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

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; 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.

BRIEF FOR RESPONDENTS-APPELLANTS

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QUESTIONS PRESENTED

1. Did the trial court err in finding that Petitioners had standing under the New York State Environmental Quality Review Act ("SEQRA") where the only Petitioner the trial court held had standing failed to demonstrate any injury different from the general public?

Answer:

The trial court erred in finding that Petitioners had standing because the only Petitioner the trial court held had standing — Petitioner John Marvin — alleged that he heard noises from trains passing through the Village of Painted Post (the "Village") and, therefore, neither alleged nor established that his injury was different from any other resident of the Village of Painted Post or the general public.

2. Did the trial court err in finding that Petitioners had standing under SEQRA where the injuries claimed by the only Petitioner the trial court held had standing consisting of train noise did not fall within the zone of interests sought to be protected by SEQRA?

Answer:

The trial court erred in finding that Petitioners had standing because train operations fall within the exclusive jurisdiction of the United States Surface Transportation Board and, therefore, the harm complained of by Petitioner John Marvin in this case consisting of train noise does not fall within the zone of interest sought to be protected by SEQRA.

3. Did the trial court err in failing to dismiss the Petition as barred by the doctrine of laches and as moot when the approvals for the project were issued nearly fifteen months prior to filing this proceeding and construction of the facility was substantially complete by the initial return date of the Petition, and Petitioners sought no immediate injunctive relief once they filed this proceeding despite notice of the previously issued approvals and the construction schedule for the facility?

Answer:

The trial court erred in failing to dismiss the Petition as barred by the doctrine of laches and as moot because Petitioners waited nearly 18 months after the Susquehanna River Basin Commission (the "Basin Commission") issued approvals for the water withdrawals at issue and until the very last day of the statute of limitations to file this proceeding, by which time the facility was substantially complete, and Petitioners did not diligently pursue temporary injunctive relief despite notice of the Basin Commission approvals and the scheduled construction of the facility.

4. Did the trial court err in failing to consider that a federal compact vesting exclusive jurisdiction in a federal commission to evaluate and approve the withdrawals of water at issue preempts a local municipality from completing a subsequent review of such withdrawals pursuant to state law?

Answer:

The trial court erred in holding that the Village was required to undertake a SEQRA review of the impacts associated with the withdrawal of water from the Susquehanna River Basin because the Susquehanna River Basin Compact vests exclusive jurisdiction in the Basin Commission to undertake such a review and as such preempts SEQRA to the extent it would require the same review, and Petitioners' challenge to the Village approvals constitutes an impermissible collateral attack on the approvals of the Basin Commission, which is a necessary party to this proceeding.

5. Did the trial court err in holding that a local municipality did not comply with SEQRA and segmented its review on the grounds that the New York State Department of Environmental Conservation ("NYSDEC") had "implicitly" designated the use of one million gallons of water per day as an unlisted action where the withdrawal is from existing wells, permitted under New York law, and where the withdrawal was approved by a federal commission?

Answer:

The trial court erred in holding that the Village did not comply with SEQRA and segmented its environmental review because NYSDEC has never "implicitly" determined that the sale of surplus water from existing wells in amounts in excess of what the wells are capable of producing and is needed by Village residents is an unlisted action and, in any event, the environmental review completed by the Village for the facility complied with the requirements of SEQRA.

6. Did the trial court err in holding that the sale of surplus water previously approved for withdrawal by a federal commission is an unlisted action under SEQRA requiring further environmental review?

Answer:

The trial court erred in holding that the sale of surplus water is an unlisted action because the sale of surplus government property pursuant to the Surplus Water Sale Agreement between the Village and SWEPI, LP, is a Type II action under SEQRA not having a significant environmental impact, and the withdrawal of water previously approved by the Basin Commission from existing, permitted wells with more than adequate capacity is not an "action" under SEQRA.

PRELIMINARY STATEMENT

Pursuant to this Article 78 proceeding, Petitioners — consisting of the Sierra Club, People for a Healthy Environment, Inc., Coalition to Protect New York, four individuals residing in the Village of Painted Post (the "Village"), and one individual residing in the City of Corning — seek to prohibit the sale of surplus water from existing Village wells to Respondent-Appellant SWEPI, LP ("SWEPI") for use in oil and gas exploration in Pennsylvania, including hydraulic fracturing or fracking (known as "hydrofracking"). Petitioners commenced this proceeding for declaratory and injunctive relief seeking to invalidate Village approvals issued for the sale of surplus water to SWEPI pursuant to a Surplus Water Sale Agreement (the "Surplus Water Agreement"), and the construction and operation of a rail siding facility (the "Facility") by Respondent-Respondent Wellsboro and Corning Railroad, LLC (the "Railroad").

The purpose of the Facility is to load surplus water produced by the Village onto rail cars for transport to Pennsylvania for hydrofracking, and for potential future sales and distribution. The Village acted pursuant to New York State Village Law, which specifically authorizes the sale of water to non-residents. The Village planned to use funds generated by the sale for needed capital improvement projects, including upgrades and repairs to the Village water system, and to hold the line on taxes. In a Decision and Order dated March 25, 2013 (Hon. Kenneth R. Fisher), the trial court invalidated the Village approvals and permanently enjoined Respondents on the grounds that the Village failed to properly analyze potential significant adverse environmental impacts associated with the withdrawal of water as purportedly required by the New York State Environmental Quality Review Act ("SEQRA").

SUMMARY OF ARGUMENT

The trial court should have dismissed this proceeding because Petitioners lack standing. The trial court rejected every conceivable basis for standing based on a reading of Petitioners' submissions, which alleged nothing more than generalized harm from the withdrawal of the surplus water to be sold and the operation of the Facility. The trial court held that Petitioner John Marvin ("Petitioner Marvin"), a Village resident, had standing because he heard train noise in the Village that sometimes woke him up at night. Thus, this entire case hangs by the thread of Petitioner Marvin's claim of train noise. Sierra Club, People for a Healthy Environment, Inc., Coalition to Protect New York, and the individual Petitioners did not commence this proceeding to address train noise. Their real purpose is to use the SEQRA review process undertaken by a municipality in New York to ultimately prevent hydrofracking in Pennsylvania.

In any event, the trial court erred in holding that Petitioner Marvin had standing because he alleged nothing more than generalized harm. Indeed, the trial court highlighted that Petitioner Marvin's complaints of train noise were "undifferentiated." The trial court's holding is contrary to the Record in this case and the law, neither of which support the conclusion that Petitioner Marvin has standing. Further, Petitioner Marvin is not a member of any of the organizational Petitioners. Despite concluding that none of the other Petitioners had standing, the trial court found that Petitioner Marvin had standing, and then allowed Sierra Club and the other organizations to remain in this proceeding to continue their challenge to the Village approvals and pursue their ultimate objective of preventing hydrofracking in Pennsylvania.

This proceeding is also barred by the doctrine of laches and is moot. In January 2011, a federal commission issued the first approvals for this project relating to the withdrawal of water for its subsequent sale to SWEPI and use for hydrofracking. In April 2012, the Village approvals were issued for the Surplus Water Agreement and the Lease. For several months thereafter, the

Railroad undertook construction of the Facility. Yet, Petitioners waited until June 25, 2012 to file this proceeding, which was the very last day of the statute of limitations for challenging the Village approvals. By that time, construction of the Facility was substantially complete. Petitioners' unreasonable delay in filing this proceeding is particularly indefensible because they knew the schedule for construction of the Facility. Petitioners' delay was further exacerbated because they choose not to seek immediate injunctive relief, such as a temporary restraining order, or an accelerated return date on their request for a preliminary injunction.

The trial court also committed reversible error in summarily dismissing the preemptive effect of the Susquehanna River Basin Compact (the "Compact") on the environmental review conducted by the Village. The gravamen of Petitioners' claims is that the Village failed to adequately assess the impact of the withdrawal of water from the Basin and its sale to SWEPI for hydrofracking in Pennsylvania. The withdrawal of water, however, was not approved by the Village, but by the Susquehanna River Basin Commission ("the Basin Commission") pursuant to the Compact, which is federal law subject to federal construction. The Basin Commission has exclusive jurisdiction to approve water withdrawals from sources located in the Susquehanna River Basin (the "Basin"), including for use in oil and gas exploration.

Not only is the Basin Commission not subject to SEQRA, but the Village is preempted by the Compact from undertaking any subsequent SEQRA review relating to the withdrawal of water from the Basin that is inconsistent or conflicts with Basin Commission approvals. By obtaining an injunction against the Village prohibiting the withdrawal and sale of surplus water until such time as the Village undertakes an additional SEQRA review of the water withdrawals at issue, Petitioners have collaterally attacked the Basin Commission approvals without joining the Basin Commission as a necessary party. The failure to join the Basin Commission effectively undermines its authority to approve withdrawals from the Basin.

Concerning the merits of the Village's SEQRA review, no basis in the law exists for the trial court's holding that in this case the use of one million gallons of surplus water per day is an unlisted action under SEQRA. The trial court's holding rests solely on an erroneous finding that the use of one million gallons of water per day was "implicitly" determined by NYSDEC as an unlisted action. NYSDEC has never made such a determination, either implicitly or explicitly. In any event, the Village undertook a thorough SEQRA review as required for the Facility and properly designated the approval of the Surplus Water Agreement as a Type II action because it involves the sale of surplus government property. The Village was not required to undertake a SEQRA review of the water withdrawals at issue, either as part of the operation of the Facility or the Surplus Water Agreement, because: (i) the Village wells were built and permitted more than five decades ago and have consistently yielded millions of gallons of water more than the Village needs for its residents; and (ii) the withdrawal and use of surplus water for hydrofracking was evaluated and approved by the Basin Commission. Because the approval of the Surplus Water Agreement was a Type II action, the Village did not segment its review.

STATEMENT OF FACTS

A. The Village Municipal Water System.

The Village is the owner of its municipal water system, which serves the inhabitants of the Village. The Village authorized the sale of surplus water to SWEPI to provide a needed source of revenue to the Village, which is a small municipality that has lost industry and jobs in the last twenty years, causing its tax base to decline significantly (R. 339-40). Through the use of a previously abandoned and contaminated property in the Village, which was the subject of extensive cleanup efforts, the Village sale of surplus water in excess of amounts needed by its residents would have generated funds for needed capital improvement projects, including

upgrades and repairs to the Village's water system and not only avoid an increase, but potentially decrease, taxes to Village residents (R. 339-40).

In 2004, in order to revitalize the industrial/commercial base of the Village and provide a means for the transfer of surplus water, the Village condemned an otherwise abandoned 50-acre industrially-zoned property in the Village (the "Property"), and acquired it through Respondent-Appellant Painted Post Development, LLC (R. 111, 214-15, 256-323). The Property was the location of a former foundry operated by Ingersoll-Rand (R. 293), which had been closed since 1985 and was subject to an environmental investigation and cleanup conducted under the inactive hazardous waste site program by NYSDEC (R. 293-94). As the result of extensive investigation and cleanup of contamination on the Property, NYSDEC certified the Property as properly remediated and it was repurposed by the Village (R. 214-15).

No new wells were constructed in connection with the Facility or the sale of surplus water to SWEPI. Rather, the Facility utilized existing wells from the Village municipal water system that have existed for over half a century. The Village wells have a permitted production capacity of over four million gallons of water per day (R. 346-47). The current capacity is based on, among other things, a production history of the Village wells that spans over six decades (R. 546-47, 551-52, 557-64), which shows there is substantial surplus capacity to provide water to Village residents and also supply surplus water to SWEPI (R. 551-52). Since the closing of the Ingersoll-Rand foundry, which operations alone used upwards of 700,000 gallons per day in the late 1970's (R. 563), the Village has had substantial excess water available for sale (R. 349).

In 2012, the average daily use of water by Village residents was 230,000 gallons per day (R. 551-52). Comparing the actual capacity of the Village wells (4,000,000 gallons per day) to the amount of water authorized by the Basin Commission for sale by the Village to SWEPI

(1,000,000 gallons per day), and including the recent average use by Village residents (230,000 gallons per day), the Village has more than three times the capacity it requires to provide the water at issue to SWEPI and serve current Village users (R. 551-52). In other words, given the amount of usage by current Village users, as well as the long history of plentiful water withdrawals from the Village wells, the withdrawal of one million gallons per day will not affect in any manner the Village's ability to supply water to its inhabitants (R. 349).

B. The Basin Commission Approvals Of The Withdrawal Of Up To One Million Gallons Of Water Per Day For Sale To SWEPI.

The Village water system and the wells which supply it are located in the Basin (R. 328-31, 349-51). Before approving the sale of surplus water to SWEPI under any contract or the lease of the Facility to the Railroad, the Village (together with companies seeking to purchase surplus water) sought Basin Commission approval to withdraw water from the Basin (R. 608-618 [application materials submitted to the Basin Commission by the Village and SWEPI]; *see also* R. 551-52, 557-66). The Basin Commission is a federal commission created by the Compact, a federal-state compact between the federal government, Pennsylvania, New York and Maryland (*see* ECL § 21-1301, *et seq.*). Pursuant to the Compact, which governed the withdrawal approvals obtained by the Village in this case, the Basin Commission has the sole authority to manage, review, and approve the withdrawal of water from the Basin (R. 342, 347, 358-59).

In December 2010, the Village, as the permit holder for the Village wells, and Triana Energy, LLC, as sponsor, applied to the Basin Commission for permission to withdraw 500,000 gallons of water per day from the Village municipal water system, specifically for oil and gas exploration in Pennsylvania (R. 349-51, 551-52, 560-65). On January 3, 2011, the Basin Commission approved the Village's application to withdraw 500,000 gallons per day of surplus water for sale to Triana Energy, LLC for oil and gas exploration in Pennsylvania (R. 330-31,

349-51). Subsequently, the Basin Commission approved the transfer of the approval issued for Triana Energy, LLC, to SWEPI (R. 333-34). In April 2011, the Basin Commission similarly approved the application by the Village to withdraw an additional 500,000 gallons per day for sale to SWEPI for the same previously approved use (R. 328-29) (the two approvals issued by the Basin Commission are collectively referred to as the "Basin Commission Approvals"). Currently, the Village has authorization from the Basin Commission to withdraw surplus water in the amount of one million gallons per day beyond the needs of Village residents for use by SWEPI for oil and gas exploration in Pennsylvania.

C. The Surplus Water Agreement Between The Village And SWEPI And Lease Between The Village And The Railroad For The Construction And Operation Of The Facility.

As a result of the Basin Commission Approvals, on March 1, 2012, the Village entered into the Surplus Water Agreement with SWEPI to sell it surplus water not required by the Village for its current water users (R. 141-47). In order to provide a means for the transfer of surplus water sold by the Village pursuant to the Surplus Water Agreement (or other users to the extent authorized by the Basin Commission), the Village entered into a lease agreement (the "Lease") with the Railroad for the construction and operation of the Facility on an approximately 11.8 acre portion of the Property (R. 120-140). The Facility operates by automatically loading surplus water from the Village's water distribution system to railroad tanker cars for distribution by rail to Pennsylvania (R. 111, 117, 120, 218).

As discussed above, the Basin Commission authorized the withdrawal of up to one million gallons of water per day from the Basin (R. 328-34, 349-51, 551-52, 601-02). Relying on the Basin Commission Approvals, the Village then agreed to sell surplus water to SWEPI pursuant to the Surplus Water Agreement, which set the price for the surplus water in the event SWEPI chooses to purchase and take delivery of the surplus water, as well as other commercial

terms not related to the amount of water sold or its use (R. 117-19, 141-47). The Surplus Water Agreement provides numerous safeguards for the protection of the Village and its residents in the event water is not available. For example, the Surplus Water Agreement is "subject at all times to the availability" of surplus water (R. 141). In addition, the Village is not required to sell surplus water in the event of a drought restriction, emergency, unforeseen operational problem, or restriction on the sale of water by the Basin Commission (R. 141).

In connection with the Lease, which included the construction of the Facility, the Village acted as lead agency pursuant to SEQRA, and undertook the required review of potential significant adverse impacts of the Lease and Facility operations (R. 111-16, 148-334). The Village treated the Lease as a Type I action pursuant to SEQRA (R. 111-12), which under the regulations is an action that may have a significant adverse impact on the environment. The Village analysis of impacts associated with the Lease included its review and completion of Parts 1 and 2 of a full environmental assessment form ("EAF"), as well as reviewing other studies and documents associated with the building and operation of the Facility (R. 111-334).

In addition, the Facility was to be leased and operated by a federal railroad (R. 111-12, 120-140). As a result, certain activities undertaken by the Railroad in connection with the Facility were not subject to compliance with state law, including SEQRA, because they were preempted by, among other laws, federal laws governing the operation of rail facilities (R. 111-16, 120). On February 23, 2012, the Village adopted a resolution classifying the action under SEQRA, and issued a negative declaration based on its determination that the Lease would not have any significant adverse impact (the "Negative Declaration") (R. 111-16).

On February 23, 2012, the Village adopted a resolution concerning the Surplus Water Agreement for the sale of surplus water in amounts and for uses specifically approved by the Basin Commission (R. 117-19). The Village did not review pursuant to SEQRA the withdrawal

of water from the Basin in connection with the approval of the Surplus Water Agreement because: (1) the withdrawal and use of the water was previously approved by the Basin Commission; and (2) the sale of surplus water is an exempt action under SEQRA (R. 117-18). Based on the terms of the Surplus Water Agreement and applicable law, as well as the Basin Commission Approvals for the withdrawal of water, the Village determined that entering into the contract to sell surplus water was a Type II action under SEQRA because the contract authorized the sale of surplus government property (R. 117-18, 141-47). Because Type II actions have been deemed by the legislature to have no significant environmental impact, the Village was not obligated to undertake any additional SEQRA review.

D. Completion of the Facility.

On April 27, 2012, after the Village adopted the required resolutions, the Railroad began construction of the Facility (R. 358). The Railroad began construction well over a year after the Basin Commission issued its second approval and approximately 15 months after its first approval. The construction schedule in place as of May 30, 2012 called for substantial completion of the Facility by July 23, 2012 (R. 358, 367-68). Pursuant to that schedule, the Facility was substantially completed by start of the fourth week of July 2012 (R. 358, 367-68). By that time, the only items remaining to be completed were limited to certain punch list items, such as electrical connections, and other similar non-substantive items (R. 358, 367-68).

PROCEDURAL HISTORY

A. The Commencement of the Present Proceeding.

Although the Basin Commission approved the withdrawal of water from the Village wells in 2011, which Petitioners now seek to prohibit by this proceeding, Petitioners have never commenced any action or proceeding of any kind challenging the Basin Commission Approvals. Instead, on June 25, 2012 — the last possible day before the expiration of the applicable statute

of limitations to challenge the Village resolutions — Petitioners commenced this proceeding by Order to Show Cause and Verified Petition (the "Petition") seeking, among other relief, equitable relief to prevent Respondents from proceeding with activities "intended to culminate in the construction" of the Facility (R. 41-42, 81-82). Petitioners did not seek a temporary restraining order pursuant to the Order to Show Cause pending the return date of the Petition (R. 41-42).

Petitioners consist of both environmental organizations and individuals. The three organizational petitioners, Sierra Club, People for a Healthy Environmental, Inc., and Coalition to Protect New York, were all allegedly formed to, among other things, advocate the protection of water resources (R. 44-5). The individual Petitioners, John Marvin, Therese Finneran, Michael Finneran, and Virginia Hauff, are residents of the Village, while Jean Wosinki is a resident of the City of Corning (R. 46-7). The protection of water resources and water rights "from the damaging effects of water withdrawals for hydraulic fracturing for gas drilling is a key focus of the work of the Coalition [to Protect New York]" (R. 45). Sierra Club similarly contends that it seeks to protect its members in Pennsylvania from the "heavy tanker truck trips required to transport the water from the rail terminus to water impoundment facilities and subsequently to various gas well drilling and hydrofracking in surrounding areas" (R. 44-45).

Pursuant to the Order to Show Cause, the initial return date on the Petition was July 23, 2013 (R. 41), which was the same day the Facility was substantially completed pursuant to the previously adopted construction schedule (R. 358, 367-68). After the return date for this matter was adjourned at the request of Respondents, on August 3, 2012, the Village and SWEPI filed its joint Answer and Objections in Point of Law (R. 83-105), together with the Administrative Record (R. 109-334). At that time, the Village and SWEPI also moved to dismiss the Petition and/or for summary judgment (R. 335-37). On September 11, 2012, the Railroad filed its

Answer and Objections in Point of Law (R. 380-406). On October 9, 2012, the Railroad moved to dismiss the Petition (R. 407-409).

On January 28, 2013, after several adjournments of the return date of the Petition due to the recusal of several judges, Petitioners filed their papers in opposition to Respondents' motion to dismiss (R. 410-544). Subsequently, this proceeding was reassigned to the Hon. Kenneth R. Fisher, who rendered the Decision and Order appealed from. On February 22, 2013, Respondents' filed their reply papers in further support of their motion to dismiss the Petition and/or for summary judgment (R. 545-639). Petitioners then filed sur-reply papers, which the trial court authorized (R. 640-645).

B. The Trial Court's Decision and Order.

By Decision and Order dated March 25, 2013, the trial court dismissed the Second and Third Causes of Action (R. 6-13), which dismissal has not been appealed by Petitioners. In connection with the First Cause of Action, the trial court first addressed the issue of whether Petitioners had standing (R. 13-26). The trial court held that none of Petitioners, with the exception of Petitioner Marvin, had standing (R. 13-26). The trial court held that Petitioner Marvin had standing based on his "proximity and complaint of train noise newly introduced into his neighborhood" (R. 25). Because the trial court held that Petitioner Marvin had standing, the trial court declined to dismiss the remaining Petitioners who did not have standing (R. 25).

Turning to the merits of the First Cause of Action, the trial court rejected all of Petitioners arguments but nevertheless found that the Village violated SEQRA by failing to review the potential significant adverse impacts associated with the withdrawal of water from the Basin and segmenting its review (R. 27, 29-37). In particular, the trial court found that "the Village's Type II designation of [the Surplus Water Agreement] was arbitrary and capricious" and that the Village violated SEQRA "when it failed to consider the environmental impact of the

[Surplus Water] Agreement with that of the Lease" because NYSDEC "has implicitly designated a water use of 1,000,000 gallons per day as an Unlisted Action" (R. 27, 29-37). In addition, although the trial court stated that it was not necessary to decide Respondents' arguments related to the Basin Commission, the trial court nevertheless held that neither the Compact nor its regulations provide for preemption of SEQRA (R. 39).

Because the trial court held that the Surplus Water Agreement should not have been classified as a Type II action, the trial court found that the Village improperly segmented its SEQRA review conducted for the Lease and the Surplus Water Agreement (R. 36-37). The trial court then searched the record and granted summary judgment in favor of Petitioners annulling the Negative Declaration for the Lease, and the Village resolutions, dated February 23, 2012, approving the Surplus Water Agreement and the Lease (R. 36-37). Finally, Petitioners were granted an "injunction enjoining further water withdrawals pursuant to [the Surplus Water Agreement] pending the Village respondent's compliance with SEQRA" (R. 38-39).

On April 22, 2013, the Village and SWEPI filed a notice of appeal from the March 25, 2013 Decision and Order of the trial court (R. 2).

ARGUMENT

POINT I

THIS PROCEEDING SHOULD BE DISMISSED BECAUSE PETITIONER MARVIN'S GENERALIZED ALLEGATIONS OF TRAIN NOISE ARE INSUFFICIENT TO ESTABLISH STANDING AND DO NOT FALL WITHIN THE ZONE OF INTERESTS PROTECTED BY SEQRA.

As will be discussed below, the trial court found that Sierra Club, People for a Healthy Environment, Inc., and Coalition to Protect New York, as well as all but one of the individual Petitioners, did not have standing (R. 13-25). The trial court found that only Petitioner Marvin had standing because he heard train noise in the Village that sometimes woke him up at night.

Sierra Club and the other organization Petitioners did not commence this proceeding because of train noise (R. 22, 25). This case is about hydrofracking (R. 45, 64, 82, 463, 467, 472), and Petitioners are attempting to use SEQRA to challenge the Village approvals in order to prohibit hydrofracking in Pennsylvania. The trial court rejected the legal authority relied on by Petitioners challenging the SEQRA review conducted by the Village, but nevertheless fashioned its own theory to give one petitioner standing, reach the merits of this proceeding, and ultimately nullify the Village approvals. The issue of prohibiting hydrofracking in another state was not before the trial court, but nevertheless explains the lengths it went to in order to find standing.

A. Petitioner Marvin Does Not Have Standing Because He Has Not Suffered A Direct Injury That Is Different From the General Public.

1. Petitioner Marvin Has Alleged Only Generalized Harm Related To Train Noise Not Distinct From That Suffered By The General Public.

The trial court spent twelve pages properly rejecting every conceivable basis for standing asserted by Petitioners, and held that none of Petitioners had standing except for Petitioner Marvin (R. 13-25). Because Petitioner Marvin is not a member of any of the organizational Petitioners, whether this proceeding may be maintained rises or falls solely on his purported standing. In order for Petitioner Marvin to demonstrate standing, he must show that he will suffer an environmental injury that is in some way different from that of the public at large (*see Soc'y of the Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 773 [1991]; *Save the Pine Bush, Inc. v Common Council of the City of Albany*, 13 NY3d 297, 304-06 [2009]; *Long Island Pine Barrens Soc'y, Inc. v Planning Bd. of the Town of Brookhaven*, 213 AD2d 484, 485 [2d Dept 1995]).

In reviewing Petitioner Marvin's standing, the rule is that standing requirements "are not mere pleading requirements but rather an indispensable part of the plaintiff's case and therefore each element must be supported in the same way as any other matter on which the plaintiff bears

the burden of proof" (*Common Council of the City of Albany*, 13 NY3d at 306 [internal quotations omitted]). Thus, Petitioners must "not only allege, but if the issue is disputed must prove, that their injury is real and different from the injury most members of the public face" (*id.*; *see also ADM, LLC v Village of Macedon*, 101 AD3d 1717, 1718 [4th Dept 2012]; *Save the Pine Bush, Inc. v Planning Bd. of Town of Clifton Park*, 50 AD3d 1296, 1297 [3d Dept 2008]; *Powers v De Groodt*, 43 AD3d 509, 513 [3d Dept 2007]; *Gallahan v Planning Bd. of the City of Ithaca*, 307 AD2d 684 [3d Dept 2003]; *Otsego 2000, Inc. v Planning Bd. of the Town of Otsego*, 171 AD2d 258, 260 [3d Dept 1991]).

Petitioners failed to meet their burden in this case because they neither alleged nor established that the noise heard by Petitioner Marvin was different than the noise heard by the general public. The sole evidence relied on by the trial court consisted of two paragraphs of the affidavit offered by Petitioner Marvin, which provides as follows:

> 15. Beginning in mid-August and continuing through mid-September, I heard train noises frequently, sometimes every night. I heard either the train whistle or the diesel engines themselves or both. The noise was so loud it woke me up and kept me awake repeatedly during that period. . . .
>
> 16. The noise was much louder than the noise from other trains that run through the village. I am concerned that increased train noise will adversely impact my quality of life and home value.

(R. 432).

All Petitioner Marvin actually alleges is that he heard train noise on some nights that woke him up, that the noise is louder than noise from other trains running through the Village, and that he is concerned that the noise will adversely impact him (R. 432). Critically, nowhere in the two paragraphs of Petitioner Marvin's affidavit (the only support offered for this alleged harm) does he even attempt to argue as the trial court found (R. 20), let alone *prove* (*see Common Council of the City of Albany*, 13 NY3d at 306), that the purported train noise

impacts him any different than any other member of the general public. Simply stated, the trial court's holding that Petitioner Marvin had standing is without basis in the Record, which contains no support for the crucial claim that he has an injury different from the general public.

Further, the Petition confirms that the effects of train noise will impact the entire Village generally (R. 54- 55). The Petition alleges that "[m]oving cars loaded with more than 96 tons of weight on and off sidings can be expected to result in significant noise" and that "[r]ailcars will enter and exit the loading facility by means of rail line that passes through the center of the village" (R. 54). In addition, the Petition alleges that the trains will run "down the existing rain line on Chemung Street to and from the center of the village" and that "Chemung Street is one the principal streets of the village, running east and west through the village" (R. 55). Thus, by alleging that the train runs through the center of the Village from one end to the other, the only conclusion is that it will affect the entire Village. Petitioners made no attempt to show how Petitioner Marvin's complaint of train noise is different from that of the general public.

The only other statement by the trial court related to Petitioner Marvin's complaint of increased train noise was the following unclear assertion:

> Marvin's undifferentiated complaint of train noise may be considered in the context of an industrial and rail facility which fell into disuse for a considerable period of time prior to the construction of the subject project, and thus his complaint of rail noise is availing to show harm distinct from that suffered by the public at large.

(R. 21). The trial court refers to an "undifferentiated" complaint of train noise that may be considered. If the trial court was concluding that Petitioner Marvin could not differentiate between old and new train noise, but that such a distinction became relevant because the former foundry had previously stopped operations, the conclusion does not follow that the noise

complained of by Petitioner Marvin — whether it was from prior or current train operations — is different from that impacting the public at large.

If, on the other hand, the trial court was concluding that Petitioner Marvin's complaint of increased train noise was literally "undifferentiated" (R. 21), *i.e.*, no different than an injury most members of the public face (*Common Council of the City of Albany*, 13 NY3d at 306), then clearly Petitioner Marvin does not have standing and this proceeding should be dismissed. "Allegations of general environmental concerns which are shared by all of the residents of the affected area are not enough" (*Trude v Town Bd. of the Town of Cohocton*, 17 Misc 3d 1104[A], 2007 NY Slip Op 51829[U], *2 [Sup Ct, Steuben County 2007], *citing Save Our Main Street Buildings v Greene County Legislature*, 293 AD2d 907, 908 [3d Dept 2002]; *see also Concerned Taxpayers of Stony Point v Town of Stony Point*, 28 AD3d 657, 658 [2d Dept 2006]; *Schulz v Warren County Bd. of Supervisors*, 206 AD2d 672, 674 [3d Dept 1994], *lv denied*, 85 NY2d 805 [1995]). This includes general impacts of increased noise throughout a wide area, which is insufficient to demonstrate damages different in kind or degree from those which may be suffered by the general public (*see Finger Lakes Zero Waste Coalition, Inc. v Martens*, 95 AD3d 1420, 1422-23 [3d Dept 2012]; *Oats v Village of Watkins Glen*, 290 AD2d 758, 760-61 [3d Dept 2002]; *see also Save Our Main Street Buildings*, 293 AD2d at 909).

In any event, even if the trial court's reliance on prior versus current train noise was relevant, which it is not because Petitioner Marvin has not alleged harm different from the general public, no facts in Petitioner Marvin's affidavit or the Record justify the inference drawn by the trial court. Nowhere in the Record did Petitioner Marvin complain of increased train noise as a result of the alleged period of disuse of the former foundry that impacted him differently than the general public, and no standing can exist in the absence of such facts. For this reason, the trial court's reliance on *Finger Lakes Zero Waste Coalition, Inc.* (R. 20-21) is not

only misplaced, but actually supports Respondents' position. In *Finger Lakes Zero Waste Coalition, Inc.*, the Third Department held as follows:

> Roll's affidavit stating that she can presently hear some noise from the landfill *does not indicate if, or to what extent, the noise level changed* in November 2010 once work began in the soil borrow area. Roll's *generalized assertions that the project will increase her exposure to noise* . . . are insufficient to demonstrate that she will suffer damages that are distinct from those suffered by the public at large.

(*Finger Lakes Zero Waste Coalition, Inc.*, 95 AD3d at 1422-23 [emphasis added]). Here, Petitioner Marvin's affidavit similarly contains general allegations of increased train noise (*see* R. 432), and fails to provide any indication, if, or to what extent, the noise level changed at the Facility or how it differed from train noise previously heard. Accordingly, the trial court erred in concluding that Petitioner Marvin's allegations of generalized harm resulting from increased train noise were sufficient to provide him standing to maintain this proceeding.

2. Petitioner Is Not Entitled To Any Presumption of Injury Based On His Alleged Proximity To The Facility.

The trial court correctly held that Petitioner Marvin was not entitled to a presumption of injury based on his alleged proximity to the Facility (R. 25). The Court of Appeals has made clear that "[t]he status of neighbor does not . . . automatically provide the entitlement, or admission ticket, to judicial review in every instance" (*Sun-Brite Car Wash, Inc. v Bd. of Zoning & Appeals of the Town of North Hempstead*, 69 NY2d 406, 414 [1987]). Therefore, where, as here, "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" (*Save Our Main Street Buildings*, 293 AD2d at 909; *accord Rent Stabilization Ass'n of N.Y.C., Inc. v Miller*, 15 AD3d 194 [1st Dept 2005]; *Boyle v Town of Woodstock*, 257 AD2d 702 [3d Dept 1999]).

According to the trial court, Petitioner Marvin allegedly resides somewhere less than 1,000 feet from the Facility (*see* R. 22-23). As the trial court recognized, courts have consistently rejected distances shorter than 1,000 feet as insufficient to give rise to an inference of injury due to their proximity to a proposed project (*Clean Water Advocates of New York, Inc. v N.Y. State Dep't of Envtl. Conservation*, 103 AD3d 1006, 1007-08 [3d Dept 2013] [within 900 feet]; *Shelter Is. Assn. v Zoning Bd. of Appeals of Town of Shelter Is.*, 57 AD3d 907, 909 [2d Dept 2008] [approximately 250 feet]; *Oats*, 290 AD2d at 760-61 [approximately 530 feet]; *Buerger v Town of Grafton*, 235 AD2d 984, 984-85 [3d Dept 1997] [within 600 feet]; *see also* R. 23 and cases cited therein).

Despite rejecting the inference of injury based on alleged proximity, the trial court then erroneously went on to rely on proximity by coupling it with Petitioner Marvin's "undifferentiated" complaint of train noise "newly introduced into the neighborhood" in order to find standing (R. 25). If Petitioner Marvin is not entitled to an inference of injury based on his proximity to the Facility *and* he has failed to allege harm from the train noise different from the general public, then the two taken together cannot possibly support a finding of standing.

The trial court further misinterpreted the Third Department's decision in *Clean Water Advocates* by concluding that this is not a proximity "without more" case (R. 25). In *Clean Water Advocates*, the Third Department held that petitioner's proximity to the project "does not, without more, give rise to a presumption that she would be adversely affected in a way different from the public at large" (*Clean Water Advocates*, 103 AD3d at 1008). What the Third Department meant by that statement was contained in the next sentence:

> Indeed, Woodhouse did not articulate *any specific harm that she would suffer based on her proximity to the project*, nor has petitioner submitted any proof establishing that [NYS]DEC's acceptance of the challenged [stormwater pollution prevention

> plan] will have any adverse environmental effects on the property of any of its members.

(*id.* [emphasis added]). Thus, regardless of proximity, a specific harm must nevertheless be identified in order to have standing.

In other words, the harm must be predicated on the proximity of the petitioner to the project at issue. Here, Petitioner Marvin's affidavit fails to provide any link between his alleged proximity to the Facility and his general allegations of train noise. Although Petitioner Marvin allegedly resides in proximity to the Facility, he does not allege that he has suffered any concrete injury as the result of noise emanating from the Facility itself. To the contrary, Petitioner Marvin's allegations are nothing more than general complaints of train noise as the result of trains moving through the Village. Again any person residing in the Village (or, for that matter, any municipality in which the train passes [R. 544]) could allege the same general allegations of harm resulting from the operation of trains.

Simply stated, without a particularized harm, Petitioners' bare allegation that Petitioner Marvin resides in proximity to the Facility is simply insufficient to confer standing. "Absent demonstration of some other injury, [petitioners] lack standing . . . regardless of their proximity to the applicant's property" (*Kemp v Zoning Bd. of Appeals of Vil. of Wappingers Falls*, 216 AD2d 466, 467 [2d Dept 1995]; *see also Barrett v Dutchess County Legislature*, 38 AD3d 651 [2d Dept 2007]). Therefore, it was incumbent upon Petitioner Marvin to establish direct harm that was in some way different from that of the public at large, which he failed to do. In the absence of any actual, unique or special injury sustained by Petitioner Marvin, this case is — contrary to the trial court's holding — a proximity without more case (*see Clean Water Advocates*, 103 AD3d at 1007-08; *see also Liebowitz v Bd. of Trustees of the Incorporated Vil. of Sands Point*, 2012 NY Slip Op 31489[U] [Sup Ct, Nassau County 2012]).

B. Petitioner Marvin's Allegations Of Increased Train Noise Do Not Fall Within The Zone Of Interests Sought To Be Protected By SEQRA Because The Operation Of Trains Falls Within The Exclusive Jurisdiction Of The Federal Surface Transportation Board.

Even if Petitioner Marvin had identified how train noise impacted him in a manner different from the public at large, he would still be unable to establish standing under SEQRA because the harm he complains of does not fall within the zone of interests sought to be protected by SEQRA (*see Soc'y of the Plastics*, 77 NY2d at 773). The sole basis of standing identified by the trial court concerned Petitioner Marvin's complaint of train noise (R. 25). The Village, however, could not review noise impacts from train operations, including the time during which the trains operate and access the Facility, because SEQRA was preempted by the Interstate Commerce Commission Termination Act of 1995, 49 USC § 10101, *et seq.* (the "Interstate Commerce Termination Act"), the Federal Railway Safety Act of 1976, 49 USC § 20101, *et seq.*, and other federal laws associated with the operation of rail facilities.

The Interstate Commerce Termination Act was enacted to "deregulate the railroad industry by significantly reducing state and local regulatory authority over railroads and granting the . . . Surface Transportation Board . . . exclusive jurisdiction over most railroad matters" (*Matter of Metro. Transp. Auth.*, 32 AD3d 943, 945 [2d Dept 2006], *citing Green Mountain R.R. Corp. v Vermont*, 404 F3d 638, 645 [2d Cir 2005]). The Interstate Commerce Termination Act provides for the express preemption of laws attempting to interfere with rail operations, stating that "[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law" (49 USC § 10501[b]). Transportation is "expansively defined" to include "a locomotive, car, vehicle, vessel, warehouse . . . , property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail" (*Green Mountain*, 404 F3d at 642, *citing* 49 USC § 10102[9]).

Courts have held that Section 10501 reflects clear congressional intent to preempt state and local regulation of rail facilities because they are considered "integral to the railroad's operation" (*see Green Mountain*, 404 F3d at 644-45; *Matter of Metro. Transp. Auth.*, 32 AD3d at 945; *see also Buffalo S. R.R., Inc. v Vil. of Croton-on-Hudson*, 434 F Supp 2d 241, 248 [SDNY 2006]). State and local authorities "cannot subject the construction of railroad facilities to pre-permitting processes where there are no clear construction standards and where the permit depends on the discretion of a local agency" (*Coastal Distribution, LLC v Town of Babylon*, 216 Fed Appx 97, 100 [2d Cir 2007]). State and local regulations only withstand preemption when they are ministerial in nature and assessed according to objective criteria, such as "[e]lectrical, plumbing and fire codes, [or] direct environmental regulations enacted for the protection of the public health and safety" (*Green Mountain*, 404 F3d at 643).

Here, SEQRA is exactly the type of law the Second Circuit has held is preempted by the Interstate Commerce Termination Act. SEQRA mandates that all agencies provide an environmental impact statement for any "action" (*see* ECL § 8-0109[2]), which is defined as, among other things, "projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies (ECL § 8-0105[4][i]; *see also* 6 NYCRR § 617.2[b]). Thus, SEQRA is implicated only where the approval was made within a state or local agency's discretion (*see Matter of Develop Don't Destroy (Brooklyn) v Urban Dev. Corp.*, 59 AD3d 312, 315 [1st Dept 2009]). In fact, the statute expressly excludes from the definition of the word "action" official acts of a "ministerial nature, involving no exercise of discretion" (*see* ECL § 8-0105[5][ii]; *Matter of Filmways Commc'ns of Syracuse, Inc. v Douglas*, 106 AD2d 185, 186 [4th Dept 1985]).

As a result, Petitioner Marvin's complaint of train noise cannot provide a basis for standing under SEQRA because the Interstate Commerce Termination Act preempted any

attempt by the Village to subject train operations (and, therefore, train noise) to a SEQRA review. The Village has no control over trains operated by the Railroad (or railroads generally), including the time during which the trains operate and access the Facility (R. 628). As the trial court found (R. 7-12), the regulation and review of those matters is vested exclusively with the Transportation Board, and Petitioners have at no time attempted to invoke its jurisdiction. Therefore, because in this case the injuries associated with train operations fall outside the zone of interests sought to be protected by SEQRA, the trial court erred holding that Petitioners have standing to maintain this proceeding based on impacts from train operations.

C. The Trial Court Erred In Not Dismissing All The Remaining Petitioners.

The trial court held based on *Matter of Humane Society v Empire State Dev. Corp.*, 53 AD3d 1013 (3d Dept 2008), that because Petition Marvin had standing the remaining Petitioners need not be dismissed (R. 20). In *Matter of Humane Society*, the named Petitioners consisted of "the Humane Society and six individual members thereof" (*id.* at 1015). The court in *Matter of Humane Society*, therefore, held that because one of the petitioners had standing it was not necessary to address the standing of the remaining petitioners (*id.* at 1017 n. 2). Here, in contrast, Petitioner Marvin is not alleged to be a member of Sierra Club, People for a Healthy Environment, Inc., or Coalition to Protect New York (R. 16, 46, 430-433).

Thus, even assuming Petition Marvin had standing (which he does not), as the trial court held (R. 13-16), none of those organizations have standing (*see Soc'y of the Plastics*, 77 NY2d at 775 [holding that if an organization is the petitioner the "key determination to be made is whether one or more of its members would have standing to sue"]). Sierra Club, People for a Healthy Environment, Inc., Coalition to Protect New York, and the remaining individual Petitioners cannot participate in this proceeding towards their ultimate objective of prohibiting

hydrofracking in Pennsylvania when the trial court held that none of them have standing (R. 13-25). Accordingly, the trial court erred in failing to dismiss them from this proceeding.

POINT II

THIS PROCEEDING IS BARRED BY THE DOCTRINE OF LACHES AND IS MOOT BECAUSE OF PETITIONERS' UNREASONABLE DELAY IN COMMENCING THIS PROCEEDING AND THE SUBSTANTIAL COMPLETION OF THE FACILITY BY THE FIRST RETURN DATE.

A. This Proceeding Is Barred By The Doctrine of Laches.

The trial court also erred in failing to dismiss this proceeding as barred by the doctrine of laches. The law is well settled that "where neglect in promptly asserting a claim for relief causes prejudice to one's adversary, such neglect operates as a bar to a remedy and is a basis for asserting the defense of laches" (*Save the Pine Bush, Inc. v N.Y. State Dep't of Envtl. Conservation*, 289 AD2d 636, 638 [3d Dept 2001] [internal quotations omitted]). Thus, in *Caprari v Town of Colesville*, 199 AD2d 705 [3d Dept 1993], the Third Department held in language applicable to the present case that where petitioners failed "to timely safeguard their interests by seeking an injunction, despite the obvious presence of ongoing construction . . . the proceedings . . . are barred by the doctrine of laches and rendered moot" (*id.* at 706).

Here, the gravamen of Petitioners' claims arises from the initial approvals issued by the Basin Commission in 2011. In February 2012, the Village adopted its resolutions approving the Lease and the Surplus Water Agreement. In April 2012, construction of the Facility began. Further, over fifteen months elapsed since the Village obtained its initial approval from the Basin Commission. Yet, Petitioners simply watched construction proceed rather than promptly commencing this action and seeking a temporary restraining order. Instead, Petitioners waited until the very last day before the statute of limitations would have barred this proceeding, by which time construction of the Facility was substantially complete (R. 358, 367-68). Petitioners

have no explanation for why they did not seek injunctive relief when the Basin Commission issued its initial approval in 2011 or when construction began in April 2012, despite having actual knowledge of the approvals and the presence of ongoing construction, as evidenced by the timeline for the project found on Petitioners' lawyer's own website (R. 632-33). Indeed, Petitioner Jean Wosinski testified that in 2011 she read that the Village was considering plans to sell millions of gallons of water per day (R. 467, ¶ 28; R. 472).

Simply stated, Petitioners were aware of everything associated with the project at issue, and did nothing to protect their rights for sixteen months before filing this proceeding at the last possible moment. Petitioners' unreasonable delay in challenging the construction of the Facility prejudiced Respondents (*see Birch Tree Partners, LLC v Zoning Bd. of Appeals of Town of E. Hampton*, 106 AD3d 1083, 1084 [2d Dept 2013] [holding that petitioner's challenge was barred by the doctrine of laches because respondent was prejudiced by petitioner's undue delay in challenging its construction]). Because Petitioners did not attempt to obtain a temporary restraining order to preserve their rights pending judicial review, and have failed to exercise diligence during the pendency of this proceeding prior to the completion of construction of the Facility, they should be barred from recovery by the doctrine of laches.

B. <u>This Proceeding Is Moot Because The Facility Was Substantially Complete Prior To The Original Return Date Of The Petition</u>.

In addition to this proceeding being barred by the doctrine of laches, the trial court also erred in failing to dismiss this proceeding as moot. "Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy" (*Citineighbors Coalition of Historic Carnegie Hill v N.Y. City Landmarks Preserve. Commn.*, 2 NY3d 727, 728-29 [2004], *citing Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172 [2002]). Where, as here, the

change in circumstances involves a construction project, the court "must consider how far the work has progressed towards completion" (*see id.*).

Here, this proceeding is moot because the Facility was substantially completed by July 23, 2012, which is the same day this proceeding was originally made returnable (R. 367-68, 388). By that time, the only remaining items to be addressed at the Facility related to certain punch list items, such as electrical connections, and other similar non-substantive items (R. 358). The law is clear that when a construction project is substantially complete, a proceeding seeking to enjoin its operation should be dismissed as moot (*see Citineighbors Coalition of Historic Carnegie Hill*, 2 NY3d at 728-29; *Weeks Woodlands Assn., Inc. v Dormitory Auth. of the State of N.Y.*, 95 AD3d 747, 747 [1st Dept 2012]; *Kowalczyk v Town of Amsterdam Zoning Bd. of Appeals*, 95 AD3d 1475, 1476 [3d Dept 2012]; *Many v Village of Sharon Springs Bd. of Trustees*, 234 AD2d 643, 643 [3d Dept 1996]).

Although Petitioners commenced this proceeding by Order to Show Cause and sought a preliminary injunction, the doctrine of mootness nevertheless applies because Petitioners failed to effectively preserve the status quo pending judicial review. The Court of Appeals has held that a chief factor in evaluating claims of mootness "has been a challenger's failure to seek preliminary injunctive relief *or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation*" (*see Citineighbors Coalition of Historic Carnegie Hill*, 2 NY3d at 728-29 [emphasis added]; *accord Dreikausen*, 98 NY2d at 172-73). For example, in language directly applicable to the present case, the court in *Weeks Woodlands Assn., Inc.*, reviewing the case of *Friends of Pine Bush v Planning Bd. of City of Albany*, 86 AD2d 246 [3d Dept 1982], stated as follows:

> *Pine Bush* expressly held that the matter before the Court was moot because the petitioners had not been diligent in seeking injunctive relief against construction activity. . . . Indeed, *Pine*

> *Bush* found that the matter was moot on the ground that the petitioners, after their motion to extend the automatic stay of the respondent's action was denied, took "no further action" to maintain the status quo . . . .

(*Weeks Woodlands Assn., Inc.*, 95 AD3d at 751, *citing Friends of Pine Bush*, 86 AD2d at 247; *see also Wallkill Cemetery Assn., Inc. v Town of Wallkill Planning Bd.*, 73 AD3d 1189, 1190 [2d Dept 2010] [holding that "the petitioners have failed to preserve their rights pending judicial review, and the matter is now academic"]).

The same result is warranted in this case. On June 25, 2012, Petitioners filed this proceeding (R. 43), together with an affidavit confirming that construction of the Facility had begun (R. 82). In fact, Petitioners' counsel's own website reflects that Petitioners had actual knowledge that construction of the Facility had begun in the Spring of 2012 (R. 632-33). On June 26, 2012, the trial court scheduled the initial return date for July 23, 2013 (R. 41-42). The immediacy associated with construction of the Facility and the timing of this proceeding was not lost on Petitioners, who alleged in support of the Order to Show Cause that construction had started and in order to effectuate the relief in the Petition a prompt hearing was necessary (R. 82). Despite actual knowledge that construction had begun (both prior to and at the time this action was commenced), Petitioners at no time diligently sought to obtain injunctive relief requested in the Order to Show Cause.

For example, upon receipt of the July 23, 2013 return date for the Petition — nearly a month after the date the Petition was filed — Petitioners could have requested that the trial court hold a hearing on their request for a preliminary injunction on an expedited basis. Certainly, Petitioners could have requested a temporary restraining order against the Railroad enjoining construction of the Facility. Petitioners did neither. Although they relied on the fact that this matter was adjourned several times, that fact is irrelevant because the Facility was substantially

complete prior to the first return date (R. 358, 367-68). Petitioners should not be excused from the application of the mootness doctrine simply because they made a boilerplate request for a preliminary injunction at the onset, but then failed to undertake any additional effort to secure it prior to the completion of the Facility. "Having pursued a strategy that foisted all financial risks (other than their own legal fees and related expenses) onto the property owner and the developer, petitioners may not expect [this Court] to overlook this substantial completion of the construction project" (*Citineighbors Coalition of Historic Carnegie Hill*, 2 NY3d at 730). Accordingly, this proceeding should be dismissed as moot.

POINT III

THE COMPACT PREEMPTED THE VILLAGE FROM UNDERTAKING A SEQRA REVIEW OF THE IMPACTS ASSOCIATED WITH THE WITHDRAWAL OF WATER FROM THE BASIN, AND BECAUSE PETITIONERS CHOSE NOT TO CHALLENGE THE BASIN COMMISSION APPROVALS, AN ATTEMPT TO DO SO PURSUANT TO THIS PROCEEDING CONSTITUTES AN IMPROPER COLLATERAL ATTACK.

A. The Basin Commission Approvals Were Not Subject To SEQRA Review Because SEQRA Is Preempted By The Compact.

1. The Compact Is Federal Law And Governed The Basin Commission Review Of The Impacts Associated With The Withdrawal Of Water From The Basin.

The trial court also committed reversible error in failing to consider the preemptive effect of the Compact on the Village SEQRA review. Petitioners seek to have SEQRA applied to assess the environmental impacts from the withdrawal of water from the Basin, but the application of SEQRA under those circumstances is preempted by the Compact. The Compact Clause of the United States Constitution provides that "[n]o state shall, without the consent of Congress, . . . enter into any . . . compact with another state" (US Const art I, § 10, cl 3). Once a compact receives federal approval, it is "transform[ed] . . . into a law of the United States" (*Tarrant Regional Water Dist. v Herrmann*, 133 S Ct 2120, 2130 n. 8 [2013], *citing Virginia v*

Maryland, 540 US 56, 66 [2003]; *accord American Sugar Ref. Co. of N.Y. v Waterfront Commn. of N.Y. Harbor*, 55 NY2d 11 [1982]). The Supremacy Clause of the United States Constitution (US Const art VI, cl 2) "then ensures that a congressionally approved compact, as a federal law, pre-empts any state law that conflicts with the Compact" (*Tarrant Regional Water Dist.*, 133 S Ct at 2130 n. 8; *see also People v Nine Mile Canal Co.*, 828 F Supp 823, 825 n. 3 [D Co 1993] ["The Compact preempts conflicting state law dealing with the same subject"]; *Alcorn v Wolfe*, 827 F Supp 47, 52 [DDC 1993] ["In light of the Supremacy Clause . . . the terms of [the Compact] . . . take precedence over conflicting state law"]).

The Basin Commission, as an entity created by the Compact, is a distinct political and governmental entity from the states that created it (*see Hess v Port Auth. Trans-Hudson Corp.*, 513 US 30, 40 [1994]). When a state enters into a compact, it cedes a portion of its sovereignty to the newly created entity (*Hess*, 513 US at 40). The compact entity then uses the state-ceded sovereignty to address a problem that is typically regional in scope, commensurate with the foot print of the commission's sovereign authority (*see id.* [stating that compact entities seek to address "interests and problems that do not coincide nicely either with the national boundaries or with State lines" — interests that "may be badly served or not served at all by the ordinary channels of National or State political action"] [internal quotations omitted]).

Consistent with the foregoing, New York federal courts have specifically held that SEQRA regulations cannot be imposed on a federal-state agency created pursuant to a federally-approved compact (*Mitskovski v Buffalo and Fort Erie Public Bridge Auth.*, 689 F Supp 2d 483, 491 [WDNY 2010], *aff'd* 415 Fed Appx 264 [2d Cir 2011]). The petitioners in *Mitskovski* asserted the same claims as Petitioners in this case, namely, that an agency created pursuant to a compact approved by Congress violated SEQRA in segmenting the project and failing to conduct an adequate review (*see Mitskovski*, 680 F Supp at 485). The Western District

of New York rejected petitioners' contention, holding that state and local agencies cannot "impose their environmental regulations upon the . . . Authority. To hold otherwise would usurp the authority granted to the compact" (*id.* at 491; *see also Seattle Master Builders Assn. v Pacific N.W. Elec. Power & Conservation Planning Council*, 786 F2d 1359 [9th Cir 1986] [holding that agency created pursuant to federal-state compact was not subject to state law requiring preparation of an environmental impact statement]; *Erie Boulevard Hydropower, L.P. v Stuyvesant Falls Hydro Corporation*, 30 AD3d 641 [3d Dept 2006] [holding that SEQRA review was not required given preemption of area by federal statute]).

The same rationale employed by the court in *Mitskovski* applies with equal force to the Basin Commission in this case. The Basin Commission was created by the Compact, a federal-state compact between the federal government, Pennlysvania, New York and Maryland (*see* ECL § 21-1301 *et seq.*; *see also* Pub L 91-575). The Compact provides that "[n]o projects affecting the water resources of the basin" may be undertaken without the approval of the Basin Commission (ECL § 21-1301 [3.10]). These "projects" approved by the Basin Commission include those forming the basis of Petitioners' claims, such as "requests for . . . *withdrawals* . . . of water for in-basin or out-of-basin use" (18 CFR 801.3[a] [emphasis added]), and "consumptive use related to . . . natural gas . . . development" (*see* 18 CFR 806.22[f]; R. 330-31). Because the Compact was approved by Congress, it is a federal law subject to federal construction, notwithstanding its codification in New York State law (*see Alcorn*, 827 F Supp at 52). The trial court's holding requiring that the Village undertake a SEQRA review of water withdrawals usurps the authority of the Basin Commission and violates the Supremacy Clause, which requires that SEQRA yield to the requirements of the Compact (*see id.*).

In fact, courts in Pennsylvania have expressly held that the Compact preempts local municipalities from applying additional conditions to the withdrawal of water or otherwise

limiting approvals previously granted by the Basin Commission (*see State College Borough Water Auth. v Bd. of Supervisors of Halfmoon Township, Centre County, P.A.* (*Halfmoon Township*), 659 A2d 640 [Pa Cmwlth 1995] [holding an attempt by a municipality to impose conditions on water resources subject to regulation by the Basin Commission is preempted by the Compact and the promulgated regulations]; *accord Levin v Bd. of Supervisors of Benner Township, Centre County*, 669 A2d 1063 [Pa Cmwlth 1995]).

In *Halfmoon Township*, the issue before the Commonwealth Court of Pennsylvania was whether a municipality could impose additional conditions on a use application previously granted by the Basin Commission for the withdrawal of groundwater in certain amounts (*Halfmoon Township*, 659 A2d at 644). The court in *Halfmoon Township* held in language directly applicable to the present case that:

> Our reading of the Compact as a whole satisfies us the state legislature indicated an intention that local governing bodies should not supplement [the Basin Commission's] decisions with respect to its authority to manage the basin's water resources. No other conclusion is logical where the Compact evinces a frustration with splintered governmental authority and responsibility, and where [the Basin Commission] has been given the power to regulate water withdrawals and diversions and to determine what areas should be designated as protected or involved in an emergency situation.

(*Halfmoon Township*, 659 A2d at 644). Thus, the court held that conditions imposed by a local governing body subject to the Basin Commission's authority, which conditions interfere with the Basin Commission's power to regulate area water resources, are preempted (*id.* at 645).

The gravamen of Petitioners' claims are that the Village must undertake hydrogeologic testing on the production wells in the aquifer located within the Basin to determine the safe yield, adopt inter-municipal drought management plans, and comprehensively address issues of water quality as related to large scale pumping (*see* 498-99). In other words, Petitioners are asking the

Village to undertake a SEQRA review of water withdrawals and impose additional conditions that were not imposed by the Basin Commission. Applying *Halfmoon Township* to the facts of this case makes clear that the Village is preempted by the Compact from undertaking any subsequent SEQRA review relating to the withdrawal of water from the Basin.

2. The Compact Is A Comprehensive Regulatory Scheme With Its Own Requirements To Assess And Evaluate The Impacts Associated With The Withdrawal Of Water From The Basin.

The express language of the Compact confirms that SEQRA must yield to the requirements of the Compact, the entire purpose of which is to prevent exactly what the trial court has ordered in this case — a splintered and potentially inconsistent review by a local municipality concerning a water withdrawal located within the Basin (*see Halfmoon Township*, 659 A2d at 644). Prior to its enactment, the water resources of the Basin were "subject to the duplicating, overlapping and uncoordinated administration of a large number of governmental agencies which exercise a multiplicity of power resulting in a splintering of authority and responsibility" (ECL § 21-1301 [Preamble ¶ 3]). One of the purposes of the Compact was to "apply the principle of equal and uniform treatment to all users of water and of water related facilities without regard to political boundaries" (ECL § 21-1301 [Preamble § 1]).

To that end, the Compact unequivocally declares that:

> The water resources of the basin are functionally interrelated, and the uses of the resources are interdependent. *A single administrative agency is therefore essential for effective and economical direction, supervision, and coordination of water resources efforts and programs of federal, state and local governments and of private enterprise. . . .*
>
> Present and future demands require increasing economies and efficiencies in the use and reuse of water resources, and these can be brought about only by comprehensive planning, programming, and management under the direction of a single administrative agency.

(ECL § 21-1301 [1.3[3], [4]] [emphasis added]). Pursuant to Article 3 of the Compact, the Basin Commission is further empowered to "[e]stablish standards of planning, design, and operation of all projects and facilities in the basin to the extent they affect water resources . . ." (ECL § 21-1301 [3.4[2]]). Pursuant to Article 11 of the Compact, the Basin Commission has been given the power to regulate water withdrawals and determine what areas should be designated as protected or involved in an emergency situation (ECL § 21-1301 [Article 11]).

The Basin Commission also regulates consumptive water use on a drilling pad basis through an administrative Approval by Rule process. The Approval by Rule process allows the Basin Commission to track all water activity associated with a drilling pad — the sources of water transported to and from a site, quantities consumptively used and the fate of flowback and produced fluids — while issuing approvals more efficiency (*see* 18 CFR 806.22[f][i], [ii]). In addition, the Basin Commission continuously monitors and evaluates the withdrawal of water and its impact on the Basin (*see* 18 CFR 806.30). Thus, the Compact regulations not only regulate the withdrawal of water from the Basin, but its use for hydrofracking.

Clearly, then, the Compact is a comprehensive regulatory scheme and does not simply require the Basin Commission to issue a ministerial permit for water withdrawals (*see* R. 39). Requiring local municipalities to undertake a SEQRA review of the water withdrawals from the Basin on a local level notwithstanding the Basin Commission's jurisdiction will inevitably lead to inconsistent and fragmented environmental reviews, which is exactly why the Compact was enacted (*see* ECL § 21-1301 [Preamble ¶ 3]), and the Basin Commission was created (*see* ECL § 21-1301 [1.3[3]] [stating that the Basin Commission is "essential for effective and economical direction, supervision, and coordination of water resources efforts and programs of federal, state and local governments and of private enterprise"]). Having the Village undertake a SEQRA review will undermine the Compact's statutory scheme that grants the Basin Commission broad

and exclusive authority to evaluate water withdrawals not in just one state such as New York, but in the several states comprising the Basin.

The trial court's decision contains a statement that at oral argument counsel for the Village stated that it did not contend that the Compact preempted SEQRA (R. 39). The Village took no such position. Rather, the Village asserted that the trial court could dispose of this proceeding without reaching the issue of preemption because Petitioners' challenge to the Village approvals constituted an impermissible collateral attack on the Basin Commission Approvals, and Petitioners failed to join the Basin Commission as a necessary party (*see* Points III.C, D below). In any event, although the trial court observed that it was not reaching the Village's preemption arguments, it nevertheless held that the Village was required to undertake a SEQRA review of the impacts of the withdrawal and neither the Compact nor its regulations provide for preemption of SEQRA (R. 39). The trial court's holding has clearly placed the issue of preemption squarely before this Court. Not only may this Court search the record and grant the necessary relief (*see Fargo v S. Is. Orthopedic Group, P.C.*, 303 AD2d 447 [2d Dept 2003]), but the question of preemption involves a question of law that appears of the face of the record (*see* R. 328-34, 349-50, 358-59), and could not have been avoided at the trial court (*see Guy v Hatsis*, 107 AD3d 671 [2d Dept 2013]; *Davis v State of N.Y.*, 91 AD3d 1356 [4th Dept 2012]). Thus, this Court can (and should) reach the issue of preemption.

B. New York State Law Confirms That The Basin Commission Is Not Subject To SEQRA.

Consistent with the Compact, the New York State Environmental Conservation Law also expressly provides that none of its provisions, which include SEQRA, or any other law of New York "which is inconsistent with the provisions of the compact shall be applicable to the [Basin Commission] or to any matter governed by the compact" (ECL § 21-1321). As discussed above (*see* Point III.A.1 above), the regulatory scheme under SEQRA is entirety inconsistent with the

provisions of the Compact and its regulations, which have separate requirements governing the approval of withdrawals related to natural gas well development (*see* 18 CFR 806.22).

Moreover, the Basin Commission is not required to undertake a review pursuant to SEQRA because it is not a state agency. SEQRA mandates that "[a]ll agencies" shall provide an environmental impact statement for "any action they propose or approve which may have a significant effect on the environment" (*see* ECL § 8-0109[2]; *see also Hinsdale Cent. Sch. v Agway Petroleum Corp.*, 73 AD2d 1043 [4th Dept 1980]). ECL § 8-0105[3] defines an "agency" as "any state or local agency." The Basin Commission, however, is neither a state nor a local agency (*see Borough of Morrisville v Delaware Riv. Bas. Commn.*, 399 F Supp 469 [ED Pa 1975]), but rather is a federal-interstate compact authority created pursuant to a compact between the federal government and several states (*see generally* ECL § 21-1301, *et seq.*).

Courts confronted with this issue have held that entities similar to the Basin Commission are not agencies as defined by SEQRA and, therefore, are not subject to SEQRA or similar law. For example, in *Chu v N.Y.S. Urban Dev. Corp.*, 13 Misc 3d 1229(A), 2006 NY Slip Op 52055(U) (Sup Ct, NY County 2006), the Court held that the Port Authority — a bi-state commission created by the states of New York and New Jersey, and approved by Congress, was a "public authority, not an administrative agency" and did not "consider itself an agency for SEQRA purposes" (*see id.*, *aff'd* 47 AD3d 542 [1st Dept 2008]). Similarly, in *Borough of Morrisville*, the court stated that the analogous Delaware River Basin Commission is "neither wholly a federal agency nor a state one. It is a body on which both the federal government and each of the four states through whose territory the Delaware River runs are equally represented" (*Borough of Morrisville*, 399 F Supp 469 at 470). Because SEQRA does not apply to the Basin Commission, any approvals obtained by the Village must instead satisfy the requirements of the Compact, which occurred in this case.

C. The Petition Constitutes An Improper Collateral Attack On The Basin Commission Approvals.

The trial court's holding that compliance with SEQRA was not excused by the fact that the Basin Commission must issue a permit for the subsequent water withdrawal (R. 39) is clearly erroneous given the scope of the Basin Commission's authority to assess the environmental impacts associated with the water withdrawals from the Basin. The Basin Commission is not a party to this proceeding, and Petitioners have never asserted any claim against it. Had Petitioners asserted such a claim, it would not only be meritless because the Basin Commission is not required to undertake a SEQRA review (*see* Points I.A, B above), but time barred (*see* ECL § 21-1301[3.10[6]] [providing that "[a]ny determination of the commission pursuant to this article or any article of the compact providing for judicial review shall be subject to such judicial review . . . provided that an action or proceeding . . . for such review is commenced within 90 days from the effective date of the determination sought to be reviewed"]).

In any event, the trial court erroneously dismissed the applicability of the Compact. Again, the gravamen of Petitioners' complaint against the Village is that it should have undertaken a SEQRA review of the same impacts encompassed in the Basin Commission Approvals. Petitioners failed to directly challenge the Basin Commission Approvals. Petitioners, therefore, cannot use this proceeding to collaterally attack them under the guise of challenging the Village actions. The law is clear — when the determination of an administrative agency such as the Basin Commission becomes final, it is conclusive and binding, and cannot be subjected to collateral attack (*see Steen v Quaker State Corp.*, 12 AD3d 989, 990 [3d Dept 2004]; *Brawer v Johnson*, 231 AD2d 664, 664-65 [2d Dept 1996]; *Matter of Joseph v Roldan*, 289 AD2d 243, 244 [2d Dept 2001]; *Matter of Rosen v City of N.Y.*, 2011 NY Slip Op 31683[U], *7 [Sup Ct, NY County 2011]; *see also Callanan Road Improvement Co. v United States*, 345

US 507, 512 [1953]). Any challenge to the review undertaken in assessing the impacts associated with water withdrawals should have been asserted in a timely proceeding against the Basin Commission.

D. The Trial Court Erred In Failing To Dismiss This Proceeding Based Upon The Non-Joinder Of The Basin Commission As A Necessary Party.

Given the gravamen of Petitioners' claims, Petitioners' failure to name the Basin Commission as a party also requires that this proceeding be dismissed. Pursuant to CPLR § 1001, a petition can be dismissed where it fails to name one or more necessary parties "who ought be parties if complete relief is to be accorded" or "who might be inequitably affected by a judgment in the action" (*Matter of 27th St. Block Ass'n v Dormitory Auth. of the State of N.Y.*, 302 AD2d 155, 160 [1st Dept 2002], *quoting* CPLR § 1001[a]). Courts have consistently held that the failure to name a governmental agency in an action where the agency may be inequitably affected by a judgment rendered in its absence is grounds for dismissal. For example, in *Town of Brookhaven v Chun Enters., Inc.*, 71 NY2d 953, 954-55 [1988], the Court of Appeals affirmed the dismissal of the proceeding for failure to join Commissioner of Social Services in action to enjoin a motel for providing lodging to the homeless. Similarly, in *City of N.Y. v Long Is. Airports Limousine Serv. Corp.*, 48 NY2d 469, 475-76 [1979], the Court of Appeals dismissed the proceeding for the failure to join the State Commissioner of Transportation who was responsible for issuing the license required to operate the service in issue.

Petitioners' claims go to the heart of the approvals granted by the Basin Commission. Moreover, the Basin Commission has clearly been inequitably affected as a result of the trial court's holding because it directly impacts the statutory and regulatory scheme of the Compact, and such judgment was rendered in absence of the Basin Commission without its essential input.

In particular, Petitioners' failure to join the Basin Commission has completely undermined its authority to approve withdrawals of water from the Basin pursuant to the Compact and its implementing regulations. Having not participated in this proceeding, the Basin Commission was precluded from defending its procedures or otherwise introducing into the record any evidence of the environmental review it undertook to assess the impacts to the Basin. Accordingly, because Petitioners' failure to join the Basin Commission has significantly prejudiced its rights, and the Basin Commission can no longer be joined as any claims against it are time-barred, this Court should dismiss this proceeding for failure to join a necessary party.

POINT IV

THE VILLAGE UNDERTOOK THE NECESSARY SEQRA REVIEW FOR THE FACILITY AND NO ADDITIONAL SEQRA REVIEW WAS REQUIRED FOR THE SURPLUS WATER AGREEMENT.

A. The Trial Court's Holding That The Use Of One Million Gallons Of Water Per Day Constitutes An Unlisted Action Is Not Supported By Authority Cited By The Trial Court.

The Court held that the use of one million gallons of water per day by a municipality constitutes an unlisted action (R. 29-30), which are actions that do not meet or exceed the thresholds for Type I actions and are not contained on the list of Type II actions (*see* 6 NYCRR § 617.2[ak]). In support of its finding, the trial court relied on *Cross Westchester Dev. Corp. v Town Bd. Of Town of Greenburgh*, 141 AD2d 796 (2d Dept 1988), and *City Council of City of Watervliet v Town Bd. Of Town of Colonie*, 3 NY3d 508 (2004), for the contention that NYSDEC has "implicitly" determined that the sale of one million gallons of surplus water from existing wells — approved by a federal commission — is an unlisted action (R. 29). Neither case stands for such a proposition.

The underlying guidance documents referenced in those cases as supporting the "implicit" determination relied on by the trial court involved *the annexation of real property*, not

the sale of surplus government property such as surplus water (*see* Appendix A [SEQRA Handbook, at 105 (1992 ed.)]; Appendix B [NYSDEC Draft Generic Environmental Impact Statement, Jan. 15, 1986, at 14]). Moreover, the SEQRA regulations expressly provide that (i) the annexation of 100 or more continuous acres of land by a state or local agency constitutes a Type I action (*see* 6 NYCRR § 617.4[b][4]); and (ii) transactions involving land are specifically excluded from the Type II surplus government property exemption (*see* 6 NYCRR § 617.5[c][25]). Thus, by express regulation transactions involving the annexation of real property were known by the regulated community as not being specifically exempted from SEQRA.

Construing the SEQRA regulations as a whole (*see New York County Lawyers' Association v Bloomberg*, 19 NY3d 712, 721 [2012]), together with the underlying guidance documents relied on by the courts in *Cross Westchester* and *City of Watervliet* (*see* Appx. A, B), the courts in those cases found that the annexation of less than 100 acres of real property constituted an unlisted action. Conversely, no legislative history or guidance from NYSDEC provides that the sale of surplus water from existing wells with a long history of production, and which has received approval of a federal commission, constitutes an unlisted action. Moreover, unlike real property, the sale of surplus government property is expressly included as a Type II action under SEQRA (*see* 6 NYCRR § 617.5[c][25]; *see also* Point IV.C.1 below).

Where a state agency promulgates regulations, it is not credible to suggest it made implicit findings nearly 20 years ago, but has not bothered to promulgate regulations or guidance providing that the use of municipal water as contemplated here triggers SEQRA review. "A court's role in interpreting a statute is to ascertain the legislative intent form the words and language that are used, and a court should not extend a statute beyond its express terms or the reasonable implications of its language" (*Matter of Victoria Petersen v Inc. Vil. of Saltaire*,

77 AD3d 954, 956 [2d Dept 2010], *citing* McKinney's Consolidated Laws of NY, Book 1, Statutes § 94). Simply stated, the trial court's holding that the NYSDEC has 'implicitly' determined that the use of one million gallons per day of water per day by a municipality constitutes an unlisted action is contrary to well-established principles of statutory construction and should be rejected.

B. The Village Completed The Necessary Environmental Review As Required And Issued A Negative Declaration For the Facility In Compliance With SEQRA.

The trial court's holding that the Village was required to perform a separate review of the Surplus Water Agreement under SEQRA was also erroneous because it fails to consider that the Village's SEQRA review was limited by both the Compact and the Interstate Commerce Termination Act. The Village was only required to undertake a SEQRA review to the extent necessary to address those portions of SEQRA not preempted by the Compact and the Interstate Commerce Termination Act. In other words, the Village undertook a SEQRA review to fill in the gaps left by the preemptive effect of those regulatory schemes, and a review of the Record shows beyond all doubt that the Village complied with SEQRA.

The law is well settled that SEQRA determinations should be upheld where, as here, the lead agency "identified the relevant areas of environmental concern, took a 'hard look' at them and made a 'reasonable elaboration' of the basis for its determination" (*Matter of Citizens Accord, Inc. v Town Bd. of the Town of Rochester*, 192 AD2d 985, 987 [2d Dept 1993], *lv denied*, 82 NY2d 656 [1993], *quoting Jackson v N.Y. State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]). The "hard look" standard does not "authorize the court to conduct a detailed de novo analysis" of environmental impacts (*see Aldrich v Pattison*, 107 AD2d 258, 267 [2d Dept 1985]). Rather, the court must defer to the agency's judgment regarding environmental impacts and resist the temptation to "weigh the desirability of any action" or "second guess" the

lead agency (*see, e.g., Akpan v Koch*, 75 NY2d 561, 570 [1990] [stating that "agencies have considerable latitude evaluating environmental effects" and "courts may not substitute their judgment for that of the agency"]; *Dangla v Town Bd. of the Town of Florida*, 259 AD2d 850, 852 [3d Dept 1999] [stating that "municipalities enjoy considerable discretion in their determinations as to substantive environmental matter"]).

The Record in this case shows that the Village took the requisite "hard look" in connection with the Lease of the Facility by determining the relevant areas of environmental concern, analyzing the potential concerns of significance, and making an appropriate determination based on its review. In particular, the Village completed, reviewed and analyzed Parts 1 and 2 of the EAF, which documented the actions to be taken involving the Facility, and reviewed additional studies and documents associated with the Facility's conveyance of surplus Village water onto railcars for transport (R. 148-67). This included: (i) an extensive report completed by the engineering firm of Hunt Engineers Architects & Land Surveyors, P.C.; (ii) other reports and studies associated with the Facility; (iii) the correspondence submitted to interested and involved agencies; and (iv) the Basin Commission Approvals (R. 169-339). Although the Village did review the water pressure associated with the operation of the Facility (R. 212-20), the Village was not required (and did not) review impacts associated with the water withdrawals because that review fell under the exclusive jurisdiction of the Basin Commission.

Based on the foregoing, the Village evaluated the Lease and its potential effect on the environment, identified potential impacts, and took the required "hard look" at those potential impacts, including identifying any measures which might be required to address them (R. 111-16). The Village then issued the Negative Declaration, which documented the comprehensive, painstaking review undertaken by the Village, and contained its reasoned elaboration of the environmental review and analysis of why the development, construction and

operation of the Facility would not result in any significant adverse impact (*see* 6 NYCRR §§ 617.7[b], 617.12[a][2]). Through this process, the Village fully executed and satisfied its obligations under SEQRA.

The trial court also erroneously concluded that the Village did not undertake any review associated with the sale of surplus water (R. 30 n. 8). The Village's resolution specifically incorporated by reference the Negative Declaration associated with the SEQRA review conducted for the Facility, as well as referenced (both in the resolution and the Surplus Water Agreement itself) the Basin Commission Approvals (R. 117-18 [referencing the Negative Declaration and other resolution; 141-42, 144-45 [referencing Lease]). The Village would have done no more review of the Surplus Water Agreement than it already completed for the Facility because as discussed, the only approvals at issue were those associated with the Basin Commission Approvals (*see King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 347-48 [1996]). Because the Village procedurally and substantively performed each of the steps required under SEQRA as part of the collective review of the Lease for the Facility and the Surplus Water Agreement, the Village complied with SEQRA to the extent it applied here.

C. The Village Property Determined That Entering Into The Surplus Water Agreement Was Exempt From SEQRA Review.

1. The Village's Approval Of The Surplus Water Agreement Was A Type II Action Under SEQRA.

Contrary to the trial court's holding (R. 30-33), the Surplus Water Agreement fits squarely within the Type II regulatory criteria. A Type II action is an action that has been determined not to present a significant impact or is otherwise precluded from environmental review under SEQRA (*see* 6 NYCRR § 617.5[a]). The SEQRA regulations contain a list of Type II actions, including subpart twenty-five, which provides in pertinent part that the "purchase or sale of furnishings, equipment or supplies, *including surplus government property*,

other than the following: land, radioactive material, pesticides, herbicides, or other hazardous materials" (6 NYCRR § 617.5[c][25] [emphasis added]). Therefore, the Type II regulations specifically include the sale of surplus government property, which the sale of surplus water was under the circumstances of this case.

The trial court cited no authority supporting its position that under these circumstances, the Surplus Water Agreement was subject to SEQRA review. As discussed above, the trial court's holding that the approval of the Surplus Water Agreement was an unlisted action was based on the erroneous conclusion that it authorized the water withdrawals at issue. Again, the Surplus Water Agreement did no such thing. The Surplus Water Agreement set the terms for SWEPI's purchase of surplus water and other commercial terms, the amount and use of which was already approved by the Basin Commission from existing, permitted wells. The Village is expressly authorized under the Village law to sell its surplus water to a private corporation outside of its geographic limits (*see* Village Law § 11-1120). Nowhere in Village Law is the sale of surplus water deemed a real property interest and nowhere in the Surplus Water Agreement has the Village granted SWEPI a real property interest in the Facility or the Village wells. The Village sale of surplus water pursuant to the Surplus Water Agreement is the sale of surplus personal property, and therefore constitutes a Type II action.

The trial court relied on the SEQRA Handbook for the contention that 6 NYCRR § 617.5(c) does not include the sale of surplus water, but only applies to personal property and equipment (R. 31). The trial court's conclusion is wrong for two reasons. *First*, this list is not on its face purported to be an exhaustive list of all possible Type II classifications under § 617.5(c)(25). Instead, the Handbook serves as guidance for practitioners. *Second*, the trial court's reliance on the Handbook is contrary to well-established principles of statutory construction. When interpreting express exceptions made in a statute, "all doubts should be

resolved in favor of the general provision rather than the exception. Where a general rule is established by statute with exceptions, the court will not curtail the former nor add to the latter by implication, and it is a general rule that an express exception excludes all others" (*In re Charles' Estate*, 200 Misc 452, 461 [Sur Ct, NY County 1951]; *see also Weingarten v Bd. of Trs. of the N.Y. City Teachers' Ret. Sys.*, 98 NY2d 575, 583 [2002]).

The SEQRA regulations define Type II actions not subject to SEQRA review by explicitly providing which actions will not present a significant impact on the environment, while excluding other actions that may present such an impact (and are, therefore, either Type I or unlisted actions). Pursuant to Section 617.5(c)(25), the sale of surplus government property is part of a non-exhaustive list of actions that "have been determined not to have a significant impact on the environment" (*see* 6 NYCRR § 617.5[a]). Section 617.5(c)(25) then provides for certain limited exceptions that do not constitute a Type II action for "land, radioactive material, pesticides, herbicides, or other hazardous materials." The sale of surplus water falls within the scope of the exemption for sale of surplus government property, and not within the exceptions for land, radioactive material, pesticides, or other hazardous materials.

For these reasons, the trial court's citation to *Town of Bedford v White* for the proposition that the Village improperly categorized the contract as a Type II action (R. 33) is erroneous because in *White* the DOT classification was clearly contradicted by the Type II regulations (*see Town of Bedford v White*, 204 AD2d 557, 559 [2d Dept 1994] [holding that NYSDOT determination under its own SEQRA regulations [17 NYCRR § 15.14] that the installation of a new traffic control light adjacent to a national landmark where no light previously existed was a Type II action and exempt was actually at least partially contradicted by regulations requiring consideration of whether such an installation impacted historic resources]). Because the approval of the Surplus Water Agreement is a Type II action, SEQRA does not apply

(*see Maltbie v Comprehensive Omnibus Corp.*, 190 Misc 1017, 1019 [Sup Ct, NY County 1947], *citing Strauch v Town of Oyster Bay*, 263 AD 833, 833 [2d Dept 1941]).

2. The Withdrawal Of Surplus Water From Existing Wells Is Not An "Action" Under SEQRA.

The trial court also erroneously held that the Surplus Water Agreement was subject to SEQRA review (R. 26-33) because the withdrawal of water from existing Village wells is not a new event triggering an "action" under SEQRA. SEQRA review is limited to those actions as defined by the statute. An "action" under SEQRA requiring potential SEQRA review involves, among other things, "projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure . . ." (*see* 6 NYCRR § 617.2; *see also* Gerrard, Environmental Impact Review in New York § 2.03[1][a] [citing the definition of actions under the SEQRA regulation and highlighting the fact that actions subject to SEQRA require some physical alteration]).

Here, the withdrawal of water from the Basin was not an "action" under SEQRA because the withdrawal involved existing, permitted wells. The withdrawal of water from the Village wells has been ongoing for decades, including in the amounts contemplated by the Basin Commission Approvals and sale to SWEPI (R. 328-34, 345-51, 550-54, 561-64). By holding that the Surplus Water Agreement was subject to SEQRA, the trial court failed to consider the fundamental fact that no change in use of the Village wells occurred. The Village wells were constructed decades earlier, fully permitted, and previously yielded volumes equal to or greater than those to be sold to SWEPI (R. 550-54, 561-641). The Village's determination to sell surplus water is also permitted under New York Village Law (*see* Village Law § 11-1120). Simply stated, as it had for over 50 years, the Village's sale of surplus to water was nothing more than a statutorily authorized municipal activity.

For these reasons, the trial court erred in relying on *Wertheim v Albertson Water District*, 207 AD2d 896 [2d Dept 1994]. In *Wertheim*, the action at issue was a capital improvement project involving the new construction of an air stripper that would act as a water filtration system. Here, in contrast, no such construction or action was at issue concerning the Surplus Water Agreement. Again, the Village wells utilized to supply the surplus water already exist, are in use, and were previously permitted decades ago. All that was needed was the construction of rail siding and an apparatus to load the water from the wells into rail cars, which was not subject to SEQRA because it was preempted by the Interstate Commerce Termination Act.

The approvals Petitioners are actually attempting to challenge in this proceeding are those issued by the Basin Commission because it authorized the withdrawal of water by the Village for use for hydrofracking in Pennsylvania. The only two actions taken by the Village related to the Lease of the Facility to the Railroad and the approval of the Surplus Water Agreement for the sale of surplus water to SWEPI, neither of which approved the withdrawal of water from the Basin. The Village relied on the Basin Commission Approvals when it entered into the Surplus Water Agreement. The Village would not have been able to sell surplus water to SWEPI without the Basin Commission Approvals or the previous permits issued by the State of New York that were based in part on the long history of withdrawal from the Village wells (R. 551-52, 561-64). The trial court failed to recognize that but for the Basin Commission Approvals no withdrawal could occur.

Indeed, the trial court's holding that the use of one million gallons per day is an unlisted action under all circumstances (R. 29-30) is not supported by the regulations or the facts. Applying the trial court's holding, every time a municipality's sales of surplus water increases above one million gallons per day it would have to undertake a SEQRA review — even where, as here, the water is obtained from existing wells within the capacity previously permitted by the

Basin Commission and the State of New York and not in excess of amounts previously sold by the Village (R. 550-54, 561-64). This would include, for example, a large industrial water user located in the Village of Painted Post that is simply drawing water from the existing Village wells. The Village wells from which the withdrawals were to take place and the volume of such withdrawals were not different in kind from prior withdrawals in the Village. Moreover, the withdrawals at issue were approved by the Basin Commission. Thus, the Village's approval of the Surplus Water Sale Agreement did not constitute a SEQRA "action."

3. There Was No Segmentation Of The Lease And The Surplus Water Agreement.

The trial court's contention that the Village improperly segmented its SEQRA review by considering the Surplus Water Agreement separately from the Lease completely ignores the fact that the approval of the Surplus Water Agreement, by definition, was a Type II action under SEQRA (*see* Point IV.B.1 above). Under the SEQRA regulations, "segmentation" of agency actions is defined as the "division of environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance" (6 NYCRR § 617.2[ag]; *Matter of Dunk v City of Watertown*, 11 AD3d 1024 [4th Dept 2004]; *Noslen Corp. v Ontario County Bd. of Supervisors*, 295 AD2d 924 [4th Dept 2002]). Thus, in order for an action to constitute improper segmentation, it must be part of a larger action and must in and of itself be deemed to have the potential to cause an impact, or in the words of the regulation, "needed individual determinations of significance" (*see* 6 NYCRR § 617.2[a][g]).

As discussed above, the approval of the Surplus Water Agreement was a Type II action (*see* Point IV.C.1 above), and the withdrawal of water was not an action subject to SEQRA because the withdrawal was from existing wells and approved by the Basin Commission (*see* Point IV.C.2 above). The Surplus Water Agreement provided no independent authorization

allowing the Village to withdraw the water needed to supply SWEPI. In any event, as discussed, the SEQRA review that the Village conducted for purposes of the Facility specifically incorporated the Basin Commission Approvals and the associated review, and therefore no additional SEQRA review was needed because the resolution specifically incorporated a negative declaration issued for the Lease (R. 118). Thus, there was no segmentation.

CONCLUSION

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

Dated: September 5, 2013

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APPENDIX A

THE SEQR HANDBOOK

November 1992

New York State Department of Environmental Conservation
Division of Regulatory Affairs
MARIO M. CUOMO, *Governor*
THOMAS C. JORLING, *Commissioner*

to Article 7 of General Municipal Law, prior to granting or denying an annexation petition, involve the weighing and balancing of social, economic and environmental factors. They are discretionary decisions to which SEQR must be applied. Annexations of 100 or more contiguous acres are Type I actions. Smaller annexations are Unlisted actions, unless some other aspect of the overall action triggers Type I review.

Annexation is typically associated with potential changes in land use or need for public services which may be more readily available from one municipality than another. Municipal decisions on annexation are similar in their consequences to rezoning decisions; both decisions have the potential to change land use patterns and require a hard look at the consequences of the whole action. In the case of an annexation, only after examination of these SEQR concerns, among other factors, can the question of public interest be fully addressed.

2. At what point in the annexation process should SEQR be applied?

SEQR should be applied at the time the initial petitions for annexation are presented to the involved municipalities, and prior to the joint municipal public hearing required under General Municipal Law. If an EIS is required, it should be made available as a draft for public review prior to the joint public hearing. The joint hearing can also serve as a SEQR hearing.

3. Can annexations associated with development proposals be reviewed separately from such development?

No. Although annexation petitions often will be the first elements of an overall action presented, annexation considerations cannot be segmented from the SEQR analysis necessary for the whole action (see discussion on Segmentation in Section 2-D, page 21). An annexation approved without considering the environmental impacts of the associated development may be unwise, if it turns out the development is not feasible.

4. What if details of future development are not known?

If the annexation petitioners are not committed to a specific development proposal, or if several parts of the area have undefined development potential, a generic EIS may be appropriate. A generic EIS would allow both the petitioners and reviewers to evaluate potential impacts of a variety of project proposals. (See discussion of generic EIS's in Section 5-H, page 77.)

5. What factors should be considered in establishing lead agency for an annexation?

Although state and county agencies occasionally have involvement with some aspect of specific projects associated with annexations, the most appropriate lead agency is likely to be from one of the involved municipalities. Major considerations are the agency's:

- jurisdiction over activities in the proposed annexation;
- jurisdiction over environmental impacts which may occur outside the proposed annexation due to activities within it (e.g., traffic congestion and waste generation); and
- ability to assess and mitigate anticipated environmental impacts.

If no development activities requiring discretionary decisions by other agencies are anticipated within the proposed annexation, only the municipal legislative boards would be involved agencies and eligible to serve as lead. All other considerations being equal, the most logical choice for lead is the agency which has had the longest standing jurisdiction within the area. This is normally an agency of the municipality from which the annexed parcel may be taken.

APPENDIX B

DRAFT GENERIC ENVIRONMENTAL IMPACT STATEMENT

AND

DRAFT REGULATORY IMPACT STATEMENT

REVISIONS TO 6 NYCRR PART 617

Statewide Regulation Implementing

THE STATE ENVIRONMENTAL QUALITY REVIEW ACT

(SEQR)

Responsible Agency:	New York State Department of Environmental Conservation 50 Wolf Road Albany, NY 12233-0001
Preparer:	Division of Regulatory Affairs
Contact Person:	Jerome W. Jensen Fred Howell Jack Nasca (518) 457-2224 50 Wolf Road Albany, New York 12233 or Gail Bowers (518) 457-6695 50 Wolf Road Albany, New York 12233
Date of Acceptance:	January 15, 1986
Comment Due Date:	April 15, 1986

Benefit: This addition will more clearly define "actions" under SEQR.

Issue 4: Annexation

Problem: During the many state-wide SEQR workshops conducted by the Department, a frequently asked question has been: does the annexation of land by a municipality fall under 617.12(b)(4)?

Revision: 617.12(b)(4) will be modified to treat annexation as a Type I action if it exceeds 100 or more contiguous acres of land by a municipality. If annexation involved less than 100 acres, it would be an Unlisted action.

Benefit: This addition will more clearly define "actions" and makes the annexation of land consistent with the other means of land acquisition under SEQR.

Issue t: Defining "any action"

Problem: The list of Type I actions involves references to "any action" which, under certain circumstances, may be classified as Type I actions. The problem with such terminology is that it treats, as actions subject to SEQR, all those actions which are clearly identified as Type II, Exempt or Excluded.

Revision: 617.12(b)(9), (11) and (12) have been modified to read "any Unlisted action", thereby clarifying and making it consistent with the list of actions never subject to SEQR.

Benefit: This revisionb will enable agencies to more clearly identify "actions" under SEQR.

Issue 6: State Register of Historic Places

Problem: The present Type I list does not adequately reflect the important historic resources of New York State.

Revision: Section 617.12(b)(9) is expanded to include actions occurring wholly or partially within, or contiguous to any facility, site, historic building, structure, district or prehistoric site listed on the State Register of Historic Places.

Benefit: This revision will ensure that important historic resources will be protected.

Issue 7: National natural landmarks

Problem: The current list of Type I actions does not recognize the significance of nationally identified natural landmarks.

Revision: 617.12(b)(10) includes an amendment including any site on the