To be Argued by:
RICHARD J. LIPPES, ESQ.
(Time Requested: 15 Minutes)

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

New York Supreme Court
Appellate Division—Fourth Department

In the Matter of the Application of the SIERRA CLUB; PEOPLE FOR A HEALTHY ENVIRONMENT, INC.; COALITION TO PROTECT NEW YORK; JOHN MARVIN; 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 PETITIONERS-RESPONDENTS

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Was the trial court correct in finding that Petitioner John Marvin has standing?

Answer:

> Yes, the trial court correctly found that Petitioner John Marvin has standing. The record shows that Petitioner Marvin lives less than 500 feet from the rail line leading into the water-loading facility and that the noise levels to which he was exposed were greater than the public at large.

2. Was the trial court correct in declining to consider Appellants' claim of laches?

Answer:

> Yes, the trial court correctly declined to consider Appellants' claims of laches. The delays that occurred were beyond Petitioners' control and arose in part as a result of Appellants' actions. Whatever harms may have occurred to Respondent WCOR as a result of its construction of the water-loading facility after the petition was filed were not harms to Appellants and may not be raised by them on appeal. WCOR proceeded at its own risk in constructing the rail loading facility.

3. Was the trial court correct in declining to consider Appellants' claim of mootness?

Answer:

> Yes, the trial court correctly declined to consider Appellants' claims of mootness. The damages that might be done to the Corning aquifer by large water extractions have not yet occurred. Water withdrawals pursuant to the agreement had been discontinued voluntarily by Appellants even before the trial court voided the water sale agreement.

4. Must the Village of Painted Post comply with SEQRA before entering into a bulk water sale agreement?

Answer:

> Yes, the trial court correctly held that the Village of Painted Post must comply with SEQRA before entering into a bulk water sale agreement, and that compliance with SEQRA is not excused by the fact that the Susquehanna River Basin Commission must issue a permit for subsequent water withdrawals. As the court correctly noted, neither the Susquehanna River Basin Compact or the regulations issued pursuant to the Compact provide for preemption of SEQRA.

5. Is the SRBC a necessary party?

Answer:

No, the approval given to SWEPI by the SRBC is not at issue in this case. Consequently, the SRBC is not a necessary party.

6. Is a bulk water sale agreement properly classified as a Type I or Unlisted action under SEQRA?

Answer:

Yes, the trial court correctly held that a bulk water sale agreement for less than 2,000,000 gpd is properly classified as an Unlisted action under SEQRA, and that the Village water sale project to ship up to 1,500,000 gpd from a loading facility "substantially contiguous" to a Village park is properly classified as a Type I Action.

7. Was the trial court correct in finding that the Village improperly segmented its review?

Answer:

Yes, the trial court correctly determined that the Village improperly segmented its review of the bulk water sale agreement and the lease of land for a water-loading facility to ship the water.

PRELIMINARY STATEMENT

This proceeding challenges various actions taken by the Village Board of the Village of Painted Post in Steuben County, New York on the ground that those actions were taken in violation of the New York State Environmental Quality Review Act (SEQRA). The Court below found in favor of Petitioners' claim for injunctive relief, determining that the actions taken violated the duties of the Village under SEQRA and voiding the actions taken by the Village

COUNTER STATEMENT OF FACTS

A. Painted Post's Water Sale and Lease Agreements

On February 23, 2012, Appellant Board of Trustees of the Village of Painted Post (hereinafter the "Village Board" or the "Village") adopted four resolutions. The resolutions

related to a proposed water sale agreement with Appellant SWEPI LP, a subsidiary of Shell Oil Co. operating gas wells in Tioga County, Pennsylvania, and to a lease agreement with Respondent Wellsboro & Corning Railroad (hereinafter "WCOR") (R. 111-119 and Appendices A and B). Two of the four resolutions documented the Village's determinations regarding the need or lack of need for environmental review of the water sale agreement and the lease (Appendix A and R. 111-116). The other two resolutions documented the Village's decisions to enter into the water sale agreement and the lease agreement (R. 117-119 and Appendix B). (In the course of preparing this brief, Petitioners discovered that two of the four resolutions were not provided in the administrative record, and consequently were omitted from the record on appeal. The two omitted resolutions are attached hereto as Appendices A and B.) Following the adoption of these resolutions, also on February 23, 2012, the Mayor of the Village signed a water sale agreement effective March 1, 2012 (R. 141-147), and signed a lease agreement between the Village's wholly-owned subsidiary, Appellant Painted Post Development LLC (hereinafter "PPD"), and WCOR effective March 1, 2012 (R. 120-140).

The water sale agreement provided for sales of up to one million gallons per day from the Village water system to SWEPI with an option to increase the amount sold by an additional 500,000 gallons per day for a total amount of 314,000,000 gallons during the term of the agreement (R. 141-142). The lease agreement was for a parcel of 11.8 acres that was part of a former Ingersoll Rand foundry site acquired by PPD from the Ingersoll-Rand Company in 2005 (R. 120-124 and 256-323). The wording of the lease acknowledged the connection between the lease and the water sale agreement. The second whereas clause of the lease stated: "WHEREAS, in connection with a certain bulk water sale contract, dated as of March 1, 2012, . . . the Village will sell a certain amount of surplus municipal water to SWEPI from its existing municipal water

supply system at a filling/metering station to be constructed by the Lessee on a portion of the Premises and SWEPI has arranged to have the Lessee withdraw, load and transport such water via rail line from the Premises." R.120. The lease incorporated the extraordinary restrictions upon the use of the site contained in the 2005 deed to PPD (R. 120-124, 257-260. Section 1.2 (h) of the lease provided that "The Lessor acknowledges the following notice provided under the 2005 Deed: Notice and warning is provided that polynuclear aromatic hydrocarbons ('PAHs'), which are semi-volatile organic compounds, are located in soils at and below ground surface of the Premises. Notice and warning is provided that such PAHs may pose a risk to humans in a scenario where future use of the Premises includes invasive activities at or below the surface of the Premises, and appropriate precautions should be taken." R. 123. Section 2.2 (a) of the lease provided: "the Lessor and Lessee hereby acknowledge and agree that pursuant to the 2005 Deed, no disturbance of excavation of surface or subsurface soils or other materials at or below the Leased Premises shall be conducted without prior notification thereof to or consent by the DEC." R. 123. Section 2.2 (c) of the lease provided that "the Lessee hereby acknowledges and agrees that pursuant to the 2005 Deed, it shall prohibit the use of ground water underlying the Premises (unless as otherwise permitted in accordance with the 2005 Deed." R. 124.

B. Painted Post's SEQRA Determinations

A resolution captioned "Resolution: Determination of Non-Significance — Village of Painted Post Proposed Contract for the Sale of Surplus Water," adopted by the Village Board on February 23, 2012, determined that the water sale to SWEPI was a Type II action exempt from review under SEQRA (Appendix A p. 1). The resolution cited 6NYCRR 617.5 (c) (25) as the provision pursuant to which the Type II exemption was claimed. *Id*. As a consequence of the Type II determination, the resolution stated, "The requirements of SEQRA . . . have been

satisfied." *Id*. p. 2. A second resolution captioned "Resolution: Negative Declaration — Village of Painted Post Lease by Painted Post Development, LLC" determined that entering into the lease was a Type I action under SEQRA and found that "the Lease will not result in any potentially significant adverse impact on the environment." (R. 111-116). The negative declaration was based upon review of a Full Environmental Assessment Form and other itemized documents (R. 113). Much of the information required to be provided in the Environmental Assessment Form reviewed and signed by the Village Board on February 23, 2012 (hereinafter the "EAF") (R. 148-168), was either not supplied, was insufficiently supplied, or was supplied incorrectly. For example, in its responses to the EAF, the Village answered "No" to the question "Is the project located over a primary, principal or sole source aquifer?" R. 150. In fact, the Corning aquifer, from which the water was proposed to be withdrawn and over which the water loading facility was to be located is designated as a primary water supply aquifer by the New York State Department of Health and the New York State Department of Environmental Conservation (hereinafter "DEC") (see *Primary and Principal Aquifer Determinations*, DEC Division of Water Technical and Operational Guidance Series 2.1.3., available at http://www.dec.ny.gov/docs/water_pdf/togs213.pdf [accessed Nov . 19, 2013]), and is one of only 18 primary aquifers in New York. *Id*. Primary aquifers are designated "to enhance regulatory protection in areas where groundwater resources are most productive and most vulnerable" *Id*. Similarly, the Village responded "No" to the question, "Will Proposed Action affect any water body designated as protected? (under Articles 15, 24, 25 of the Environmental Conservation Law, ECL)." R. 159. In fact, as a primary water supply aquifer, the Corning aquifer is a protected water body under the ECL ECL 15-0514 provides for the mapping of primary water supply aquifer areas and prohibits certain incompatible uses over primary groundwater recharge areas.

The Village responded "No" to the question, "Will Proposed Action affect surface or groundwater quality or quantity," (R. 160), when in fact the project would remove 1,000,000 gpd or more from the Corning aquifer (R. 142). The Village responded "Not Applicable" to the question whether the "Proposed Action requires water supply from wells with greater than 45 gallons per minute pumping capacity" (R. 160), when in fact the proposed demand for the project was 1000 gpm (R. 218). The Village also responded "Not Applicable" to the question whether the "Proposed Action would use water in excess of 20,000 gallons per day" (R. 160). In fact the project was projected to use up to 1,000,000 and possibly as much as 1,500,000 gallons per day. R. 141-142. The Village responded "Not Applicable" to the question of "maximum vehicular trips generated per hour" (R. 152), even though Appellants' consultants projected 42 rail cars leaving the facility and 42 rail cars arriving to take their place at the loading docks every 16 hours (R. 218). This would be a total of 84 rail cars accompanied by diesel engines moving down one of the main streets of the Village next to residential areas and a park every 16 hours. The Village responded "No" to the question, "Will the project produce operating noise exceeding local ambient noise levels?" R. 154. It made this response without doing any noise studies to justify its conclusion, and in disregard of the obvious facts alleged in the petition that using diesel engines to move heavily laden rail cars on and off a curved rail spur is bound to generate substantial noise above the ambient levels of a residential neighborhood (R. 54). Finally, in response to the question "What are the predominate land uses within ¼ mile of proposed action," the Village responded "Industrial," even though the full length of the water-loading facility is located just across Charles Street from a residential neighborhood and the project adjoins residential areas and a Village park on two other sides. Some of the residential houses to the north, east and south of the project are shown in the aerial photograph attached to the affidavit of Petitioner John Marvin., R. 434, and

the residential properties to the east and south of the project and the park area to the south of the project are shown in the engineering drawings provided as part of the administrative record (R. 192-210).

C. The SRBC Approvals Issued to SWEPI

Prior to the Village approving and signing the water sale agreement on February 23, 2012 (R. 141-147), Appellant SWEPI LP apparently filed a source application with the Susquehanna River Basin Commission (SRBC) to use of water taken from the Village water system for the consumptive use of gas drilling in Pennsylvania. It is to be assumed that an application was filed because SWEPI received an approval (by email) from the SRBC to use the Village as a source of water in an amount not to exceed 500,000 gpd on March 28, 2011 (R. 602). Petitioners cannot say when the application that led to this approval was filed because the application has not been provided to Petitioners, either as part of the administrative record produced by the Village on August 3, 2012 (R. 109-379), or in the additional SRBC materials provided to Petitioners on January 10, 2013 (R. 599-613).

SWEPI filed its second application to the SRBC to use an additional 500,000 gpd from the Village on March 7, 2012, after the water sale agreement had been signed (R. 603). SWEPI received an email approval from the SRBC for this additional amount on July 24, 2012 (R. 601). The March 28, 2011, and July 24, 2012, SRBC approvals issued by the SRBC to SWEPI each stated that the approval was "subject to any approval or authorization required by the Commission's (host) member state to utilize such source" (R. 601-602). Neither approval was provided to Petitioners until January 10, 2013 (R. 599-602). The only SRBC approval provided as part of the administrative record was an approval issued to Triana Energy on January 3, 2011 (R. 331).

The approvals issued by the SRBC to SWEPI to use water from the Village were contained in emails (R. 601-602). Unlike other types of water withdrawal approvals issued by the SRBC, these emailed approvals were not posted on the SRBC website, and were not accessible to the public (see discussion of this point in the Affidavit Ruth Young, the President of Petitioner PHE Inc., R. 443-446). It was not until copies of these approvals were provided to Petitioners on January 10, 2013, that Petitioners had an opportunity to review them.

The wording of SWEPI's March 7, 2012, application to the SRBC of two letters written by the Village Superintendent of Public Works to the SRBC, indicate that SWEPI may have misrepresented the status of the Village approval to the SRBC in its application that lead to the March 28, 2011 approval. SWEPI's March 7, 2012, application states that "Shell has amended its contract with Painted Post to allow purchase up to 1.0 MGD, which is reflected in the January 23, 2012 commitment letter (enclosed) [emphasis added]." R. 603. The reference to a commitment letter apparently refers to a letter from the Superintendent of the Village Public Works Department, Larry E. Smith, dated January 23, 2012 (R. 605). In his letter of January 23, 2012, Mr. Smith misrepresented that the Village had approved water sales to SWEPI, when, in fact, it was not until February 23, 2012, after the letter was written, that the Village made the decision to enter into the water sale agreement with SWEPI. Mr. Smith's letter stated:

> This letter serves to confirm hat the Village of Painted Post PWS ID# NY5002222 is willing to supply fresh water from its public water supply system, on a bulk basis for use by SWEPI LP gas well operations, in accordance with the terms described below. . . . .By signing this letter, the Village confirms its agreement with these terms and conditions, confirms that it is duly authorized to provide the above-described bulk water sales, and acknowledges to the best of its knowledge that it is in compliance with regulating agencies and will continue to operate under the terms and conditions of its approvals.

R. 605. A similar letter from Mr. Smith written on February 1, 2011 was also provided by Appellants on January 10, 2013 (R. 611). It appears that Mr. Smith's February 1, 2011, letter

was attached to an earlier application filed by SWEPI with the SRBC. Like Mr. Smith's January 23, 2012, letter, his February 1, 2011, letter stated:

> This letter serves to confirm hat the Village of Painted Post PWS ID# NY5002222 is willing to supply fresh water from its public water supply system, on a bulk basis for use by SWEPI LP gas well operations, in accordance with the terms described below. . . . .By signing this letter, the Village confirms its agreement with these terms and conditions, confirms that it is duly authorized to provide the above-described bulk water sales, and acknowledges to the best of its knowledge that it is in compliance with regulating agencies and will continue to operate under the terms and conditions of its approvals.

R. 611. The statements made in Mr. Smith's letters regarding the Village's agreement to sell water to SWEPI were not correct at the time they were made. If the Feb. 1, 2011, letter was submitted to the SRBC as part of a SWEPI application to the SRBC before February 23, 2012, it was a misrepresentation that the Village had made the decision to sell water to SWEPI when in fact that Village had not yet made that decision.

D. The Construction of the Rail Loading Facility

Throughout the summer of 2012 the water loading facility was constructed by Respondent WCOR. R. 432. In mid-August 2012, notwithstanding the near drought conditions in the area and SRBC restrictions on water withdrawals for gas drilling from the Chemung River, R. 445, the first water shipments from the water-loading facility began. R. 432. The shipments from the facility were conducted at night and created extremely noisy conditions for those who lived near the site. R. 426-429, 432. Petitioner John Marvin was one of the neighbors of the loading facility who was affected by the noise. R. 432. His affidavit stated, "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." *Id*. Petitioner Marvin lives within 400 feet of the

rail line and 500 feet from the edge of the water-loading facility. The distance from Mr. Marvin's home to the rail line and the site of the water-loading facility is demonstrated by the aerial photograph attached to Mr. Marvin's affidavit (R. 434). The scale in the bottom left-hand corner of the photograph allows the distances to be measured. *Id*.

E. The Procedural History

On June 25, 2012, Petitioners filed their petition challenging the adequacy of the environmental review conducted by the Village and seeking a preliminary injunction against the bulk water sales and continued construction of the water-loading facility.

Unfortunately, Petitioners' request for a preliminary injunction was not heard for eight months. Due to Appellants' request for an extension of time to file their answer, various scheduling difficulties, an unusual number of judicial recusals and an appointment to a higher court, the first hearing in the case was not conducted until March 1, 2013.

Appellants Village and SWEPI did not file their answer, the administrative record, and a motion to dismiss and/or for summary judgment until August 3, 2012 (R. 83-379). Respondent WCOR filed its answer on September 11, 2012, almost a month after the water-loading facility began operations (R. 380-403), and filed a motion to dismiss and/or for summary judgment on October 9, 2012 (R. 407).

As described above, it was not until January 10, 2013, in response to repeated requests from Petitioners, that Petitioners were finally provided with a copy of SWEPI's March 7, 2012, application to the SRBC to use water obtained from the Village and provided with copies of the approvals issued to SWEPI by the SRBC to use water from the Village on March 11, 2011 and July 24, 2012 (R. 599-619).

Petitioner's memorandum of law and supporting affidavits were filed January 28, 2013, and Respondents filed their memoranda of law and supporting affidavits three weeks later, WCOR on February 21, 2013 and SWEPI and the Village on February 22, 2013.

The case was heard by Justice Kenneth R. Fisher on March 1, 2013. Justice Fisher issued his decision on March 25, 2013. R. 6-40.After determining that Petitioner John Marvin had standing based on his "proximity and complaint of train noise newly introduced into his neighborhood" (R. 25), the decision held that:

> In sum, the Village Board acted arbitrarily and capriciously when it classified the Surplus Water Sale Agreement as a Type II action and failed to apply the criteria set out in the regulations to determine whether an EIS should issue, and when it improperly segmented the SEQRA review of the Lease from the Surplus Water Sale Agreement. . . . Accordingly, searching the record, summary judgment is granted to petitioners as follows: The Village resolutions designating the Surplus Water Agreement as a Type II action is annulled. Similarly, the Negative Declaration as to the Lease Agreement must be annulled, as in reaching the decision as to a negative declaration, the Village Board improperly segmented its review of the Lease from the Surplus Water Sale Agreement.
>
> Petitioners also seek the annulment of the Village approvals of the Surplus Water Sale agreement and the Lease. . . . [H]ere . . . the Village short circuited the SEQRA process as to the Surplus Water Sale Agreement by an improper Type II designation and failed to consider the Surplus Water Sale Agreement when issuing its negative determination as to the Lease due to improper segmentation. Accordingly, the Village Board resolutions approving the Surplus Water Sale Agreement and Lease agreement of February 23, 2012, are annulled.
>
> Petitioners are granted an injunction enjoining further water withdrawals pursuant to the Surplus Water Sale Agreement pending the Village respondent's compliance with SEQRA.

R. 36-38. In reaching its decision, the court noted that "it is not necessary to decide, and the court does not reach, the parties' arguments related to SRBC except to hold that compliance with SEQRA is not excused by the fact that the Susquehanna River Basin Commission must issue a permit for the subsequent water withdrawal. Neither the Susquehanna River Basin Compact

(ECL 21-1301) or its regulations (21 NYCRR §1806-8) provide for preemption of SEQRA." R. 39.

ARGUMENT

POINT I
PETITIONERS HAVE STANDING

The trial court correctly found that Petitioner John Marvin has standing based on his proximity to the rail line and water-loading facility and his complaint of train noise newly introduced into his neighborhood, which the court found, is different than the noise suffered by the public in general. Because Marvin has standing, the court correctly determined that it need not dismiss the other petitioners whom the court determined did not have standing.

A. Petitioner John Marvin Has Standing

As noted above, Petitioner John Marvin states in his affidavit that the noise from the water trains was so loud that it would wake him up and keep him up at night when the trains were running during late evening and early morning hours, and further states that he lives only one half block from the water loading facility, as shown on an aerial photograph provided as Exhibit A to his affidavit. R. 430, 434. As previously indicated, the exact distance from Petitioner Marvin's home may be calculated using the aerial photograph and the distance scale on the photograph. Measuring the distance on the photograph and applying the distance scale shows that Petitioner Marvin lives within 400 feet of the rail line and within 500 feet of the entrance to the water-loading facility. R. 434. The trial court overlooked this photograph and scale and calculated a distance of less than 1,000 feet using a map provided by Appellants.

While the "proximity with more standard" applied by the court correctly supports Marvin's standing, in fact, Appellants' argument that the proximity exception only applies in zoning cases is incorrect, and a claim of proximity alone in fact will create a presumption of

standing. Therefore, in the following non-zoning cases, the courts have adopted the proximity exception to support the standing of the petitioners involved. See, *e.g., Ziemba v City of Troy,* 37 AD3d 68 [3rd Dept 2006] (with respect to a proposed demolition of historic property the court determined, "Here, the individually named petitioners live within two blocks of the proposed demolition and can see the historic buildings from their homes. Inasmuch as we have recognized standing based upon the allegation that a petitioner resides in the immediate facility of a project that will affect the petitioners' scenic view, we agree with Supreme Court that the individual petitioners established standing." *Id*.); *Long Island Contractors Association v Town of Riverhead,* 17 AD3d 590 [2nd Dept 2005] (in a challenge to a portable asphalt manufacturing plant on a municipal solid waste landfill, the court found that an individual petitioner who owned property adjacent to the landfill had standing, but denied standing to two petitioners who lived one-half mile from the plant, since they had not demonstrated that their properties were in close proximity to the asphalt plant.); *Town of Coeymans v City of Albany,* 284 AD 2d 830 [3rd Dept. 2001] (in a challenge to the siting of a landfill, the court indicated that allegations that the individual petitioners lived in close proximity to the proposed project, coupled with their allegations that they were adversely effected by the project, were "sufficient to create a presumption that [these petitioners] will be adversely effected in a way different than the public at large," citing *Matter of McGrath v Town Bd. of N. Greenbush,* 254 A.D.2d 614 [3rd Dept 1998]; *Lordo v Board of Trustees of the Incorporated Village of Munsey Park,* 202 AD2d 506 [2nd Dept. 1994] (where the court found that the individual petitioners had standing where they claimed potential traffic congestion, coupled with their status as owners or residents of property near the site of the proposed project); and *East Fifties Neighborhood Coalition v Lloyd,* 13 Misc3d 1243 (A) 2006 WL3489044 [N.Y. Sup. 2006] (in a challenge to the New York City

Department of Environmental Protection to place a vertical access shaft to connect to a water tunnel, the court held that the Society of Plastics case held that "persons and business located near construction site involving government action may complain of in fact injuries which fall 'within the zone of interest' or concerns sought to be provided under SEQRA." *Id*.)

Fourth Department precedent, as well, supports application of the proximity presumption if the presumption is otherwise available. In *Matter of Ontario Heights Homeowners Assoc. v Town of Oswego Planning Board*, 77 AD3d 1465 [4th Dept 2010], a petitioner owning property 697 feet from the subject property line and 1,242 from the edge of the proposed building improvements, and who alleges injury from the decision to permit the developer to construct a private sewage treatment plant thereon instead of using the municipal sewage system, was found to have standing inferred from proximity.

Therefore, in the instant case where Petitioner John Marvin lives one half block from the site, which is in fact approximately 400 feet from the rail line to the loading facility and 500 feet from the entrance to the facility, where he can see the facility from his home, and where the noise of trains entering and leaving the facility was so loud that it woke him up at night which did not previously exist, would certainly fulfill his standing requirements. While the Appellants' claim that the noise from the train that kept Marvin up at night was no different than the noise heard by the rest of the entire village, this claim has no support in the record and is contrary to common sense. The Court below and this Court can certainly take judicial notice of the fact that the closer you are to a noise creator the louder it will be, the farther away you are the less likely you are to hear the noise, and therefore, the Appellants' claim that the entire village could hear the noise at the same level as Petitioner Marvin is unfounded.

Finally, the Court of Appeals has recently expanded the rule for standing for individuals and organizations, allowing standing in a much broader category of cases, and adopting a standing standard closer to that required in federal court as espoused in the landmark environmental standing case of *Sierra Club v Morton*, 405 US 727 [1972]. In the case of *Matter Of Save the Pine Bush, Inc. v Common Council of the City of Albany*, 13 NY3d 297 [2009], the court stated:

> "We hold that a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing under the State of Environmental Quality Review Act (SEQRA) to challenge governmental actions that threatens that resource. Applying that rule to this case, we hold that the individual petitioners who are members of petitioners Save the Pine Bush, Inc., and the organization itself, have standing to challenge an action alleged to threaten endangered species in the Pine Bush area."

Id. at 301.

Therefore, in the instant proceeding, the long standing interest of Petitioner organizations in the preservation of abundant and clean drinking water supplies, and in assuring a healthful environment for its members, and where the individual members have raised non-economic environmental issues and how adverse environmental consequences would effect their environmental wellbeing, and finally where at least one Petitioner lives only one half block from the project site, clearly the Petitioners in the instant case meet the requirements for standing in New York State.

B. Other Petitioners Need Not Be Dismissed

Because Marvin has standing, the trial court correctly determined that it need not dismiss other petitioners who do not have standing (*Matter of Humane Society v Empire State Dev. Corp.*, 53 AD3d 1013, 1017 n.2 [3d Dept. 2008](“inasmuch as one of the petitioners has

standing, it is not necessary to address respondents' challenges regarding the standing of the remaining petitioners").

POINT II
THE DOCTRINE OF LACHES IS NOT APPLICABLE

A. Petitioners Did Not Delay in Filing or Prosecuting their Case

The trial court correctly declined to consider Appellants' claims of laches and mootness. While Appellants acknowledge that Petitioners filed this proceeding within the four months statute of limitations, they claim that Petitioners knew, or should have known, that the water withdrawal had been approved by the SRBC in the spring of 2011, and waited nearly two years to bring this action. Of course, as described above, the approvals issued to SWEPI were by emails that were transferred between the Appellants and the SRBC, and never made public. Moreover, the second approval by the SRBC was not issued to SWEPI until July 24, 2012. Neither approval was provided to Petitioners until January 10, 2013. R. 601, 602, To make matters even more confusing, the initial approval issued by the SRBC to SWEPI on March 28, 2011, appears to have been made in reliance on a representation that the Village had agreed to the sale of water to SWEPI when in fact the Village did not agree to the sale until Feburary 23, 2012. Furthermore, the first SRBC approval was not for the 1.0 million gallons per day of water to be provided pursuant to the water sale agreement, but rather, for only 500,000 gallons of water per day. Therefore, for all of these reasons, knowledge of SRBC's approvals cannot be attributed to the Petitioners before the filing of the petition.

Of course, as much as Appellants seem to want to blow a smoke screen concerning the issues in this case, the Petitioners are in no way are challenging the approvals issued to SWEPI by the SRBC, but rather, the decisions by the Village of Painted Post to enter into the water sale

agreement and the lease agreement, as described above. The approvals issued by the SRBC are not an issue in this case.

Therefore, any delay that would be attributed to the Petitioners bringing this proceeding must start from the date in which the Village of Painted Post actions took place, and as previously acknowledged the action was brought within the four months statute of limitations from the date of those actions. As indicated by the Court in *Allison v New York City Landmarks Preservation Commission*, 35 Misc3d 500 [NY Cty 2011] "[t]he short, four months statute of limitations applicable to this proceeding, CPLR § 217(1), itself almost defies a laches defense. It ensures in the first instance against stale claims." *Id*. at 514.

Appellants next indicate that construction of the rail shipment facility had been started at the time that this action was brought, and that the Petitioners delayed in bringing this action while they knew construction was proceeding. Moreover, Appellants contend that construction was complete on the return date of Petitioners' Order to Show Cause, although the schedule attached to the affidavit of Robert Drew shows that construction was not scheduled for completion until July 30, 2012. R. 367-368. Whatever harms may have occurred to Respondent WCOR as a result of its construction of the water-loading facility after the petition was filed were not harms to Appellants and may not be raised by them in this appeal. Furthermore, as will be shown below, WCOR proceeded at its own risk in constructing the water loading facility.

Even if Respondent WCOR had chosen to appeal, the *Dreikausen* decision upon which Appellants rely is not applicable to the facts of this case because in this case Petitioners sought a preliminary injunction. *Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165 [2002]. In *Dreikausen*, the court held that the case was moot after determining that petitioners had failed to seek a preliminary injunction. The court stated, "the 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," *id*. at 172-73. In the present case, Petitioners proceeded by Order to Show Cause, and the Show Cause Order signed by Justice Latham ordered the Appellants and Respondent WCOR to show cause "why a judgment should not be made herein granting the relief sought in the Verified Petition and in particular grant a preliminary injunction enjoining all further work in furtherance of construction of the transloading facility in Painted Post, New York, which is referenced in the Petition." See Order to Show Cause, R. 41. Therefore, the chief factor relied upon by the court in *Dreikausen* is lacking in the instant case, since Petitioners had in fact sought preliminary injunctive relief. While Appellants now acknowledge that Petitioners sought a preliminary injunction when they filed their Order to Show Cause, they claim that the Petitioners did nothing to assure the status quo by seeking a temporary restraining order. Of course, Appellants overlook the fact that a temporary restraining order cannot be obtained against a municipal government in New York State, CPLR 6313 (a), and the gravamen of Petitioners' Complaint challenged the actions of the Village of Painted Post so that a temporary restraining order could not be obtained against them. Moreover, the problem with the status quo not being maintained had nothing to do with any action that the Petitioners did not take, but rather the continuing recusal and changes of judges that resulted in the request for a preliminary injunction to be delayed until March 2013, and it was not any fault of the Petitioners.

Moreover, in spite of the fact that the Order to Show Cause was signed on June 26, 2012, and orders to show cause are normally made returnable at the earliest date possible, Justice Latham made the Order to Show Cause returnable on July 23, 2012. R. 41. Exacerbating this

late return date, was the fact that Justice Latham then recused himself from the case, as did two other judges to whom the case was assigned, until the case was assigned to Justice Valentino, who then was elevated to the Appellate Division, before the case was assigned to Justice Renzi, and then finally reassigned to Justice Fisher. Certainly, the delay in the return date, as well as the various delays caused by the changes of the judges, cannot be attributed to Petitioners for laches or mootness purposes.

Also, it cannot be denied that Respondent WCOR continued with their construction with full knowledge that the Petitioners were seeking preliminary injunctive relief, and therefore, proceeded at their own risk. See *Allison v New York Landmarks Preservation Commission*, *supra* at 514, where the court stated: "Although that period[of limitations] is now close to expiration, Appellants weighed the risk against their business incentive not to wait for that period to expire, but to proceed immediately, at their own risk, to undertake costly work, despite the obvious opposition by members of the public, including Grunewald and petitioner organization's members, at LPC's hearings and meetings. Appellants continued the work despite petitioners' motion for a preliminary injunction and its partial and potential further success.(citations omitted)." *Id*. See also, *e.g., Lucas v The Board of Appeals of the Village of Mamaroneck*, 2007 WL 6681711 (trial order, NY Sup., Jonathan Lippman, J 2007).

Finally, even if the Petitioners had not sought preliminary injunctive relief, the court in *Dreikausen* indicated various exceptions militating against laches or mootness, which included "where novel issues of public interest such as environmental concerns warrant continuing review… where a challenged modification is readily undone without undo hardship….(citations omitted). " 98 NY2d at 173. The novel issues of municipal bulk water sales from potentially-stressed aquifers in New York, see discussion below, fall squarely within this exception.

POINT III
THE DOCTRINE OF MOOTNESS IS NOT APPLICABLE

The Environmental Harms Sought to be Prevented Have Not Yet Occurred

Petitioners' claims have not been mooted by WCOR's construction of the water loading facility. The potential adverse effects on both quantity and quality of water that will be drawn from the Corning aquifer sought to be avoided by Petitioners have not yet taken place (indeed, no water withdrawals have been made by the Appellants since mid-October 2012). The injunctive relief order by the trial court remains necessary to avoid such environmental damage in the future. The issue complained of in this case is not the construction of the water loading facility, but rather the withdrawal of huge amounts of water, a million gallons per day and perhaps more in the future, by the Appellant SWEPI. Therefore, there is no need to undo the construction of the loading facility that has already taken place, and, no need for WCOR or the Appellants to expend any further costs on deconstruction.

While Appellants argue throughout their brief that Petitioners' goal in this case was to stop hydrofracking in Pennsylvania, there is no support for this claim in the record, and it is not a claim they made to the trial court. The gravamen of this proceeding is to attempt to assure adequate and clean water supplies for the Petitioners, and the members of Petitioners' organizations, as well as for the other residents of the area obtaining their drinking water supplies from the Corning aquifer and aquifers connected to the Corning aquifer.

POINT V
COMPLIANCE WITH SEQRA IS NOT EXCUSED BY THE FACT THAT THE SRBC MUST ISSUE A PERMIT FOR THE USE OF THE WATER WITHDRAWN

The trial court held correctly that the Village of Painted Post must comply with SEQRA before entering into a bulk water sale agreement, and that compliance with SEQRA is not excused

by the fact that the Susquehanna River Basin Commission (hereinafter the "SRBC") must issue a permit for the subsequent water withdrawals. Furthermore, at the oral hearing of the case, Appellants' counsel stated that Appellants were not arguing pre-emption and Appellants legal papers below did not argue pre-emption. As Justice Fisher stated in his Decision and Order, "It is observed that, at oral argument of this matter, counsel for the Village emphatically stated that the Village did not contend that the SRBC compact or its regulations preempted SEQRA." As this Court is aware, and as has been repeatedly held, an argument cannot be raised for the first time on appeal, if the issue or argument was not raised in the trial court. *Brodsky v New York City Campaign Finance Board*, 107 AD3d 544 [1st Dept. 2013]; *Perez v City of New York*, 104 AD3d 661 [2nd Dept 2013]; *Franza v Olin*, 73 A.D.3d 44 (4th Dept. 2010); *Morris v Schepp*, 59 AD3d 933 [4th Dept 2009]; *Soho Plaza Corp., Inc., v Nationwide Mutual Insurance Company*, 309 AD2d 504 [1st Dept 2003]; *Bruno v Price Enterprises, Inc*., 299 AD2d 846 [4th Dept 2002].

Even if this Court were to consider Respondents' preemption argument, Justice Fisher correctly determined that, "neither the Susquehanna River Basin Compact (ECL 21-1301) or its regulations (21 NYCRR §1806-8) provide for preemption of SEQRA." R. 39.

Moreover, the actual approvals issued by the SRBC to SWEPI explicitly state that the SRBC approvals are "subject to any approval or authorization required by the Commission's (host) member state to utilize such source." (R. 601-602).

In the present case, in addition to the SRBC, a quasi-federal agency, the DEC, the State and County Health Departments and the Village are required to grant approvals of aspects of the Village water sale project. See the approvals listed in the EAF, R. 155. The SEQRA regulations make clear that in such a circumstance the Village is responsible for compliance with SEQRA in

connection with the Village's approval process. Section 617.15 of the regulations addresses actions involving a federal agency. That section provides, inter alia:

> (b) Where a finding of no significant impact (FNSI) or other written threshold determination that the action will not require a federal impact statement has been prepared under the National Environmental Policy Act of 1969, the determination will not automatically constitute compliance with SEQR. In such cases, state and local agencies remain responsible for compliance with SEQR.
>
> (c) In the case of an action involving a federal agency for which either a federal FNSI or a federal draft and final EIS has been prepared, except where otherwise required by law, a final decision by a federal agency will not be controlling on any state or local agency decision on the action, but may be considered by the agency [emphasis added].

6 NYCRR 617.15.

The requirements of section 617.15 are described in the DEC's *SEQRA Handbook* (3d ed. 2010, available at http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf [accessed Nov. 19, 2013]), which has been prepared by the DEC to explain the SEQRA regulations. The *Handbook* states: "In situations where federal as well as state or local governments are involved in a project, and the federal agency is reviewing the project under NEPA, the state and local agencies must still satisfy SEQR[A]. . . . A decision by a federal agency that a project or program is categorically excluded from NEPA review does not eliminate the responsibility of state and local agencies to appropriately classify and, if necessary, review the project or program under SEQR[A]. Where a finding of no significant impact (FNSI) or other written threshold determination that the action will not require a federal impact statement has been prepared under the National Environmental Policy Act of 1969, the determination will not automatically constitute compliance with SEQR[A]. In such cases, state and local agencies remain responsible for compliance with SEQR[A]." *Id*. at 188-189.

Appellants present their claim of pre-emption as if the trial court's decision required that the SRBC conduct a SEQRA review. That was not the court's decision. The water withdrawals at issue in this case require the approval of multiple governmental bodies and the decision of the court below applied only to the approval required by the Village of Painted Post. The trial court made no determination regarding the SRBC approval, except to indicate that it did not preempt SEQRA compliance. For this reason, the Pennsylvania and *Mitskovski* cases cited by Appellants are not relevant to the facts of the present case. *State College Borough Water Auth. v Halfmoon Township*, 659 A2d 640 [Pa Cmwlth 1995], *Levin v Benner Township*, 669 A2d 1 063 [Pa Cmwlth 1995], and *Mitskovski v Buffalo & Fort Erie Public Bridge Authority*, 689 F. Supp. 2d 483 [WD NY 2010], *aff'd* 415 Fed Appx 264 [2d Cir 2011]. The issue in the Pennsylvania cases was whether additional conditions could be attached to an SRBC approval by a local water authority. The Pennsylvania courts held that it would interfere with the SRBC approval process to give a local agency the right to add conditions to an SRBC approval. It should also be pointed out that Pennsylvania has no comparable environmental review statute as SEQRA, and no law that requires the drafting of an EIS. The present case presents wholly different factual circumstance. Furthermore, no attempt has been made by any governmental body in the present case to add conditions to an SRBC approval. No attempt has been made by any governmental body in the present case to add conditions to an SRBC approval.

Similarly, the *Mitskovski* decision cited by Appellants involved the application of SEQRA to international compact agency which is entirely different from an interstate compact entity such as the SRBC. Because the laws of two countries, the United States and Canada, control the Public Bridge Authority, neither the legislation nor regulations which created the agency required state law compliance. Therefore, this case is not applicable to the issue of whether the decision of the

Village of Painted Post to enter into a water sale agreement is subject to SEQRA. The issue in the *Mitskovski* case was whether SEQRA applied to decisions of the Buffalo and Fort Erie Public Bridge Authority with respect to a Border Infrastructure Improvement Project ("BIIP"). Although the court found that the Bridge Authority was a state agency, it also determined that it was "the product of a compact between New York and Canada, approved by Congress," and termed it a "compact entity." The court said, "Neither state may unilaterally regulate the internal operations of a compact entity." Consequently, the court held that "the undisputed facts demonstrate that the BIIP involved internal infrastructure improvements and relocation of existing infrastructure, [and] neither New York nor the City of Buffalo can impose their environmental regulations upon the Public Bridge Authority." *Id*.

A. The Susquehanna River Basin Compact Does Not Pre-empt State Environmental Review

The SRBC Compact, an interstate compact between New York, Pennsylvania, Maryland and the federal government, does not contain any provisions that would pre-empt the application of New York's SEQRA law to the decision by the Village of Painted Post to enter into a water sale agreement.

Article 12 of the Compact addresses the rights of state and local agencies to plan, design, construct, operate, or maintain projects in the basin in. ECL 21-1301 Art 12. Section 12.2 of that article provides that "Each state and local agency otherwise authorized by law to plan, design, construct, operate, or maintain any project or facility in or for the basin shall continue to have, exercise, and discharge such authority, except as specifically provided by this section [emphasis added]," (*Id*.) Section 12.2 requires that state and local agencies consult with the SRBC in the planning of projects in the Basin and that no expenditures be made by a state and local agency on a project in the Basin unless the project is in the SRBC's comprehensive plan. Neither of these

requirements pre-empts the conduct of an environmental review by a village in New York of its decision to enter into a water sale agreement.

Furthermore, the SRBC specifically and repeatedly has disclaimed a role in regulating the environmental impacts of projects in the Basin. The SRBC states on its website, "While our regulations are intended to be protective of aquatic resources, SRBC does not regulate and has never regulated water quality for any projects, whether for natural gas development or other purposes. The Susquehanna River Basin Compact — that established SRBC 40 years ago — directs SRBC to avoid regulatory duplication, particularly in the area of water quality. In the Susquehanna basin, basin, water quality regulations fall in the domain of our sovereign member states, New York, Pennsylvania and Maryland, and the federal government. Since the states had already assumed responsibility for regulating water quality, SRBC consciously chose not to regulate water quality to avoid what would be an obvious duplication." "Overview or What SRBC Does and Does Not Regulate, Question #2: What is SRBC's role in regulating water quality?" in *Frequently Asked Questions (FAQs), SRBC's Role in Regulating Natural Gas Development*, Susquehanna River Basin Commission, available at http://www.srbc.net/programs/natural_gas_development_faq.htm [accessed Nov. 19, 2013].

The SRBC's position on environmental reviews is acknowledged in a 2011 letter to the SRBC by the Maryland Attorney General, "We understand that the SRBC is an interstate body, the regulations of which overlay the regulations of its member states. And we further understand . . . that the SRBC believes that it must defer to its member states' regulation of the environmental impacts associated with the projects that come to the SRBC for water." Letter from Douglas F. Gansler, Attorney General of the State of Maryland, to Richard A. Cairo, Executive Director, SRBC, August 23, 2011, available at

http://www.oag.state.md.us/Environment/SRBC_GanslerOnFracking.pdf [accessed Nov. 19, 2013]. A recent press release issued by the SRBC affirms this position, "Despite some calls for us to make [the SRBC's study of the cumulative impact of consumptive water uses and water availability in the basin] an expansive environmental assessment, we are being responsible water managers by focusing in our areas of responsibility and scientific and technical expertise" [emphasis added]. SRBC Staying in its Lane, Studying Water Quantity, SRBC News Release, May 8, 2013, available at http://www.srbc.net/newsroom/NewsRelease.aspx?NewsReleaseID=106 [accessed Nov. 19, 2013].

Appellants cite the recent United State Supreme Court case of *Tarrant Regional Water District v Herrmann*, 569 US __, 133 S Ct 2120 [2013], for the proposition that interstate compacts take precedence over state law. As the Court in *Tarrant* noted in a footnote "a congressionally approved compact, as federal law, preempts state law that conflicts with the compact under the Supremacy Clause." In the present case, there is no conflict between the provisions of the Susquehanna River Basin Compact and SEQRA, New York's environmental quality review law.

The present case thus presents a similar factual situation to the *Tarrant* case. *Tarrant* addressed the claim of the Tarrant Regional Water District in Texas that it was entitled under the Red River Basin Compact to take water located in Oklahoma in disregard of prohibitions contained in Oklahoma water statutes. The Court stated that "[t]he background notion that a State does not easily cede its sovereignty has informed our interpretation of interstate compacts," and said that "when confronted with silence in compacts touching on the States' authority to control their waters, we have concluded that '[i]f any inference at all is to be drawn from [such]

silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens.' "On the basis of this principle, the Court held that the Red River Basin Compact did not pre-empt the Oklahoma water statutes, affirming 9-0 the judgment of the 10th Circuit Court of Appeals. *Id*.

The *Erie Boulevard* case cited by Appellants involved interpretation of the Federal Power Act (the "FPA") (*Erie Boulevard Hydropower v Stuyvesant Falls Hydro Corporation*, 30 AD3d 641 [3d Dept 2006]). In that case, the court noted that under the FPA, FERC's jurisdiction with respect to the regulation and licensing of hydroelectric facilities affecting the navigable waters of the United States "pre-empts all [s]tate licensing and permit functions," and held that SEQRA review of a FERC-governed license application was not required. Unlike the FPA, the Susquehanna River Basin Compact does not pre-empt state licensing and permit functions, as discussed above.

B. The SRBC Regulations Do Not Pre-empt State Environmental Review

The SRBC regulations, like the SRBC Compact, explicitly recognize the continuing authority of the member states. The SRBC project review regulations applicable to water withdrawals from public water supplies expressly provide that any sources of water approved pursuant to the regulations "shall be further subject to any approval or authorization required by the member jurisdiction on existing state permits and local approvals." 18 CFR 806.22(f) (9). Indeed, under the SRBC regulations, a user seeking an approval to use water purchased from a municipality must demonstrate in the application for approval that the municipality has approved the water sale prior to seeking the approval.

Under SRBC's project review regulations, Appellant SWEPI, a subsidiary of Shell Oil Co., was required to obtain an approval from SRBC for its planned use of water purchased from

the Village of Painted Post. There is no basis for Appellants' claim that the process pursuant to which the SRBC approved SWEPI's use of water purchased from the Village of Painted Post pre-empted the need for the Village to conduct a SEQRA review prior to entering into a water sale agreement with SWEPI. The Approval by Rule procedures for "consumptive use related to unconventional natural gas and other hydrocarbon development" are set forth in 18 CFR 806.22(f). Section 806.22 (f) (9) provides that:

> (9) The Executive Director may grant, deny, suspend, rescind, modify or condition an approval to operate under this approval by rule, or renew an existing approval by rule granted hereunder, and will notify the project sponsor of such determination, including the sources and quantity of consumptive use approved. The issuance of any approval hereunder shall not be construed to waive or exempt the project sponsor from obtaining Commission approval for any water withdrawals or diversions subject to review pursuant to § 806.4(a). Any sources of water approved pursuant to this section shall be further subject to any approval or authorization required by the member jurisdiction [emphasis added].

Section 806.22 (f) (9) makes it clear that, far from claiming exclusive jurisdiction to review and approve withdrawals from public water supplies, the SRBC regulations expressly provide that "Any sources of water approved pursuant to this section shall be further subject to any approval or authorization required by the member jurisdiction."

C. The Approvals Issued to SWEPI Explicitly Recognize the Authority of New York State to Require Separate Approvals

Considering the wording of Section 806.22 (f) (9), it is not surprising that the approvals issued by the SRBC to SWEPI to utilize water obtained from the Village of Painted Post on March 28, 2011 and July 24, 2012, explicitly state that the approval granted is "subject to any approval or authorization required by the Commission's (host) member state to utilize such source" (R. 601-602). The second paragraph of each approval states in full, "As a result of this approval, and pursuant to 18 CFR Section 806.22(f)(11), the project sponsor may utilize this

source for natural gas development at any drilling pad site for which it has an effective Approval by Rule issued by the Commission, subject to any approval or authorization required by the Commission's (host) member state to utilize such source" [emphasis added]. *Id*.

D. SWEPI's Applications to the SRBC Misrepresented the Village Approvals

As described above, the approvals issued to SWEPI by the SRBC appear to have been issued in reliance on misrepresentations regarding the status of the Village approvals made in SWEPI's applications. Had SWEPI waited to apply to the SRBC until the Village had actually approved the water sale, and not submitted misrepresentations, no SRBC approval would have been issued before the Village conducted its environmental review of the water sale project and made the decision to enter into the water sale agreement on February 23, 2012.

POINT V
THE SRBC IS NOT A NECESSARY PARTY

Petitioners have not challenged the SRBC's grant of an approval to SWEPI, nor do they challenge the regulations or procedures under which the approval was granted. As described above, an approval issued by SRBC does not anyway preempt or otherwise affect the requirements that the Village comply with SEQRA. Therefore, since the actions of SRBC are not in any way affected by this lawsuit, they are not necessary parties, and indeed, it would be inappropriate to make them a party to this lawsuit. The approval given to SWEPI by the SRBC is not at issue in this case and there is no claim that environmental review was to be done by the SRBC. As noted above, the water withdrawals at issue in this case require the approval of multiple governmental bodies. Petitioners' claims and the decision of the court below applied only to the approvals given by the Village of Painted Post. Petitioners made no claims and the trial court made no determination regarding the SRBC approvals. Consequently, the SRBC is not a necessary party.

POINT VI.
SEQRA WAS VIOLATED

One of the major issues in this case is whether or not the Village of Painted Post has fulfilled its statutory duties as required by SEQRA and the regulations promulgated pursuant thereto. As previously indicated the Village of Painted Post has taken two actions that they have treated as separate and distinct from each other. The first action taken by the Respondent Painted Post was an agreement by the Village Board to enter into a bulk water sales agreement with Respondent SWEPI, which provided for the sale and withdrawal of up to 1,500,000 gallons of water per day from the Painted Post public water supply. The second action taken by the Village was to approve the lease entered into by Painted Post Development LLC (a development subsidiary of the Village) to the Wellsboro and Corning Railroad for the construction of a rail/loading facility so that the water withdrawn by SWEPI could then be deposited on the Wellsboro and Corning Railroad trains and shipped by rail to Wellsboro, Pennsylvania, where the water would then be transshipped to various wellheads to be used for natural gas hydrofracking. The Village has taken the position that SEQRA does not legally apply to these activities, but nevertheless, voluntarily engaged in a SEQRA environmental review, and determined that there would be no adverse environmental consequences from these two actions, and therefore, determined that there was no necessity to draft an environmental impact statement or to engage in any further environmental review prior to taking the two actions indicated.

As will be established below, the trial court correctly held that the determinations made by the Village with respect to the water sale agreement and the lease of the land for the water-loading facility violated SEQRA in two respects: 1. The Village's Type II designation of the Surplus Water Sale Agreement ("Agreement") was arbitrary and capricious, and 2. The Village improperly segmented its review of the water sale agreement with that of the lease for the water-

loading facility and failed to consider the environmental impact of the water sale agreement with that of the lease.

A. The Statutory Scheme of SEQRA

In 1976, New York State enacted the New York State Environmental Quality Review Act. While SEQRA was patterned after its Federal counterpart, the National Environmental Policy Act (NEPA), 42 USCA 4332 *et seq*., the New York State Legislature recognized that NEPA was merely a procedural statute that would assure that environmental issues were considered by a decision maker prior to taking any action. However, as opposed to SEQRA, NEPA was not a substantive act which would require any particular decision from the decision maker. However, New York wished to provide greater protection to the environment when it passed SEQRA, and therefore, made significant changes from NEPA, including the requirement that environmental impact statements must be prepared in a much broader category of actions, and the requirement of substantive duties on the part of the decision maker to assure that environmental consequences that are identified will be avoided or mitigated.

As pointed out in *City of Buffalo v New York State Department of Environmental Conservation*, 184 Misc2d 243 [Erie Cty 2000]:

> "The substantive mandate of SEQRA is much broader than that of the National Environmental Policy Act (NEPA). 42 USCA Section 4332 requires federal agencies to prepare an EIS [Environmental Impact Statement] for 'any major federal action significantly affecting the quality of the human environment.' This should be contrasted with Section 8-0109 of SEQRA which is more expansive it its terms. Subdivision 2 of this Section requires an EIS for 'any action which is proposed or approved which may have a significant affect on the environment.' Only a 'low threshold' is required to trigger SEQRA review." Onondaga Landfill Systems, Inc. v Flack, 81 A.D.2d 1022, 440 N.Y.S.2d 788 (4th Dept., 1981)" [emphasis added].

Id. The Legislature declared that the purpose of SEQRA was to:

> "Declare a State policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the State."

ECL 8-0101.

The heart of SEQRA lies in its provision regarding Environmental Impact Statements. As previously indicated, the law provides that whenever an action may have a significant impact on the environment, an EIS shall be prepared. ECL 8-0109 (2). This document is to contain all of the information necessary to assure that the decision-making body, called the "lead agency," can ultimately determine to go forward or not with any project in a manner that will create the least negative impact to the environment. The "lead agency," that agency having principle responsibility for carrying out or approving the project or activity, in this case the Painted Post Village Board, is charged with the responsibility of determining whether the project under consideration may have significant adverse environmental effects, and if so, to prepare the EIS. The EIS is also made available to the public so that they are apprised of the adverse environmental consequences that might ensue and allow them to comment and propose mitigating measures.

The "lead agency" is also the entity that is charged with carrying out the procedures mandated by SEQRA. Therefore, the lead agency must "act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid environmental effects…." (ECL 8-0109 [1]).

It was the Appellate Division, Fourth Department that decided the early seminal and landmark decisions interpreting SEQRA. Therefore, since the early landmark cases of *Town of Henrietta v Department of Environmental Conservation*, 76 AD2d 215 [4th Dept 1980], and

H.O.M.E.S. v New York State Urban Development Corporation, 69 AD2d 222 [4th Dept 1979], the courts of New York State have had numerous occasions to comment upon the requirements and responsibilities of agencies pursuant to SEQRA. The courts early on in these cases recognized that because of the importance placed upon SEQRA responsibilities by the Legislature, substantial compliance with SEQRA will not suffice, and that the statute must be strictly and literally construed, along with the procedural requirements indicated in the regulations promulgated pursuant to statute, 6 NYCRR Part 617. *Matter of Rye Town/King Civic Association v Town of Rye*, 82 AD2d 474 [2nd Dept 1981], *app. dism.* 56 N.Y.S.2d 985 [1982]; *Schenectady Chemicals v Flack*, 83 AD2d 460 [3rd Dept 1991].

In the oft-quoted citation from *Schenectady Chemicals*, the court stated:

> By enacting SEQRA, the Legislature created a procedural framework which was specifically designed to protect the environment by requiring parties to identify possible environmental changes 'before they have reached ecological points of no return.' At the core of this framework is the EIS, which acts as an environmental 'alarm bell.' It is our view that the substance of SEQRA cannot be achieved without its procedure, and that <u>any attempt to deviate from its provisions will undermine the law's express purposes. Accordingly, we hold that an agency must comply with both the letter and spirit of SEQRA before it will be found that it has discharged its responsibility thereunder</u> [citations omitted] [emphasis added].

83 AD2d at 478. The courts in New York State continue to adhere to this strict and literal compliance standard as necessary to fulfill the goals of SEQRA, and not just because the Legislature mandated that the act be carried out "to the fullest extent" practicable, ECL 8-0103(6), but also in recognition that to assure that both the spirit and letter of SEQRA are followed, courts cannot allow a lead agency the rubric of "substantial compliance" to escape the environmental goals of the Act. See, *e.g., Stony Brook Village v Reilly*, 294 AD2d 481 (2nd Dept 2002); *Matter of Rye Town/King Civic Association v Town of Rye*, *supra*.

Moreover, if a lead agency is allowed to rectify a SEQRA procedural violation without voiding the actions taken after the violation occurred and requiring it to be done properly, the lead agency would treat the renewed work as a mere post-hoc rationalization of what had gone on before. The Court of Appeals decision in *Tri-County Taxpayers Association v Town of Queensbury*, 55 NY2d 41 [1982] is instructive. In that case, the Appellate Division, with two judges dissenting on the issue of remedy, determined that nullifying a vote of the electorate that took place prior to SEQRA compliance "would serve no useful purpose to undo what has already been accomplished . . . ." (79 AD2d 337 [3rd Dept 1981] at 342). However, the Court of Appeals adopted the position of the dissenters, holding that in order to properly insure that the goals of SEQRA would be met, the vote had to be nullified. The Court stated:

> "It is accurate to say, of course, that by actions of rescission later adopted the Town Board could have reversed the action authorizing the establishment of the sewer district. As a practical matter, for several reasons, however, the dynamics and freedom of decision-making with respect to a proposal to rescind a prior action are significantly more constrained than when the action is first under consideration for adoption."

55 NY2d at 64. Therefore, where a procedural violation of SEQRA is held to exist, in order to assure that the goals of SEQRA are met, the decision must be annulled.

While the procedural responsibilities of SEQRA require a strict standard of compliance, the lead agency is allowed to fulfill substantive duties in making its final decision and choosing from appropriate alternatives is within their discretion. However, the broader discretion that resides with an agency concerning its substantive duties does not insulate the agency from judicial review. Indeed, in the case of *Akpan v Koch*, 75 NY2d 561 [1990], the court elucidated the standard of review concerning substantive matters:

> Nevertheless, an agency, acting as a rationale decision-maker, must have conducted an investigation and reasonably exercised its discretion so as to make a reasoned elaboration as to the affect of a proposed action on a particular environmental concern. Thus, while a court is not free to

> substitute its judgment for that of the agency on substantive matters, the court must insure that, in light of the circumstances of a particular case, the agency has given due consideration to pertinent environmental factors (citations omitted).

555 NY2d at 21.

The standard that is universally applied in determining whether or not a lead agency has fulfilled its SEQRA requirements was first espoused in the *H.O.M.E.S.* case, *supra*, and eventually memorialized in the SEQRA regulations at 6 NYCRR 617.7(b), commonly called the "hard look standard". That standard requires that the agency must:

(1) Identify all areas of relevant environmental concern; and

(2) Take a "hard look" at the environmental issues identified; and

(3) Present a reasoned elaboration for why these identified environmental impacts will not adversely affect the environment, in the event that it is determined that an Environmental Impact Statement need not be drafted.

In determining whether or not an Environmental Impact Statement needs to be prepared, the SEQRA regulations provide a detailed road map concerning the obligations of the lead agency. Therefore, after a lead agency is designated, and after an Environmental Assessment Form is prepared, the lead agency must first determine whether or not the proposed action falls within the categories of either "Type I", "Unlisted", or "Type II". Type II actions are those actions that are identified in Section 617.5 of the regulations, which have already been determined not to have an adverse effect on the environment, and therefore no further SEQRA review is required. They include minor actions such as painting yellow lines on a highway or maintaining a public building. By contrast, Type I actions are those actions that because of their size, scope or type, are determined that more likely than not they may have adverse environmental consequences, and therefore require the drafting of an Environmental Impact Statement.

(Unlisted actions are those actions that are neither Type I or Type II.) In the instant case, the Village determined that the lease agreement with the Wellsboro and Corning Railroad was preempted from any state or local regulation, including SEQRA, because of various federal laws and determined that the water withdrawal and sales agreement to SWEPI was exempt as a Type II action, and therefore, no environmental review was necessary.

B. The Village's Type II designation was Arbitrary and Capricious

The decision of the Village to categorize the bulk water sale to SWEPI as a Type II action under SEQRA was arbitrary and capricious. There was no reasonable basis for its determination that a sale of water to a water user outside the municipal water district was a Type II action under the SEQRA regulations and thus did not require an environmental review. Under the SEQRA regulations projects using more than 500,000 gallons of water per day near a park are Type I actions. Because the water-loading facility and the Village water system infrastructure are near Hodgman Park, the project is properly classified as a Type I action. Even if it were to be determined that the project is not located near Hodgman Park, the lower court determined that projects using water in amounts less than 2,000,000 gallons per day are Unlisted actions and require an environmental review under SEQRA.

1. The Water Sale Project Constitutes an Action under SEQRA

In their brief on appeal, Appellants claim that the water withdrawals at issue in this case do not constitute not an action under SEQRA because the withdrawals were planned to come from existing wells within previously permitted limits. Appellants' Brief at p. 46. The claim that the sale and withdrawal of water by the Village of Painted Post is not an action so that SEQRA does not apply to it is both inconsistent with the Village's determination that the water sale is a Type II action, and further, and perhaps more importantly, again this claim was never made to the

trial court, and therefore, cannot be made for the first time on this appeal. See discussion, *supra* at p. 21. However, even if such a claim where to be considered by this Court, such a claim overlooks the numerous ways in which the water sale project constitutes an action under SEQRA. Section 617.2(b) of the SEQRA regulations defines "actions" to include, inter alia:

> (1) 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, that:
>
> (i) are directly undertaken by an agency; or
>
> (ii) involve funding by an agency; or
>
> (iii) require one or more new or modified approvals from an agency or agencies;

While it is true that the bulk water sale did not require modification of the existing water withdrawal permits issued by the DEC, other new or modified approvals were required. The bulk water sale to a corporation outside the Village water district required a new approval from the Village under Village Law § 11-1120, the lease of land for the location of the water-loading facility required the approval of the Village, and the disturbance of hazardous the waste site at the leased location for the construction of the water-loading facility required the approval of the DEC pursuant to the restrictions contained in the deed of the site to the Village. The EAF states that approvals were required from the Village Planning Board for the lease agreement, from the County Health Department to extend the water mains, from the State Health Department for "back-flow prevention," and from the DEC for "SWPPP" (R. 155). In addition, the withdrawal of 1,000,000 gallons of water per day or more from the Corning Aquifer by the Village water system as contemplated by the water sale agreement is an activity that would change the use of the natural resource of the Corning aquifer. The Corning aquifer is one of 18 primary aquifers in New York and the only aquifer in New York to be designated a potentially-stressed area "where

the utilization of groundwater resources is potentially approaching or has exceeded the sustainable limit of the resources" by the SRBC (*Groundwater Management Plan for the Susquehanna River Basin*, SRBC Publication No. 236, June 2005, Executive Summary, p. v, available at http://www.srbc.net/programs/docs/GW_Mngt_Plan_June2005/GWMP%20Final.pdf [accessed Nov. 19, 2013]). Primary aquifers have been designated by the NYS Department of Health to "enhance regulatory protection in areas where groundwater resources are most productive and most vulnerable." See the DEC's technicial guidance document on primary aquifers, TOGS 2.1.3 cited above, and the DEC website, Primary & Principal Aquifers, http://www.dec.ny.gov/lands/36119.html. Finally, the water sale project required the construction of a water-loading facility. For each of these reasons, the project constitutes an action by the Village within the clear wording of Section 617.2 (b).

Appellants characterize the water sale to SWEPI as equivalent to providing increased water usage to a user in the Village. However, providing increased usage to a user within the Village does not require a separate approval by the Village, does not require a lease of land from the Village and does not require an approval of the DEC to disturb a hazardous waste location. Therefore the bulk water sale to SWEPI is not the equivalent of increased water usage by a user in the Village.

2. A Water Sale of Less than 2,000,000 gpd is an Unlisted Action

Under the SEQRA regulations, an action is either Type I, Unlisted or Type II. A Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS. "For all individual actions which are Type I or Unlisted, the determination of significance must be made by comparing the impacts which may be reasonably expected to result from the proposed action with the criteria listed in section 617.7(c)." 6 NYCRR 617.4 (a) (1). Type II actions are those actions that "have been determined not to have a

significant impact on the environment." 6 NYCRR 617.5 (a). The Type I and Type II actions listed in the regulations are applicable to all agencies. An Unlisted action is one that is "not identified as Type I or Type II action . . . ." 6 NYCRR 617.2 (ak). "Unlisted actions range from very minor zoning variances to complex construction activities falling just below the thresholds for Type I actions . . . ." *SEQR Handbook*, p. 27 (3d ed. 2010).

Because a water use of less than 2,000,000 gallons of water per day is not listed in the regulations as either a Type I action or a Type II action, it is an Unlisted action. This is manifest in the definition of Unlisted action contained in 6 NYCRR 617.2 (ak), "Unlisted action means all actions not identified as a Type I or Type II action."

In reaching its determination that a water use of less than 2,000,000 gpd is an Unlisted action, the trial court cited three cases *Cross Westchester Dev. Corp. v Town Bd. of Town of Greenburgh*, 141 AD2d 796, 797 [1988], *City Council of Watervliet v Town Bd. of Colonie*, 3 N.Y.3d 508, 517-518 (2004), and *Wertheim v Albertson Water Dist*., 207 A.D.2d 896 [2d Dept 1994]. Each of these cases supports the court's determination. The two court of appeals cases, the *Cross Westchester* case and the *Watervliet* case, involved the question of whether an annexation of real property was an action under SEQRA. Each case held that the annexation of less than 100 acres is an Unlisted action. Prior to these decisions, in the case of *Matter of Connell v Town Bd. of Wilmington* (113 AD2d 359 [1985], *aff'd* 67 NY2d 896 [1986]), the Court of Appeals had affirmed a decision holding that an annexation of land was not an action under SEQRA. In 1987, apparently in response to the *Connell* case, the DEC amended its regulations to clarify that the annexation of 100 or more contiguous acres constitutes a Type I action (see 6 NYCRR 617.4 [b]). The *Cross-Westchester* decision recognized that "[i]n doing so, DEC implicitly determined that an annexation of less than 100 acres is an 'unlisted action,'" and gave deference to that

determination in reaching its holding effectively over-ruling the *Connell* case. The *Watervliet* case followed the holding of the *Cross-Westchester* case.

The threshold at issue in this case, the water usage threshold, was addressed in the Second Department's decision in *Wertheim*. In *Wertheim*, the issue was whether a water usage of less than 2,000,000 gpd is properly classified as a Type I action or as an Unlisted action. (The SEQRA regulations provide in 6 NYCRR §617.4(b)(6)(ii) that "a project or action that would use ground or surface water in excess of 2,000,000 gallons per day" is a Type I action.) The trial court had determined that it was a Type I action because the usage (a water filtration system) was located "wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area, or designated open space." The Second Department concluded that, because that the amount of water used in the project did not meet the 25% threshold contained in 6 NYCRR 617.12(b)(10), that the project did not qualify as a Type I action, and should have been categorized as an Unlisted action.

In the present case, the court below determined that the withdrawal and sale of nearly one quarter of the Village's municipal public water supply was <u>at a minimum</u> an Unlisted action. Acknowledging that withdrawal of 2 million or more gallons per day as indicated in the DEC regulations is a Type I action, the court determined that withdrawal of less than 2 million gallons a day would be an Unlisted action, since the court had also determined that it did not fall within the Type II designation that the Village indicated as will be more fully developed below.

3. The Village Water Sale Is a Type I Action because the Water Loading Facility Is Substantially Contiguous to Hodgman Park

Unlike the *Wertheim* case, in the present case, the projected water withdrawals of 1,000,000-1,500,000 gpd exceed the 25% threshold contained in 6 NYCRR 617.12(b)(10). Consequently, because the water loading facility is located adjacent to Hodgman Park, the action

at issue in the present case is a Type I action. As discussed below, the water sale and the lease of land for the water loading facility are properly considered as one action under SEQRA.

As noted above, Section 617.4(b)(6)(ii) of the SEQRA regulations provides that "a project or action that would use ground or surface water in excess of 2,000,000 gallons per day" is a Type I action. Section 617.4(b)(10) of the regulations provides that "any Unlisted action, that exceeds 25 percent of any threshold in this section, occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland" is a Type I action. Twenty-five percent of 2,000,000 gpd is 500,000 gpd. The amount at issue in the present case, 1,000,000-1,500,000 gpd, is significantly above 500,000 gpd, and thus meets the threshold for a Type I action set forth in Section 617.4(b)(10).

The trial court properly determined that Hodgman Park is "substantially contiguous" to the water loading facility. Several maps in the record demonstrate the location of Hodgman Park adjacent to the water loading facility. The location of Hodgman Park is clearly marked on the map attached as Exhibit B to Joseph Picciotti's affidavit of February 22, 2013, R. 634, although this map incorrectly shows the location of the water loading facility as a small dot on West Water Street whereas in fact, the water loading facility occupies a large area between West Water Street and West Chemung Street, and the rail entrances to the water loading facility run from the rail line that runs down Chemung Street. A more accurate depiction of the location of the water loading facility in relation to the park is contained in the sketch plan for the water loading facility provided as Exhibit 7 to the Administrative Record, R. 187. This plan shows that the location of facility is adjacent to various components of the park such as the lacrosse field and the softball field without indicating that these components are contained within a park. *Id*. The layout of the water loading stations along the rail spur off West Chemung Street is shown in a number of the

engineering drawings provided as Exhibit 8 to the Administrative Record. R. 192-194, 196-197, 202, 206-207, 209-210. Two of these drawings show the location of the park on the West Water Street side of the facility without indicating that it is a park. R. 192, 202.

Although these maps clearly show that the park is adjacent to the water loading facility, the 500,000 gpd threshold contained in section 617.4 (b) (10) also applies in situations where a proposed activity is not directly adjacent to a sensitive resource, but is in close enough proximity that it could potentially have an impact. The DEC's *SEQR Handbook* states that "[t]he term "substantially contiguous" as used in . . . section 617.4 (b) . . . (10), is intended to cover situations where a proposed activity is not directly adjacent to a sensitive resource, but is in close enough proximity that it could potentially have an impact." *SEQR Handbook*, p. 24 (3d ed. 2010).

> The term "substantially contiguous" as used in both sections 617.4 (b) (9) and (10), is intended to cover situations where a proposed activity is not directly adjacent to a sensitive resource, but is in close enough proximity that it could potentially have an impact. Although the term can be difficult to define, the following examples may provide some guidance. . . . Construction of a structure on a site that is separated from a City Park by a 50 foot right-of-way would be substantially contiguous. [Emphasis added].

SEQR Handbook, pp. 23-24.

The trial court properly applied the construction in the *SEQR Handbook* to its consideration of "substantially contiguous" in section 617.4 (b)(10), in determining that Hodgman Park was substantially contiguous to the water loading facility, citing *Lorberbaum v Pearl*, 182 A.D.2d 897, 900 [3d Dept. 1992]. In the *Lorberbaum* case, the court found that the Town of Plattsburgh Planning Board improperly concluded that a proposed subdivision project was not substantially contiguous to two national historic landmarks and therefore not a type I action. The court stated, "the evidence indicates that the project is substantially contiguous to Plattsburgh Bay and Valcour Bay, listed as historic sites on the National Register of Historic Places. Portions of the southern boundary and the eastern boundary of the golf course are common with the border of

Valcour Bay's northwestern shoreline. The two bays are visible from the shores of the project. . . . Moreover, the fact that the Department of Environmental Conservation, the agency in charge of implementing SEQRA, has indicated that it interprets "substantially contiguous" to mean "in proximity to" or "near" (see, Draft, *The SEQRA Handbook*, 1991) supports petitioners' position." In the present case, portions of the water loading facility site have a common boundary with Hodgmen Park. Indeed, the park and the site of the water loading facility were once part of the same parcel of land. R. 214.

4. Water is Not Furnishings, Equipment or Supplies under the SEQRA Regulations

Appellants' claim that the water sale agreement may be categorized as a Type II action under the SEQRA regulations is unmerited. As the trial court determined, Appellants' reliance on 6 NYCRR 617.5 (c) (25) is not appropriate. Section 617.5 (c) (25) provides that actions for "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" are Type II actions. There is no support for the claim that water usage is a form of "furnishings, equipment or supplies" within section 617.5 (c) (25). The phrase "surplus government property" used in the provision is given as an example of "furnishings, equipment or supplies." It does not expand the types of property covered by that section to include other types of government property.

The DEC has published guidelines for what types of property are properly considered to be within the scope of section 617.5 (c) (25). The guidelines list "interior furnishings; fire trucks; garbage and recycling hauling trucks; school busses; maintenance vehicles; construction equipment such as bulldozers, backhoes, dump trucks; police cars; computers, scanners, and related equipment; firearms, protective vests, communications equipment, fuel, tools and office supplies." *The SEQR Handbook*, p. 40 (3d ed. 2010). The guidelines explain the rationale for the

Type II categorization of these types of property: "[T]he simple purchase or sale of materials does not create an adverse environmental impact." *Id*. By contrast, as the court below noted, "a significant daily withdrawal of water, representing roughly one fourth of the Village's total well capacity . . . is of an entirely different character than the simple purchase and sale of materials. . . . There is absolutely no indication that the Type II exemption in section 617.5 (c) (25) . . . was intended to apply to natural resources such as a public water supply." R. 31.

Article XIV of the State Constitution makes clear in Section 4 that water resources are part of the natural resources of the state: "The policy of the state shall be to conserve and protect its natural resources and scenic beauty . . . . The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, . . . and regulation of water resources." *Id*. In 2011, the Legislature enacted new water withdrawal permitting legislation, expanding the types of withdrawals subject to permitting to include all withdrawals of water of 100,000 gallons per day or more with the exception of certain types of withdrawals that are exempted from the permit program, such as agricultural withdrawals. ECL 15-1501 *et seq*. The legislature has long recognized the importance of protecting New York's water resources. ECL 15-0105 states: "In recognition of its sovereign duty to conserve and control its water resources for the benefit of all inhabitants of the state, it is hereby declared to be the public policy of the state of New York that:

- The regulation and control of the water resources of the state of New York be exercised only pursuant to the laws of this state;
- The waters of the state be conserved and developed for all public beneficial uses;
- Comprehensive planning be undertaken for the protection, conservation, equitable and wise use and development of the water resources of the state to the end that such water resources be not wasted and shall be adequate to meet the present and future needs

> for domestic, municipal, agricultural, commercial, industrial, power, recreational and other public, beneficial purposes

The discussion of natural resources damages on the DEC website affirms that groundwater is considered a natural resource, "Natural resources that may be subject to [a Natural Resource Damages] claim include, but are not limited to, land, water, groundwater, drinking water supplies, air, fish, wildlife, and biota [emphasis added]" (*Natural Resource Damages*, available at http://www.dec.ny.gov/regulations/2411.html, [accessed Nov. 19, 2013]).

The right and obligation of our federal and state governments to protect natural resources derives from long established common law public trust principles. *W.J.F. Realty Corp. v New York*, 176 Misc2d 763 [Suffolk Cty 1998], *aff'd* 267 AD2d 233 [2nd Dept 1999] (upholding the Long Island Pine Barrens Act, which protects the Long Island aquifer, against a takings challenge by applying the Public Trust Doctrine.] *Smithtown v Poveromo,* 71 Misc2d 524 [Suffolk Cty 1972], *rev'd on other grounds*, 79 Misc2d 42 [App.Term Suffolk Cty 1973] ("The control and regulation of navigable waters and tideways was a matter of deep concern to sovereign governments dating back to the Romans . . . . The entire ecological system supporting the waterways is an integral part of them (the waterways) and must necessarily be included within the purview of the trust.")

Appellants' claim that the right of the Village to withdraw water from the Corning aquifer constitutes an ownership interest in the water in the aquifer demonstrates a fundamental misunderstanding of the nature of water rights in New York. The Village does not have an ownership right in the Corning aquifer. As described above, the water is a public trust asset of the state. Rather, as an adjoining landowner and as a permitted municipality, the Village has the right to the use of water from the aquifer for the benefit of its residents. *Stevens v Spring Valley Water Works & Supply Co*., 42 Misc2d 86, 2d dpt appellate term, 1964], *aff'd*, 22 AD 2d 830, [2nd Dept

1964], *Smith v City of Brooklyn*, 18 AD 340, *aff'd*, 160 NY 357 [ ], *Forbell v City of New York*, 47 AD 371, *aff'd*, 164 NY 522 [--], two landmark decisions in American groundwater law. This right is subject to the correlative rights of other adjoining landowners to use the aquifer, including the rights of other permitted municipalities. *Id*. The initial approval granted to the municipality of the Village of Painted Post in 1909 by the State Water Supply Commission to establish a municipal water system makes clear that the rights to withdraw water derive from the lands acquired by the Village to create the water supply system and that those rights are to be exercised in a manner that is "just and equitable to other municipalities and civil divisions of the State affected thereby and to the inhabitants thereof, particular consideration being given to their present and future necessities for sources of water supply." R. 73.

Common law riparian rights are affirmed in 6 NYCRR Section 601.12 (o) of the state's newly adopted water permitting regulations. This section provides that "The issuance of a water withdrawal permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of federal, state or local laws or regulations; nor does it obviate the necessity of obtaining the assent of any other jurisdiction as required by law for the water withdrawal authorized."

Furthermore, Section 617.5 (c) (25) of the SEQRA regulations explicitly excludes actions involving the purchase or sale of land from being categorized as "furnishings, equipment or supplies" within the meaning of that section. Water rights are incident to the ownership of land and it has long been established that water rights are classified as real property. *Tracey Development Co. v People*, 212 N.Y. 488 [1914]. *Matter of Van Etten v City of New York*, 226 NY 483 [1919], *Niagara Mohawk Power Corp. v Cutler*, 109 AD2d 403 [3rd Dept 1985].

Rights to groundwater are treated similarly to rights to surface water in New York and are also considered incident to the ownership of land. See the *Stevens, Smith* and *Forbell* cases cited above.

For each of the reasons explained above, the Village's claim that the water withdrawal and sale of up to one million gallons per day was a Type II action, is logically inconsistent with SEQRA and the DEC regulations. For these reasons, the trial court was correct in holding that the Village's determination that the sale of up to 1.5 million gallons per day of public water resources to SWEPI for transportation out of state does not fall within the Type II exemption to SEQRA, and constituted either a Type I or an Unlisted action.

C. The Village Improperly Segmented its Review

As the trial court found, the Village improperly segmented its review of the bulk water sale agreement and the lease for the water-loading facility. For the reasons discussed above, there was no reasonable basis for the determination by the Village that the water sale agreement was a Type II action. Therefore, the attempt by the Village to treat the water sale agreement and the lease as separate and independent actions constituted segmentation in violation of the SEQRA regulations. Section 617.2(ag) of the regulations defines "segmentation" to be "the division of the environmental review of an action so that various activities or stages are addressed as though they were independent, unrelated activities needing individual determinations of significance." "Considering only a part or segment of an action is contrary to the intent of SEQR[A]. . . ." 6 NYCRR 617.3(g) (1).

Even if one were to assume that SEQRA review was preempted concerning the lease of land for the transshipment loading facility, the attempt by the Village to look at the two actions that they have taken as separate and independent actions was directly contrary to the SEQRA

regulations. Therefore, in determining whether a project will have a significant effect on the environment, the reviewing agency must consider all reasonably related long-term, short-term and cumulative effects, including other simultaneous or subsequent actions which are included in any long range plan of which the action under consideration is a part. *Farrington Close Condominium Board of Managers v Incorporated Village of Southampton*, 205 AD2d 623, 613 [2nd Dept. 1994]; *Defreestville v North Greenbush*, 299 AD2d 631 [3rd Dept. 2002]; *New York Canal Improvement Association v Town of Kingsbury*, 240 A.D.2d 930 [3rd Dept. 1997].

What the Village did in the instant action was engage for SEQRA terms in what is called segmentation. Segmentation refers to the situation where a lead agency considers the environmental consequences of separate actions that are interrelated but are considered separately. Segmentation is defined in the regulations as "the division of the 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). While segmentation is allowed in the regulations in certain instances, it is frown upon. Therefore, as indicated the regulations at 6 NYCRR 617.3 (g):

> Actions commonly consist of a set of activities or steps. The entire set of activities or steps must be considered the action, whether the agency decision making relates to the action as a whole or to only a part of it.
>
> (1) Ensuring only a part or segment of an action is contrary to the intent or SEQRA. If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance, and any subsequent EIS, the supporting reasons and must demonstrate that such review is clearly no less protective of the environment. Related actions should be identified and discussed to the fullest extent possible.

There is no question that the two actions taken by the Village of Painted Post are interrelated and dependent upon each other. To put it another way, either action has any independent utility without the other action, and there would be no need for the water withdrawal

without a transshipment loading facility, and likewise there would be need for transshipping loading facility for the water, without allowing for the water withdrawal. Therefore, since in determining whether a project will have a significant effect in the environment, as previously indicated, the reviewing agency must consider all reasonably related long-term, short-term cumulative effects, including other simultaneous or subsequent actions which are included in the action, considering these two actions separately, since they have no independent utility, the Village has engaged in segmentation. Even if they could correctly engage in segmentation, they certainly did not follow the regulations to indicate the reasons why they are segmenting, and why such segmentation would be equally protective of the environment as if they considered the action as one action and as a whole for an environmental review purposes. Indeed, since the sale of the water was in fact not exempt, and therefore SEQRA review would be required, the Village would also have been required to consider the adverse environmental consequences that would ensue not just because of the sale of the water, but of entire project including transshipping loading facility. Certainly, there can be no claim that the sale of water was preempted by the Railroad laws, and therefore, SEQRA certainly does apply.

After engaging in what they consider to be voluntary SEQRA compliance for the water loading facility lease, the Village determined that an Environmental Impact Statement need not be drafted because there were no adverse significant environmental consequences that would ensue and issued a negative declaration of their explanation of why an Environmental Impact Statement need not be drafted. R. 111-116.

However, even the voluntary compliance did not meet the requirements of SEQRA. Therefore, to reiterate, environmental review under SEQRA requires that the lead agency consider the environmental consequences of all reasonably related long-term, short-term and

cumulative effects, including other simultaneous or subsequent questions which are included in any long range plan for which the action is a part. Even a cursory review of the Environmental Assessment Form shows that the Village only considered the potential environmental consequences that would happen within the Village of Painted Post boundaries. They completely ignored any adverse environmental consequences that might ensue at the other end of the rail line in Wellsboro, Pennsylvania, the environmental consequences of using the water for hydrofracking purposes in Pennsylvania, and the effects that might ensue concerning the water withdrawal in other municipalities such as Corning or Erwin. So at best, the voluntary environmental review engaged in the Village of Painted Post only considered half of the action that was being taken, that being the potential consequences within the Village of Painted Post, and never considered either voluntarily or otherwise, the other potential adverse environmental consequences that might ensue outside the Village boundaries.

Of course, even those matters that were considered by the Village in its voluntary environmental review were not considered adequately. As can be seen from the affidavits of Petitioners' expert witness, hydrogeologist Paul Rubin, he discusses at length the commonly accepted studies that would necessary to determine whether or not the water withdrawal would create adverse environmental consequences to the Corning aquifer, and which were not done. R. 481-525, 640-643. Therefore, the Village and its consultants, did not have the information necessary to arrive at the conclusion that there would be no adverse environmental consequences from engaging in the water withdrawal and transshipping loading facility. Moreover, the Village simply either ignored the increased noise and traffic impacts, or they simply stated that they would not occur in a conclusory fashion without any support or study to support such

conclusions. As we now know, their conclusions were simply false as it relates to the increased noise pollution, or the adverse effects upon the water supply.

The trial court stated, "It cannot be controverted that the sale of the water, and the lease of the land for the Railroad to build and operate the transloading of the water, are intrinsically related." R. 33. The wording of the lease agreement makes this apparent, stating that it has been entered into "in connection with a certain bulk water sale contract, dated as of March 1, 2012, [whereby] the Village will sell a certain amount of surplus municipal water to SWEPI from its existing municipal water supply system at a filling/metering station to be constructed by the Lessee on a portion of the Premises and SWEPI has arranged to have the Lessee withdraw, load and transport such water via rail line from the Premises." R. 120.

Appellants' claim that the environmental review conducted by the Village encompassed the water sale agreement is not supported by the record. The commonly accepted studies that would necessary to determine whether or not the water withdrawal would create adverse environmental consequences to the Corning aquifer were not done. Affidavits of expert Paul Rubin. R. 481-525, 640-643. Therefore, the Village and its consultants, did not have the information necessary to arrive at the conclusion that there would be no adverse environmental consequences from engaging in the water sale. Moreover, in completing the EAF, the Village ignored all aspects of the water sale agreement, as detailed above.

For all these reasons, the Village Board acted arbitrarily and capriciously when it classified its bulk Water Sale Agreement with SWEPI as a Type II action and failed to apply the criteria set out in the regulations to determine whether an EIS should issue, and when it improperly segmented the SEQRA review of the Lease from the Water Sale Agreement. Consequently, the trial court properly annulled the Village resolutions designating the Water Sale

Agreement as a Type II and the Negative Declaration as to the Lease Agreement because the Village Board improperly segmented its review of the Lease from the Surplus Water Sale Agreement, and the Village approvals of the Water Sale agreement and the Lease.

CONCLUSION

Therefore, for the foregoing reasons, the Village failed its statutory responsibilities under its SEQRA, and the court below properly voided the actions taken and issued an injunction against any further water withdrawals until SEQRA has been fully complied with. It is respectfully submitted that this Court affirm the decision of the Court below.

DATED: Buffalo, New York
November 20, 2013

Respectfully submitted,

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APPENDIX A

RESOLUTION
DETERMINATION OF NON-SIGNIFICANCE – VILLAGE OF PAINTED POST
PROPOSED CONTRACT FOR THE SALE OF SURPLUS WATER

A regular meeting of the Board of Trustees (the "Board") of the Village of Painted Post was duly convened on February 23, 2012 at 5:00 p.m. at 261 Steuben Street, Painted Post, New York 14870 and said meeting having been properly publicly noticed and held, and at which there was a quorum present and participating throughout.

The following resolution was duly offered and seconded, to wit:

WHEREAS, it has been proposed that the Village of Painted Post ("Village") sell certain surplus potable water from the Village water supply to be drawn from the Village wells to SWEPI LP, ("SWEPI"), having an address at 200 N. Dairy Ashford Street, Houston, Texas 77079, as the Village is authorized to sell such surplus potable water and it desires to sell such water as proposed herein, and the Village water supply has sufficient capacity to sell such surplus water without negatively impacting the ability of the Village to provide water to current Village water supply customers and such finding is based upon various studies and analyses completed, including those completed by Hunt Architects, Engineers and Land Surveyors, P.C., pursuant to an engineering reported dated November 11, 2011 (the November 2011 Hunt Report").

WHEREAS, the Village has made application to and received permission from the Susquehanna River Basin Commission ("SRBC") to withdraw additional water in an amount of 1,000.0000 gallons per day ("gpd") which will be sold as surplus potable water in addition to the water that the Village is already withdrawing in order to supply current customers of the Village water supply system.

WHEREAS, pursuant to Article 8 of the Environmental Conservation Law of the State of New York as amended, including the regulations thereunder associated with the New York State Environmental Quality Review Act, 6 N.Y.C.R.R. 617.1 *et seq.* (collectively referred to as "SEQRA"), the Village has determined that the sale of surplus water to SWEPI under the circumstances here is a Type II action under SEQRA pursuant to other provisions 6 N.Y.C.R.R. 617.5(c)(25), as discussed herein, the sale of surplus water is specifically exempted from SEQRA review.

NOW, THEREFORE, BE IT RESOLVED: Upon thorough review and due consideration of the Village of the proposed surplus water sale agreement for the sale of surplus water to SWEPI in the form presented to at this meeting and its review of the appropriate regulations and law concerning the sale of such surplus water, the Village makes the following findings:

I. The Village has considered the proposed sale of surplus water pursuant to the surplus water sale agreement in the form presented to at this meeting, and it has determined that the sale of surplus water pursuant to the proposed agreement is a Type II action under SEQRA

and therefore has been deemed by the legislature to have no significant negative environmental impact.

II. This resolution has been prepared in accordance with Article 8 of the New York State Environmental Conservation Law and associated regulations.

III. The requirements of SEQRA concerning the proposed contract for the sale of surplus potable water pursuant to the surplus water sale agreement have been satisfied.

IV. This resolution will take effect immediately.

Said matter having been put to a vote, the following votes were recorded:

	Yea	*Nea*	*Abstain*	*Absent*
Roswell Crozier, Jr.	[X]	[ ]	[ ]	[ ]
William Scheidweiler	[ ]	[ ]	[ ]	[X]
Richard Lewis	[X]	[ ]	[ ]	[ ]
Richard Thorne	[X]	[ ]	[ ]	[ ]
Ralph Foster	[X]	[ ]	[ ]	[ ]

The resolution was thereupon duly adopted.

Certification

I, the undersigned, being the Clerk of the Village of Painted Post hereby certified that the foregoing is a complete and accurate copy of a resolution duly enacted by the Village of Painted Post at a regular meeting thereof held on the 23rd day of February, 2012, duly called, publicly noticed and publicly held at which a quorum was present and participating thereat throughout and that said resolution has not be rescinded, modified or amended in any respect.

DATED: February 23, 2012

Anne Names

Anne Names, Clerk of the Village of Painted Post, New York

APPENDIX B

RESOLUTION - VILLAGE OF PAINTED POST CONCERNING APPROVAL OF A PROPOSED LEASE BY PAINTED POST DEVELOPMENT LLC

A regular meeting of the Board of Trustees (the "Board") of the Village of Painted Post was duly convened on February 23, 2012 at 5:00 p.m. at 261 Steuben Street, Painted Post, New York 14870 and said meeting having been properly publicly noticed and held, and at which there was a quorum present and participating throughout.

The following resolution was duly offered and seconded, to wit:

WHEREAS, the Village of Painted Post, on behalf itself and as the sole member of Painted Post Development, LLC ("PPD") (the "Village"), has reviewed the proposed lease by PPD to the Wellsboro & Corning Railroad, LLC, a federally regulated railroad (the "Railroad") of an approximately 11.8 acre portion of the 50 acre parcel formally owned and operated by Ingersoll-Rand Corporation ("Ingersoll Rand") located in the vicinity of 450 West Water Street, Village of Painted Post, New York (the "Site") and the land of which is the subject of the Lease is proposed for the development, construction and operation by the Railroad of a transloading facility ("the Facility" or "the transloading facility") whereby surplus potable water from the Village of Painted Post water distribution system from such water drawn from the Village wells not located on the Site will be loaded onto railroad cars for transport and distribution away from the Site (the "Lease").

WHEREAS, the Village of Painted Post has conducted a coordinated review of the Lease in accordance with applicable law, including federal law under the Interstate Commerce Commission Termination Act of 1995 and the federal Railroad Act of 1970 (collectively referred to as "ICCTA") as well as under Article 8 of the New York Environmental Conservation Law and applicable regulations under 6 N.Y.C.R.R. 617.1 et seq. known as the New York State Environmental Quality Review Act (SEQRA), and after reviewing applicable documentation including reports, analyses, a proposed site plan for the Site, an engineering report, a certain document constituting a bargain and sale deed entitled "Former Ingersall-Rand Foundry Site, Steuben County, Painted Post, New York dated August 1, 2005 ("the 2005 Deed") as well as reviewing a completed Part I and Part II of a full Environmental Assessment Form completed in accordance with SEQRA, the Village has, in a prior resolution, issued a negative declaration formally determining that the Lease will have no significant negative impact on the Environment and such resolution approving the negative declaration for the Lease is incorporated herein by reference.

WHEREAS, as referenced, the transloading facility shall be operated on the Site in accordance with the Lease and shall include the design, planning, construction, equipping and operating and maintaining of a (i) filling/metering station and related improvements to be used for a filling/metering station; (ii) a rail siding on the Site and related improvements, included rail loading facilities, to connect to the existing rail line along Chemung Street adjacent to the Site to be used solely for the loading and transportation by rail car of surplus potable water drawn from the Village distribution system from Village wells not located on the Site; (iii) the acquisition and installation in and around the Site of certain machinery, equipment and other items of tangible personal property associated with the transloading facility to be operated at the Site;

WHEREAS, the Railroad, as lessee, shall in accordance with the Lease as presented in the form thereof at this meeting, be required to undertake each of the requirements imposed by applicable law and documentation associated with the property encompassing the Site, including but not limited to each of the requirements under the 2005 Deed with such conditions and restrictions including but are not limited to the following: (i) avoiding the use of ground water underlying the property subject to such restriction in the 2005 Deed, (ii) implementing each of the requirements of the 2005 Deed as applicable under the remedial work plan incorporated to it as well as incorporating the soil fill management protocol as required, as well as implementation/and or maintenance of identified institutional controls (i.e., maintaining fencing, and cover materials etc.) as well as abiding by the other requirements under the Lease associated with the management and control of stormwater, including as set forth in the report prepared by Hunt Engineers, Architects and Land Surveyors P.C. dated November 11, 2011 ("the November 2011 Hunt Report") and abiding by each of the requirements and proposed measures to be implemented pursuant to the site plan proposed for the Site also provided and on file with the Village for the Facility including implementing measures required by the permit issued by the Department of Environmental Conservation for the Site pursuant to the State Pollutant Discharge Elimination System Permit Program, including a Stormwater Pollution Prevention Plan.

WHEREAS, the Village Board of Trustees has determined that it is in the best interest of PPD and the Village to execute the Lease in the form presented to at this meeting (the Proposed Lease) including the provisions set forth therein for lease payments, hold harmless protections and the other terms set forth therein subject to the findings set forth below.

NOW, THEREFORE, be it resolved:

Upon review and due consideration by the Village of the proposed Lease as well as the Village's review of the completed SEQRA review and the issuance of a negative declaration, the Village makes the following findings:

(i) The form and substance of the Lease Agreement (in substantially the form presented to at this meeting and/or in such form as is approved by the Mayor upon and with the advice of counsel to the Village) are hereby approved.

(ii) The Mayor is hereby authorized, on behalf of the Village, to negotiate, execute and deliver the Lease Agreement and any related documents with such changes, variations, omissions and insertions as the Mayor shall approve upon and with the advice of counsel to the Village pending the satisfaction by the Village of a certain Mortgage and payoff of a certain Note ($230,000 outstanding principal plus all accrued interest) associated with the former Ingersoll Rand Foundry, including all the conditions required to satisfy such Mortgage and Note including but not limited to securing appropriate environmental impairment liability insurance on which the parties may agree (and the payment by the Village of a portion of the premium associated therewith). The execution of the Lease Agreement and related documents by the Mayor shall constitute conclusive

evidence of such approval. The Mayor is further hereby authorized, on behalf of the Village, to designate any additional authorized representatives of the Village.

(iii) The Mayor is hereby authorized and directed for and in the name and on behalf of the Village to do all acts and things required and to execute and deliver all such certificates, instruments and documents, to pay all such fees, charges and expenses and to do all such further acts and things as may be necessary or, in the opinion of the Mayor, desirable and proper to effect the purposes of the foregoing resolutions and to cause compliance by the Village with all of the terms, covenants and provisions of the documents executed for and on behalf of the Village. .

(iv) Due to the complex nature of this transaction, the Village hereby authorizes its Mayor to approve, execute and deliver such further agreements, documents and certificates as the Village may be advised by counsel to the Village or Transaction Counsel to be necessary or desirable to effectuate the foregoing, such approval to be conclusively evidenced by the execution of any such agreements, documents or certificates by the Mayor.

(v) The resolution will take effect immediately.

Said matter having been put to a vote, the following votes were recorded:

	Yea	*Nea*	*Abstain*	*Absent*
Roswell Crozier, Jr.	[X]	[ ]	[ ]	[ ]
William Scheidweiler	[ ]	[ ]	[ ]	[X]
Richard Lewis	[X]	[ ]	[ ]	[ ]
Richard Thorne	[X]	[ ]	[ ]	[ ]
Ralph Foster	[X]	[ ]	[ ]	[ ]

The resolution was thereupon duly adopted.

Certification

I, the undersigned, being the Clerk of the Village of Painted Post hereby certified that the foregoing is a complete and accurate copy of a resolution duly enacted by the Village of Painted Post at a regular meeting thereof held on the 23rd day of February, 2012, duly called, publicly noticed and publicly held at which a quorum was present and participating thereat throughout and that said resolution has not be rescinded, modified or amended in any respect.

DATED: February 23, 2012

Anne Names

Anne Names, Clerk of the Village
of Painted Post, New York