To be Argued by:
RICHARD J. LIPPES
(Time Requested: 30 Minutes)

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Appellate Division–Fourth Department Docket No. CA-13-01558

Court of Appeals

of the

State of New York

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-Appellants,

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-Respondents,

and the WELLSBORO AND CORNING RAILROAD, LLC,

Respondent-Respondent.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to § 500.1 of the Rules of the Court of Appeals, Petitioners-Appellants, SIERRA CLUB, INC. and PEOPLE FOR A HEALTHY ENVIRONMENT, INC., advise the Court that the following are corporate parents, subsidiaries or affiliates of SIERRA CLUB, INC. and PEOPLE FOR A HEALTHY ENVIRONMENT, INC.

NONE

DATED: Buffalo, New York
May 15, 2015

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PRELIMINARY STATEMENT OF THE CASE

This Reply Brief for the Petitioners-Appellants (hereinafter cited as "Petitioners") is submitted in reply to issues raised by the Respondents-Respondents (hereinafter cited as "Respondents") in their brief in response. Some of the arguments made by the Respondents have been made for the first time, and therefore, as to those arguments, it is respectfully submitted that this Court lacks jurisdiction to consider them, and such arguments will be pointed out in this Reply Brief. This Reply Brief will also clarify and support the arguments made in Petitioners' initial brief, as they relate to the arguments made by Respondents in their brief in response. Therefore, as will be seen, neither latches or mootness is applicable to the facts of this case, and any argument of preemption does not affect the failure of the Respondents in fulfilling their legal obligations under the New York State Environmental Quality Review Act, Environmental Conservation Law §8-8101, 80-0101, (hereinafter cited as "SEQRA").

POINT I

PETITIONER JOHN MARVIN HAS STANDING TO PURSUE THIS PROCEEDING.

Petitioners will not reiterate the arguments made in their initial brief, although some recitation of those arguments will be helpful in understanding this Reply. Therefore, as indicated in the Petitioners' initial brief, at the trial court, Justice Fisher did not accept Petitioners' argument that John Marvin's proximity to

the rail-loading facility, in and of itself, provides a presumption that he has standing. However, in considering whether or not John Marvin had standing, Justice Fisher did take into account Mr. Marvin's proximity to the rail-loading facility and found that such proximity, coupled with the new significant train noise that kept him up at night was sufficient to grant Petitioner Marvin's standing under the zone of interest test as espoused in the *Society of Plastics Indus. Inc. v. County of Suffolk*, 77 N.Y.2d 761 (1991) case. Justice Fisher called this the "proximity plus more" test.

However, the Appellate Division refused at all to consider John Marvin's proximity to the rail-loading facility, and therefore only considered the train noise, which both the trial court and they determined fell within the zone of interest of SEQRA. However, the train noise alone did not provide Petitioner Marvin standing, since they determined that hearing the train noise was no different than all of the residents in the Village as the train proceeded from one end of the Village to the other. The Appellate Division also specifically stated that John Marvin raised no complaints concerning noise from the rail-loading facility itself. (R. 658). Therefore, they determined that any claim of noise by John Marvin was not an injury different from the public at large.

Respondents also cite the Appellate Division's reference that Petitioner Marvin did not claim any noise from the rail-loading facility. However, both the

Appellate Division's position concerning noise from the rail-loading facility, and their lack of consideration of the proximity of John Marvin to the rail-loading facility, is misplaced.

The proof that John Marvin has standing, and has been injured in a manner different from the public at large, is supported by three distinct documents in the Record. First, in John Marvin's Affidavit, second are the allegations in the Verified Petition, and third is the Affidavit of John Marvin's neighbors Gerald and Teresa Flegal.

In his Affidavit, John Marvin stated:

> Beginning in mid-August and continuing through mid-September, I heard noise training frequently, sometime every night. I heard either the train whistle or diesel engines themselves or both. The noise was so loud it woke me up and kept me awake repeatedly during this period. I spoke with my neighbor Teresa Flegal who lives on Chemung St. and was glad to learn she was making measurements of the noise with a decimal meter.

(R. 432). Mr. Marvin also pointed out that:

> [O]ur home is located 1-half block from the railroad line that crosses Charles Street and a block and a half from the rail-loading facility at issue in this case. The location of our home is shown in the aerial photograph from Google.com attached as exhibit A.
>
> 5. I can see the rail-loading facility from my front door across the lawn of the old high school."

(R. 430). Therefore, there is nothing in Mr. Marvin's Affidavit which would indicate that he was not claiming noise from trains entering and exiting the rail siding located in the rail-loading facility, and was only claiming noise from trains running on the rail tracks running away from the siding and through the village. Indeed, his claim that he heard train noises, sometimes every night, does not delineate where that noise came from, and it is common sense that it would have come from both from trains entering and exiting the rail-loading facility and from the trains proceeding along the tracks through the village.

In fact, noise from trains entering and exiting the rail-loading facility is exactly what was alleged in the Verified Petition:

> 32. The November 2011 Hunt Engineers report referenced in the EAF . . . states that, " . . . The site is designed for 42 tanker cars and each cycle will fill all 42 tankers for a total of 970,000 gallons in approximately 16 hours. Once all 42 tanker cars are filled to capacity, the railroad will pull them off the new siding and replace them with empty tankers and the filling process will begin again."
>
> 33. If 42 loaded railcars are being removed from the loading facility every 16 hours and replaced with 42 empty railcars, the total number of railcars entering and leaving the facility every 16 hours will be 84 cars.
>
> 34. The loaded rail cars will be heavy. The weight of one gallon of water is 8.345 pounds. The weight of a rail car loaded with 23,100 gallons of water would be 192,769.5 pounds. That is more than 96 tons of weight per car in addition to the weight of the car.

> 35. Moving cars loaded with more than 96 tons of weight on and off sidings can be expected to result in significant noise from the engines required to move the rail cars and from squealing wheels."

R. 53-54.

Finally, Mr. Marvin's neighbors presented an Affidavit in support of Mr. Marvin's standing. In their Affidavit, the Flegals indicated that they live about 30 feet from the rail-loading facility, R. 426, and live on the same street as Mr. Marvin. The Flegals stated that the high noise levels were due to the noise of trains entering and exiting the rail loading facility, "[t]he noise that we heard from the trains entering and exiting the loading facility during this time was much louder than the train noises we were accustomed to hearing and occurred at night rather than during the day. None of the other trains that run through the Village run at night." R. 427. The Flegals attached a table of noise measurements that they took as an exhibit to their Affidavit, and 8 of the 10 noise measurements shown on the table occurred when trains arrived or departed from the rail-loading facility. R. 429.

Respondents claim in their Brief that Petitioner John Marvin cannot rely on the allegations of a non-party to confirm his standing. However, in requiring proof of injury in fact, such proof is not only limited to affidavits by the Petitioner himself who is asserting standing. Proof may be solicited through other evidence, and in this case, such evidence was presented by the neighbors. The fact that the

neighbors are not parties to the lawsuit is irrelevant to the evidence that they presented of train noise from the rail-loading facility, and as previously indicated, there is nothing in John Marvin's Affidavit which indicates that he was not asserting train noise from the rail-loading facility.

Of course, the trial court realized that in making his allegations of train noise John Marvin was taking into account his proximity to trains entering and exiting the rail-loading facility and noise from those trains, and that is why Justice Fisher applied the "proximity plus" test. The Fourth Department's gratuitous statement that John Marvin was not relying on noise from the rail-loading facility is contrary to the evidence in the Record and the allegations of the Verified Petition.

Finally, this Court's requirement of injury in fact as indicated in the *Society of Plastics* case, require that such injury be different in kind, or in the degree from its effects on the community generally. *Society of Plastics Industries v. County of Suffolk*, 77 N.Y.2d at 773 (emphasis added). There is no question, and this Court can take judicial notice of the fact that noise is loudest to those people nearest the source of the noise, and the farther away from the noise, the less they will hear the noise. Therefore, since John Marvin, like the Flegals, lives close to both the rail siding leading into and out of the rail-loading facility and the main rail line, there is no question that the noise would be louder at his home than other residents of the

Village who live farther away from the rail-loading facility, and therefore, his injury in fact is at least different in degree than other members of the community.

For all the foregoing reasons, and the reasons indicated in the Petitioner's Brief, Petitioner Marvin has standing.

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 Respondents' claims of laches and mootness. While Respondents 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 Susquehanna Rivera Basin Commissioner (hereinafter cited as "SRBC") in the spring of 2011, and waited nearly two years to bring this action. Of course, as described in the section dealing with the SRBC, starting at page 22, the approvals issued to SWEPI were by emails that were transferred between the Respondents 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 February 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 Respondents seem to want to blow a smoke screen concerning the issues in this case, the Petitioners are not 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 at issue in this case.

Therefore, any delay that would be attributed to the Petitioners bringing this proceeding must start from the date 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 Misc.3d 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.

Respondents 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, Respondents 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 the Wellsboro and Corning Railroad (hereinafter cited as "WCOR") as a result of its construction of the water-loading facility after the petition was filed were not harm to Respondents in this appeal and may not be raised by them in this appeal. Furthermore, WCOR proceeded at its own risk in constructing the water loading facility.

Even if WCOR had chosen to appeal, the *Dreikausen* decision upon which Respondents 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 N.Y.2d 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 Respondents and 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 rail-loading 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 did in fact seek preliminary injunctive relief. While Respondents 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, Respondents 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. The delay was not any fault of the Petitioners.

Therefore, 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 finally 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 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, Respondents 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. Respondents 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 N.Y.2d 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 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 available to other users of the Corning aquifer sought to be avoided by Petitioners are only beginning to take place. They are long-term effects that will become increasingly manifest over time. 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 sustained withdrawals of huge amounts of water, a million gallons per day and perhaps more in the future, by the Respondents. 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 Respondents to expend costs on deconstruction. While Respondents argued below 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 Respondents made to the trial court. The gravamen of this proceeding is an 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 IV

ICCTA DOES NOT PREEMPT SEQRA REVIEW OF NOISE IMPACTS IN THIS CASE

Regarding Respondents' claim of preemption under the Interstate Commerce Commission Termination Act of 1995 (ICCTA), 49 U.S.C. §§ 10101-11917, such preemption certainly does not compel the Village to lease land for a rail-loading facility. That discretionary decision does not in any way deal with regulation of a railroad, and an independent decision of the Village was necessary to lease the land

for the rail-loading facility. ICCTA does not preempt the decision of whether or not to lease. As discussed below, ICCTA has no application unless the activity at issue involves transportation by a rail carrier and the land on which the activity at issue takes place is owned by or leased to a rail carrier.

A. SEQRA Requires that the Village Conduct an Adequate SEQRA Review Addressing Noise Impacts before Making the Decision to Lease Property for a Rail-loading Facility

Prior to entering into a lease of an 11.8 acre vacant brownfield site to the Wellsboro & Corning Railroad, the Village was required by SEQRA to conduct an adequate review of the environmental impacts of its proposed bulk water sale and rail-loading facility project. The proposed lease constituted an action under SEQRA because it was a project directly undertaken by the Village that may affect the environment by changing the use of the property. Section 617.2(b)(1) of the SEQRA regulations defines "actions" to include, inter alia, "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; . . . ." 6 NYCRR § 617.2(b)(1). Section 617.4(b)(6)(i) of the SEQRA regulations provides that "a project or action that involves the physical alteration of 10 acres" is a Type I action. 6 NYCRR § 617.4(b)(4). Because the rail-loading facility project involved the physical alteration of 11.8 acres, it was a Type I action. Consideration of the impacts of the

proposed project might have caused the Village to decide against leasing proposed site for a rail-loading facility. . ICCTA has no bearing on the decision of the Village to lease Village property to a rail road.

The Village was required to consider noise impacts in its SEQRA review. Noise is listed as one of the impacts to the environment agencies are required to consider in ECL §§ 8-0105(6), and 8-0109. *Cf. Matter of Merson v. McNally*, 90 N.Y.2d 742 (1997). The DEC has developed a program policy for assessing and mitigating noise impacts. Program Policy #DEP-00-1 (October 6, 2000), http://www.dec.ny.gov/docs/permits_ej_operations_pdf/noise2000.pdf.

B. ICCTA Preemptions Does Not Apply to Property Not Owned by or Leased to a Rail Carrier

The general principle that ICCTA preempts state and local laws that apply to rail carrier operations is well-established and is not disputed by Petitioners. Petitioners do dispute that the principle is applicable to the Village's consideration of noise impacts from a proposed rail loading facility on property owned by the Village during a SEQRA review. The mere consideration by a Village of a project to lease land for a rail loading facility does not constitute regulation of a rail carrier within the purview of ICCTA.

Section 10501 of ICCTA and the federal and state cases and the STB decisions addressing ICCTA preemption establish a two-pronged test for determining when preemption applies, "To come within the Board's jurisdiction,

an activity must constitute transportation *and must be performed by, or under the auspices of, a rail carrier* [emphasis added]." *Suffolk & Southern Rail Road LLC—Lease and Operation Exemption—Sills Road Realty, LLC*, STB Finance Docket No. 35036, August 26, 2008,[1] citing *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004); and *Florida East Coast Railway v. City of Palm Beach*, 266 F.3d 1324 (11th Cir. 2001). Other cases enunciating this principle include *Girard v. Youngstown Belt Railway Co*., 134 Ohio St. 3d 79 (2012), *New York & Atlantic Railway Co. v. Surface Transportation Board*, 635 F.3d 66, 71-72 (2d Cir.2011); *J.P Rail, Inc. v. New Jersey Pinelands Commission*, 404 F. Supp. 2d 636, 638 (D.N.J. 2005); *Town of Babylon and Pinelawn Cemetery — Petition for Declaratory Order*, STB Finance Docket No. 35057, 2008 WL 4377804 (Sept. 24, 2008), *New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway—Construction, Acquisition and Operation Exemption—In Wilmington and Woburn, MA*, STB Finance Docket No. 34797 (July 10, 2007) and *Hi Tech Trans, LLC — Petition for Declaratory Order*, STB Finance Docket No. 34192, 2003 WL 21952136 (Aug. 14, 2003).. In *Babylon*, the STB explained the two-pronged test in detail:

> [W]hile section 10501(b)(2) enumerates various transportation activities over which the Board's jurisdiction is exclusive, section 10501(a)(1) clearly specifies that the Board's jurisdiction is over

[1] http://www.stb.dot.gov/decisions/readingroom.nsf/WEBUNID/45A59D80F8117AEB852574B2004B4CC6?

> "transportation by rail carrier." Thus, to come within the Board's jurisdiction and thereby be entitled to preemption under section 10501(b), an activity must constitute "transportation" and must be performed by, or under the auspices of, a "rail carrier." [Citations omitted.] For an activity to be subject to the agency's jurisdiction, and therefore entitled to preemption, both jurisdictional prongs of the statutory test must be met, not just one as suggested by NYAR. [Citations omitted.] The Board reasonably applied the record evidence in this case to its existing precedent to conclude that Coastal is not a rail carrier and would not become a rail carrier by virtue of the construction activities for which it seeks to be protected from state and local regulation. Simply put, where, as here, a non-rail carrier is operating a transload facility for its own benefit, it is not subject to the Board's jurisdiction.

2008 WL 4377804.

In their brief, Respondents' fail to address the second prong of the test for when ICCTA preemption applies, i.e., whether the activity at issue is performed by, or under the auspices of, a rail carrier. Respondents do not cite any of a number of cases holding that there is no preemption for activities conducted by an entity that is not a rail carrier, including the cases listed above. See *Girard* ("we hold that there is no preemption under the ICCTA. It is undisputed that the portion of Mosier Yard sought to be appropriated by the city contains no active or abandoned tracks, contains no portion of rights-of-way of any rail lines, contains no permanent structures, and is undeveloped as a whole"), *Hi Tech Trans* (district court should have dismissed the amended complaint because there was no basis for relief given "untenable" and "meritless" claim by solid waste transfer station operating pursuant to a license from a railroad that application of New Jersey's

environmental regulations to its rail-loading facility was preempted by ICCTA); *J.P Rail*, (finding that a waste transfer facility not yet opened for business would likely not involve "transportation by rail carrier"); *Florida East Coast Railway* ("It is clear, however, that in no way does federal preemption under the ICCTA mandate that municipalities allow any private entity to operate in a residentially zoned area simply because the entity is under a lease from the railroad. The language of the ICCTA preemption provision in no way suggests that local regulation was to be so thoroughly disabled"); *New York Susquehanna and Western Railway Corp. v. Jackson*, 500 F. 3d 238, 3rd Circuit 2007 ("Because we conclude that the District Court's factfinding does not support its conclusion that all of the State's environmental regulations at issue are preempted here, we remand for consideration of each regulation individually"); and *Jones Creek Investors, LLC v. Columbia County*, Dist. Court, SD Georgia 2013 ("Taking Plaintiffs' allegations as true, Plaintiffs' state law [tort] claims do not constitute "transportation" under the ICCTA. Consequently, the ICCTA does not preempt those claims. CSX's motion to dismiss these claims is DENIED.")

In an extensive review of state, federal and Surface Transportation Board (STB) decisions addressing the preemption effects of ICCTA, Petitioners did not find a single case in which a party sought a ruling that ICCTA applied to activities on a property that was not under the control of a rail carrier. In *Girard*, *supra*, the

Ohio Supreme Court made explicit what is implicit in the other cases addressing ICCTA preemption—that the activity at issue must take place on property owned or operated by a rail carrier:

> When the loading, unloading, or transloading of materials is performed by a rail carrier, *on property owned by the rail carrier*, through services rendered as a common carrier to the public, such activity has been found to fall under the purview of the ICCTA [emphasis added] [citations omitted].

134 Ohio St. 3d at 81. The *Girard* court mentions that the case before it involved an unconsummated agreement to lease the property at issue to a non-rail carrier, but the court's holding that ICCTA preemption did not apply to the property was based on a finding that the property was owned by a rail carrier. The *Girard* court noted that the property "sought to be appropriated by the city contains no active or abandoned tracks, contains no portion of rights-of-way of any rail lines, contains no permanent structures, and is undeveloped as a whole." The court stated, "These facts make Youngstown Railway's situation completely distinguishable from many cases finding preemption as applied under the ICCTA." *Id*. at 87. *Girard* quoted the Third Circuit's statement in *Hi Tech* that:

> The mere fact that the [Canadian Pacific Railroad] ultimately uses rail cars to transport the [construction and demolition] debris Hi Tech loads does not morph Hi Tech's activities into 'transportation by rail carrier.' Indeed, if Hi Tech's reasoning is accepted, any nonrail carrier's operations would come under the exclusive jurisdiction of the STB if, at some point in a chain of distribution, it handles products that are eventually shipped by rail by a rail carrier. The district court

> could not accept the argument that Congress intended the exclusive jurisdiction of the STB to sweep that broadly, and neither can we.

High Tech at 308-309, quoted in *Girard* at 90.

Although Petitioners have been unable to find cases in which ICCTA preemption is claimed for proposed activities on property not owned or leased by a rail carrier, Petitions have found examples of environmental review in which noise from proposed rail loading facilities has been considered. One example is the pending EIS for the application of Finger Lakes LPG Storage LLC to obtain a permit for the underground storage of liquefied petroleum gas (LPG). *Draft Supplemental Environmental Impact Statement, Finger Lakes LPG Storage LLC LPG Storage Facility*, August 2011,[2] and the Sound Study attached as Exhibit I.[3] The proposed LPG storage project involves shipments of LPG by Norfolk-Southern Railway from the facility. As part of the EIS for the storage project, extensive consideration is being given to the impacts of noise at the project's rail-loading facility.

> For the gas loading and unloading process, measurements were taken from a similar facility located in Savona, New York, owned by Inergy Midstream, parent company of Finger Lakes LPG Storage. In considering the various activities on site, the noise produced by the train engine moving around tank cars has the greatest possibility for an impact to day time ambient levels. This activity would occur daily for approximately 2 hours during the afternoon. The rest of the site activities include truck movements and pumps, which will sometimes

[2] http://www.dec.ny.gov/docs/permits_ej_operations_pdf/fngrlkdseis.pdf
[3] http://www.dec.ny.gov/docs/legal_protection_pdf/20140307huntsoundstudy.pdf.

> operate during the night. In order to correctly measure these sounds, levels were obtained from the existing facility during all processes.

Finger Lakes EIS, pp. 110-119. Surely, Crestwood (the successor in interest to Inergy Midstream) and Norfolk Southern would have asserted ICCTA preemption if they thought SEQRA review of the noise impacts of the storage project's rail-loading facility was preempted by ICCTA.

A second example of rail noise being considered in an environmental review of a proposed project involving a rail-loading facility, is the environmental review conducted by the US Environmental Protection Agency (EPA of the Hudson River PCBs Superfund Site. The Noise Impact Assessment prepared as part of that review explains that activities at the processing facility will include "[l]oading processed material from the onsite staging areas into rail cars; and [a]ssembly of loaded rail cars into a train set for transportation to the final disposal facility." Hudson River PCBs Superfund Site Phase 1 Final Design Report, Attachment J - Noise Impact Assessment, Prepared for: General Electric Company, Prepared by: Epsilon Associates, Inc., , March 21, 2006 Figure 5 – 5 Locomotive Noise Impacts -- Processing Facility GE Hudson River PCBs Superfund Site Phase 1 Final Design, p. 13.[4]

[4] http://www.epa.gov/hudson/pdf/2006_03_21%20Phase%20I%20FDR%20ATTACHMENT%20J.pdf.

For all these reasons, the Village was not preempted by ICCTA from conducing the review of noise impacts of the proposed bulk water sale and rail-loading facility project under SEQRA. Because SEQRA review of noise impacts was not preempted, noise impacts are relevant to the standing considerations in this case.

POINT V

THE SUSQUEHANNA RIVER BASIN COMPACT DOES NOT PREEMPT SEQRA

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 approve the amounts of water used by Respondent SWEPI pursuant to the water sale agreement. R. 39. As explained below, Respondents' claims that SEQRA is preempted by the Susquehanna River Basin Compact are unfounded.

A. The Issue of Preemption by the Susquehanna River Basin Compact Was Not Raised in the Trial Court and Is Not Subject to Review

In their joint brief before this court, Respondents argue that "The [Susquehanna River Basin] Compact preempted the Village from undertaking a SEQRA review of the environmental impacts associated with the withdrawal of water from the Basin." Respondents' Brief. p. 39. Ten pages of their brief are spent

developing this point. *Id*. 39-49. Not only is their legal argument erroneous for the reasons set forth below, it is an argument that was not presented to the trial court. As the trial judge observed in his decision, Respondents' counsel emphatically stated at the oral hearing that Respondents were not arguing preemption by the Compact. R. 39. "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." *Id*. In these circumstances, this court does not have jurisdiction to consider Respondents' compact preemption claim. *Bingham v. New York City Transit Authority*, 99 N.Y.2d 355 (2003). This court stated in *Bingham:*

> As we have many times repeated, this Court with rare exception does not review questions raised for the first time on appeal. Unlike the Appellate Division, we lack jurisdiction to review unpreserved issues in the interest of justice. A new issue—even a pure law issue—may be reached on appeal only if it could not have been avoided by factual showings or legal countersteps had it been raised below (see *Telaro v Telaro*, 25 NY2d 433, 439 [1969]). . . .
>
> These are not empty technicalities. Rather, they are "at the core of the distinction between the Legislature, which may spontaneously change the law whenever it perceives a public need, and the courts which can only announce the law when necessary to resolve a particular dispute between identified parties" *(Lichtman v Grossbard*, 73 NY2d 792, 795 [1988]). Moreover, in making and shaping the common law—having in mind the doctrine of *stare decisis* and the value of stability in the law—this Court best serves the litigants and the law by limiting its review to issues that have first been presented to and carefully considered by the trial and intermediate appellate courts.

> Had defendants' new argument been presented below, plaintiff would have had the opportunity to make a factual showing or legal argument that might have undermined defendants' position.

Id. at 359. Even if this Court were to consider Respondents' compact preemption argument, the trial court 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.

B. The Provisions of the Susquehanna River Basin Compact Do Not Conflict with SEQRA

The Susquehanna River Basin Compact (hereinafter the "SRB Compact" or the "Compact"), an interstate compact between New York, Pennsylvania, Maryland and the federal government, ECL § 21-1301, does not preempt the application of New York's SEQRA law to the decision by the Village of Painted Post to enter into a bulk water sale agreement.

The standards for determining when the provisions of an interstate water compact preempt state law were addressed by the United States Supreme Court in the 2013 case of *Tarrant Regional Water District v Herrmann*, 569 U.S. __, 133 S. Ct. 2120 (2013). *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.'" *Id.* at 2132. On the basis of this principle, the Court held that the Red River Basin Compact did not preempt the Oklahoma water statutes, affirming 9-0 the judgment of the 10th Circuit Court of Appeals. While the Court in *Tarrant* noted in a footnote that "a congressionally approved compact, as federal law, preempts state law *that conflicts* with the compact under the Supremacy Clause" (*id*. at fn. 8, emphasis added), the Court decided that the Red River Basin Compact did not conflict with Oklahoma state law. Consequently, it held that the prohibitions contained in Oklahoma's water statutes were not preempted by the Red River Basin Compact. Similarly, in the present case there is no conflict between the provisions of the SRB Compact and SEQRA, New York's environmental quality review law, and therefore there is no preemption.

No provisions of the SRB Compact preempt state environmental regulation. The wording of the Compact makes clear that the purpose of the compact is to coordinate planning and operations of its state members, not to preempt their laws. The purposes of the Compact are summarized in the project review regulations of the commission established to implement the provisions of the Compact, the

Susquehanna River Basin Commission ("SRBC"), 21 NYCRR Part 1806. Section 1806.2 of the regulations provides:

> (a) The general purposes of this part are to advance the purposes of the compact and include, but are not limited to:
>
> (1) The promotion of interstate comity;
>
> (2) The conservation, utilization, development, management and control of water resources under comprehensive, multiple purpose planning; and
>
> (3) The direction, supervision and coordination of water resources efforts and programs of federal, state and local governments and of private enterprise.

The Compact directs the SRBC to avoid regulatory duplication, particularly in the area of water quality. Article 3 of the Compact relating to the "Powers and Duties of the Commission," makes clear that the project review powers of the Commission are exercised alongside the project review powers of the member states. Section 3.10 of the Compact provides "No projects affecting the water resources of the basin, except those not requiring review and approval by the commission under paragraph 3 following, shall be undertaken by any person, governmental authority or other entity prior to submission to and approval by the commission *or appropriate agencies of the signatory parties* for review." ECL § 21-1301, Article 3, Section 3.10, emphasis added.

Section 12.2 of the Compact addresses intergovernmental relations between the SRBC and state and local agencies and projects. ECL § 21-1301, Article 12, Section 12.2. This section provides:

> For the purposes of avoiding conflicts of jurisdiction and of giving full effect to the commission as a regional agency of the signatory parties, the following rules shall govern projects of the signatory states, their political subdivisions and public corporations affecting water resources of the basin: . . . .
>
> 3. *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*.

Id., emphasis added. Section 12.2 makes clear that only an explicit preemption of state law would be applicable and no explicit preemption of state and local water withdrawal permitting or environmental review is provided in the either Compact or the SRBC regulations. In the absence of an explicit preemption, section 12.2 states, state and local agencies *shall continue to have authority* to plan, design, construct, operate, or maintain any project or facility in or for the basin. *Id*., emphasis added.

The SRBC has specifically and repeatedly 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 of 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 website.[5]

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.[6] The SRBC's position on not performing

[5] http://www.srbc.net/programs/natural_gas_development_faq.htm [accessed May 9, 2015].
[6] http://www.oag.state.md.us/Environment/SRBC_GanslerOnFracking.pdf [accessed May 3, 2015].

environmental reviews is affirmed in a 2013 press release issued by the SRBC's Executive Director, "Despite some calls for us to make [the SRBC's recently launched a multi-year effort to study the cumulative impact of consumptive water uses and water availability for the Susquehanna basin] *an expansive environmental assessment*, we are being responsible water managers by focusing in our areas of responsibility and scientific and technical expertise." *SRBC Staying in its Lane, Studying Water Quantity*, Paul Swartz, SRBC Executive Director, SRBC News Release, May 8, 2013, emphasis added.[7]

As this discussion shows, Respondents' claims that the Compact evinces a comprehensive regulatory scheme to preempt state environmental regulation is not borne out by the wording of the Compact or the statements of the SRBC.

C. The Compact Regulations Explicitly Recognize the Authority of New York State to Require Separate Approvals

The Compact regulations, like the Compact itself, explicitly recognize the continuing authority of the member states to impose permitting and approval requirements on projects in the Susquehanna River Basin. The regulations require that the project sponsor of any approval by rule of a source of water for consumptive use related to unconventional natural gas and other hydrocarbon development projects "*shall obtain all necessary permits or approvals required for*

[7] http://www.srbc.net/newsroom/NewsRelease.aspx?NewsReleaseID=106 [accessed May 9, 2015].

the project from other Federal, state, or local government agencies having jurisdiction over the project," 21 NYCRR 1806.22(f)(7), emphasis added. The regulations also require that any approval by rule of a source of water for consumptive use related to unconventional natural gas and other hydrocarbon development projects. "*shall be further subject to any approval or authorization required by the member jurisdiction*." 21 NYCRR 1806.22(f)(9), emphasis added.

In accordance with these requirements, each of the approvals issued by the SRBC to SWEPI to use water from the Village of Painted Post water system explicitly states that the approval is "*subject to any approval or authorization required by the Commission's (host) member state to utilize such source*." R. 601-602, emphasis added.

For the reasons set forth above, the Compact, the Compact regulations, and the actual SRBC approvals at issue in this case all make it clear that the SRB Compact does not preempt SEQRA review of a proposed bulk water sale by the Village.

Furthermore, under the procedures adopted by the SRBC, a natural gas company seeking an approval by rule to use water purchased from a public water supplier must demonstrate in its application for approval that there is an agreement in place with the public water supplier. The nature of the review given to the use of water from public water supplies by natural gas companies by the SRBC is

described on the SRBC website. A section of the SRBC website captioned *Frequently Asked Questions: SRBC's Role in Regulating Natural Gas Development*[8] answers the question, "Can natural gas companies use water from public water suppliers?" The answer provided is:

> Yes. Natural gas companies may request approval to purchase water from a public water supplier under SRBC's Approval by Rule regulations. In many cases, SRBC does not currently regulate the public water supply system, nor has SRBC staff reviewed the individual sources for the system. SRBC staff does not conduct specific studies related to these applications to purchase water. However, all sources for the public water supply systems are currently approved by the appropriate state agency, and SRBC coordinates with these agencies in its review of the request to purchase bulk water. In the review, SRBC establishes that:
>
> - There is sufficient excess capacity to support the requested bulk sale;
> - *There is an agreement in place between the natural gas company and the public water supplier*;
> - The public water supply system is in compliance with its permits (reporting meets requirements, allocated quantities not exceeded, water loss in the system is within acceptable range, etc.);
> - The water for the bulk sale will come from the existing system and not require a modification under state regulations;
> - The connection for the bulk sale will be fully metered and quantities monitored; and
> - The request is administratively complete and otherwise acceptable.

[8] http://www.srbc.net/programs/natural_gas_development_faq.htm [accessed May 9, 2015].

> An approval issued by SRBC does not insure that water will be available for purchase every day; the agreement between the gas company and the public water supplier dictates availability.

Id., emphasis added. A sample public water supply commitment letter is provided on the SRBC's *Forms & Applications* webpage.[9] The commitment letter confirms that a public water supply system has agreed to supply water to a Project Sponsor and provides the specific terms and conditions of that agreement:

> This letter serves to confirm that Name of Public Water Supply, PWS ID # , is willing to supply water from its public water supply system, on a bulk basis, for use by Legal Name of Gas Company gas well operations, in accordance with the terms described below.
>
> Name of Public Water Supply operates a public water system in Name of County, which has a total capacity to supply up to _____ million gallons per day (mgd). The current average daily demand for Name of Public Water Supply system is approximately _____ mgd and peak day demand is _____ mgd. Name of Public Water Supply is willing to provide Raw/Finished/Other water to Legal Name of Gas Company in an amount up to _____ mgd, as a bulk sale, during the period from starting date through ending date. It is understood that such amounts are not a commitment to reserve water, and that such amounts are subject to curtailment in case of drought restrictions or other unforeseen operational conditions that require Name of Public Water Supply to suspend or limit bulk water sales. Legal Name of Gas Company will arrange to collect water for its use by truck at Hydrant/Standpipe/Other (Water withdrawal must be made through a manmade conveyance owned by the public water supplier), located at Connection Location(s) Latitude: N° 0.000000 W° 0.000000 as designated by Name of Public Water Supply, during normal office hours or at other previously agreed-to times. This withdrawal will be metered by Water Supplier/Project Sponsor/Other using Meter Make: _____, Model _____, Serial # _____.

[9] http://www.srbc.net/forms/docs/54944.pdf [accessed May 9, 2015].

> Legal Name of Gas Company has agreed to pay Name of Public Water Supply for the water received from Name of Public Water Supply in the amount of $_____ per 1,000 gallons plus $_____ service fee per truckload.
>
> By signing this letter, Name of Public Water Supply confirms its agreement to 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.

Id.

In their brief, Respondents misstate the SRBC requirements for the use of water from public water supplies when they state that, "in order for the Village to approve the sale of surplus water to SWEPI, the Village was first required to apply to the Basin Commission for approval of the water withdrawals." Respondents' Brief p. 8. In fact, as described above, the SRBC regulations and procedures require that the application be made by the Project Sponsor, not the public water supply system, and that the public water supply system approve the bulk water sale agreement *before* an application for approval of the public water supply as a water source is submitted to the SRBC by the Project Sponsor. Thus, under the SRBC regulations and procedures, when SWEPI made an application to the SRBC to use water from the Village water system, it was required to attach a commitment letter from the Village confirming that the Village had entered into an agreement with SWEPI to provide water to SWEPI. Such a commitment letter could not properly

have been given by the Village until after the Village Board approved the water sale agreement to SWEPI on February 23, 2012. R. 117-119, 141-147.

From the above description of the provisions of the SRB Compact, the compact regulations and the SRBC approvals issued to SWEPI, it can be seen that the cases cited by Respondents in support of their arguments for compact preemption are inapposite. 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"). *Mitskovski v Buffalo & Fort Erie Public Bridge Authority*, 689 F. Supp. 2d 483 (W.D. N.Y. 2010), *aff'd* 415 Fed. Appx 264 (2d Cir. 2011). Although the district 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*. at 491. Application of SEQRA to an international compact agency presents entirely different legal issues than the application of SEQRA to an interstate compact entity such as the SRB Compact. Because the laws of two

countries, the United States and Canada, control the Fort Erie Public Bridge Authority, neither the legislation nor regulations which created the agency required state law compliance. The situation with an interstate compact such as the SRB Compact is entirely different. See *Tarrant*, supra. The holding in *Seattle Master Builders v. Pacific Northwest Electric Power and Conservation Planning Council*, 786 F.2d 1359, (9th Cir. 1986) is similarly inapplicable to the facts of the present case. The issue in the *Seattle* case was whether the 1983 regional energy plan developed by the Pacific Northwest Electric Power and Conservation Planning Council violated the Washington and Montana environmental protection laws. The Ninth Circuit determined that the Council was a "compact organization" and said that a state can impose state law on a compact organization only if the compact specifically reserves its right to do so. Because neither Washington nor Montana reserved such rights in their statutes agreeing to establishment of the Council, the court found that their laws did not apply to the plan. In contrast to the statutes establishing the Pacific Northwest Electric Power and Conservation Planning Council, the Susquehanna River Basin Compact explicitly gives member states the right to regulate environmental impacts. The case of *Erie Boulevard Hydropower v Stuyvesant Falls Hydro Corporation*, 30 A.D.3d 641 (3d Dept. 2006) cited by Respondents involved interpretation of the Federal Power Act ("FPA"), not an interstate compact. In that case, the court noted that under FPA, FERC's

jurisdiction with respect to the regulation and licensing of hydroelectric facilities affecting the navigable waters of the United States "preempts all [s]tate licensing and permit functions," and held that SEQRA review of a FERC-governed license application was not required. Unlike FPA, the Susquehanna River Basin Compact does not preempt state licensing and permit functions, as discussed above.

The Pennsylvania cases cited by Respondents are not relevant to the facts of the present case either. The issue presented in those cases was whether a local water authority could attach additional conditions to an SRBC approval. *State College Borough Water Auth. v Halfmoon Township*, 659 A.2d 640 (Pa. Cmwlth 1995), *Levin v Benner Township,* 669 A.2d 1063 (Pa. Cmwlth 1995). 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. The present case presents a wholly different factual circumstance. No attempt has been made by any governmental body to add conditions to the SRBC approvals issued to SWEPI to use water from the Village water system.

POINT VI

CONDUCTING A SEQRA REVIEW IS NOT A COLLATERAL ATTACK ON THE SRBC APPROVALS

Respondents' argue that Petitioners' claims are somehow a collateral attack on the SRBC approvals. But Petitioners are not seeking to invalidate the approvals

granted by the SRBC to SWEPI to use water from the Village, nor do Petitioners challenge the regulations or procedures pursuant to which the approvals were granted. What Petitioners' challenge in this case is the failure of the Village to conduct a SEQRA review of its decision to enter into a bulk water sale agreement with SWEPI. This is not a collateral attack on the SRBC approvals issued to SWEPI which explicitly state that they are "subject to any approval or authorization required by the Commission's (host) member state to utilize such source." R. 601-602.

The circumstances of this case are thus completely different than facts before this Court in the cases cited by Respondents. In *Matter of Lewis Tree Service, Inc.* v. *Fire Dept of City of N.Y.*, 66 N.Y. 2d 667 (1985) a tree services company sought to annul a determination of the New York City Fire Department awarding a contract for the trimming of trees to another bidder and to direct that it be awarded the contract. The Fire Department had declined to award the petitioner the contract because of a previous determination by the Comptroller that the petitioner had violated the provisions of Labor Law § 231(2) in failing to pay prevailing wage and benefits under two tree-spraying contracts it had with the New York City Housing Authority. The Court said that the decision of the Comptroller could not be collaterally attacked in the tree service's proceeding against the Fire Department. The facts of the present case are not analogous. Similarly, in

Callanan Road Improvement Co. v *United States*, 345 U.S. 507 (1953) the appellant brought suit in 1951 against the Interstate Commerce Commission ("ICC") to challenge certain alleged modifications made by the ICC in a certificate issued in 1942 and transferred to the appellant by the ICC in 1944. The Court determined that the appellant had not challenged the certificate at the time it was transferred to the appellant and stated, "the appellant cannot in this collateral proceeding attack the validity of the Commission's order of March 7, 1944. . . . The appellant must take the certificate as it stood at the time it sought and received the Commission's approval for its transfer." *Id*. at 513. Again, the facts of the present case are not analogous.

Respondents incorrectly state in their brief that "[b]y April 2011, the Basin Commission issued two approvals for the withdrawal of up to one million gallons of water." This is not correct. The record shows that the second approval issued by the SRBC to SWEPI was not issued until July 24, 2012, one month after Petitioners commenced this proceeding. R. 601. Thus Respondents' claims of having the SRBC approvals they needed in place prior to Petitioners' lawsuit is demonstrably incorrect. Furthermore, Petitioners observe that, had SWEPI waited to apply to the SRBC for the first approval, which was issued on March 28, 2011, until the Village had actually entered into a bulk water sale agreement with SWEPI as required by the SRBC's approval procedures described above, no SRBC

approval would have been issued before the Village made the decision to enter into the water sale agreement on February 23, 2012. R. 117-119, 141-147.

Respondents' claims that Petitioners knew of the SRBC approvals before filing their Article 78 proceeding is true only to the extent that Petitioners read newspaper articles claiming that SRBC approvals had been issued. As pointed out above, the second approval, for a transfer of 500,000 gpd was not even granted until after the Article 78 proceeding was filed. Furthermore, as Ruth Young, president of Petitioner People for a Healthy Environment, Inc., points out in her affidavit dated December 18, 2012, "From our perspective, both the content of the approval issued by the SRBC to SWEPI to take water from the Painted Post municipal water system (the 'Painted Post approval') and the process followed by the SRBC in issuing the approval are quite mysterious." R. 444. Ms. Young pointed out that, compared to an approval issued to SWEPI to take water from the Chemung River in Big Flats, NY that was renewed by the SRBC in June 2012 (the "Big Flats approval"), "no notice that the Painted Post approval was pending was posted on the SRBC website, and there was no mechanism for commenting on the Painted Post approval on the SRBC website." R. 445. She also pointed out that "A substantial amount of information is available on the SRBC website for the Big Flats approval. None is available on the website for the Painted Post approval." *Id.* "Unlike SWEPI's Big Flats approval," she stated, "SWEPI's Painted Post approval

is not referenced on the SRBC's Water Resource Project Location Map, http://www.srbc.net/wrp/Map.aspx?ID=8138. If one goes to the SRBC water resource portal project search webpage, http://srbc.neUwrp/Search.aspx, and searches for SWEPI LP projects, the Big Flats approval comes up with a substantial amount of information about the approval. The Painted Post approval does not come up in such a search." R. 445-446. She states "The only indication on the SRBC website that an approval has been issued for the Painted Post withdrawals is that the Village of Painted Post shows on the list of approved water sources for SWEPI. But there is no docket number, no date for the issuance of the approval, no statement of the amounts approved and [no] opportunity to view the actual approval issued." R. 446. Apparently, the only documentation of the Painted Post approvals is contained in the two emails issued by the SRBC, one on March 28, 2011, and one on July 24, 2012. R. 601-602. In these circumstances, it was difficult for Petitioners to obtain information about the Painted Post approvals.

Whatever the circumstances of their issuance, Petitioners have not challenged the SRBC approvals issued to SWEPI to use water from the Village of Painted Post water system. For this reason and the other reasons stated above, Petitioners' claims are not a collateral attack on the SRBC approvals issued to SWEPI.

POINT VII

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 in any way 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 VIII

COMPLAINCE WITH THE STATE ENVIRONMENTAL QUALITY REVIEW ACT

Most of Petitioners' arguments concerning the lack of compliance with SEQRA are contained in Petitioners' original Brief. However, Respondent has

made some particular points, sometimes in a shotgun manner, which need response so that there can be no claim that Petitioners agree with the Respondents on those issues.

First, Respondents raised a rather nuanced argument for the first time before this Court as it relates to SEQRA compliance. While the Wellsboro and Corning Railroad, which did not appeal the trial court's decision and is not appearing in this Court, did raise the issue of preemption concerning the construction of the rail-loading facility in the trial court, (WCOR did not appeal to the Fourth Department either), the Respondents now make the claim that not only is any SEQRA review preempted by ICCTA, but that the voluntary SEQRA review that the Village did engage in was limited by the preemptive effect of both ICCTA and the SRB Compact. Of course, as previously indicated, any claim of preemption by the SRB Compact was specifically waived in the trial court, and only raised for the first time on appeal at the Appellate Division. However, the argument that the preemptive effect of ICCTA and the SRBC permit, as it relates to limiting the review of noise, is raised for the first time in this Court. As such, it is respectfully submitted that this Court does not have jurisdiction to consider it. *Altshuler Shaham Provident Funds, Ltd. v. GML Tower LLC*, 21 N.Y.3d 352 (2013); *Bingham v. New York City Transit Authority*, *supra*.

Another issue not raised in the trial court and therefore raised for the first time on appeal, is the claim that SEQRA review does not encompass adverse environmental impacts that occur outside of the State of New York. This issue is important, since the so called voluntary environmental review engaged in by the Respondents essentially stopped at the Village's borders, and did not consider any environmental consequences elsewhere in the Corning aquifer or at the end of the rail line where the water would be off loaded, or any environmental consequences concerning the use of the water for hydrofracking purposes. Since as indicated in Petitioners' original brief, SEQRA requires a review of all the long term, short term and cumulative effects of an action, therefore, an appropriate environmental review would not be limited to the effects within the borders of the Village of Painted Post. The cases cited by the Respondents are all distinguishable, since they deal with the construction of facilities outside of the State of New York, rather than with effects outside of the state of New York of an action that takes place within the state. Obviously, New York state agencies or municipalities have no jurisdiction or control over a project that is being constructed in another state, but that is not the situation presented in the present case.

CONCLUSION

For all of the foregoing reasons and the reasons indicated in Petitioners' original Brief, it is respectfully requested that this Court reverse the finding of the Appellate Division and determine that John Marvin has standing, and reinstate the Decision of the trial court concerning the merits issues in this case including the grant of injunctive relief.

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