To be Argued by:
RACHEL TREICHLER
(Time Requested: 30 Minutes)

APL 2014-00266
Steuben County Clerk's Index No. 2012-0810
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.

BRIEF FOR PETITIONERS-APPELLANTS

RACHEL TREICHLER, ESQ.
7988 Van Amburg Road
Hammondsport, New York 14840
(607) 569-2114

RICHARD J. LIPPES & ASSOCIATES
Richard J. Lippes, Esq.
1109 Delaware Avenue
Buffalo, New York 14209
(716) 884-4800

Attorneys for Petitioners-Appellants

Date Completed: December 22, 2014

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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
December 22, 2014

RICHARD J. LIPPES, ESQ.
LIPPES & LIPPES
1109 Delaware Avenue
Buffalo, New York 14209
Telephone: (716) 884-4800

RACHEL TREICHLER, ESQ.
7988 Van Amburg Road
Hammondsport, New York 14846
Telephone: (607) 569-2114

Attorneys for Petitioners-Appellants

I. STATEMENT OF QUESTIONS PRESENTED

(1) Did the Appellate Division misapprehend the law by not finding that Petitioner John Marvin had a presumption of standing based upon his proximity to a transloading facility and noise from the trains entering and exiting the facility, even though this case is not a zoning case?

Answer: Even though this is not a zoning case, the applicable precedents allow a presumption of standing to raise a challenge under SEQRA based solely on a party's proximity.

(2) Did the Appellate Court misapprehend the law as it relates to standing by only considering John Marvin's claim of noise pollution and ignoring completely his proximity to the transloading facility and train noise from the facility?

Answer: The Appellate Court improperly applied the proximity plus presumption when it failed to acknowledge John Marvin's proximity to the transloading facility and his exposure to train noise from the facility.

(3) While the Appellate Court did not reach the merit issues since it dismissed the Petition based upon a lack of standing, was the trial court correct in determining that the sale by the Village of Painted Post of one million gallons per day from the Corning aquifer was not exempt from environmental review pursuant to SEQRA as a Type II exempt action of sale of surplus property?

Answer: If it is determined that Petitioner Marvin has standing, the trial court's holding that the Type II exemption for surplus property contained in 6 N.Y.C.R.R. § 617.5(c)(25) does not apply to bulk water withdrawals should be affirmed.

(4) Was the trial court correct in determining that the sale of one million gallons of water per day or more from the Corning aquifer constitutes an Unlisted action pursuant to the SEQRA regulations?

Answer: If it is determined that Petitioner Marvin has standing, the trial court's holding that a bulk water sale agreement for less than 2,000,000 gallons per day is properly classified as an Unlisted action under SEQRA should be affirmed.

(5) Did the Village of Painted Post improperly segment its SEQRA review of an agreement to sell one million gallons of water per day or more from the Corning aquifer from its separate consideration of a lease of Village land for a facility to ship the water?

Answer: If it is determined that Petitioner Marvin has standing, the trial court's holding that the Village improperly segmented its SEQRA review of a bulk water sale agreement and a lease of land for a facility to ship the should be affirmed.

II. PROCEDURAL HISTORY OF THE CASE

This proceeding has been brought by the Petitioners-Appellants (hereinafter cited as "Petitioners") to require the Respondent-Respondent Village of Painted Post to engage in an environmental review pursuant to the New York State Environmental Quality Review Act, Environmental Conservation Law §8-101 et. seq. (hereinafter cited as "SEQRA") prior to entering into agreements to sell one million gallons of water per day from the Village's public water supply, and to lease land for the construction of a rail siding and transloading facility where the water would be loaded on 42 rail tanker cars every 16 hours and transported through the Village to Pennsylvania to be used in the hydrofracking process of natural gas drilling. R. 218-219. [1]

The trial court (Kenneth R. Fisher, J.S.C.) in its Decision of March 25, 2013, determined that the Petition could proceed based upon the standing of Petitioner John Marvin. R. 25. The court then determined that SEQRA had been violated and enjoined the Respondents from further water withdrawals until the Village complied with SEQRA. R. 38. A Notice of Appeal was filed by Respondents Village of Painted Post and Painted Post Development, LLC and SWEPI, LP on April 25, 2013. R. 2. The Wellsboro and Corning Railroad, LLC did not appeal the trial court's Decision.

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[1] All citations to the Record are designated "R. __".

On March 28, 2014, the Appellate Division, Fourth Department determined that none of the Petitioners, including John Marvin, had standing to pursue the Petition, and therefore reversed the trial court's Decision, annulled the injunction, and dismissed the Petition. R. 656-659. Notice of Entry of the Appellate Division's Decision and Order was served by ordinary mail on the Petitioners on March 31, 2014.

On April 29, 2014, Petitioners moved in the Appellate Division, Fourth Department, to reargue or in the alternative for leave to appeal to the Court of Appeals. On June 13, 2014, the Appellate Division denied Petitioners' motion to reargue or for leave to appeal to the Court of Appeals, which was served by ordinary mail with notice of entry on June 16, 2014.

On July 17, 2014, Petitioners' motion for leave to appeal to the Court of Appeals was filed. Leave to appeal was granted by the Court on October 23, 2014. R. 660.

III. JURISDICTIONAL STATEMENT

The Order of the Appellate Division, Fourth Department, is a final determination of the instant proceeding, since it dismissed the Petition. As such, this Court has jurisdiction to consider this Appeal from the final determination of this case as rendered by the Appellate Division, Fourth Judicial Department

pursuant to §5602(1)(ii) of the New York Civil Practice Laws and Rules and §500.22 of the Rules of this Court.

IV. STATEMENT OF FACTS

The Village of Painted Post is located at the confluence of four rivers, the Cohocton River, the Canisteo River, the Tioga River and the Chemung River. At Painted Post, the Cohocton River and the Tioga River meet to form the Chemung River, just north of where the Canisteo River joins the Tioga River. The site was marked in early times by a painted post.

Underlying the confluence of these four rivers is the Corning aquifer. R. 471. As Petitioner and geologist Jean Wosinski explains in her affidavit, the Corning aquifer is "unlike the extensive, porous, water bearing rock layers that comprise what people most often think of as an aquifer." R. 466. Rather, "the Corning aquifer consists of relatively narrow branches of loose glacial fill located at the bottom of four deep river valleys" and is highly dependent on sustained rainfall on the surrounding hills for its productivity. Id.

The Corning aquifer is the principal drinking water supply source for at least five municipalities located above the aquifer, including the Village of Painted Post municipal water system. R. 489. The other municipalities served by the aquifer include the City of Corning, the Town of Corning, the Town of Erwin, and the

Village of Riverside. Id. A number of industrial, governmental, business and private users in southeastern Steuben County also make use of the Corning aquifer. R. 61-62. The Corning aquifer has been designated as a "Primary Water Supply Aquifer" by the New York State Department of Health and the New York State Department of Environmental Conservation. R. 58. The Corning aquifer is one of three designated Primary Water Supply Aquifers on the Cohocton River and one of only 18 Primary Water Supply Aquifer designated in the state. Id.

In early 2012, the Board of Trustees of the Village of Painted Post decided to begin selling large amounts of water from the village water system to a gas drilling company in Pennsylvania to use for hydrofracking. (R. 111-119, 651-655. The Board voted at a meeting on February 23, 2012, to enter into a bulk water sales agreement with SWEPI LP, a subsidiary of Shell Oil Co. operating gas wells in Tioga County, Pennsylvania. R. 117-119. To facilitate the bulk water sales, the Board also voted to approve the lease of a brownfield site was located next to a residential to the Wellsboro & Corning Railroad for the construction of a water transloading facility so that water could be shipped by rail to Wellsboro, Pennsylvania. R. 653-655. The property is owned by Painted Post Development LLC, a wholly owned subsidiary of the Village. Id.

The bulk water sales agreement provided for the sale to SWEPI LP of up to one million gallons per day from the village water system with an option to

increase the amount 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. These amounts represented two to three times the Village's recent water usage from the Corning aquifer. R. 59. The bulk water sale agreement stated that "SWEPI LP may . . . take delivery . . . from the filling/metering station and transloading facility to be constructed and located in the vicinity of 450 West Water Street." R. 141. The lease agreement with the Wellsboro & Corning Railroad provided for the lease of 11.8 acres of a former Ingersoll-Rand foundry site for the construction of a new rail spur and a transloading facility whereby water from the Village's water distribution system would be loaded onto railroad cars for transport to Wellsboro, Pennsylvania. R. 120-124, 256-323, 653-655. The foundry site was acquired by Painted Post Development from the Ingersoll-Rand Company in 2005. The lease to the Wellsboro & Corning Railroad incorporated the extraordinary restrictions upon the use of the site contained in the 2005 deed, including a prohibition on the use of groundwater underlying the site unless permission to do so is granted by the DEC. R. 123-124, 256-323. The lease acknowledged the connection between the lease and the water sales agreement, stating, "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 Village Board segmented its review of the environmental impacts of the proposed project. At its meeting on February 23, 2012, the Board determined that the bulk water sale to SWEPI was a Type II action exempt from review under SEQRA. R. 651-652. The Board's "determination of non-significance" of the bulk water sale agreement, cited 6 N.Y.C.R.R. 617.5(c)(25) as the provision pursuant to which the Type II exemption was claimed. R. 651. Section 617.5(c)(25) provides that actions for the "purchase or sale of furnishings, equipment or supplies, including surplus government property, other than the following: land, radioactive material, pesticides, herbicides, or other hazardous materials" are Type II actions that are not subject to review under SEQRA. As a consequence of the Type II determination, the resolution stated, "The requirements of SEQRA . . . have been satisfied." R. 652.

At the same meeting, Board determined that entering into the lease for the transloading facility 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. 113. The negative declaration was based upon a review of a Full Environmental Assessment Form (EAF), a report prepared by engineering consultants to the Village, the site plan prepared for the railroad, and the 2005 deed to the site.

R. 112, 148-168, 188-211, 212-255, 256-323. None of the materials reviewed by the Village in conjunction with the EAF referenced any hydro-geologic testing of the impact of the proposed withdrawals on the Corning aquifer and did not provide the sort of data necessary to evaluate the impact of the water withdrawals on the aquifer, as Petitioner's expert witness, hydro-geologist Paul Rubin, pointed out in his affidavits. R. 481-525, 640-643. As Mr. Rubin stated in one of his affidavits:

> "Assessments of aquifer safe yield require detailed knowledge of aquifer boundary conditions, saturated aquifer conditions, knowledge of potentially overlapping cones of depression, cumulative water demand, and empirical pumping and recovery test data that can be analyzed. . . . Such testing replaces the use of old production records that cannot adequately assess aquifer limitations or even well's ability to continuously produce high yields. . . .
>
> "[T]o permit large-scale water withdrawals without a rigorously derived and documented assessment of safe yield may adversely impact Corning aquifer users during dry and drought periods, both as a result of insufficient water availability and from potential influx of contaminants from added induced recharge from overlying streams . . . . The reason [hydrogeologic testing is required] is that it is impossible to make informed, scientifically valid, determinations of safe yield without it (i.e., production data cannot be exclusively used for these evaluations). . . .
>
> "There has been no empirical drawdown and recovery data provided to support [Respondents' claims that its proposed withdrawals will not harm the aquifer]."

R. 641-642.

Much of the information required to be provided in the Environmental Assessment Form reviewed and signed by the Village Board on February 23, 2012, was either not supplied, was insufficiently supplied or was supplied incorrectly. R. 148-168. 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, as noted above, 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 cited as DEC), and is one of only 18 primary aquifers in New York. R. 58. Primary aquifers are designated "to enhance regulatory protection in areas where groundwater resources are most productive and most vulnerable." 1990 DEC Division of Water Technical and Operational Guidance Document on Primary and Principle Aquifer Determinations, TOGS 2.1.3, http://www.dec.ny.gov/docs/water_pdf/togs213.pdf [last accessed December 16, 2014]. Similarly, the Village responded "Not Applicable" to the question in the EAF 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 whether the "Proposed Action requires water

supply from wells with greater than 45 gallons per minute pumping capacity." R. 160. In fact the proposed demand for the project was 1000 gallons per minute. R. 218. The Village responded "No" to the question whether there would be "objectionable . . . noise or vibration as a result of the Proposed Action," and indicted that the project will produce no operating noise exceeding local ambient noise levels. R. 165. In fact the project produced noise at levels up to 102 db, far above ambient noise levels. R. 427, 429. Other questions on the EAF that were either answered improperly or left unanswered are identified in the petition. R. 67-71.

Following adoption of the Board's resolutions authorizing the agreements, the Mayor of the Village signed the agreements effective March 1, 2012. R. 120-147. Work began to install new piping and other equipment for the village water system in March. R. 431.

On June 25, 2012, Petitioners filed the instant proceeding in Steuben County Supreme Court challenging the adequacy of the environmental review conducted by the Village for the bulk water sale and the lease of land and seeking a preliminary injunction against the bulk water sales and the continued construction of the rail-loading facility. Notwithstanding Petitioners' application for a preliminary injunction, the first hearing in the case was not held until March 1, 2013.

Throughout the summer of 2012 while the legal proceeding was in limbo, the transloading facility was constructed. Petitioner John Marvin described the construction in his affidavit, "Construction began at the facility site in June 2012. There was a lot of earth moving equipment. I was told that they could not take any dirt away from the site because of the contaminants in the soil, but that they could bring dirt in and that is what they did. After they graded the piles of dirt at the site, they put up a new fence, put in the new rail line and put in the piping system for the water loading facility. The work moved quickly at the foundry site and in August 2012, I saw that the rail spur and 42 water pumps had been installed, one tanker length apart. In the middle of August, water trains started running." R. 432.

The engineering report prepared by a consultant for the Wellsboro & Corning Railroad described the operation of transloading facility:

> "The Wellsboro & Corning Railroad is proposing to install a transloading facility at the former Ingersoll Rand Foundry . . . . The facility will be operated 24-hours-a-day by the Wellboro Corning Railroad. The project will be constructed so as to provide an automated water loading system that will withdraw potable water from the Painted Post municipal water piping that is currently located on the project site. A new rail siding will be constructed within this proposed project area, and tanker cars will be parked on the siding while the loading process is being completed."

R. 214. The report states, "Each railroad tanker, positioned at each station, has a 3-inch connection that will be used to fill each tanker with approximately 23,200

gallons of water. The site was designed for 42 tanker cars and each cycle will fill all forty two (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." R. 218. As the petition noted, "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." R. 53.

When water shipments from the facility began in August 2012, they were conducted at night and created extremely noisy conditions for those who lived near the site. R. 426-429, 432. Petitioner 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 at 240 Charles St. within 400 feet of the rail line and 500 feet from the edge of the water-loading facility. R. 430, 434. 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.

The noise caused by operation of the facility was not a surprise to Petitioners. The petition identified engines moving heavily loaded rail cars on the sidings of the loading facility as a probable source of "significant noise." R. 54.

> "34. The loaded rail cars will be heavy. The weight of one gallon of water is 8.345 pounds. The weight of a railcar 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 railcars and from squealing wheels."

Id. Petitioner Marvin mentions diesel engines as a source of the noises he heard in his affidavit. R. 432. Presumably, the diesel engine noise Mr. Marvin heard was caused by the engines moving tanker cars into and out of the transloading facility. The source of the train noises heard by the neighbors of the transloading facility is explained in the affidavit of Gerald and Teresa Flegal, who like John Marvin live on Charles Street. The Flegals live "at 200 Charles St. . . . at the intersection of Charles St. and Chemung St. The railroad tracks run down Chemung Street along the side of our house. We are about 30 feet from the rail loading facility." R. 426. They state that the high noise levels they heard 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 table of noise measurements provided by the Flegals identifies eight of the ten high noise measurements as occurring when trains arrived or departed the transloading facility. R. 429. The remaining two high instances occurred when trains were idling. Id. The Flegals stated in their affidavit, that "many residents of this area" of the Village were concerned about the noise and spoke out about their concerns. R. 428. They noted that they attended a Village Board meeting on September 10, 2012, and spoke out about their concerns "as did many of our neighbors." Id. These statements by the Flegals make it clear that the residents of the neighborhood next to the transloading facility were the ones who complained about noise from the water trains, not more distant residents of the Village.

The location of the transloading facility is described in the petition:

> "The land leased for the loading facility is located on the western side of the center of the village, bordered on two sides by residential areas, and adjacent to a public park."

R. 55. Several maps contained in the record, including the system map for the Wellsboro-Corning Railroad and a map of the Village water system, show that the transloading facility is located on the northwest edge of the Village. R. 544, 565.

These maps make clear that the residential areas bordering the transloading facility were located between the loading facility and the rest of the Village. It is a well-known fact that sound decreases in inverse proportion to distance, so the further someone lives from a source of sound, the more attenuated the noises from that source would be. For these reasons, the sounds from engines and trains entering and exiting the transloading facility would have been loudest in the residential neighborhood in which Petitioner John Marvin lived. As a consequence, the noise from engines and trains entering and exiting the transloading facility affected those village residents who lived next to the loading facility more than other residents of the village who lived further away.

Justice Fisher issued his trial Decision and Order on March 25, 2013. R. 6-40. Concerning the issue of standing, Justice Fisher determined that Petitioner Marvin had standing to bring the Petition. While agreeing with the Respondents that Petitioner Marvin's proximity to the site did not create a presumption of standing, since such presumption only obtains in zoning cases, Justice Fisher determined that this was not a "proximity alone" case, but rather a "proximity plus environmental harm case," and that the two, taken together, provided John Marvin's standing. R. 25. Justice Fisher found that the environmental harm experienced by Petitioner Marvin was his "complaint of train noise newly

introduced into his neighborhood," which he found was "different than the noise suffered by the public in general." Id.

Having found that Petitioner Marvin had standing, Justice Fisher determined:

> "In sum, the Village Board acted arbitrarily and capriciously when it classified the Surface 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 resolution 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 are granted an injunction enjoining further water withdrawals pursuant to the Surplus Water Sale Agreement pending Respondents' compliance with SEQRA. [Citations omitted]."

R. 36-38.

The Appellate Division reversed Justice Fisher's decision. The appellate court found that Petitioner Marvin's claim of newly created noise fell within the zone of interest of SEQRA, but determined that Petitioner Marvin did not have standing because his claim was no different than the public at large. R. 657. In its summary of the facts on noise, the appellate court asserted that "Marvin raised no

complaints concerning noise from the transloading facility itself," R. 658, and stated that "the noise from the moving trains affected many of the Village residents, a large number of whom expressed their concerns at a village board meeting." Id.

The water trains resumed operation following the Appellate Division decision.

V. ARGUMENT

A. PETITIONER JOHN MARVIN HAS STANDING

Since this Court's Decision in Society of Plastic Indus. v. County of Suffolk, 77 N.Y.2d 761 (1991), the courts in New York State have struggled with the second part of the standing requirement in environmental and land use cases. While courts have had no problem determining whether or not the issues raised by a petitioner fall within the zone of interest of the New York State Environmental Quality Review Act, Environmental Conservation Law § 8-101, et. seq. (hereinafter cited as "SEQRA"), the requirement that a petitioner be injured in a manner different than the public at large has created significant contradictory decisions within the Appellate Division departments, and within each department. See, e.g., McCartney v. Dormitory Authority of the State of New York, 5 A.D.3d 1090 (4th Dept. 2004); Save Our Main Street Buildings v. Greene County, 293 A.D.2d 907 (3rd Dept.) lv. den. 98 N.Y.2d 609 (2002); Buerger v. Town of

Grafton, 235 A.D.2d 984 (3rd Dept.) lv. den. 89 N.Y.2d 816 (1997); Matter of Long Island Pine Barrens Society, Inc., v. Planning Board of Town of Brookhaven, 213 A.D.2d 484, (2nd Dept. 1995).

Many of the Appellate Division departments that sought to apply the "different than the public at large" requirement have misapplied the Society of Plastics' decision. While the requirement that in order for an individual to have standing to pursue a SEQRA violation, that individual must be injured in a way different than the public at large is clearly stated in Society of Plastics, this Court went on to indicate in its Plastics decision that petitioners must demonstrate the existence of "direct harm," that is the "threat of cognizable injury... different in kind or degree from the public at large," when the challenged action has localized impacts. Society of Plastics, 77 N.Y.2d at 778-79. When applying this factor, however, this Court took great care to assure that a significant number of appropriately situated petitioners would have such standing, stating:

> "In sum, the threat and environmental impacts of this particular law, are such that certain ... residents can show a special or differentiating harm, providing a large pool of potential plaintiffs whose interests satisfy the policy goals of SEQRA and of the standing doctrine, with no compromise of the Court's commitment to the enforcement of SEQRA. This is not a case where to deny standing to this plaintiff would be to insulate governmental action from scrutiny."

Id. at 779.

Clearly, this Court never intended that the standing analysis would become an exacting requirement that a particular petitioner alleges an injury that is so much more acute or unique relative to almost all other individuals in the affected community such that only a few—possibly none—might have standing.

(1) THE HISTORY OF STANDING PRIOR TO SOCIETY OF PLASTICS

Lacking any State Constitutional analog to the Federal Constitution's Article III's "case or controversy" requirement, New York courts have recognized that even a fewer standing hurdles exist for litigants seeking to bring suit in New York than exist at the federal level. See, e.g., Industrial Liaison Committee of the Niagara Falls Area Chamber of Commerce v. Williams, 131 A.D.2d 205, 209 (3rd Dept.) (held standing under SEQRA to be interpreted more broadly than under NEPA), aff'd., 72 N.Y.2d 137 (1988).

In Dairylea Cooperative v. Walkley, 38 N.Y.2d 6 (1975), this Court expressly adopted the two-prong "zone of interest" test for standing formulated by the United States Supreme Court. In Dairylea, this Court held that a petitioner has standing if it can show, (1) as a result of agency action it will suffer injury-in-fact, and (2) the interest the petitioner asserts falls arguably within the zone of interests to be protected by the statute. Id. at 9. In its acknowledgement of the broad contours of standing to access New York courts, this Court noted:

> "A fundamental tenant of our system of remedies is that when a government agency seeks to act in a manner adversely affecting a party, judicial review of that action may be had. The increasing pervasiveness of administrative influence on our daily life on both the state and federal level necessitates a concomitant broadening of the category of persons entitled to a judicial determination as to the validity of proposed action."

Id. at 10. The Court concluded that standing will be denied only where there is a clear legislative intent negating review, or lack of any injury in fact. Id.

Before Dairylea, this Court indicated that it was "troubled by the apparent readiness of our courts in zoning litigation to dispose of disputes over land use on questions of standing without reaching the merits, an attribute which is glaringly inconsistent with the broadening rules of standing in related fields." Douglaston Civic Ass'n v. Galvin, 36 N.Y.2d 1 (1974). The Court summed up its finding that the Civic Association in Douglaston had associational standing as follows:

> "We reach this result simply in recognition of the modern day fact of life that participation by neighborhood groups in land use decisions has grown from the exception to the rule. While often informal and disorganized, it is a practice that needs to be encouraged lest a neighborhood become nickeled-and-dimed to death by gas stations, beauty parlors, taverns and the like."

Id. at 8. Thus, this Court has admonished the lower courts that "standing principles, which in the end are matters of policy, should not be heavy-handed..." Matter of Sun-Brite Car Wash, Inc. v. Board of Zoning Appeals of Town of North Hempstead,

69 N.Y.2d 406, 413 (1987) (". . . it is desirable that land use disputes be resolved on their own merits rather than by preclusive, restrictive standing rules.")

Of course, federal law does not require a showing of injury different from than public at large. Over 30 years ago, the United States Supreme Court sought to broaden the scope of standing to include parties who can demonstrate that their interests fall within the "zone of interests" sought to be protected by the statutory provision at issue. With respect to noneconomic environmental and aesthetic interests, such as those at issue in this proceeding, the Supreme Court stated in Sierra Club v. Morton, 405 U.S. 727 (1972):

> "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few, does not make them any less deserving of legal protection through the judicial process."

Id. at 734. Similarly, in Society of Plastics, supra, this Court cited with approval those circumstances where:

> "Associations dedicated to environmental preservation seeking to represent the interests of persons threatened with environmental harm ... in such instances, in fact injury within the zone of interest of environmental statutes has been established by proof that agency action will directly harm association members in their use and enjoyment of the affected natural resources."

77 N.Y.2d at 775-776, citing United States v. Students Challenging Regulatory Agency Procedures ("SCRAP"), 412 U.S. 669, 687 (1973). This citation

evidences a far less restrictive policy by this Court toward standing when environmental or community groups and their members seek to raise environmental concerns through an Article 78 proceeding. Indeed, in SCRAP, the United States Supreme Court found that the plaintiffs had standing because they had alleged that the illegal action of a governmental commission "would directly harm them in their use of the natural resources of the Washington Metropolitan area." 412 U.S. at 687. In response to the argument that the environmental plaintiffs were not claiming injury that was sufficiently distinct, the Supreme Court stated:

> "We have already made clear that standing is not to be denied simply because many people suffer the same injury... deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread government actions could be questioned by nobody. We cannot accept that conclusion."

Id. at 687-88. Subsequent decisions of the United States Supreme Court, and of several United States Circuit Courts of Appeals, indicate that nearby landowners often have standing to challenge the government's failure to follow statutorily prescribed procedures so long as that failure impairs a separate concrete interest of the plaintiff, such as use and enjoyment. Lujan v. Defenders of Wildlife, 504 U.S. 555, 571-573 (1992). See, e.g., Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 336 (1989) (no question made of standing for a citizen's council of

the vicinity to challenge the contents of environmental impact statement); Waterford Citizen's Association v. Reilly, 970 F.2d 1287 (4th Cir. 1992) (nearby plaintiffs have standing to challenge an agency's failure to comply with the National Historic Preservation Act of 1966); Society Hill Towers Owners Association v. Rendell, 210 F3d 168 (3rd Cir. 2000) (Where association claimed that its members would be harmed by the building of a hotel and garage by increased traffic, pollution and noise and impairment of the use and enjoyment of the historic district).[2]

(2) THE PROXIMITY EXCEPTION TO THE SOCIETY OF PLASTICS STANDING RULE SHOULD APPLY TO ALL LAND USE CASES NOT JUST ZONING CASES

While this Court created a presumption of standing for individuals who live nearby an area that was requested to be rezoned in Matter of Har Enterprises v. Town of Brookhaven, 74 N.Y.2d 524 (1989) and the Sun-Brite case, supra, New York trial state courts and the Appellate Divisions within New York have issued many contradictory decisions concerning whether or not the proximity exception applied by this Court in zoning cases also applies to proximity cases in non-zoning land use cases raising SEQRA issues.

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[2] This Court has recently moved closer to the federal standard in the case of Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 N.Y.3d 297 (2009) where the court indicated it would adopt a standing requirement similar to that of Sierra Club v. Morton, supra.

The two Court of Appeals cases determining that the proximity exception provides standing, Har Enterprises and Sun Brite, both arose from challenges to administrative actions taken under a zoning code. Therefore, it is not surprising that the court in writing these decisions, applied the facts in these cases and framed their decisions in terms of zoning. For example, in Sun-Brite, the court stated:

> "[W]hile something more than the interest of the public at large is required to entitle a person to seek judicial review — the petitioning party must have a legally cognizable interest that is or will be affected by the zoning determination — proof of special damage or in fact injury is not required in every instance to establish that the value or enjoyment of one's property is adversely affected . . . thus, an allegation of close proximity alone may give rise to an inference of damage or injury that enables a nearby owner to challenge a zoning board decision without proof of actual injury. [Citations omitted]."

69 N.Y.2d at 413-414. A comparison of decisions where appellate divisions have determined that the proximity exception and presumption applies in the non-zoning context, e.g., Matter of Ontario Heights Homeowners Assoc. v. Town of Oswego Planning Board, 77 A.D.3d 1465 (4th Dept. 2010); Ziemba v. City of Troy, 37 A.D.3d 68 (3rd Dept. 2006); Long Island Contractors Association v. Town of Riverhead, 17 A.D.3d 590 (2nd Dept. 2005); Town of Coeymans v. City of Albany, 284 A.D.2d 830 (3rd Dept. 2001); 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 A.D.2d 506 (2nd Dept. 1994), with those

cases that determined that the proximity exception only applies in zoning cases, e.g., Save Our Main Street Buildings v. Greene County, 293 A.D.2d 907 (3rd Dept. 2002); Rent Stabilization Ass'n of N.Y.C., Inc. v. Miller, 15 A.D.3rd 194 (1st Dept. 2005); Boyle v. Town of Woodstock, 257 A.D.2d 702 (3rd Dept. 1999); Barrett v. Dutchess County Legislature, 38 A.D.3d 65 (2nd Dept. 2007); Matter of Oates v. Village of Watkins Glen, 290 A.D.2d 758 and of course the Fourth Department's decision in the instant case. R. 656, shows a split, even within departments, on this issue.

The United States Supreme Court as well as other federal courts have established what in New York terms would be called the proximity exception to standing requirements in all land uses cases. For example, in Robertson v Methow Valley Citizens Council, 490 U.S. 332, 336 (1989) the court indicated that there was no question regarding standing for a citizen's council in the vicinity to challenge the contents of an environmental impact statement, and in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) the court at footnote 7 indicated that the Robertson court did not address standing "for the very good reason that the plaintiff was a citizen's council for the area in which the challenged action was to occur, so that its members would obviously be concretely affected." Id.

In the instant case, the trial court determined that the proximity exception did not apply to the fact that John Marvin lived closed by the

transloading site and railroad tracks because the case is not a zoning case. As previously shown, Petitioner Marvin lives within 400 feet of the rail line and within 500 feet from the edge of the transloading facility. R. 434. There is no question that John Marvin lives in proximity to the facilities that are causing the noise pollution which the trial court and Appellate Division recognize was within the zoning interests of SEQRA. If this was a zoning case, the proximity exception would certainly apply. There is no sound reason that it should not apply in this non-zoning case.

Based on the reasons stated by this court in both Har Enterprises and Sun-Brite to provide a proximity presumption in zoning cases, it would appear that a distinction between zoning and non-zoning cases is a distinction without a difference. The presumption is granted to a resident that lives nearby property that is going to be rezoned, because it is assumed that because of such proximity, the rezoning may have negative affects upon the homeowner. Likewise, it should be assumed that the proximity of a homeowner to a land use action that is being taken in a non-zoning case, would also have the same potential negative effects, and therefore, the presumption should also apply.

While this court has never indicated that the proximity presumption it has applied in zoning cases is not applicable in non-zoning cases, this court has not previously addressed whether the presumption would apply in non-zoning cases.

This case therefore gives the court the opportunity to determine whether or not such a presumption exists in non-zoning cases.

(3) THE RULE THAT A PETITIONER MUST BE INJURED IN A MANNER DIFFERENT THAN THE PUBLIC AT LARGE NEEDS TO BE CLARIFIED

The other major standing issue which this case presents is clarification of what this court meant in Society of Plastics when the Court determined that in order to have standing in a SEQRA case, the petitioner or plaintiff must show that the issue he raises in the case is within the zone of interest that SEQRA in intended to protect, and further, that the petitioner or plaintiff has been injured in a manner different than the public at large. Since 1991, this Court has not clarified this two prong test, especially as it concerns what type of injury is different than the public at large, and frankly, the trial courts and appellate courts are all over the place interpreting this requirement, and often, as in the instant case, issues a decision that would preclude any judicial review at all.

In the instant case, the Appellate Division, while acknowledging that the issue of newly created train noise raised by Petitioner John Marvin fell within the zone of interest of SEQRA, nevertheless determined that Petitioner Marvin was not injured in a manner different than the public at large. Leaving aside for the moment the fact that the Appellate Division did not give any weight or other consideration to the fact of Petitioner Marvin's proximity to the transloading

facility and the movement of the rail cars, they determined that since the rail line ran through the center of the Village, that therefore everyone in the Village was similarly affected by the train noise. Petitioner Marvin argued that the noise was much louder for him because he lives close to both the rail line and transloading facility, but this distinction was not discussed or adopted by the Appellate Division.

The trial court, after rejecting the proximity alone exception to the requirement that a petitioner be injured in a way different than the public at large, found that Petitioner Marvin had standing considering both his proximity to the transloading facility and rail line together with his complaint that the train noise was so loud it kept him up at night. Therefore, the trial court adopted the proximity plus more test in finding that Petitioner Marvin had standing.

The Appellate Division found that Petitioner Marvin did not meet the proximity plus more test. The Appellate Division looked only at Marvin's proximity to the rail line, and did not address his close proximity to the rail loading facility. Finding that the train moved through the Village and that other residents of the Village could also hear the noise from the trains, the Appellate Division determined that Petitioner Marvin lacked standing different than the public at large. The Appellate Division asserted that "Marvin raised no complaints concerning noise from the transloading facility itself," R. 658. However, when

Petitioner Marvin's claims regarding being awoken by noise from train engines, R. 432, are coupled with the allegations in the petition that noise will be caused by train engines entering and exiting the transloading facility, R. 54, and with the allegations in the affidavit of Gerald and Teresa Flegal, Petitioner Marvin's neighbors, attributing the loud noises they heard to engines pulling train cars into and out of the transloading facility, R. 427, it seems apparent that the noise complained of by Petitioner Marvin was caused by the operation of the transloading facility. Thus the Appellate Division's statement that "Marvin raised no complaints concerning noise from the transloading facility itself," R. 658, ignored the proximity of Petitioner Marvin to the transloading facility, and ignored the movement of train engines into and out of the transloading facility as the source of the loud noises he heard.

Accepting the Appellate Division's reasoning, there would be no resident within the Village of Painted Post who would have standing to challenge the inadequate SEQRA review based upon the newly created train noise, even though the court determined such newly created train noise fell within the zone of interest of SEQRA. The result of the Appellate Division's decision is to insulate the Village of Painted Post actions from any judicial review, a result which is directly contrary to this Court's consistent prior decisions indicating that standing rule

should not be so restrictive as to avoid judicial review of an agency decision, including the admonitions described above in the Society of Plastics case.

While this Court has recently stated that "we have been reluctant to apply these principles, [standing requirements] in an overly restrictive manner where results would be to completely shield the particular action from judicial review" Matter of the Association for a Better Long Island, Inc. v. New York State Department of Environmental Conservation, 23 N.Y.3d 1, 6, (2014), that is precisely what the Fourth Department did in the instant case, as well as the very recent case of Kindred v. Monroe County, 119 A.D.3d 1347 (4th Dept. 2014), and it appears to be a trend in other appellate divisions as well. See, e.g., Clean Water Advocates of New York v. New York State Department of Environmental Conservation, 103 A.D.3d 1006 (3rd Dept. 2013); Finger Lakes Zero Waste Coalition, Inc. v. Martens, 95 A.D.3d 1420 (3rd Dept. 2012); Matter of Powers v. DeGroodt, 43 A.D.3d 509 (3rd Dept. 2007); Matter of Many v. Village of Sharon Springs, 218 A.D.2d 845 (3rd Dept. 1995); Long Island Pine Barrens Society v. Planning Bd. of the Town of Brookhaven, 213 A.D.2d 484 (2nd Dept. 1995).

Indeed, the interpretation of the Society of Plastics test of injury different than the public at large, has resulted in the absurd situation where the more people that are adversely affected by an environmental action, the less likely that anyone will have standing to require an environment review under SEQRA, or to obtain

judicial review because of lack of standing. It is respectfully submitted that this Court needs to provide clarification concerning the "injury different than the public at large" requirement, or actions that are taken with significant adverse environmental consequences will potentially be done without any environment review pursuant to SEQRA, as well any judicial review.

B. MERITS ISSUES PRESENTED BY THIS CASE

Having dismissed the petition in the present case on standing grounds, the Appellate Division did not reach the significant merits issues that lead the trial court to determine that SEQRA had been violated and issue an injunction. If this Court decides the standing issues in a manner favorable to Petitioners, the issues discussed by the trial court are of great public importance, and it would be valuable for the Court to reach these issues. Villages, towns and cities across New York State are being offered substantial monetary incentives to sell large volumes of water from the aquifers, rivers and lakes that constitute the sources of their public water supplies to entities located outside their municipal boundaries. If municipalities are able to engage in such sales without conducting environmental assessments of the impacts of the proposed withdrawals on the sources of their water supplies, great harm may be done to those water sources and to the other users of those sources. This is especially true as we enter a time of increasing

climate uncertainty. The record is complete on the merit issues presented by this case, so if this Court determines that the Petitioners have standing, there is no reason to remand the merit issues. They can be determined by this Court.

(1) SEQRA WAS VIOLATED

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. New York wished to provide greater protection to the environment when it passed SEQRA, and the Legislature 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 Misc.2d 243 (Erie County, 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).

The Appellate Division, Fourth Department decided several early, landmark decisions interpreting SEQRA. Since the cases of Town of Henrietta v. Department of Environmental Conservation, 76 A.D.2d 215 (4th Dept. 1980), and H.O.M.E.S. v. New York State Urban Development Corporation, 69 A.D.2d 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. Other early 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 N.Y.C.R.R. Part 617. Matter of Rye Town/King Civic Association v Town of Rye, 82 A.D.2d 474 (2nd Dept. 1981), app. dism, 56 N.Y.2d 985 (1982); Schenectady Chemicals v Flack, 83 A.D.2d 460 (3rd Dept. 1991).

In an oft-quoted statement, the court in Schenectady Chemicals noted:

> 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 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 [citations omitted] [emphasis added].

83 A.D.2d 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 A.D.2d 481 (2nd Dept. 2002); Matter of Rye Town, 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 N.Y.2d 41 (1982) is instructive. In that case, the Third Department, 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 A.D.2d 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 N.Y.2d 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 N.Y.2d 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 N.Y.2d 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 nor Type II.

In the instant case, the Village segmented its review of the environmental impacts of the proposed project. At its meeting on February 23, 2012, the Village determined that the bulk water sale to SWEPI was a Type II action exempt from review under SEQRA. R. 651-652. At the same meeting, the Village determined that the lease agreement with the Wellsboro and Corning Railroad was a Type I action, conducted a cursory environmental review, and found that "the Lease will not result in any potentially significant adverse impact on the environment." R. 113.

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.

1. The Water Sale Project Constitutes an Action under SEQRA

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 clearly 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;

The water withdrawal project is an activity that may affect the environment by changing the use or condition of the Corning aquifer, a natural resource as provided in 6 N.Y.C.R.R. § 617.2(b)(1). The water sales were directly undertaken by the Village, thus meeting the requirement of Subsection (1)(i) 6 N.Y.C.R.R. § 617.2(b)(1)(i), and they required a number of new or modified approvals, meeting the requirement of Subsection (1)(iii) of 6 N.Y.C.R.R. § 617.2(b). While the bulk water sale did not require modification of the existing water withdrawal permits issued to the Village by the DEC, 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. In addition to these approvals, 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.

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 N.Y.C.R.R. § 617.4(a)(1). Type II actions are those actions that "have been determined not to have a significant impact on the environment." 6 N.Y.C.R.R. § 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 N.Y.C.R.R. § 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).

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. 6 N.Y.C.R.R. § 617.4(b)(6)(ii). 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 N.Y.C.R.R. 617.2(ak), "Unlisted action means all actions not identified as a Type I or Type II action." Therefore, the trial court was correct in determining that projects using water in amounts less than 2,000,000 gallons per day are Unlisted actions and require an environmental review under SEQRA.

In reaching its determination that a water use of less than 2,000,000 gallons per day is an Unlisted action, the trial court cited three cases, Cross-Westchester Dev. Corp. v. Town Bd. of Town of Greenburgh, 141 A.D.2d 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, 898 (2d Dept. 1994). Each of these cases supports the court's determination. The Cross-Westchester case and the Watervliet case, involved the question of whether an annexation of real property is 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 A.D.2d 359 (3rd Dept. 1985), aff'd 67 N.Y2.d 896 (1986), the Court of Appeals had affirmed the Third Department's 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 N.Y.C.R.R. § 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," 141 A.D.2d at 797, and gave deference to that determination in reaching its holding. The Watervliet case adopted the reasoning of the Cross-Westchester case, effectively over-ruling the Connell case. 3 N.Y.3d at 517-518.

The proper categorization of projects that do not meet the water usage thresholds of either 617.4(b)(6)(ii) or 617.12(b)(10), 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 gallons per day is properly classified as a Type I action or as an Unlisted action. The trial court in Wertheim had determined that the water filtration system at issue in that case was a Type I action because the usage 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 disagreed, concluding that, because that the amount of water used in the project did not meet the 25% threshold contained 617.12(b)(10), that the project did not qualify as a Type I action, and should have been categorized as an Unlisted action. 207 A.D.2d at 898.

In the present case, the trial court correctly held that "the DEC has implicitly designated a water use of 1,000,000 gallons per day an Unlisted action and, therefore, the Village's designation of the action as Type II was arbitrary and capricious." R. 29-30.

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

If a project is "occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area, or designated open space," Section 617.4(b)(10) of the SEQRA regulations provides that "any Unlisted action, that exceeds 25 percent of any threshold in this section," is a Type I action. 6 N.Y.C.R.R. § 617.12(b)(10). Twenty-five percent of the 2,000,000 gallons per day threshold contained in section 617.4(b)(6)(ii) is 500,000 gallons per day. The amount at issue in the present case, 1,000,000 gallons per day or more, is significantly above 500,000 gallons per day, 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 shown on the Google map of the area on page 634 of the record, R. 634. The water loading facility occupies the area between West Water Street and West Chemung Street on this map. A more exact 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 on page 187 of the record. 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 of the transloading facility. 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 gallons per day 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. 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. 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." SEQR Handbook, p. 23-24 (3d ed. 2010). The trial court properly interpreted the phrase "substantially contiguous" in section 617.4 (b)(10) using the guidance of the SEQR Handbook, in determining that Hodgman Park was substantially contiguous to the water loading facility. The court's interpretation was in accordance with the case of Lorberbaum v. Pearl, 182 A.D.2d 897, 900 (3d Dept. 1992), which the trial court cited. In the Lorberbaum case, the Third Department 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 Lorberbaum 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, SEQR Handbook, 1991) supports petitioners' position." 182 A.D.2d at 900. In the present case, portions of the water loading facility site have a common boundary with Hodgman Park. R. 187, 634. Indeed, the park and the site of the water loading facility were once part of the same parcel of land. R. 214. For all these reasons, the trial court properly determined that Hodgman Park was substantially contiguous to the water loading facility.

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

As the trial court determined, the Village's reliance on the Type II exemption provided in 6 N.Y.C.R.R. § 617.5(c)(25) was 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. 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." SEQR Handbook, p. 40 (3d ed. 2010). The rationale for the Type II categorization of these types of property is explained in the guidelines: "[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 Misc.2d 763 (Suffolk County 1998), aff'd 267 A.D.2d 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 Misc.2d 524 (Suffolk County 1972), rev'd on other grounds, 79 Misc2d 42 (App. Term Suffolk County 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 and must necessarily be included within the purview of the trust.")

The Village's claim that its right 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 Misc.2d 86, (App. Term 2nd Dept. 1964), aff'd, 22 A.D.2d 830, (2nd Dept. 1964), Smith v. City of Brooklyn, 18 A.D. 340, aff'd, 160 N.Y. 357 (1913), Forbell v. City of New York, 47 A.D. 371, aff'd, 164 N.Y. 522 (1900) 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. 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 N.Y.C.R.R. § 601.12 (o) of the state's newly adopted water permitting regulations. Section 601.12 (o) 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 N.Y. 483 (1919), and Niagara Mohawk Power Corp. v Cutler, 109 A.D.2d 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, the trial court was correct in holding that 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 SEQRA regulations to determine whether an EIS should issue.

C. The Village Improperly Segmented its Review

The Village's misclassification of water sale agreement as a Type II action caused it to improperly segment its environmental review of the entire water withdrawal and shipment project. Segmentation refers to the situation where a lead agency considers the environmental consequences of separate actions that are interrelated but are considered separately. Section 617.2(ag) of the SEQRA 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." 6 N.Y.C.R.R. § 617.2(ag). While segmentation is allowed in certain instances, it is frowned upon. Therefore, as provided in section 617.3(g)(1) of the regulations, "Considering 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." 6 N.Y.C.R.R. § 617.3(g)(1). The Village made no demonstration that it came within this exception to the rule against segmentation.

The trial court correctly found that the Village's treatment of the water sale agreement and the lease as separate and independent actions under SEQRA constituted segmentation in violation of the SEQRA regulations. R. 34. As 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 court pointed out that the wording of both the water sale agreement and the lease agreement recognized the interdependence of the two agreements, quoting the statement in water sale agreement that "SWEPI LP may . . . take delivery . . . from the filling/metering station and transloading facility to be constructed and located in the vicinity of 450 West Water Street" (R.

33, 141), and quoting the statement in the lease that it has been entered into "in connection with a certain bulk water sale contract, dated as of March 1, 2012, by and between the Village and SWEPI LP . . . . SWEPI has arranged to have the Lessee withdraw, load and transport such water via rail line from the Premises." R. 33-34, 120.

It is apparent that the environmental review conducted by the Village for the lease did not address the impacts of the water sale agreement. In completing the EAF of the lease agreement, the Village ignored all aspects of the water sale agreement. As noted above, 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 DEC. R. 58. The Village responded "Not Applicable" to the question in the EAF 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 whether the "Proposed Action requires water supply from wells with greater than 45 gallons per minute pumping capacity." R. 160. In fact the proposed demand for the project was 1000 gallons

per minute. R. 218. The affidavits of Petitioners' expert witness, hydro-geologist Paul Rubin, discuss at length the commonly accepted studies that would have been necessary for the Village to conduct to determine whether or not the water withdrawals would create adverse environmental consequences to the Corning aquifer, and the fact that those studies were not done. R. 481-525, 640-643. As a result of its failure to conduct these studies, 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 shipment from the transloading facility. Id. Moreover, Mr. Rubin pointed out, TDS measurements in various parts of the aquifer provided by the Petitioners "provide a strong indicator that extraction of large quantities of groundwater from the Corning aquifer will result in regular degradation of aquifer water quality by reducing natural dilution." R. 493. Even the matters pertaining to the transloading facility were not considered adequately in the EAF. For example, in the EAF the Village either ignored the increased noise and traffic impacts, or simply stated that they would not occur in a conclusory fashion without any support or study to support such conclusions. R. 165. Other questions in the EAF that were either answered improperly or left unanswered are identified in the petition. R. 67-71, 148-168. When the transloading facility began operation, the conclusions in the EAF regarding no increased noise impacts were shown to be untrue. R. 427-433.

Furthermore, the EAF prepared by the Village shows that the Village only considered the potential environmental consequences that would happen within the boundaries of the Village of Painted Post. As described above, 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. Nonetheless, the Village completely ignored any adverse environmental consequences that might ensue outside the Village boundaries for other users of the Corning aquifer or at the other end of the rail line in Wellsboro, Pennsylvania, and surrounding areas where the water was ultimately to be used in the hydraulic fracturing of gas wells.

For all these reasons, the Village Board acted arbitrarily and capriciously when it improperly segmented its SEQRA review of the lease agreement from the water sale agreement. Consequently, the trial court properly annulled the Village resolutions designating the water sale agreement as a Type II action and issuing a negative declaration as to the lease agreement, voided the agreements and enjoined further water sales until the Village complied with SEQRA.

VI. CONCLUSION

For all of the foregoing reasons, the decision of the Appellate Division should be reversed and a finding should be made that the Petitioners have standing, and further, and the trial court's Decision should be reinstated voiding the actions taken by the Village of Painted Post and issuing an injunction against any further water withdrawals until the Village has fully complied with SEQRA.

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Respectfully submitted,

RICHARD J. LIPPES, ESQ.
1109 Delaware Avenue
Buffalo, New York 14209
Telephone: (716) 884-4800

RACHEL TREICHLER, ESQ.
7988 Van Amburg Road
Hammondsport, New York 14846
Telephone: (607) 569-2114

Attorneys for Petitioners-Appellants