see* R. 24). In *Ontario Heights*, this Court held that petitioner had standing because he lived directly across the street from a proposed private sewage treatment plant (*Ontario Heights*, 77 AD3d at 1466). The particularized environmental harm to the petitioner in *Ontario Heights* as the result of living across the street from a sewage treatment plant is so obvious that it can be inferred and thus is readily distinguishable from Petitioner Marvin's generalized allegations that he will be affected by noise from a train running through the Village.

Further, to the extent Petitioners assert that *Ontario Heights* can be interpreted as holding that standing under SEQRA can inferred from proximity alone, that proposition is based on this Court quoting language from *Michalak v Zoning Bd. of Appeals of Town of Pomfret,* 286 AD2d 906 [4th Dept 2001], which, in turn, quoted *Sun-Brite Car Wash, Inc. v Bd. of Zoning & Appeals of the Town of North Hempstead*, 69 NY2d 406 [1987], for the proposition that "adverse effect or

aggrievement can be inferred from the proximity" (*see Michalak*, 286 AD2d at 906, *citing Sun-Brite Car Wash, Inc.*, 69 NY2d at 414). *Sun-Brite*, however, was a zoning case in which the Court of Appeals held that "an allegation of close proximity alone may give rise to an inference of damage . . . that enables a nearby owner *to challenge a zoning board decision without proof of actual injury*" (*see id.* at 414 [emphasis added]).

Thus, *Sun-Brite's* holding that proximity alone may establish standing in a zoning case, which was relied on by this Court in *Michalak* and *Ontario Heights*, is inapplicable. All of the other courts in which this issue has been considered have concluded that proximity alone is insufficient to establish SEQRA standing and there is nothing in this Court's decision in *Ontario Heights* indicating that this Court intended to adopt a rule contrary to those cases, which are discussed above. Because proximity alone is insufficient, and Petitioners failed to allege any particularized injury-in-fact different from the public at large, they do not have standing.

C. The Court of Appeals Has Not Expanded The Rule For Standing.

Contrary to Petitioners' contention, the Court of Appeals in *Save the Pine Bush, Inc. v Common Council of the City of Albany* did not expand SEQRA standing (*see* Pet.'s Br. at 15). As the trial court recognized (R. 18), the Court of Appeals

> did not remove the requirement that a member of the organization seeking standing experience actual harm, but, rather, held that such harm can be proven by a *direct interference with an individual's ability to experience and enjoy a natural resource*, even if that individual does not live in close proximity to that resource, *so long as the individual can demonstrate that he or she regularly uses the area to be impacted.*

(*see Finger Lakes Zero Waste Coalition, Inc.*; 95 AD3d at 1422 n * [emphasis added]). In other words, Petitioners must still "meet[] the *Society of Plastics* test by showing that the threatened harm of which petitioners complain will affect them differently from 'the public at large'"

(*see Save the Pine Bush, Inc. v Common Council of the City of Albany*, 13 NY3d 297, 305 [2009]; *see also Soc'y of the Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761 [1991]).

None of the Petitioners, including Petitioner Marvin, have met the *Society of Plastics* standard (*see* Resp.'s Br. Point I; *see also* R. 13-25). Indeed, Petitioners' contention that they have an interest in preserving clean drinking water and assuring a healthy environment (*see* Pet.'s Br. at 15) has consistently been rejected as insufficient to establish standing because such concerns amount to the same general concerns of the community (*see Clean Water Advocates*, 103 AD3d at 1008 [holding that "any claim of environmentally-related injury to these water bodies . . . is devoid of evidentiary support and far too speculative and conjectural to demonstrate a specific injury-in-fact"]; *Long Island Pine Barrens Society, Inc. v Planning Bd. of Town of Brookhaven*, 213 AD2d 484, 485-86 [2d Dept 1995] [holding that "generalized allegations that this project will have a deleterious impact upon the aquifer . . . are insufficient to establish their standing"]). Accordingly, the trial court erred in failing to dismiss this proceeding based on standing.

D. Petitioners Have Conceded That Petitioner Marvin's Allegations Of Train Noise Do Not Fall Within The Zone Of Interests Sought To Be Protected By SEQRA.

Petitioners have not even attempted to respond to Point I.B of the Village and SWEPI's initial brief, which demonstrates that Petitioner Marvin's allegations of train noise do not fall within the zone of interests sought to be protected by SEQRA because the Interstate Commerce Termination Act preempted the Village from assessing (or otherwise attempting to mitigate) the impacts of train noise pursuant to SEQRA (*see* Point II above; Resp.'s Br. at 22-24). Petitioners have not set forth any argument suggesting how the Village could have attempted to regulate the operations of trains, including mitigating train noise, through the SEQRA process. In fact, the Railroad has the right to run any number of trains at any time regardless of any review

undertaken by the Village. Simply stated, train noise is an issue for the Surface Transportation Board, and at no time have Petitioners attempted to invoke its jurisdiction.

As this Court has held, the failure of a party to set forth any argument to the contrary in their brief may be considered as a concession of the point (*see Faith Temple Church v Town of Brighton*, 17 AD3d 1072, 1073 [4th Dept 2005] [holding that the "failure of respondents to address the issue of standing in their brief may be considered as a concession that petitioner has standing"]; *accord Weldon v Rivera*, 301 AD2d 934, 935 [3d Dept 2003]; *Matter of Faith AA*, 139 AD2d 22, 26 [3d Dept 1988]). Because train noise cannot as a matter of law fall within the zones of interest protected by SEQRA, Petitioners lack standing and this case should be dismissed on this ground alone.

POINT II

THE COMPACT PREEMPTED THE VILLAGE FROM UNDERTAKING A SEQRA REVIEW OF THE WATER WITHDRAWALS AND THIS PROCEEDING IS AN IMPERMISSIBLE COLLATERAL ATTACK ON THE BASIN COMMISSION APPROVALS.

A. The Compact Preempted The Village's Review Of Water Withdrawals From The Basin Under SEQRA.

1. The Compact Does Not Provide That Approvals Issued By The Basin Commission Are Subject To SEQRA.

Petitioners' contention that the Compact does not preempt SEQRA because the Basin Commission Approvals are "subject to any approval" by the Basin Commission's member states to utilize the source (*see* Pet.'s Br. 21, 27-29) is without merit. Petitioners have not cited any authority for the proposition that SEQRA constitutes an "approval" by a member state to utilize a source as that term is used in the Compact. SEQRA is not an "approval." SEQRA is a set of "procedural and substantive requirements" that must be followed *prior to* undertaking proposed "actions" (*see WEOK*

Broadcasting Corp. v Planning Bd. of Town of Lloyd, 79 NY2d 373 [1992]), *i.e.* prior to issuing an approval (*see* 6 NYCRR § 617.2[b]).

The regulatory provisions Petitioners rely on simply recognize that state and local permits or approvals *may* be required notwithstanding that the Basin Commission has approved a water withdrawal (*see* 18 CFR 806.22[f][9], [11]; *see also* 18 CFR 806.22[f][7] [providing that the "project sponsor shall obtain all necessary permits or approvals . . . from other federal, state, or local government agencies having jurisdiction over the project"]). Thus, for example, the Compact contemplates that after the Basin Commission authorizes a water withdrawal other local approvals (such as a site plan or special permit) or state approvals (such as for backflow prevention measures from NYSDOH) may be required prior to utilizing the physical infrastructure that facilitates the Commission-approved water withdrawal. These are the "approvals" referenced in the Basin Commission Approvals and the Compact (*see* 18 CFR 806.22[f][7], [9], [11]).

Here, the Interstate Commerce Termination Act preempted local zoning and permitting requirements as correctly held by the trial court (*see* R. 7-13), which is not disputed by Petitioners. Thus, applying the Compact provisions relied on by Petitioners to the facts of this case, the only "approvals" that were required prior to utilizing the Facility to withdraw the water were a State Pollutant Discharge Elimination System Permit from NYSDEC for stormwater and backflow prevention permit from NYSDOH, both of which were obtained (R. 359-60). In other words, the Basin Commission Approvals were "subject to" receipt of these two permits, which were ministerial in nature (R. 359-60). Both agencies were treated as involved agencies and the permits considered as part of the SEQRA review for the Lease (R. 112, 169-75, 359-63).

2. The Compact's Comprehensive Regulatory Scheme Preempts The Village From Regulating Water Withdrawals Through The SEQRA Review Process.

Petitioners urge this Court to disregard the clear consequence of the Compact's provisions regarding further state and local approvals in favor of construing the Compact to require a local municipality to undertake a SEQRA review of the potential impacts associated with the withdrawal of water from the Basin — the same impacts that the Basin Commission is required to (and does) review pursuant to the Compact (*see* ECL §§ 21-1301 [3.4][2], 21-1301 [Article 11]; 18 CFR part 806). Petitioners' interpretation of the Compact as requiring local municipalities to duplicate the review of water withdrawals undertaken by the Basin Commission cannot be reconciled with the Compact's comprehensive regulatory scheme, which vests the Basin Commission with exclusive jurisdiction to regulate water withdrawals in the multi-state geographic area comprising the Basin (*see* Resp.'s Br. Point III.A.2).

The Compact even provides an "[a]pproval by rule for consumptive use related to unconventional natural gas and other hydrocarbon development" (*see* 18 CFR 806.22[f] and require the Basin Commission to monitor how the water is used for hydrofracking in Pennsylvania (*see* 18 CFR 806.30). Thus, the Basin Commission Approvals not only included a review of the environmental impacts associated with water withdrawals from the Basin, but expressly contemplated the use of such water for hydrofracking (R. 621-25; *see also* 18 CFR 806.22[f][11]). That is the purpose of the Basin Commission: to assess withdrawal impacts on a multi-state level by "apply[ing] the principle of equal and uniform treatment to all users of water and of water related facilities . . ." (ECL § 21-1301 [1.3][5]). Petitioners, on the other hand, have not cited any authority for their contention that the Village must assess the same impacts on the Basin that were previously considered by the Basin Commission or the use of the water for hydrofracking in Pennsylvania (*see* Pet.'s Br. at 50).

Petitioners' interpretation also offends the principal purpose of the Compact, which was to create one entity — the Basin Commission — to review impacts associated with water withdrawal because the water resources in the Basin "are functionally interrelated, and the uses of these resources are interdependent" (*see* ECL § 21-1301 [1.3][3]; *see also* Resp.'s Br. at 33-34). Petitioners' interpretation thus defeats the obvious purpose of the Compact and, therefore, should be rejected (*see* McKinney's Cons. Laws of NY, Book 1, Statutes § 96 ["A basic consideration in the interpretation of a statute is the general spirit and purpose underlying its enactment, and that construction is to be preferred which furthers the object, spirit and purpose of the statute."]; *People v Marrero*, 69 NY2d 382, 399 [1987] ["An interpretation of a statute which produces an unreasonable or incongruous result and one which defeats the obvious purpose of the legislation and renders it ineffective should be rejected."]).

Petitioners' reliance on the Basin Commission's website, correspondence, and press releases, similarly fails to support Petitioners' contention that the Basin Commission has "disclaimed a role in regulating the environmental impacts of projects in the Basin" (*see* Pet.'s Br. at 25-26). Of course, the Basin Commission does not evaluate environmental impacts associated with matters other than water withdrawals from the Basin because it was not created for that purpose. Thus, for example, to the extent air emissions are associated with a project that also involves an approval of water withdrawals by the Basin Commission, the Compact would not preempt a local municipality from reviewing air impacts pursuant to SEQRA. However, it does not follow from the materials cited by Petitioners that the Basin Commission has disclaimed a role in evaluating environmental impacts of water withdrawals — *because that review falls within their exclusive jurisdiction under the Compact.*

3. Petitioners Have Erroneously Distinguished The Cases Cited By The Village And SWEPI That Are Applicable And Support The Preemption Of SEQRA.

Petitioners attempt to distinguish various cases cited by the Village and SWEPI (*see* Pet.'s Br. at 23-24), but in doing so completely miss the point of Village and SWEPI's arguments. Petitioners claim that *Mitskovski v Buffalo & Fort Erie Public Bridge Authority*, 689 F Supp 2d 483 (WDNY 2010), *aff'd* 415 Fed Appx 264 (2d Cir 2011), is not applicable because the agency "involved the application of SEQRA to an international compact agency which is entirely different from an interstate compact entity such as [the Basin Commission]" (*see* Pet.'s Br. at 23). The distinction Petitioners attempt to make is without a difference. The Compact in this case (between the federal government and several states) (*see* ECL § 21-1301, *et seq.*) and the compact in *Mitskovski* (between the federal government, New York and Canada) (*see Mitskovski*, 689 F Supp 2d at 489), are both federal laws pursuant to the Contract Clause of the U.S. Constitution. Thus, just as SEQRA could not be imposed in *Mitskovski* to usurp the authority granted the Public Bridge Authority under its compact, Petitioners cannot employ SEQRA to usurp the Basin Commission's authority over water withdrawals under the Compact.

Further, Petitioners also erroneously attempt to distinguish *Levin v Bd. of Supervisors of Benner Township, Centre County*, 669 A2d 1063 (Pa Cmwlth 1995) and *State College Borough Water Auth. v Bd. of Supervisors of Halfmoon Township, Centre County, P.A.* (*Halfmoon Township*), 659 A2d 640 (Pa Cmwlth 1995), on the grounds that the Village did not attempt to condition the Basin Commission Approvals (*see* Pet.'s Br. at 23). That is the point. The Village did not condition the effect of the approvals based on a SEQRA review because it could not do so without infringing on the jurisdiction of the Basin Commission (*see Halfmoon Township,* 659 A2d at 644-45).

Moreover, Petitioners fail to take into account the preemption analysis undertaken by the Court in *Halfmoon Township*, in which the Court found that local governing bodies cannot supplement the Basin Commission's decisions with respect to its authority to manage the Basin's water resources (*see id.* at 644). This is precisely what Petitioners are asking this Court to sanction. Petitioners want the Village: (i) to determine "whether or not the *water withdrawal* would create adverse environmental consequences to the Corning aquifer" (*see* Pet.'s Br. at 50 [emphasis added]; R. 511-18) by supplementing the Basin Commission's review of water quality and the impacts of the withdrawals on the aquifer; and (ii) to the extent necessary, impose conditions to mitigate any potentially significant adverse environmental impacts (*see* R. 57-64, 65-73). This conflicts with the holding in *Halfmoon Township* and, therefore, should be rejected.

Contrary to Petitioners' contention, the United States Supreme Court's decision in *Tarrant Regional Water Dist. v Herrmann*, 133 S Ct 2120 (2013) does not support their position. The Village and SWEPI cited *Tarrant* for the principle that once a compact receives federal approval, it is transformed into a law of the United States (*see* Resp.'s Br. at 29), which is not disputed. *Tarrant* otherwise involved a dispute between states regarding whether states may restrict out-of-state diversions of water (*see Tarrant,* 133 S Ct at 2125), not whether a local municipality may apply a state law such a SEQRA to undertake a review of impacts that are within the exclusive jurisdiction of a federal-state agency created pursuant to a compact. Finally, the Court's holding in *Erie Boulevard Hydropower, L.P. v Stuyvesant Falls Hydro Corporation*, 30 AD3d 641 (3d Dept 2006), is not limited to the Federal Power Act, but recognizes that a state agency cannot undertake a SEQRA review where, as here, the area sought to be reviewed is regulated by federal law (*see id.* at 644-45).

B. Petitioners Have Confirmed That They Are Collaterally Attacking The Basin Commission Approvals And, As A Result, The Basin Commission Is A Necessary Party.

The statement in Petitioners' brief that the Village failed to "determine whether or not the water withdrawal would create adverse environmental consequences to the Corning aquifer" (*see* Pet.'s Br. at 50) completely contradicts Petitioners' contention that the Basin Commission Approvals are "not at issue in this case" and have not been challenged by Petitioners (*see* Pet.'s Br. at 29). Petitioners' entire case is based on the theory that the Village should have undertaken a SEQRA review of water withdrawals. Again, the Basin Commission has jurisdiction over water withdrawals (*see* Resp.'s Br. Point III.A.2) and the Basin Commission Approvals authorize the water withdrawals at issue (*see* R. 328-34). It is thus impossible to reconcile Petitioners' argument that the Village should have analyzed water withdrawals with their argument that the very approvals authorizing the withdrawals are not at issue.

As the Record and the arguments in Petitioners' brief make clear, this entire case is about Petitioners taking issue with the fact that the Village relied on the Basin Commission review of the pertinent water withdrawals instead of conducting a duplicate review pursuant to SEQRA (*see* R. 57-64, 65-73, 511-18). Petitioners, therefore, should have commenced an action against the Basin Commission for judicial review of the Basin Commission Approval, which is expressly authorized by the Compact (*see* ECL § 21-1301[3.10][6]]). Moreover, Petitioners had every opportunity to challenge the Basin Commission Approvals (including the subsequent authorization for transfer of the approval from Triana Energy, LLC to SWEPI in April 2012), but failed to do so prior to the expiration of the statute of limitations. Petitioners cannot use this proceeding to collaterally attack the Basin Commission approvals under the guise of challenging the Village's compliance with SEQRA (*see* Resp.'s Br. Point III.C).

For the same reason, the Basin Commission is a necessary party to this proceeding because Petitioners' claims directly impact the validity and status of the Basin Commission Approvals and the review the Basin Commission undertook pursuant to the Compact (*see* Resp.'s Br. Point III.D). The trial court nullified the Negative Declaration and ordered the Village to undertake a SEQRA review that, if undertaken to the extent urged by Petitioners, will infringe on the prior review undertaken by the Basin Commission and the determinations made. In the meantime, the Basin Commission Approvals have effectively been revoked by the trial court. The Basin Commission should have been given an opportunity to defend its approvals and otherwise introduce relevant evidence into the Record. It was not given that opportunity and, as a result, the Basin Commission and Respondents were prejudiced.

C. The Actions Subject To SEQRA In This Case Were Not Subject To The National Environmental Policy Act.

To the extent Petitioners assert that the actions taken in this proceeding were subject to the National Environmental Policy Act of 1969, 42 USC § 4321, *et seq.* ("NEPA") (*see* Pet.'s Br. at 22), Petitioners' assertion is without merit. No NEPA review was required for any of the approvals at issue because neither the Village nor the Basin Commission are federal agencies (*see* 42 USC § 4332[2]; 40 CFR 1508.12; *Brooklyn Bridge Park Coalition v Port. Auth. of N.Y. and N.J.*, 951 F Supp 383, 393-94 [SDNY 1997] [holding that Port Authority of New York and New Jersey, created pursuant to an interstate compact approved by Congress, was not subject to NEPA]). Thus, the Village did not need to make finding under 6 NYCRR § 617.15.

D. Petitioners Incorrectly Claim That The Village And SWEPI Failed To Raise The Issue Of Preemption Before The Trial Court And, In Any Event, It Cannot Be Waived Because It Is Purely A Question Of Law.

Petitioners incorrectly rely on the principle of law that an argument cannot be raised for the first time on appeal (*see* Pet.'s Br. at 21), which has no bearing on whether this Court can

reach the issue of whether the Compact preempted SEQRA under the circumstances. The Village and SWEPI did raise the issue of preemption before the trial court in a memorandum of law submitted by the Village and SWEPI. In fact, Petitioners submitted (and the trial court accepted) a sur-reply memorandum of law at oral argument addressing that issue. More tellingly, had the issue not been raised, the trial court would not have held that the Compact did not preempt SEQRA (*see* R. 39). Even if it was not raised, this Court can review the issue of preemption because it involves "[a] question of law appearing on the face of the record . . . [that] could not have been avoided by the opposing party if brought to that party's attention in a timely manner" (*see Mills v Mills*, 2013 NY Slip Op 7320 [4th Dept 2013], *quoting Oram v Capone*, 206 AD2d 839, 840 [4th Dept 1994]; *accord Davis v State of N.Y.*, 91 AD3d 1356 [4th Dept 2012]). Petitioners' misinterpretation of the proceedings below cannot preclude this Court from addressing purely legal questions, which is precisely what is implicated by the Village and SWEPI's preemption arguments.

POINT III

PETITIONERS' BRIEF CONFIRMS THAT THEY UNREASONABLY DELAYED IN COMMENCING THIS PROCEEDING AND BECAUSE THERE IS NO DISPUTE THAT THE FACILITY WAS SUBSTANTIALLY COMPLETE BEFORE THE RETURN DATE THE PROCEEDING IS MOOT.

A. Petitioners' Claims Are Barred By The Doctrine Of Laches.

Petitioners' contention that the process whereby the applications submitted by the Village to the Basin Commission and/or the approvals issued by the Basin Commission were not made public and thus they were not aware of the Basin Commission Approvals (*see* Pet.'s Br. at 16-17) is contradicted by the Record. The Record demonstrates that at the time of the application to the Basin Commission, SWEPI provided specific notice to various municipalities and government agencies, including the Town of Irwin, the Steuben County Planning Department, NYSDEC and

NYSDOH (*see* R. 614-19). Moreover, Petitioners were well aware of the approvals over a year before they commenced this proceeding, as evidenced by counsel for Petitioners' own website and Petitioner Jean Wosinski's affidavit testimony (R. 467, 632-33; and also Resp.'s Br. at 26).

Petitioners also claim that they were not provided certain information concerning the Basin Commission Approvals until after Petitioners made "several requests for it" (*see* Pet.'s Br. at 10), implying that the Village failed to provide records in a timely fashion. In fact, Petitioners' laches is highlighted by their own lack of diligence in following up on their Freedom of Information Law ("FOIL") request for documents concerning, among other things, the Basin Commission Approvals. That request was made to the Village on June 6, 2012 *and responded to by the Village on June 22, 2012 – four days before Petitioners commenced this proceeding* (R. 41, 558-60). Thus, the documents were available before Petitioners commenced this proceeding and they never bothered to review them until this proceeding had been pending for nearly five (5) months. Further, even though discovery is not permitted in a special proceeding in the absence of a court order (*see* CPLR § 408), the Village nonetheless provided the information sought by the Petitioners (R. 557-60, 561-98, 599-619).

In addition, any claim that the Village or SWEPI did not accurately represent the status of the application process to the Basin Commission has been waived by Petitioners because it is a factual argument that was not raised before the trial court (*see, e.g., Nichols v Diocese of Rochester*, 42 AD3d 903, 905 [4th Dept 2007]). If Petitioners had timely challenged the Basin Commission Approvals, this issue could have been addressed, but instead Petitioners waited to collaterally attack the Basin Commission Approvals without joining the Basin Commission as a necessary party. In any event, Petitioners new found concern that the letter of intent submitted by the Village's Superintendent of Public Works "may have" misrepresented the status of the contract with SWEPI (*see* Pet.'s Br. at 29) is specious. As is evident from the January 2012

letter to the Basin Commission, the Village merely represented an intent to enter into an agreement, since it states, among other things, that the Village is "willing to supply" fresh water but only "when available as determined by the Village" (R. 607).

B. This Proceeding Is Moot Because There Is No Dispute That The Facility Was Substantially Complete By the First Return Date This Proceeding.

Petitioners cannot refute that the construction schedule for the Facility, in place long before this proceeding was initiated, called for its substantial completion by July 23, 2012, which is the same day this proceeding was originally made returnable (R. 367-68, 388). Petitioners knew the Facility was being constructed in the spring of 2012 (R. 417-18, 633), but they nevertheless waited until construction was nearly complete before filing this proceeding on the very last day before the statute of limitations would have barred this proceeding. Now the Facility is complete and Respondents are precluded from using it to the detriment of the community. As a result, dismissal is appropriate.

Petitioners also claim that laches and/or mootness does not apply because they sought a preliminary injunction in this matter (*see* Pet.'s Br. at 18-19). Petitioners' suggestion that the Railroad proceeded with construction with full knowledge of Petitioners' boilerplate request for injunctive relief (*see* Pet.'s Br. at 19) is misleading because construction had already been ongoing for nearly three months and was nearing completion (R. 357-58, 367). Petitioners boilerplate request for a preliminary injunction at the beginning of this proceeding, and complete lack of diligence thereafter in pursuing it, does not make the mootness doctrine any less applicable (*see Friends of Pine Bush v Planning Bd. of City of Albany*, 86 AD2d 246 [3d Dept 1982]).

Moreover, the Village and SWEPI did not "overlook" CPLR § 6313(a) regarding temporary restraining orders against municipalities (*see* Pet.'s Br. at 18). Although CPLR § 6313(a) generally provides that "[n]o temporary restraining order may be granted . . . against a . . . municipal

corporation of the state to restrain the performance of statutory duties," courts have granted injunctive relief against such officers or entities when the circumstances warrant it (*see generally Komyathy v Bd. of Educ. of Wappinger Cent. Sch. Dist. No. 1*, 75 Misc 2d 859 [Sup Ct, Dutchess County 1973]). Moreover, without regard to the general statutory prohibition to seek such relief against municipalities, Petitioners certainly could have sought a temporary restraining order against the Railroad or SWEPI.

Contrary to Petitioners' contention, *Allison v New York City Landmark's Preservation Commission,* 35 Misc 3d 500 (Sup Ct, NY County 2011) fails to support their claim that laches does not apply merely because they brought this proceeding within the four-month limitations period. In fact, *Allison* held that petitioners and specifically sought a preliminary injunction before construction started. (*Id.* at 513). Conversely, Petitioners in this case waited to exercise their rights knowing the Basin Commission Approvals were issued more than year earlier, and stood idly by while construction of the Facility was being completed (filed in within three months of decision).

Petitioners' claim that laches should not apply because they have raised novel issues of municipal bulk water sales (*see* Pet.'s Br. at 19) should also be rejected. Petitioners' arguments are only novel because they are bottomed on fundamentally flawed interpretations of law, which as previously discussed at length defy long held precedent and applicable regulations, infringe the jurisdiction of the Basin Commission, and contradict the Record. Petitioners have not cited any authority supporting the contention that SEQRA requires a small municipality in New York, exercising its right under New York Village Law to sell surplus water from existing, permitted wells, to duplicate the review of other agencies and review far cast impacts associated with hydrofracking in other states. SEQRA has never been applied to the breadth urged by Petitioners

and this Court should decline to accept Petitioners' flawed interpretation of the law by reversing the Decision and Order of the trial court.

POINT IV

THE RECORD REFLECTS THE VILLAGE UNDERTOOK AN EXTENSIVE SEQRA REVIEW OF THE LEASE AND FACILITY, AND NO ADDITIONAL REVIEW WAS REQUIRED.

A. The Village Took The Required Hard Look At The Relevant Areas Of Environmental Concern.

1. Petitioners' Arguments Fail To Recognize That The Village's SEQRA Review Was Limited By The Preemptive Effect Of Federal Law.

Petitioners attack the Village's SEQRA review by claiming that the Village relied on insufficient or inaccurate information associated with the Full EAF and otherwise failed to adequately assess certain impacts (*see* Pet.'s Br. at 5-6, 49-51). In doing so, Petitioners fail to recognize that federal law preempted several potential areas that might otherwise be subject to SEQRA as discussed above. Petitioners argue that the Village improperly failed to take into account impacts from rail operations at the Facility (*see* Pet.'s Br. at 50), but the Interstate Commerce Termination Act precluded such a review (*see* Resp.'s Br. at 22-24, 41; R. 111-16, 169-86, 362-63, 627-29; *see also Joint Petition for Declaratory Order-Boston and Maine Corp. and Town of Ayer, MA*, STB Finance Docket No 33971, 2001 WL 458685, at *5 [STB Apr. 30, 2001], *aff'd Boston & Maine Corp. v Town of Ayer*, 191 F Supp 2d 257 [D Mass 2002]). Similarly, Petitioners argue that the Village failed to adequately analyze impacts from water withdrawals in the Basin, and surface and ground water quality (*see* Pet.'s Br. at 50-51), but the Compact preempted such a review (*see* Point II above; Resp.'s Br. Point III.A). Further, the Record reflects the Basin Commission Approvals specifically took into account the nature of the withdrawals and associated impacts (*see* R. 346-49, 550-52).

Even assuming the Compact did not so obviously preempt the Village's SEQRA review of water withdrawals, Petitioners' contention that the Village should have undertaken a multi-state analysis of the impacts on the aquifer and other resources (*see* Pet.'s Br. at 50), is without merit. Petitioners' denial that their "goal in this case was to stop hydrofracking in Pennsylvania" (*see* Pet.'s Br. at 20), cannot be reconciled with their contention that the Village ignored "any adverse environmental consequences . . . at the other end of the rail line in Wellsboro, Pennsylvania [and] the environmental consequences of using water for hydrocracking purposes in Pennsylvania . . ." (*see* Pet.'s Br. at 50). In any event, SEQRA does not expand the jurisdiction of involved agencies (*see* ECL § 8-0103[6]; *White v Westage Dev. Group*, 191 AD2d 687, 689-90 [2d Dept 1993]), and thus does not authorize an analysis of potential impacts in other states (*see Niagara Mohawk Power Corp. v Public Service Commission of the State of New York*, 137 Misc 2d 235, 239 [Sup Ct, Albany County 1987], *aff'd* 138 AD2d 63 [3d Dept 1988], *app. den.* 73 NY2d 702 [1988]). Simply stated, the reach of SEQRA is necessarily limited to the jurisdiction of the involved agencies undertaking the review, which in this case was limited to the Village approving the Lease and Surplus Water Agreement, and NYSDEC and NYSDOH issuing certain ministerial permits (R. 111-16, 186, 357-58, 360-63).

2. The SEQRA Review Completed For The Lease And The Facility Included Numerous Studies And Analyses That Satisfied The Hard Look Standard.

Petitioners concede that "[t]he issue complained of in this case is not the construction of the water loading facility" (*see* Pet.'s Br. at 20). Thus, Petitioners' claims regarding the Village's SEQRA review of the Facility should be rejected in their entirety. In any event, contrary to Petitioners' contention, when the Village's SEQRA review is evaluated in the context of the preemptive effect of the Compact and the Interstate Commerce Termination Act, the Record demonstrates that Village properly identified the relevant areas of environmental

concern, took the required "hard look," and made a "reasoned elaboration" of the basis of its determination in the form of the Negative Declaration (*see* Resp.'s Br. Point IV.B; R. 111-16, 123-40, 148-334; *Spitzer v Farrell*, 100 NY2d 186, 190 [2003], *quoting Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 363-64 [1986]; *Forman v Trs. of State Univ. of New York*, 303 AD2d 1019, 1020 [4th Dept 2003]).

Petitioners erroneously claim, among other things, that the Village failed to adequately review impacts associated with the Facility's location in proximity to certain residential uses in the Village (*see* Pet.'s Br. at 6, 49-51). The Record, however, demonstrates that the Village analyzed the industrial zoning associated with the Facility site and the past uses of the site (including the operation of a foundry on it by Ingersoll Rand for decades) (R. 111-14, 156-57, 256-91, 357-58, 362-64), and ongoing measures in place to prevent impact from past uses (R. 214-15, 219-20, 300-21, 359-65). Not only that, but the SEQRA review associated with the Lease included a review of, among other impacts, those impacts associated with the construction and operation of the Facility, including from storm water runoff during construction and operation (R. 113-16, 155-56, 215-20), and the operational impact of the Facility on Village water pressure (R. 217-20, 225-55, 545-49).

Moreover, the Record establishes that the Village properly relied on numerous documents, reports, and analyses in undertaking its SEQRA review, including: (i) responses to the Full EAF; (ii) the report prepared by report by Hunt Engineers Architects & Land Surveyors, P.C. that reviewed the *relevant* potential environmental impacts associated with the Lease and operation of the Facility; (iii) reports documenting the previous remediation completed at the Facility site and its impacts, and additional site controls to prevent potential impacts from past site uses; and (iv) agency correspondence concerning ministerial permits needed for the operation of the Facility (*see* R. 109-328). Thus, because the Village's SEQRA review identified

relevant areas of impact, took a hard look at them, and issued a reasoned elaboration that set forth its findings, the Village fully executed and satisfied its obligations under SEQRA.

B. The Village Did Not Segment Its Review Because The Surplus Water Agreement Is A Type II Action And The SEQRA Review Completed For the Lease Reviewed Any Potential Impacts.

Petitioners spend several pages of their brief attempting to characterize the Surplus Water Agreement as a Type I action and/or an unlisted action on the grounds that the agreement allegedly constitutes a project using more than 1,000,000 gallons per day and/or is adjacent to a park (*see* Pet.'s Br. at 36-47) because that is the only way Petitioners can succeed on their claim that the Village improperly segmented its SEQRA review. Petitioners' arguments, however, completely ignore that the Village undertook a SEQRA review of the Lease (which encompassed the Facility) as a Type I action, which considered all relevant areas of environmental concern that were not preempted by federal law (*see* Point III.A above; *see also* R. 111-116). A SEQRA review of the Surplus Water Agreement would have not encompassed any more of a review than that undertaken in connection with the Lease (*see King v Saratoga County Bd. Supervisors*, 223 AD2d 894, 896 [3d Dept 1996], *aff'd* 89 NY2d 341 [1996]). Thus, regardless of how Petitioners characterize the Surplus Water Agreement, the Village complied with SEQRA.

Petitioners' characterization of the Surplus Water Agreement as a Type I and/or unlisted action continues to ignore that it did not authorize or effectuate any "action" under SEQRA because all it did was fix the economic terms of a bulk sale contract. The SEQRA regulations define "action" as projects or physical activity such as construction or other activities that may affect the environment by changing the use, appearance or condition of a natural resource or structure (*see* NYCRR § 617.2[b]). Therefore, the only action as it relates to water withdrawals were the Basin Commission Approvals, and as discussed above and in the Village and SWEPI's

initial brief (*see* Resp.'s Br. at 46), such withdrawals were not subject to SEQRA because they were preempted by the Compact.

Petitioners concede that "the bulk water sale [contemplated by the Surplus Water Agreement] did not require modification of the existing water withdrawal permits issued by [NYSDEC] . . ." (*see* Pet.'s Br. at 37). Thus, by Petitioners' own admission, the Surplus Water Agreement did not effectuate any change in the permits for the Wells, or make a change in the capacity associated with the same. As a result, the sale of surplus water pursuant to the Surplus Water Agreement is the sale of surplus government property — property that the Village has a right to sell under New York Village Law (*see* Village Law § 11-1120) — and thus constitutes a Type II action (*see* 6 NYCRR § 617.5[a]; *see also* Resp.'s Br. at 43-44). For this reason, the Village did not improperly segment its SEQRA review of the Surplus Water Agreement from the Lease, since the review of a Type I action (the Lease) and a Type II action (the Surplus Water Agreement) cannot be segmented as a matter of law because a Type II action does not need an "individual determinations of significance" (*see* 6 NYCRR § 617.2[ag]).

Finally, Petitioners' assertions that: (i) NYSDEC was required to "authorize" use of the Facility site due to its previous designation as an inactive waste site; and (ii) certain ministerial permits from NYSDEC and NYSDOH triggered SEQRA review of the Surplus Water Agreement do not support Petitioners' argument that segmentation occurred or the SEQRA review otherwise did not meet standards. Both of these issues were specifically addressed in the SEQRA review for the Lease, as both agencies were treated as involved agencies for that review (*see* R. 111-16, 120-40, 148-86, 169-77, 325). Further, although NYSDEC was not required to "authorize" use of the Facility site, notice of the construction of the Facility was provided to NYSDEC as required and such notice was specifically included as part of the SEQRA record for the Negative Declaration for the Lease (R. 111-16, 212-17, 218-20, 324-35, 357-65).

C. Petitioners Have Not Cited Any Authority For The Conclusion That NYSDEC Has "Implicitly" Determined That The Use Of One Million Gallons Of Water Is An Unlisted Action.

Petitioners attempt to justify the trial court's holding that NYSDEC has somehow "implicitly" determined that the *use* of one million gallons of water per day constitutes an unlisted action by relying on the same authority cited by the trial court, which is all distinguishable because those cases involved new actions and not the bulk sale of water from previously permitted wells (*see* Resp.'s Br. at 39-40, 47). *City Council of City of Watervliet v Town Board of Town of Colony*, 3 NY3d 508 [2004], and *Cross Westchester Dev. Corp. v Town Board of Town of Greenburgh*, 141 AD2d 796 [2d Dept 1988], involved the annexation of real property, which, unlike the sale of surplus water, is excepted from the definition of a Type II action and under certain circumstances included in the definition of a Type I action (*see* 6 NYCRR §§ 617.4[b][4], 617.5[c][25]; *see also* Resp.'s Br. at 39-40). *Wertheim v Albertson Water District*, 207 AD2d 896 [2d Dept 1994] is also distinguishable because it involved the construction of a new pollution control device and water filtration system (*see id.*).

Petitioners also incorrectly argue that SEQRA is triggered because the bulk sale of water outside of the Village limits requires an approval under Village Law § 11-1120 (*see* Pet.'s Br. at 37). In fact, no authority exists (and none has been cited by Petitioner) holding that the sale of water outside of a village's municipal limits requires a SEQRA review. This is particularly true under the circumstances presented in this case, where the source of water was previously permitted and authorized by the Basin Commission, and the withdrawals will be undertaken at levels well within recognized production capacities (R. 57, 345-51, 550-52, 557-64).

As they did before the trial court, Petitioners devote a great deal of their brief to an irrelevant discussion of water rights and riparian rights, which has nothing to do with the bulk sale of water. Nowhere in the Village Law is the sale of surplus water deemed a real property interest. More importantly, nowhere in the Surplus Water Agreement has the Village granted SWEPI a real property interest in the Village wells (*see* R. 345-47). In an analogous case, it has been held that "soil or sand which has been severed from realty becomes personal property" (*Hamlet at Willow Creek Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 114 [2d Dept 2009]). The sale of water to SWEPI is no different. Once the water is withdrawn from the aquifer, which was approved by Basin Commission, the water is severed from the realty and becomes surplus governmental property that can be sold in accordance with Village Law.

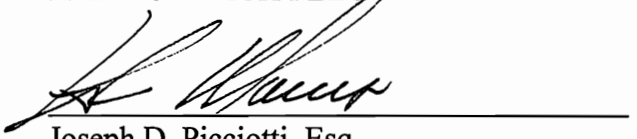
Finally, Petitioners' extensive citations to the New York State Constitution and proposed water regulations and permitting requirements are irrelevant because they do not apply to the Village or its sale of water to SWEPI under the Surplus Water Agreement. In fact, the provisions relied on by Petitioners expressly provide that they "shall not apply to any diversion or furnishing of water authorized or made pursuant to the compact" (*see* ECL § 21-1307[2]; *see also* ECL § 15-1501[7] [providing that "withdrawals that have received an approval from a compact basin commission" are "exempt from the permit requirements established by this section"]). In the Basin, water withdrawals fall within the jurisdiction of the Compact, and that principle is expressly recognized under New York law.

CONCLUSION

For the foregoing reasons, the Village and SWEPI respectfully submit that the Decision and Order of the trial court should be reversed, and the Petition dismissed in its entirety.

Dated: December 24, 2013

HARRIS BEACH PLLC



Joseph D. Picciotti, Esq.
John A. Mancuso, Esq.
Attorneys for Respondents Village of Painted Post, Painted Post Development, LLC and SWEPI, LP
99 Garnsey Road
Pittsford, New York 14534
Telephone: (585) 419-8800

On Brief: Joseph D. Picciotti, Esq.
John A. Mancuso, Esq.
A. Vincent Buzard, Esq.