To be Argued by:
JOSEPH D. PICCIOTTI
(Time Requested: 20 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 RESPONDENTS-RESPONDENTS THE VILLAGE OF PAINTED POST; PAINTED POST DEVELOPMENT, LLC; AND SWEPI LP

HARRIS BEACH PLLC
Joseph D. Picciotti, Esq.
John A. Mancuso, Esq.
A. Vincent Buzard, Esq.
Attorneys for Respondents-Respondents The Village of Painted Post, Painted Post Development, LLC and Swepi, LP
99 Garnsey Road
Pittsford, New York 14534
Tel.: (585) 419-8800
Fax: (585) 419-8816

Dated: March 19, 2015

STATEMENT PURSUANT TO RULE § 500.1(f)

Respondent the Village of Painted Post currently has no parents or affiliates; Respondent Painted Post Development, LLC is a wholly owned subsidiary of the Village of Painted Post.

Respondent Painted Post Development, LLC currently has no subsidiaries or affiliates.

Respondent SWEPI, LP currently has no affiliates; Shell Exploration Company, Inc. is a wholly owned subsidiary of SWEPI, LP; Respondent SWEPI, LP is 1% owned by Shell Energy Holding GP LLC and 99% owned by Shell US E&P Investments LLC. Shell Energy Holding GP LLC is a wholly owned by Shell US E&P Investments LLC, which is wholly owned by Shell Oil Company, which is wholly owned by Shell Petroleum Inc., which is wholly owned by Shell Petroleum N.V., which is wholly owned by Royal Dutch Shell, plc which is a publically traded corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Treatises

Regulations

Constitutional Provisions

Administrative Agency Decisions

QUESTIONS PRESENTED

1. Did the Fourth Department properly hold that Petitioner Marvin does not have standing based on general allegations of noise from a train running through the Village of Painted Post?

   Yes, Petitioner Marvin does not have standing because his alleged injury consists solely of noise from a train running through the Village that is no different from the public at large and, in any event, the Interstate Commerce Commission Termination Act of 1995 preempted the Village from reviewing impacts associated with noise from rail operations.

2. Did the Village properly consider that a federal compact governing the review and approval of water withdrawals in this case preempted the Village from completing an additional environmental review of such withdrawals?

   Yes, the Village was not required to undertake an additional environmental review of the impacts associated with water withdrawals because the Village was preempted by the Susquehanna River Basin Compact, and the Susquehanna River Basin Commission, the federal authority vested with exclusive jurisdiction, reviewed and approved the water withdrawals.

4. Should this proceeding be dismissed on the grounds of mootness and laches when the transloading facility was substantially complete by the first return date of the Petition and Petitioners failed to diligently seek injunctive relief?

   Yes, this proceeding should be dismissed on the grounds of mootness and laches because the transloading facility was substantially complete by the first return date and Petitioners failed to timely challenge the water withdrawal approvals issued by the Susquehanna River Basin Commission.

5. Did the Village undertake the necessary environmental review of the project pursuant to the New York State Environmental Quality Review Act?

   Yes, considering the preemptive effect of federal law, the Village took the required hard look at the relevant areas of environmental concern for the transloading facility as required, and the sale of surplus water did not require an additional environmental review because the Susquehanna River Basin Commission previously reviewed and approved the water withdrawals from existing, permitted wells with more than adequate capacity.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Pursuant to this Article 78 proceeding, Petitioners seek to prohibit the sale of surplus water by Respondent Village of Painted Post (the "Village") from existing Village wells to Respondent SWEPI, LP ("SWEPI"). The Village wells are located in the Susquehanna River Basin (the "Basin"), which is comprised of the Susquehanna River and its tributaries, and spreads over parts of New York, Maryland and Pennsylvania. The withdrawal of water from the Basin is governed by the Susquehanna River Basin Compact (the "Compact"), which was adopted by Congress, and the legislatures of New York, Maryland and Pennsylvania. The Compact established the Susquehanna River Basin Commission (the "Basin Commission") as the exclusive entity to regulate the conservation, development, and administration of water resources within the Basin.

Petitioners commenced this proceeding for declaratory and injunctive relief seeking to invalidate Village approvals issued for the sale of surplus water to SWEPI pursuant to a contract (the "Surplus Water Agreement"), and the construction and operation of a transloading facility (the "Transloading Facility") by Respondent Wellsboro and Corning Railroad, LLC (the "Railroad") pursuant to a lease (the "Lease"). The purpose of the Transloading Facility is to load surplus water from Village wells onto railcars for transport to Pennsylvania. The Village

acted pursuant to New York State Village Law, which specifically authorizes the sale of water to non-residents.

In a Decision and Order, dated March 25, 2013, Supreme Court, Steuben County, found that none of the Petitioners, except Petitioner John Marvin ("Petitioner Marvin"), had standing to maintain this proceeding. Finding that Petitioner Marvin had standing, the Court reached the merits of the Petition, and invalidated the Village approvals and permanently enjoined Respondents on the grounds that the Village failed to properly analyze potential significant adverse environmental impacts associated with the withdrawal of water pursuant to the New York State Environmental Quality Review Act ("SEQRA"). The Appellate Division, Fourth Department, reversed the trial court on the ground that Petitioner Marvin lacked standing to maintain this proceeding because he failed to prove an injury distinct from that suffered by the general public.

The decision of the Fourth Department should be affirmed because Petitioners lack standing. This entire case hangs by the thread of Petitioner Marvin's claim of train noise. The trial court rejected every conceivable basis for standing for every Petitioner, except Petitioner Marvin, who the Fourth Department properly held did not have standing because Petitioners failed to establish that train noise impacted Petitioner Marvin different from that of the general public. Petitioner Marvin raised no complaints concerning noise from the

Transloading Facility itself, but rather from trains running through the Village. Because the impacts of such train noise are not particular to Petitioner Marvin, the allegations are insufficient to establish standing.

Petitioners ask this Court not only to reverse this determination, but that this Court revisit a standard that has been an integral part of this Court's jurisprudence for decades and has been re-affirmed as recently as 2014. This Court should not revisit the parameters of SEQRA standing because, in this case, the regulation of train operations and facilities, including train noise, is preempted by the Interstate Commerce Commission Termination Act of 1995, 49 USC § 10101, *et seq.* (the "Termination Act"). SEQRA cannot be applied to regulate train noise or the rail operations associated with the Transloading Facility because the Surface Transportation Board is vested with the exclusive jurisdiction to regulate rail transportation, and the construction and operation of rail facilities. Because Petitioner Marvin's asserted injury for standing relates solely to train noise — a matter regulated exclusively by federal law — Petitioner Marvin does not have standing and this proceeding should be dismissed on this ground alone.

This proceeding should also be dismissed on the grounds of mootness and laches. By April 2011, the Basin Commission issued two approvals for the withdrawal of up to one million gallons of water. Petitioners, however, never challenged those approvals. In April 2012, the Village approved the Surplus Water

Agreement and Lease, and for several months thereafter, the Railroad undertook construction of the Transloading Facility. Yet, Petitioners waited until June 25, 2012 to file this proceeding — the very last day of the statute of limitations for challenging the Village approvals and over fourteen months after the Basin Commission issued its last approval. By the initial return date of this proceeding, construction of the Transloading Facility was substantially complete. Petitioners' laches should not be excused, and the fact that the Transloading Facility was substantially complete by the first return date moots this proceeding.

With respect to Petitioners' challenge to the SEQRA review completed by the Village, Petitioners fail to recognize the limits of SEQRA's reach in light of the preemptive effect of the Compact, the existence of which Petitioners do not even mention in their brief. The gravamen of Petitioners' claims is that the Village failed to adequately assess the impact of the withdrawal of water from the Basin. As applied to the facts and circumstances here, the Compact preempted the Village from undertaking any additional SEQRA review relating to the withdrawal of water from the Basin. The Compact is a comprehensive, federal regulatory scheme governing the review and approval of water withdrawals from the Basin, including for use in oil and gas exploration. Instead of challenging the approvals issued by the Basin Commission, Petitioners have collaterally attacked them in this proceeding without joining the Basin Commission as a necessary party.

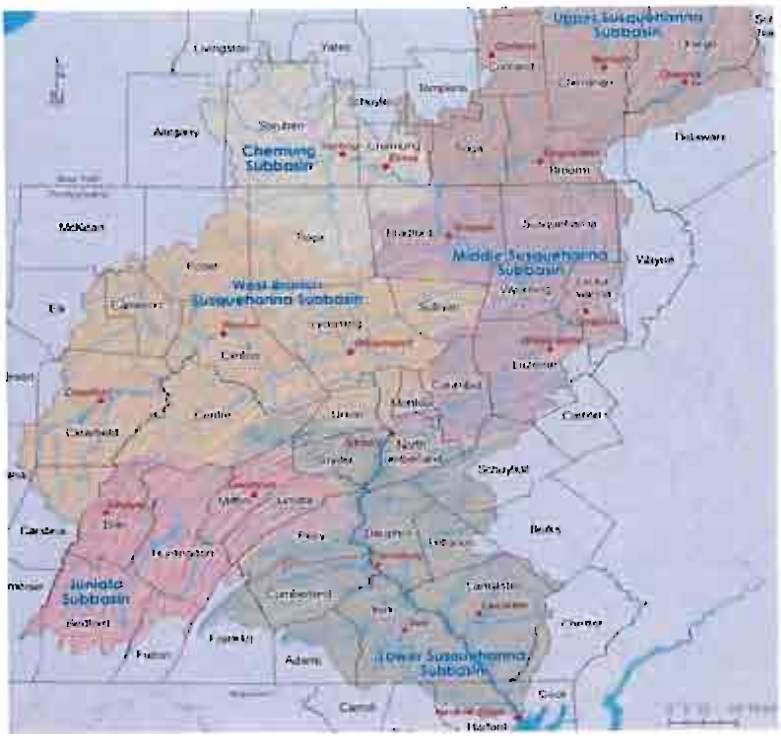
When the SEQRA review completed by the Village is evaluated in the context of the preemptive effect of federal law, the Record demonstrates that the Village satisfied its obligations as Lead Agency under SEQRA. The Surplus Water Agreement was not an "action" under SEQRA because the Basin Commission was responsible for reviewing and approving the withdrawal and use of surplus water by the Village. The Surplus Water Agreement set the commercial terms of the sale of water and did not authorize water withdrawals. The Surplus Water Agreement, therefore, did not affect the environment because no physical activity or construction occurred with respect to water withdrawals, which were previously authorized by the Basin and would continue to be withdrawn from Village wells as it has for decades. Even if the approval of the Surplus Water Agreement was an "action" under SEQRA, the sale of water by the Village fits squarely within the Type II regulatory criteria as the sale of surplus government property expressly authorized by New York Village Law.

STATEMENT OF FACTS

A. The Village municipal water system and the Basin Commission.

Petitioners challenge the sale of surplus water by the Village from existing wells constructed decades earlier, fully permitted, and which have yielded volumes on par with those amounts at issue in this proceeding (R. 550-54, 561-626). The Village municipal water system is located in the Susquehanna River Basin (R. 117,

328-31, 349-51), which covers half of the land area of Pennsylvania and portions of New York and Maryland, including all or part of 66 counties:



(*see* http://www.srbc.net/pubinfo/docs/SRB%20General%205_13%20Updated.pdf [last visited March 19, 2015]).

The Susquehanna River Basin Compact governs the withdrawal of water from the Basin (*see* ECL § 21-1301 *et seq.*). Over forty years ago, the United States of America, and the legislatures of New York, Maryland, and Pennsylvania adopted the Compact because they recognized the water resources of the Basin as regional assets vested with local, state, and national interest of which they have joint responsibility (*see* ECL § 21-1301 [Preamble]). Prior to its enactment, the water resources of the Basin were subject to duplicating, overlapping and

uncoordinated administration by a large number of local governmental agencies, which resulted in a splintering of authority (*id.* at ¶3).

The Compact was concurrent legislation between the United States, New York, Maryland and Pennsylvania that governs the conservation, utilization, development, management and control of the waters of the Susquehanna River and the Basin (ECL § 21-1301 [Preamble ¶1]). The purpose of the Compact was to, among other things, apply equal and uniform treatment to all users of water and water related facilities in the Basin without regard to political boundaries (*id.* at ¶5). Because the water resources of the Basin are interrelated, the establishment of a single administrative agency was essential for the effective supervision and coordination of water resources in the Basin. Accordingly, the Compact created the Basin Commission in order to carry out the purposes of the Compact (*id.* at ¶3).

B. The Basin Commission approved the withdrawal of up to one million gallons of water per day for sale to SWEPI.

Pursuant to the Compact and the regulations promulgated by the Basin Commission (*see* 18 CFR Parts 801, 806, 807 and 808), the Basin Commission is responsible for, among other things, approving requests for withdrawals of water from the Basin and its use for natural gas development (*see* ECL § 21-1301 [Article 11]; 18 CFR 806.22[f][i], [ii]). Thus, 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. In December 2010, the

Village, as the permit holder for the Village wells, and Triana Energy, LLC, as sponsor, applied to the Basin Commission for permission to withdraw 500,000 gallons of water per day from the Village municipal water system for oil and gas exploration in Pennsylvania (R. 349-51).

The Village applied to the Basin Commission in order to obtain the approvals necessary to sell surplus water and generate a much needed source of revenue to the Village, which is a small municipality that has lost industry and jobs in the last twenty years, causing its tax base to decline significantly (R. 339-40). After obtaining the necessary approvals from the Basin Commission, the Village approved the sale of surplus water in excess of amounts needed by its residents. The proceeds of sale were to be used to provide funds for needed capital improvement projects, including upgrades and repairs to the Village water system, and allow the Village to not only avoid an increase, but potentially decrease real property taxes to Village residents (R. 339-40).

New York Village Law expressly permits the Village to sell surplus water to private corporations beyond its borders where the sale does not render the Village water supply insufficient to serve Village inhabitants (*see* Village Law § 11-1120). In connection with the Village's application, the Basin Commission sought and obtained production data from the Village wells over a four-decade period showing extensive production of water for use by Village users, as well as industrial users

such as Ingersoll-Rand, and demonstrating a production capacity of over four million gallons of water per day (R. 346-47; 546-48, 551-52, 557-64). In contrast, the average daily use of water by Village residents was 230,000 gallons per day in 2012 (R. 551-52). The production history of the Village wells demonstrates that there was substantial surplus capacity to provide water to Village residents and sell surplus water to SWEPI for use beyond Village borders (R. 551-52, 554-64).

On January 3, 2011, the Basin Commission approved the Village's application to withdraw 500,000 gallons of water per day from the Basin (R. 330-31, 350). In addition to reviewing extensive production data associated with the Village wells, the Basin Commission required as part of its approval that the sale of water be tracked, including the quantities of such water fully metered and monitored (R. 601-02). Subsequently, the Basin Commission approved the transfer of the approval issued for Triana Energy, LLC, to SWEPI (R. 333-34). In April 2011, the Basin Commission similarly approved the application by the Village to withdraw an additional 500,000 gallons per day (R. 328-29).

Since the closing of the Ingersoll-Rand foundry, which alone used upwards of 700,000 gallons per day in the late 1970's (R. 563), the Village has had substantial excess water available for sale (R. 349). Comparing the actual, permitted capacity of the Village wells (4,000,000 gallons per day) to the amount of water authorized for withdrawal by the Basin Commission (1,000,000 gallons

per day) and average use by Village residents (230,000 gallons per day), the Village has more than three times the capacity needed to sell water to SWEPI and meet the needs of current Village users (R. 551-52). Petitioners have never challenged the approvals issued by the Basin Commission.

C. The Surplus Water Agreement between the Village and SWEPI and Lease between the Village and the Railroad for the Transloading Facility.

Relying on the Basin Commission approvals authorizing the withdrawal of up to one million gallons of water per day from the Basin (R. 328-34, 349-51, 551-52, 601-02), on March 1, 2012, the Village and SWEPI entered into the Surplus Water Agreement to sell SWEPI surplus water not required by the Village for its water users (R. 141-47). The Surplus Water Agreement does not authorize the withdrawal of water, but sets the price for the surplus water purchased by SWEPI, as well as other commercial terms not related to the amount of water to be sold or its use (R. 117-19, 141-47).

The Surplus Water Agreement provides several safeguards for the protection of the Village and its residents in the event water is not available. For example, the Surplus Water Agreement limits the sale of water to one million gallons per day "beyond the needs of the current water uses within [the Village's] municipal boundaries" and is "subject at all times to the availability" of surplus water (R. 141). The Village is also not required to sell surplus water in the event of a

drought restriction, emergency, unforeseen operational problem, force majeure event, or restriction on the sale of water by the Basin Commission (R. 141).

In order to provide a means for the transfer of surplus water after sale, the Village then entered into the Lease with the Railroad for the construction and operation of the Transloading Facility on an approximately 11.8-acre portion of a vacant 50-acre industrially-zoned property (the "Property"), which the Village condemned and acquired through Painted Post Development, LLC (R. 111, 214-15, 256-323). Ingersoll-Rand previously operated a foundry on the Property that was closed in 1985 and subsequently subject to an environmental investigation and cleanup conducted under the inactive hazardous waste site program by the New York State Department of Environmental Conservation ("NYSDEC") (R. 293-94). As the result of extensive investigation and cleanup of contamination, NYSDEC certified the Property as properly remediated for industrial and commercial uses, and it was repurposed by the Village (R. 214-15).

Pursuant to the Lease, the Railroad leased a portion of the Property from the Village for purposes of constructing and operating the Transloading Facility — a filling/metering station and rail siding connecting to the existing rail line to be used solely for the loading and transportation of water (R. 120). The Transloading Facility operates by automatically loading surplus water from the Village water distribution system to railroad tanker cars for distribution by rail to Pennsylvania

(R. 111, 117, 120, 218). The Transloading Facility utilizes existing, permitted wells from the Village municipal water system (R. 217-18, 346-47). The water is drawn from Village wells that are not located on the Property (R. 326-27). No new wells were constructed in connection with the Transloading Facility or the sale of surplus water to SWEPI, nor were any actions taken to expand the capacity of such wells.

D. The SEQRA review completed by the Village.

In connection with the Lease, the Village acted as lead agency pursuant to SEQRA and undertook the required review of potential significant adverse impacts of the Lease (R. 111-16, 148-334). The Village treated the Lease as a Type I action (R. 111-12), which under SEQRA is an action that may have a significant adverse impact on the environment. The Village reviewed and completed a full environmental assessment form ("EAF"), and reviewed various studies and documents associated with the construction and operation of the Transloading Facility (R. 109-327). These documents included a report prepared by engineering consultants reviewing the relevant potential environmental impacts associated with the Lease and operation of the Transloading Facility; reports documenting the previous remediation completed at the Property; and agency correspondence concerning ministerial permits needed for the operation of the Transloading Facility (R. 109-327).

The Village analyzed the industrial zoning associated with the Transloading Facility site and the past uses of the Property, including the operation of a foundry on it by Ingersoll-Rand for decades (R. 111-14, 156-57, 256-91, 357-58, 362-64), and ongoing measures in place to prevent impact from past uses (R. 214-15, 219-20, 300-21, 360-65). The SEQRA review by the Village also included a review of, among other impacts, those associated with the construction and operation of the Transloading Facility, including from storm water runoff during construction and operation (R. 113-16, 155-56, 215-20), and the operational impact of the Transloading Facility on water pressure (R. 217-20, 225-55, 545-49). The SEQRA review by the Village also relied on the approvals issued by the Basin Commission, which specifically took into account the impact of the volume of the withdrawals from the Basin (R. 346-49, 550-52).

Further, because the Village leased the Transloading Facility to a federally-regulated railroad (R. 111-12, 120-140), the Village SEQRA review considered the applicability of the Termination Act and other federal laws associated with the construction and operation of rail facilities (R. 111-16). The Village determined that certain activities undertaken by the Railroad, including the construction, development and operation of the Transloading Facility, were not subject to compliance with SEQRA because the Termination Act and other federal

law preempted the regulation of the construction and operation of rail facilities under SEQRA (R. 111-16, 120).

Taking into account the preemptive effect of the Termination Act, the Village conducted a SEQRA review of the action associated with leasing the Transloading Facility to the Railroad and certain aspects of the construction and operation of the Transloading Facility (R. 111, 114). On February 23, 2012, the Village adopted a resolution classifying the Lease as a Type I action under SEQRA (R. 111-16). Based on the Village's review of extensive documentation associated with the construction and operation of the Transloading Facility, the Village issued a negative declaration (the "Negative Declaration") determining that the Lease would not have any significant adverse impact on the environment (R. 111-16).

On February 23, 2012, the Village also adopted a resolution approving the Surplus Water Agreement for the sale of surplus water in amounts and for uses approved by the Basin Commission (R. 117-19). The Village resolution specifically incorporated by reference the Negative Declaration issued for the Lease, and both the resolution and Surplus Water Agreement referenced the approvals issued by the Basin Commission (R. 117-18, 141-42, 144-45). The Village did not undertake an additional review of water withdrawals from the Basin pursuant to SEQRA for two reasons. First, the Basin Commission

previously approved the use and withdrawal of surplus water. Second, the sale of surplus water is not an action under SEQRA (R. 117-18).

Based on the terms of the Surplus Water Agreement, the approvals issued by the Basin Commission, and the nature of the withdrawals from existing, permitted wells, the Village determined that entering into the contract to sell surplus water was a Type II action under SEQRA because the Surplus Water Agreement was limited to setting the commercial terms for the sale of surplus government property and did not authorize any water withdrawals (R. 117-18, 141-47). Because Type II actions have been deemed by the legislature to have no significant environmental impact, the Village did not undertake any additional SEQRA review.

E. Completion of the Transloading Facility.

On April 27, 2012, well over a year after the Basin Commission issued its last approval authorizing the withdrawal of water, the Railroad began construction of the Transloading Facility (R. 358). The construction schedule in place as of May 30, 2012 called for substantial completion of the Transloading Facility by July 23, 2012 (R. 358, 367-68). The Transloading Facility was substantially completed by July 23, 2012, by which time the only items remaining to be completed were limited to certain punch list items, such as electrical connections, and other similar non-substantive items (R. 358, 367-68).

PROCEDURAL HISTORY

On June 25, 2012, Petitioners commenced this proceeding by Order to Show Cause and Verified Petition seeking, among other relief, equitable relief to prevent Respondents from proceeding with activities "intended to culminate in the construction" of the Transloading Facility (R. 41-42, 81-82). Although Petitioners sought a preliminary injunction, Petitioners did not seek a temporary restraining order pending the return date of the Petition (R. 41-42). The initial return date on the Petition was July 23, 2012 (R. 41), which was the same day the Transloading Facility was substantially completed pursuant to the previously adopted construction schedule (R. 358, 367-68).

By Decision and Order dated March 25, 2013, the trial court held that none of the Petitioners had standing except Petitioner Marvin (R. 13-25) based on his "proximity and complaint of train noise newly introduced into his neighborhood" (R. 25). Turning to the merits, the trial court held that the Village violated SEQRA by failing to review the potential significant adverse impacts associated with the withdrawal of water from the Basin and segmenting its review (R. 27, 29-37). The trial court held that neither the Compact nor its regulations provide for preemption of SEQRA (R. 39). The trial court annulled the Negative Declaration, and the Village resolutions approving the Surplus Water Agreement and the Lease (R. 36-37), and enjoined further water withdrawals (R. 38-39).

The Appellate Division, Fourth Department, reversed the trial court's Decision and Order on the grounds that Petitioners lacked standing (R. 656-59). "Notably, Marvin raised no complaints concerning noise from the transloading facility itself" (R. 658). "Inasmuch as we are dealing with the noise of a train that moves throughout the entire Village, as opposed to the stationary noise of the transloading facility," the Fourth Department held that Petitioner Marvin "will not suffer noise impacts 'different in kind or degree from the public at large'" (R. 658).

ARGUMENT

POINT I

PETITIONER MARVIN'S GENERALIZED COMPLAINT OF TRAIN NOISE IS INSUFFICIENT TO ESTABLISH STANDING.

A. Petitioner Marvin has failed to prove that he has suffered a direct injury that is different from the general public.

The only person Petitioners claim has standing is Petitioner Marvin and his standing fails because his sole claim is that he heard noise from a train running through the Village. As recently as 2014, this Court has re-affirmed the requirement that in order to demonstrate standing, a petitioner must show that he will suffer "a direct harm, injury that is in some way different from that of the public at large" (*see Matter of Assn. for a Better Long Island, Inc. v New York State Department of Environmental Conservation*, 23 NY3d 1, 6 [2014], citing *Soc'y of the Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 774 [1991];

see also Save the Pine Bush, Inc. v Common Council of the City of Albany, 13 NY3d 297, 304 [2009]). Applying this requirement, the Fourth Department correctly held that Petitioner Marvin failed to establish an injury from train noise that is in some way different from that of the public at large (R. 658).

In *Save the Pine Bush*, this Court stated that standing requirements "are not mere pleading requirements but rather an indispensable part of the plaintiff's case and therefore each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof" (*Save the Pine Bush*, 13 NY3d at 306 [internal quotations omitted]). Petitioners must "not only allege, but if the issue is disputed must prove, that their injury is real and different from the injury most members of the public face" (*id.*). Petitioners "may be put to their proof on the issue of injury, and if they cannot prove injury their case[] will fail" (*id.*). Thus, this Court articulated the clear rule that a petitioner bears the burden of proving an injury that is in some way different from the public at large.

Petitioner Marvin's proof in this case falls far short of the showing required by this Court's precedent. The only evidence in the Record concerning Petitioner Marvin hearing train noise consists of two paragraphs in his Affidavit, which allege as follows:

> 15. Beginning in mid-August and continuing through mid-September, I heard train noises frequently, sometimes every night. I heard either the train whistle or the diesel engines themselves or both. The noise was so

> loud it woke me up and kept me awake repeatedly during that period. . . .
>
> 16. The noise was much louder than the noise from other trains that run through the village. I am concerned that increased train noise will adversely impact my quality of life and home value.

(R. 432). All Petitioner Marvin alleges is that on some nights he heard train noise that woke him up, that the noise is louder than noise from other trains running through the Village, and that he is concerned that the noise will adversely impact him.

Noise from a train moving through the Village would affect every resident, not just Petitioner Marvin. Nowhere does he even attempt to argue, let alone prove, a real and different injury from train noise (*see Save the Pine Bush*, 13 NY3d at 306). The Record contains no evidence that train noise impacts Petitioner Marvin any different than any other member of the general public. In fact, the Fourth Department expressly found that the rail line at issue runs through the entire Village, along the main thoroughfare, and affected many of the Village residents (R. 658; *see also* R. 627-29). Any person residing near train tracks on which trains are operating — from the Village of Painted Post to Pennsylvania — could make the same allegations as Petitioner Marvin.

The Petition confirms that the effects of train noise will impact the entire Village generally (R. 54-55). The Petition alleges that "[r]ailcars will enter and exit the loading facility by means of a rail line that passes through the center of the

Village" (R. 54). In addition, the Petition alleges that the trains will run "down the existing rail line on Chemung Street to and from the center of the village" and that "Chemung Street is one the principal streets of the village, running east and west through the village" (R. 55). By alleging in the Petition that the train runs through the center of the Village from one end to the other, Petitioners are conceding that the alleged train noise affects the entire Village. Petitioners made no attempt to show how Petitioner Marvin's complaint of train noise is different from any other Village resident or member of the general public.

Petitioners' contention that the Fourth Department "looked only at Marvin's proximity the rail line, and did not address his close proximity to the rail loading facility" (*see* Pet.'s Br. at 29-30) is contrary to the Fourth Department's decision and the Record. The Fourth Department found that, "[n]otably, Marvin raised no complaints concerning noise from the transloading facility itself" (R. 658). Thus, the Fourth Department held that "[i]nasmuch as we are dealing with the noise of a train that moves throughout the entire Village, as opposed to the stationary noise of the transloading facility, we conclude that Marvin will not suffer noise impacts 'different in kind and degree from the public at large'" (R. 658).

The Fourth Department did not rely on Petitioner Marvin's proximity to the Transloading Facility because it was not the basis of his alleged harm from train noise. Petitioner Marvin alleged that he "heard train noises" that were "much

louder than the noise from other trains that run through the village" (*see* R. 432). The "noise creator" is a train running through the Village; not the Transloading Facility. Petitioner Marvin did not allege that the Transloading Facility is generating noise or that noise from train whistles or engines are emanating from the Transloading Facility. Petitioner Marvin has not "articulated any specific harm that he would suffer based on his proximity to the [Transloading Facility]" (*see Oates v Vil. of Watkins Glen*, 290 AD2d 758, 761 [3d Dept 2002]), or that the Transloading Facility otherwise had anything to do with the train noise he heard.

Petitioner Marvin's complaint of increased train noise is a textbook example of general impacts of increased noise throughout a wide area. Petitioner Marvin's standing "cannot be based on the claim that a project would indirectly affect . . . noise levels . . . throughout a wide area" (*see Save Our Main Street Buildings v Greene County Legislature*, 293 AD2d 907, 909 [3d Dept 2002], citing *Oates*, 290 AD2d at 760-61 [internal quotations omitted]; *Gallahan v Planning Bd. of City of Ithaca*, 307 AD2d 684, 685 [3d Dept 2003]). In other words, Petitioner Marvin's "generalized assertions that the project will increase . . . exposure to noise . . . are insufficient to demonstrate that [he] will suffer damages that are distinct from those suffered by the public at large" (*see Finger Lakes Zero Waste Coalition, Inc. v Martens*, 95 AD3d 1420, 1422-23 [3d Dept 2012]).

Petitioners, apparently recognizing the fatal flaw in their proof on standing, have asserted for the first time that the allegations of non-parties who have allegedly suffered harm should be considered (*see* Pet.'s Br. at 30). The allegations contained in the Affidavit of Gerald and Teresa Flegal are irrelevant because they are neither individual parties nor members of any of the organizational Petitioners (R. 426-428). Petitioners cannot rely on the allegations of a non-party to confer standing on Petitioner Marvin. Rather, Petitioner Marvin must prove that he "would suffer direct harm, injury that is in some way different from that of the public at large . . . . These requirements ensure that the courts are adjudicating actual controversies for parties that have a genuine stake in the litigation" (*see Assn. for a Better Long Island, Inc.*, 23 NY3d at 6, citing *Soc'y of Plastics*, 77 NY2d at 773-74).

In order to seek judicial review of an administrative determination, Petitioner Marvin "'must have a legally cognizable interest that is or will be affected by the determination'" (*Har Enters. v Town of Brookhaven*, 74 NY2d 524, 527-28 [1989], citing *Sun-Brite Car Wash, Inc. v Bd. of Zoning and Appeals of the Town of North Hempstead*, 69 NY2d 406, 413 [1987]). "A plaintiff generally has standing only to assert claims on behalf of himself or herself . . . [and] one does not, as a general rule, have standing to assert claims on behalf of another" (*Caprer v Nussbaum*, 36 AD3d 176, 182 [2d Dept 2006]). In other words, Petitioner

Marvin "cannot obtain standing on a *jus tertii* [or third-party] basis" (*see Dental Soc. of State v Carey*, 61 NY2d 330, 340 [1984]). "The requirement of injury in fact for standing purposes is closely aligned with [this Court's] policy not to render advisory opinions" (*Soc'y of Plastics*, 77 NY2d at 773).

Petitioner Marvin did not complain of train noise from the Transloading Facility (R. 432, 658). The claim that the Flegals may have heard train noise from the Transloading Facility does not confer standing on Petitioner Marvin. Allowing Petitioner Marvin to rely on allegations of non-parties or other members of the general public to gain standing would undermine the requirement that the party bringing the lawsuit has sustained an actual injury. Otherwise, a person who has not sustained any injury could nevertheless bring an action in a representative capacity on behalf of the real party in interest. The standing requirements articulated by this Court ensure that litigants have proven an actual injury so that courts are not issuing advisory opinions amongst parties with no actual stake in the controversy.

B. Allegations of increased train noise cannot provide standing to Petitioners because train operations are governed exclusively by federal law.

1. The Termination Act is a comprehensive federal scheme granting the Surface Transportation Board exclusive jurisdiction over railroad "transportation."

The Fourth Department correctly concluded that Petitioner Marvin lacked standing because his alleged harm of train noise was no different from that of the

public at large (*see* Point I.A above). In addition, a separate and independent reason Petitioner Marvin's complaint of train noise cannot be a basis for standing is that, under the circumstances of this case, the Termination Act (49 USC § 10101, *et seq.*) preempted the Village from reviewing noise impacts from train operations or the Transloading Facility. Despite Respondents fully briefing this issue in the Fourth Department, Petitioners never raised any argument in response (*see* Pet.'s Br. [4th Dept Dkt No CA-13-01558]).

The Interstate Commerce Act, the predecessor statute to the Termination Act, is "among the most pervasive and comprehensive of federal regulatory schemes" (*Chicago & N.W. Tansp. Co. v Kalo Brick and Tile Co.*, 450 US 311, 318 [1981]). In 1995, Congress enacted the Termination Act, which abolished the Interstate Commerce Commission and substantially deregulated the railroad industry (*Pejepscot Indus. Park, Inc. v Maine Cent. R.R. Co.*, 215 F3d 195, 197 [1st Cir 2000]) by reducing state and local regulatory authority over rail operations (*see Matter of Metro. Transp. Auth.*, 32 AD3d 943, 945 [2d Dept 2006], citing *Green Mountain R.R. Corp. v Vermont*, 404 F3d 638, 645 [2d Cir 2005]). The Termination Act created the Surface Transportation Board, which has been granted "exclusive jurisdiction over most railroad matters", including "transportation by rail carriers" and the "construction . . . of . . . facilities" (*Green Mountain*, 404 F3d at 645, citing 49 USC § 10501[b]).

The Termination Act contains an express preemption clause that provides in relevant part:

> (b) The jurisdiction of the [Surface Transportation] Board over —
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to . . . practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of . . . facilities . . . is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(49 USC § 10501[b]). Section 10501 reflects clear congressional intent to preempt state and local regulation of rail facilities because they are considered "integral to the railroad's operation" (*see Green Mountain*, 404 F3d at 644-45; *see also Matter of Metro. Transp. Auth.*, 32 AD3d at 945; *Buffalo S. R.R., Inc. v Vil. of Croton-on-Hudson*, 434 F Supp 2d 241, 248 [SDNY 2006]). It is "difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations" than Section 10501 (*see CSX Trans., Inc. v Ga. Pub Serv. Commn.*, 944 F Supp 1573, 1581 [ND Ga 1996]).

In order for a facility to fall within the purview of federal preemption, the facility must fall within the parameters of "transportation by rail carrier" (*see* 49 USC § 10102). The Termination Act defines "transportation" as follows:

> "transportation" includes —
>
> (A) a locomotive, car, vehicle . . . property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail, regardless of ownership or an agreement concerning use . . .
>
> (B) services related to that movement, including receipt, delivery, . . . transfer in transit, . . . handling, and interchange of . . . property . . .

(49 USC § 10102[9]). Under the Termination Act, the Surface Transportation Board has exclusive jurisdiction over the very issues raised by Petitioners, namely, rail transportation, and the construction and operation of rail facilities (*see* 49 USC §§ 10501[b], 10102[9]).

This expansive definition of transportation also includes the Transloading Facility to load water onto trains for transport (R. 658). For example, in *Green Mountain,* the railroad carrier brought an action seeking a declaration that the State of Vermont's environmental land use statute was preempted by the Termination Act in connection with the railroad's proposed construction of a transloading facility on its property (*see Green Mountain*, 404 F3d at 639). The Court found that "transportation" is "expansively defined" to include a locomotive, car, property, or facility of any kind related to the movement of property by rail (*see id.*, citing 49 USC § 10102[9]). The Court further held that "[c]ertainly, the plain language grants the [Surface] Transportation Board wide authority over the

transloading and storage facilities undertaken by [the railroad carrier]" (*see id.* at 642).

Consistent with the holding of the Second Circuit in *Green Mountain*, courts have regularly held that transloading facilities fall within the exclusive jurisdiction of the Surface Transportation Board (*see Coastal Distribution, LLC v Town of Babylon*, 216 Fed Appx 97, 101 [2d Cir 2007] [recognizing that the construction of transloading facilities are within the Surface Transportation Board's exclusive jurisdiction because they are "integral to the railroad's operation"]; *Texas Central Business Lines Corporation v City of Midlothian*, 669 F3d 525, 530 [5th Cir 2012] [holding that the statutory term "transportation" encompasses "transloading"]; *Hi Tech Trans, LLC – Petition for Declaratory Order —Newark, NJ*, STB Finance Docket No. 34192, 2003 STB LEXIS 475 [STB Aug. 14, 2003] ["There is no dispute that . . . transloading activities are within the broad definition of transportation."]).[1]

Here, both the Transloading Facility and the railcars carrying surplus water are, by definition, "transportation" under the Termination Act. As a service necessary to the eventual interstate rail movement, the Transloading Facility enables the transfer of surplus water onto railcars, which then carry the surplus water to Pennsylvania (R. 658). The Transloading Facility is an essential part of

[1] Decisions of the Federal Surface Transportation Board are also available on its website at http://www.stb.dot.gov/home.nsf/EnhancedSearch?OpenForm.

the Railroad's interstate rail transportation network, and is, by definition, "related to the movement of . . . property . . . by rail" (*see* 49 USC § 10102[9][A]). Likewise, the transfer of water onto railcars at the Facility for transport by rail is part of the Railroad's "receipt, . . . handling, and interchange of . . . property" (49 USC § 10102[9][B]). Thus, the Termination Act preemption applies.

2. Because the Transloading Facility and railcars constitute "transportation," the Termination Act preempted the Village from undertaking a SEQRA review of noise impacts from rail operations.

Courts "have found two broad categories of state and local actions to be preempted regardless of the context or rationale for the action" (*see CSX Transp. Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34662, 2005 WL 1024490 [STB May 3, 2005]). As is relevant here, "[t]he first is any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the board has authorized" (*id.* at *2). State and local laws that fall within this precluded category "are a per se unreasonable interference with interstate commerce. For such cases, once the parties have presented enough evidence to determine that an action falls within [this category], no further factual inquiry is needed" (*id.* at *3).

Courts have similarly held that state and local authorities "cannot subject the construction of railroad facilities to pre-permitting processes where there are no

clear construction standards and where the permit depends on the discretion of a local agency" (*Coastal Distribution, LLC*, 216 Fed Appx at 100). "Permitting" or "preclearance" requirements impose an unreasonable burden on rail transportation and are, therefore, preempted by the Termination Act (*see Norfolk Southern Railway Company v City of Alexandria*, 608 F3d 150, 160 [4th Cir 2010], citing *Green Mountain*, 404 F3d at 643; *Joint Petition for Declaratory Order-Boston and Maine Corp. and Town of Ayer, MA*, STB Finance Docket No. 33971, 2001 WL 458685, at *5 [STB Apr. 30, 2001], *aff'd Boston & Maine Corp. v Town of Ayer*, 191 F Supp 2d 257 [D Mass 2002]).

In a case directly applicable here, the Surface Transportation Board has found that the California Environmental Quality Act — the California state law equivalent to SEQRA — is "categorically preempted by § 10501(b)" (*see California High-Speed Rail Authority — Petition for Declaratory Order*, STB Finance Docket No. 35861, 2014 WL 7149612, at *7 [STB December 12, 2014]). The Surface Transportation Board found that:

> CEQA is a state preclearance requirement that, by its very nature, could be used to deny or significantly delay an entity's right to construct a line that the Board has specifically authorized, thus impinging upon the Board's exclusive jurisdiction over rail transportation.

(*id.*). Similarly, courts in California have held that the California Environmental Quality Act is preempted for railroad projects because, in the context of railroad

operations, it "is not simply a health and safety regulation imposing an incidental burden on interstate commerce" (*id.*, citing *Friends of the Eel River v North Coast Railroad Authority*, 178 Cal Rptr 3d 752, 767-71 [Cal Ct App 2014]).

Several courts in other jurisdictions have similarly concluded that state environmental statutes are preempted by the Termination Action (*see Green Mountain*, 404 F3d at 644-45 [preempting Vermont environmental and land use statute]; *City of Auburn v United States Government*, 154 F3d 1025, 1027-31 [9th Cir 1998] [preempting Washington state and local environmental review laws]; *Grafton and Upton Railroad Company v Town of Milford*, 337 F Supp 2d 233, 239 [D Mass 2004] [preempting Massachusetts environmental regulations and local zoning by-laws]; *City of Encinitas v North San Diego County Transit Development Board*, No 01-CV-1734-J (AJB), 2002 WL 34681621, *4 [SD Cal January 14, 2002] [preempting California environmental regulations]; *see also Green Mountain Railroad Corporation — Petition for Declaratory Order*, STB Finance Docket No. 34052, 2002 WL 1058001, *4 [STB May 24, 2002]). To hold otherwise in this case would put New York in opposition to the rule established by several courts throughout the Country.

Here, just as with the California Environmental Quality Act, SEQRA is exactly the type of state environmental statute preempted by the Termination Act. SEQRA mandates that all agencies provide an environmental impact statement for

any action (*see* ECL § 8-0109[2]), and that no agency may approve an "action until it has complied with the provisions of SEQR[A]" (6 NYCRR § 617.3[a]). SEQRA contains pre-clearance requirements that by their very nature could be used to delay or deny the construction of a Facility, thus infringing on the exclusive jurisdiction of the Surface Transportation Board. Therefore, the Village could not review noise impacts from train operations or the Transloading Facility because SEQRA is preempted by the Termination Act.

Petitioners cannot avoid this conclusion by claiming that SEQRA is ministerial in nature. SEQRA is implicated only where the approval was made within a state or local agency's discretion (*see* 6 NYCRR §§ 617.2[b], [e]; *Matter of Develop Don't Destroy (Brooklyn) v Urban Dev. Corp.*, 59 AD3d 312, 315 [1st Dept 2009]). By the same token, SEQRA is not ministerial in nature and assessed according to objective criteria, such as "[e]lectrical, plumbing and fire codes, [or] direct environmental regulations enacted for the protection of the public health and safety . . ." (*Green Mountain*, 404 F3d at 643). SEQRA expressly excludes from the definition of "action" official acts of a "ministerial nature, involving no exercise of discretion" (*see* ECL § 8-0105[5][ii]; *Matter of Filmways Commc'ns of Syracuse, Inc. v Douglas*, 106 AD2d 185, 186 [4th Dept 1985]). SEQRA is not a ministerial statutory scheme analogous to a building or fire code.

The Surface Transportation Board has held that subjecting a rail carrier to claims based "on the alleged byproducts (such as noise, vibration, and various discharges) of conventional and routine rail operations on the rail carrier's own property . . . would unduly burden interstate commerce . . ." (*Norfolk Southern Railway Company – Petition for Declaratory Order*, STB Finance Docket No. 35701, 2013 WL 5891582, at *3 [STB November 4, 2013]; *see also Pace v CSX Transp., Inc.*, 613 F 3d 1066, 1068-69 [11th Cir 2010]). The Surface Transportation Board has exclusive jurisdiction over these matters and Petitioners have at no time attempted to invoke its jurisdiction (*see* 49 USC § 11701[b]; *Flynn v Burlington Northern Santa Fe Corp.*, 98 F Supp 2d 1186, 1191 [ED Wash 2000]).

In short, the Village has no control over train operations, including the time during which the trains operate and access the Transloading Facility (R. 628), and Petitioners cannot use SEQRA as a basis to deny Respondents the right to operate the Transloading Facility and prohibit trains from carrying surplus water by alleging that their operation has resulted in increased noise. Any attempt by the Village to address anticipated train noise from the Transloading Facility or any other aspect of rail operations as part of the SEQRA process was preempted by the Termination Act. Because the Termination Act preempted the Village from reviewing noise impacts from train operations or the Transloading Facility, Petitioner Marvin's complaint of train noise cannot form a basis for standing in this

case. Thus, Petitioners do not have standing to maintain this proceeding based solely on impacts from train operations.

C. Petitioner Marvin is not entitled to any presumption of injury based on his alleged proximity to the Transloading Facility.

Petitioners' request that this Court clarify and revise the law to provide that proximity alone is sufficient to demonstrate standing in a SEQRA case (*see* Pet.'s Br. at 24) is not at issue in this case because Petitioner Marvin's claim of standing was not based on his proximity to the Transloading Facility, but noise from a train that runs through the entire Village (*see* R. 432). Petitioner Marvin did not allege that his proximity to the Transloading Facility was the basis for his complaint of injury and, therefore, his alleged proximity to the Transloading Facility is not relevant to the issue of whether he has standing. Thus, it is not necessary to clarify the rules of proximity and standing.

In any event, should this Court consider Petitioner Marvin's claimed proximity to the Transloading Facility as his basis of injury, this Court in *Save the Pine Bush* rejected the contention that proximity alone is sufficient to demonstrate standing in a SEQRA case because such a standard would result in an inflexible rule that is inconsistent with this Court's standing jurisprudence (*see Save the Pine Bush*, 13 NY3d at 305). In fact, the municipality argued that this Court should "adopt a rule that environmental harm can be alleged only by those who own or inhabit property adjacent to, or across the street from, a project site" (*id.*). This

Court rejected such a rule as arbitrary because it "would mean in many cases that there would be no plaintiff with standing to sue, while there might be many who suffered real injury" (*id.*).

By the same token, this Court should reject Petitioners' proposed rule that an environmental harm can be deemed to have occurred (for standing purposes) by anyone who owns property in some proximity to a project site. This proposed rule is equally arbitrary based on the same analysis undertaken by this Court in *Save the Pine Bush*. As this Court stated:

> Indeed, people who visit the Pine Bush, though they come from some distance away, seem much more likely to suffer adverse impact from a threat to wildlife in the Pine Bush than the actual neighbors of the proposed hotel development—the owners and occupants of the nearby office buildings and shopping malls. The neighbors may care little or nothing about whether butterflies, orchids, snakes and toads will continue to exist on or near the site.

(*Save the Pine Bush*, 13 NY3d at 305). The gravamen of this Court's holding is that, regardless of proximity, petitioners may (or may not) be capable of showing that the threatened harm affects them different from the public at large. In other words, proximity to the project is not dispositive because the landowner may have, in fact, not suffered any real injury different from the public at large, which is precisely the case here.

This Court in *Save the Pine Bush* expressly declined to "suggest that standing in environmental cases is automatic, or can be met by perfunctory

allegations of harm" (*Save the Pine Bush*, 13 NY3d at 306; *see also Sun-Brite Car Wash, Inc.*, 69 NY2d at 414 [stating that "[t]he status of neighbor does not . . . automatically provide the entitlement, or admission ticket, to judicial review in every instance"]). The point bears repeating — standing in an environmental case is not automatic based on proximity alone, but rather requires a review of the facts of the particular case and the actual injuries. Where "no zoning-related issue is involved, there is no presumption of standing to raise a SEQRA challenge based on a party's close proximity alone" (*Save Our Main Street Buildings*, 293 AD2d at 908; *see also Rent Stabilization Assn. of N.Y.C., Inc. v Miller*, 15 AD3d 194, 194 [1st Dept 2005]; *Boyle v Town of Woodstock*, 257 AD2d 702, 704 [3d Dept 1999]).

Petitioner Marvin's alleged proximity to the Transloading Facility "does not, without more, give rise to a presumption that [he] would be adversely affected in a way different from the public at large" (*see Clean Water Advocates of New York, Inc. v New York State Department of Environmental Conservation*, 103 AD3d 1006, 1008 [3d Dept 2013]; *Barrett v Dutchess County Legislature*, 38 AD3d 651, 653 [2d Dept 2007]; *Kemp v Zoning Bd. of Appeals of Village of Wappingers Falls*, 216 AD2d 466, 467 [2d Dept 1995]). Rather, based on this Court's holding in *Save the Pine* Bush, Petitioner Marvin was required to not only allege, but prove that his injury "is real and different from the injury most members of the public

face" (*see Save the Pine Bush*, 13 NY3d at 306), which he failed to do for the reasons set forth above.

Further, even if proximity alone is sufficient to give rise to a presumption of standing in a SEQRA case (which it is not), Petitioner Marvin is not entitled to a presumption of standing because he does not reside in sufficient proximity to the Transloading Facility. Petitioner Marvin allegedly resides approximately 787 feet from the Transloading Facility (R. 23). Courts have found distances of less than 700 feet as insufficient to give rise to a presumption of standing (*see Oates*, 290 AD2d at 760-61 [approximately 530 feet]; *Matter of Gallahan v Planning Bd. of City of Ithaca*, 307 AD2d 684, 685 [3d Dept 2003] [approximately 700 feet]; *Buerger v Town of Grafton*, 235 AD2d 984, 984-85 [3d Dept 1997] [within 600 feet]; *see also* R. 23 and cases cited therein). And while courts have concluded that landowners within 500 feet of a project are close enough to remove the burden of pleading a special harm (*see Save the Pine Bush*, 13 NY3d at 309 [Piggott, J. concurring]), Petitioner Marvin resides more than 500 feet from the Transloading Facility and, therefore, is not entitled to a presumption of standing.

Petitioners' contention that affirming the decision of the Fourth Department will result in no Village resident having standing (*see* Pet.'s Br. at 30) is incorrect. There are numerous Village residents that live in immediate proximity to the Transloading Facility who could have standing to maintain this proceeding,

provided they suffered a special injury different from the public at large and such injury was not preempted by federal law (*see* Point I.B. above). None of those people, however, are petitioners in this proceeding. Petitioners have not identified a single party who heard noise from, or otherwise sustained an injury based on proximity to, the Transloading Facility.

Conversely, if this Court finds that Petitioner Marvin has standing based a fleeting allegation of noise from a train running through the Village or allegations contained in a non-party affidavit, then there would be nothing left of the standing rules articulated by this Court over the past twenty years. Countless numbers of people residing in any municipality where the train tracks run — potentially hundreds of miles away from the Transloading Facility and the Village — would have standing based on the same allegations made by Petitioner Marvin. Accepting Petitioners' argument would essentially permit citizen suits under SEQRA, which has been expressly rejected by this Court (*see Soc'y of Plastics*, 77 NY2d at 770).

Indeed, for Petitioners to rely on train noise as a basis to gain standing cannot be reconciled with the concession in Petitioners' brief below that the "issue complained of in this case is not the construction of the water loading facility" (*see* Pet.'s Br. at 20 [4th Dept Dkt No CA-13-01558]). Petitioners did not commence this proceeding because of train noise. Rather, Petitioners challenge the

water withdrawals approved by the Basin Commission and the sale of surplus water by the Village. Petitioners' concession should eliminate any doubt that Petitioners have suffered no injury from train noise. Petitioners' generalized allegations of train noise running through the Village should, therefore, be rejected as insufficient to establish standing in this proceeding.

POINT II

THE BASIN COMMISSION REVIEWED AND APPROVED THE WATER WITHDRAWALS AND THE COMPACT PREEMPTED THE VILLAGE FROM UNDERTAKING AN ADDITIONAL SEQRA REVIEW OF THE WITHDRAWALS.

A. The water withdrawals approved by the Basin Commission were not subject to an additional SEQRA review because the Compact preempted SEQRA.

1. The Compact is federal law and governed the review and approval by the Basin Commission of the water withdrawals at issue.

The Compact preempted the Village from undertaking a SEQRA review of the environmental impacts associated with the withdrawal of water from the Basin. As discussed above, the Compact was concurrent legislation between the United States of America, New York, Maryland and Pennsylvania that created the Basin Commission to exclusively govern the management, review and approval of water withdrawals from the Basin (*see* ECL § 21-1301, *et seq.*). The Compact governed the withdrawal approvals issued by the Basin Commission and obtained by the Village in this case (R. 342, 347, 358-59).

The Compact Clause of the United States Constitution provides that "[n]o state shall, without the consent of Congress, . . . enter into any . . . Compact with another state" (US Const. Art. 1, Section 10, Cl. 3). Congress approved the Compact (*see* Pub L 91-575). Once Congress approved the Compact, it was "transform[ed] . . . into a law of the United States" (*see Tarrant Regional Water Dist. v Herrmann*, 133 S Ct 2120, 2130, n.8 [2013], citing *Virginia v Maryland*, 540 US 56, 66 [2003]; *accord American Sugar Ref. Co. of NY v Waterfront Commn. of N.Y. Harbor*, 55 NY2d 11, 30 [1982]). The Supremacy Clause of the United States Constitution (US Const. Art. VI, cl. 2) "then ensures that a congressionally approved Compact, as a federal law, pre-empts any state law that conflicts with the Compact" (*Tarrant Regional Water Dist.*, 133 S Ct at 2130, n.8; *see also People v Nine Mile Canal Co.*, 828 F Supp 823, 825, n.3 [D Co 1993]; *Alcorn v Wolfe*, 827 F Supp 47, 52 [DDC 1993]).

"The Supremacy Clause, in article VI of the Constitution, 'may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and state law" (*Balbuena v IDR Realty LLC*, 6 NY3d 338, 356 [2006], citing *New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins. Co.*, 514 US 645, 654 [1995]). "Implied preemption takes two forms. The first, referred to as field preemption, occurs if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left

no room for the States to supplement it" (*Balbluena*, 6 NY3d at 356, citing *Cipollone v Liggett Group, Inc.*, 505 US 504, 516 [1992] [internal quotations omitted]). The second type, conflict preemption, provides "that a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found . . . where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*id.*, citing *Ray Atlantic Richfield Co.*, 435 U.S. 151 [1978] [internal quotations omitted]).

2. The Compact is a comprehensive regulatory scheme governing review and approval of withdrawals from the Basin.

Requiring local municipalities pursuant to SEQRA to duplicate the review of water withdrawals undertaken by the Basin Commission cannot be reconciled with comprehensive regulatory scheme of the Compact. The Basin Commission was created to "effect comprehensive multiple purpose planning for the conservation, utilization, development, management, and control of the water and related natural resources of the Basin, which includes part of New York, Pennsylvania and Maryland" (*see* 18 CFR 801.0[a]). The Basin Commission was created by the Compact, which has the force of federal law (*see* ECL § 21-1301 *et seq.; see also* Pub L 91-575; *Alcorn*, 827 F Supp at 52).

Prior to the enactment of the Compact, water resources in the Basin were "subject to the duplicating, overlapping and uncoordinated administration of a large number of governmental agencies which exercise a multiplicity of powers

resulting in a splintering of authority and responsibility" (ECL § 21-1301 [Preamble ¶3]). Thus, an overarching purpose of the Compact was to "apply the principal of equal and uniform treatment to all users of water and of water related facilities without regard to political boundaries" (ECL § 21-1301 at 1.3[5]). To that end, the Compact unequivocally declares that:

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

(ECL § 21-1301 at [1.3][3][4] [emphasis added]). The Basin Commission is the single administrative agency for supervising and coordinating the water resources in the Basin, which includes the Village municipal water system.

"The Compact provides generally that no project affecting the water resources of the basin shall be undertaken by any person, governmental authority, or other entity prior to approval by the [Basin] Commission" (18 CFR 801.4[a]). In particular, the Compact provides that the Basin Commission is specifically

empowered to "[e]stablish standards of planning, design, and operation of all projects and facilities in the basin to the extent they affect water resources . . ." (ECL § 21-1301 [3.4][2]). The Basin Commission also has specific authority to regulate water withdrawals and determine what area should be designated as protected or involved in an emergency situation (ECL § 21-1301 [Article 11]; *see also* 18 CFR 801.3). Further, Part 806 of the Basin Commission regulations comprehensively establish the scope and procedures for review and approval of projects, including special standards governing water withdrawals and consumptive use of water (*see* 18 CFR Part 806; 18 CFR 806.1[a]).

In an analogous case, the Western District of New York held that SEQRA regulations cannot be imposed on a federal-state agency created pursuant to a federally-approved compact (*see Mitskovski v Buffalo and Fort Erie Public Bridge Auth.*, 689 F Supp 2d 483, 491 [WDNY 2010], *aff'd* 415 Fed Appx 264 [2d Cir 2011]). The Court held that state and local agencies cannot "impose their environmental regulations upon the . . . Authority. To hold otherwise would usurp the authority granted to the compact" (*id.* at 491; *see also Seattle Master Builders Assn. v Pacific N.W. Elec. Power & Conservation Planning Council*, 786 F2d 1359, 1370-71 [9th Cir 1986] [holding that an agency created pursuant to a federal-state compact was not subject to state law requiring the preparation of an

environmental impact statement]; *Erie Boulevard Hydropower, L.P. v Stuyvesant Falls Hydro Corporation*, 30 AD3d 641, 645 [3d Dept 2006] [holding that SEQRA review was not required given preemption by federal statute]).

The same rationale employed by the Court in *Mitskovski* applies here to the Basin Commission. Clearly, the Compact is a comprehensive regulatory scheme with its own requirements to assess and evaluate the impacts associated with the withdrawal of water from the Basin. The "projects" approved by the Basin Commission include those forming the basis of Petitioners' claims, such as "requests for . . . withdrawals . . . of water for in-basin or out-of-basin use" (*see* 18 CFR 801.3[a]), and "consumptive use related to . . . natural gas . . . development" (*see* 18 CFR 806.22[f]; R. 330-31). Thus, the Compact not only regulate the withdrawal of water from the Basin, but also regulates and monitors how the water is used, including for hydraulic fracturing in other states. Requiring the Village to conduct a SEQRA review of water withdrawals would usurp the authority of the Basin Commission — rendering its decisions meaningless — in violation of the Supremacy Clause.

Indeed, the Environmental Conservation Law recognizes that its provisions, which include SEQRA, must yield to the Compact and the jurisdiction of the Basin Commission. In this regard, ECL § 21-1321 provides as follows:

> No provision of this chapter or of any other law of this state which is inconsistent with the provisions of the

> compact shall be applicable to the Susquehanna river basin commission or to any matter governed by the compact.

Section 21-1321 is contained in chapter 43-B of the ECL. That chapter also contains SEQRA, which is codified in Article 8 of the ECL (*see* ECL § 8-0101, *et seq.*). Construing SEQRA as requiring an additional review of impacts associated with water withdrawals — when it has already been reviewed by the Basin Commission — is entirely inconsistent with the Compact and its regulations. The Compact has separate requirements and criteria governing the review and approval of water withdrawals, including the assessment of impacts to a resource (*i.e.*, the Basin) that spans a portion of three states.

Petitioners' interpretation of SEQRA also offends the principal purpose of the Compact — to eliminate the splintering of authority amongst local municipalities and vest in a single agency the power to regulate water withdrawals (*see* ECL § 21-1301 at § 1.3[3], Preamble ¶¶1, 3, 5). "A basic consideration in the interpretation of a statute is the general spirit and purpose underlying its enactment, and that construction is to be preferred which furthers the object, spirit and purpose of the statute" (*see* McKinney's Cons. Laws of NY, Book 1, Statutes § 96). "[A]n interpretation of a statute which produces an unreasonable or incongruous result and one which defeats the obvious purpose of the legislation and renders it ineffective should be rejected" (*People v Marrero*, 69 NY2d 382, 399 [1987]).

Petitioners' contrary interpretation defeats the obvious purpose of the Compact and, therefore, should be rejected.

3. The Compact preempted the Village from undertaking an additional SEQRA review or applying additional conditions to water withdrawals approved by the Basin Commission.

That the Compact preempts the Village from undertaking a SEQRA review of the environmental impacts associated with the withdrawal of water from the Basin is confirmed by several decisions from the Pennsylvania state courts holding that the Compact preempts a local municipality from applying any additional conditions to the withdrawal of water or otherwise limiting the approvals issued by the Basin Commission. For example, in *State College Borough Water Auth. v Board of Supervisors of Halfmoon Township, Centre County, P.A. (Halfmoon Township)*, 659 A2d 640 (Pa Comwlth 1995), the issue before the court was whether a municipality can impose additional conditions on a water use application previously granted by the Basin Commission for the withdrawal of groundwater in certain amounts (*id.* at 644).

The court in *Halfmoon Township* held in language directly applicable to the present case that:

> Our reading of the Compact as a whole satisfies us the state legislature indicated an intention that local governing bodies should not supplement [the Basin Commission's] decisions with respect to its authority to manage the basin's water resources. No other conclusion is logical where the Compact evinces a frustration with

> splintered governmental authority and responsibility, and where [the Basin Commission] has been given the power to regulate water withdrawals and diversions and to determine what areas should be designated as protected or involved in an emergency situation.

(*Halfmoon Township*, 659 A2d at 644). Thus, the court held that conditions imposed by a local governing body subject to the authority of the Basin Commission that interfere with its power to regulate area water resources are preempted (*id.* at 645; *see also see also Levin v Bd. of Supervisors of Benner Township, Centre County*, 669 A2d 1063 [Pa Comwlth 1995]).

As applied here, the Compact preempted the Village from undertaking any additional SEQRA review relating to the withdrawal of water from the Basin. Petitioners claim that the Village must undertake a SEQRA review of water withdrawals in the form of hydrogeologic testing on the production wells in the aquifer located within the Basin to determine the safe yield and comprehensively address issues of water quality related to large scale pumping (*see* R. 498-99). The Compact, however, preempts the Village from imposing additional conditions as part of a SEQRA review that were not imposed by the Basin Commission. If the Village cannot impose conditions, then logically the Village cannot conduct a SEQRA review of impacts associated with water withdrawals from the Basin. Certainly, the Village could not effectively invalidate an approval by imposing additional conditions on the approvals issued by the Basin Commission.

B. The Record demonstrates that the withdrawal and use of surplus water sold by the Village was subject to review and approved by the Basin Commission pursuant to the Compact.

Pursuant to the comprehensive regulatory scheme of the Compact, the Basin Commission reviewed and approved the Village's application for withdrawal of water for oil and gas exploration in Pennsylvania (R. 328-34, 349-51). The approvals issued by the Basin Commission were well-founded based on the following pertinent facts:

- The Village wells have a permitted production capacity of over 4,000,000 gallons of water per day and have been in operation for more than 70 years.
- The 4,000,000 gallon capacity of the Village wells is based upon production data spanning at least 40 years.
- Given the amounts associated with the sale to SWEPI and what is needed by the Village to supply its residents and other customers, the Village has more than 3 times the capacity it needs to sell water to SWEPI and provide water to its residents and other customers.

(R. 346-47, 546-47, 551-52, 557-64). After obtaining, among other information, the permitted capacity of the Village wells and production data over a four-decade period (R. 550-51, 561-64), which demonstrates a substantial surplus capacity, the Basin Commission approved the withdrawal of one million gallons of water from the Basin specifically for use in oil and gas exploration in Pennsylvania (R. 328, 333-34) pursuant to the Approval by Rule Process (*see* 18 CFR 806.22[f]).

Petitioners have failed to even acknowledge, let alone dispute, that the Basin Commission specifically reviewed and approved the withdrawal of one million gallons of water per day (R. 328-34, 349-51, 551-52, 601-02). Despite the Basin Commission approving the water withdrawals by the Village and Respondents fully briefing this issue in the Fourth Department, neither the Basin Commission nor the Compact are mentioned even once in Petitioners' brief. Petitioners' failure to acknowledge the role of the Basin Commission in the approval process completely undermines the credibility of Petitioners' contention that the Village did not conduct a proper environmental review of water withdrawals. A proper review was completed and approvals were issued — by the Basin Commission.

C. Petitioners are barred from collaterally attacking the approvals issued by the Basin Commission.

In April 2011, the Basin Commission issued its second and final approval to withdraw water, which resulted in the Village having authorization to withdraw up to one million gallons per day beyond the needs of Village residents for use by SWEPI for oil and gas exploration in Pennsylvania (R. 328-29, 602). If Petitioners felt aggrieved by the Basin Commission, they should have brought an action against it at that time as authorized by the Compact (*see* ECL § 21-1301 at 3.10[6] [providing that "[a]ny determination of the Commission pursuant to this article or any article of the compact providing for judicial review shall be subject to such judicial review . . . provided that an action or proceeding . . . for such review is

commenced within 90 days from the effective date of the determination sought to be reviewed"]).

This Court has held that an agency determination, made in accordance with its statutory authority that is never challenged, such as the Basin Commission's determinations in this case, "under settled principles, cannot be collaterally attacked . . ." (*see Matter of Lewis Tree Serv. v Fire Dept of City of N.Y.*, 66 NY2d 667, 668 [1985]). In other words, courts have consistently held that when the determination of an agency becomes final, it is conclusive and binding, and cannot be subject to collateral attack (*see Steen v Quaker State Corp.*, 12 AD3d 989, 990 [3d Dept 2004]; *Adirondack Park Agency v Bucci*, 2 AD3d 1293, 1295 [4th Dept 2003]; *Brawer v Johnson*, 231 AD2d 664, 664-65 [2d Dept 1996]; *Matter of Joseph v Roldan*, 289 AD2d 243, 244 [2d Dept 2001]; *see also Callanan Road Improvement Co. v United States*, 345 US 507, 512 [1953]).

Here, any challenge to the review undertaken in assessing the impacts associated with water withdrawals should have been asserted in a timely proceeding against the Basin Commission in a court of competent jurisdiction (ECL § 21-1301 at 3.10[6]). As used in the Compact, the phrase "court of competent jurisdiction" means, with reference to the courts in New York, a court in which an Article 78 proceeding may be brought (*see* ECL § 21-1309). Petitioners failed to challenge the approvals issued by the Basin Commission prior to the

expiration of the 90-day statute of limitations established by the Compact (*see* ECL § 21-1301 at 3.10[6]). Having failed to institute an Article 78 proceeding against the Basin Commission prior to the expiration of the statute of limitations, Petitioners cannot use this proceeding to collaterally attack its approvals under the guise of challenging compliance with SEQRA by the Village.

D. This proceeding should have been dismissed for failure to join the Basin Commission as a necessary party.

Petitioners' failure to name the Basin Commission as a party requires that this proceeding be dismissed. Pursuant to CPLR §1001, a petition can be dismissed if it fails to name one or more necessary parties "who ought to be parties if complete relief is to be accorded" or "who might be inequitably affected by a judgment in the action" (*Matter of 27th Block St. Assn. v Dormitory Auth. of the State of N.Y.*, 302 AD2d 155, 160 [1st Dept 2002], quoting CPLR §1001[a]). Courts have consistently held that the failure to name a governmental agency where the agency's decision is at issue and such agency may be inequitably affected by a judgment rendered in its absence is grounds for dismissal (*see Town of Brookhaven v Marian Chun Enters., Inc.*, 71 NY2d 953, 954-55 [1988]; *City of N.Y. v Long Is. Airports Limousine Serv. Corp.*, 48 NY2d 469, 475-76 [1979]).

If the Village approvals are set aside on the grounds that a SEQRA review of water withdrawals from the Basin was required, it will completely undermine the

authority of the Basin Commission to approve water withdrawals and frustrate one of the main purposes of the Compact (*see* ECL § 21-1301 at 1.3[3], Preamble ¶¶1, 3, 5). If the Petition is granted, the approvals issued by the Basin Commission will be effectively annulled because the Village will be barred from withdrawing water. Further, other applicants seeking approval from the Basin Commission will have no assurance that its approvals are valid because they may be invalidated years later through a collateral attack without the Basin Commission being joined as a party. Having not participated in this proceeding, the Basin Commission was precluded from defending its procedures or introducing the record of the environmental review it undertook prior to issuing its approvals.

Petitioners' failure to join the Basin Commission is even more egregious in this case because the Record demonstrates that Petitioners and their counsel were fully aware of the Basin Commission Approvals at the time (R. 632-33). Indeed, Petitioner Jean Wosinski testified that in 2011 she knew that the Village was considering plans to sell millions of gallons of water per day and the Basin Commission approved the water withdrawals at issue (R. 467, ¶28; R. 472). Petitioners' failure to join the Basin Commission significantly prejudiced its rights and the Basin Commission can no longer be joined because any claims against it are time barred. Accordingly, this Court should dismiss this proceeding for failure to join the Basin Commission as a necessary party.

POINT III

THIS PROCEEDING SHOULD BE DISMISSED AS MOOT AND BARRED BY THE DOCTRINE OF LACHES.

A. This proceeding is moot because the Transloading Facility was substantially complete by the first return date of this proceeding.

In the event this Court determines that Petitioners have standing, this proceeding is nevertheless barred by the doctrines of laches and mootness because the Transloading Facility was substantially complete by the first return date of this proceeding. In *Cityneighbors Coalition of Historic Carnegie Hill v N.Y. City Landmarks Preserv. Commn.*, 2 NY3d 727, 728-29 (2004), this Court held that "where the change in circumstances involves a construction project, we must consider how far the work has progressed toward completion." Thus, where a construction project is substantially complete, a proceeding seeking to enjoin its operation should be dismissed as moot (*see id.*).

On February 23, 2012, the Village adopted resolutions issuing the Negative Declaration, and approving the Lease and Surplus Water Agreement (R. 111-119). In April 2012, construction of the Transloading Facility began (R. 358). Yet, Petitioners simply watched construction proceed rather than promptly commencing this action and seeking a temporary restraining order. On June 25, 2012, the very last day before the statute of limitations would have barred this proceeding, Petitioners filed this lawsuit (R. 43). The Court made the Petition returnable on

July 23, 2012, by which time the Transloading Facility was substantially completed and the only remaining items to be addressed at the Transloading Facility related to certain punch list matters (R. 357-58, 367-68). At no time have Petitioners disputed that the Transloading Facility was substantially complete by the first return date of the Petition.

In addition to the delay in commencing this proceeding, Petitioners were not diligent in seeking injunctive relief. One of the chief factors bearing on mootness is "challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation" (*see Cityneighbors Coalition of Historic Carnegie Hill*, 2 NY3d at 728-29; *Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172-73 [2002]). Thus, a matter is rendered moot where petitioners have not been diligent in seeking injunctive relief against construction activity (*see Weeks Woodlands Assn., Inc. v Dormitory Auth. of the State of N.Y.*, 95 AD3d 747, 747 [1st Dept 2012], citing *Friends of Pine Bush v Planning Bd. of the City of Albany*, 86 AD2d 246 [3d Dept 1982]).

Although Petitioners commenced this proceeding by order to show cause seeking a preliminary injunction, Petitioners failed to effectively preserve the status quo pending judicial review. At the time Petitioners commenced this proceeding, Petitioners' counsel acknowledged that the Transloading Facility was

being constructed (R. 82), but Petitioners never sought a temporary restraining order. In any event, Petitioners' request for injunctive relief was obviously deficient as a matter of law because it was supported by nothing except a four paragraph, handwritten affidavit from Petitioners' counsel that failed to satisfy any of the factors for a preliminary injunction, *i.e.*, (1) a likelihood of success on the merits; (2) irreparable injury; and (3) the balance of hardships between the parties (*see Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005]). Petitioners' perfunctory request for a preliminary injunction and complete lack of diligence thereafter in pursuing it warrants the application of the mootness doctrine (*see Cityneighbors Coalition of Historic Carnegie Hill*, 2 NY3d at 728-29).

Upon receipt of the July 23, 2013 return date for the Petition — nearly a month after the date the Petition was filed — Petitioners could have requested an expedited hearing on their request for a preliminary injunction or a temporary restraining order against the Railroad. Petitioners did neither. Petitioners have argued throughout this proceeding that the mootness doctrine should not apply because this matter was adjourned several times, but that fact is irrelevant because the Transloading Facility was substantially complete prior to the first return date (R. 358, 367-68). Accordingly, this proceeding should be dismissed as moot.

B. The doctrine of laches bars this proceeding because Petitioners failed to timely challenge the approvals issued by the Basin Commission.

"[W]here neglect in promptly asserting a claim for relief causes prejudice to one's adversary, such neglect operates as a bar to a remedy and is a basis for asserting the defense of laches" (*Save the Pine Bush, Inc. v N.Y. State Dep't of Envtl. Conservation*, 289 AD2d 636, 638 [3d Dept 2001] [internal quotations omitted]; *see also Save the Pine Bush v City Engineer of City of Albany*, 220 AD2d 871, 872 [3d Dept 1995]). In other words, because Petitioners fail "to timely safeguard their interests by seeking an injunction, despite the obvious presence of ongoing construction . . . the proceedings . . . are barred by the doctrine of laches . . ." (*Caprari v Town of Colesville*, 199 AD2d 705, 706 [3d Dept 1993]).

On January 3, 2011, over seventeen months before Petitioners commenced this proceeding, the Basin Commission issued its first approval authorizing the withdrawal of 500,000 gallons of water per day (R. 330-31). On April 15, 2011, the Basin Commission issued its second approval authorizing the withdrawal of an additional 500,000 gallons of water per day for the same use (R. 328-29). Petitioners challenged neither approval. Petitioners claim that the Basin Commission allegedly "misjudged the character of our local geology and the nature of our local geology" (R. 467), but at no time have Petitioners taken any action to challenge the approvals issued by the Basin Commission.

Despite Respondents extensively briefing this issue below, Petitioners now offer no explanation for why they did not challenge the approvals issued by the Basin Commission, or seek injunctive relief when the Basin Commission issued its initial approval in 2011 or when construction began in April 2012. Petitioners had actual knowledge of the approvals issued by the Basin Commission in 2011 and the presence of ongoing construction in 2012 (R. 82, 467 ¶¶28-30, 472, 632-33). Petitioners, however, did nothing to assert their claims or protect their rights for over fourteen months until filing this proceeding at the last possible moment. Because of Petitioners' unreasonable delay, this proceeding is barred by the doctrines of laches and mootness.

POINT IV

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

A. The SEQRA review undertaken by the Village was limited by the preemptive effect of federal law.

Petitioners' SEQRA analysis is fundamentally flawed because it fails to consider the preemptive effect of the Termination Act and the Compact on the SEQRA review undertaken by the Village. The Surface Transportation Board and the Basin Commission had exclusive jurisdiction over certain aspects of this matter. The Surface Transportation Board had exclusive jurisdiction over the

construction and operation of the Transloading Facility (*see* Point I.B above; R. 111-16, 169-86, 362-63, 627-29). The Basin Commission had exclusive jurisdiction over the water withdrawals and associated impacts on the Basin, and the use of such water for oil and gas exploration in Pennsylvania (*see* Point II above).

The Village was only required to undertake a SEQRA review of the Lease and Surplus Water Agreement to the extent necessary to address those portions of SEQRA not preempted by the Termination Act and the Compact. With respect to the construction and operation of the Transloading Facility, the Village determined that a review of the Lease was required, including impacts from storm water runoff during construction and operation, and water pressure associated with the operation of the Transloading Facility (R. 111-16). With respect to the sale of water, the Village determined that establishing the commercial terms of sale of water based on withdrawals previously approved by the Basin Commission was a Type II action under SEQRA (R. 117-19). In short, the Village SEQRA review filled in the gaps left by the preemptive effect of the Termination Act and the Compact, and as discussed below the Record demonstrates that the Village clearly complied with SEQRA.

B. The Village completed the required environmental review by taking a hard look at the relevant areas of environmental concern as required by SEQRA.

When the SEQRA review completed by the Village is evaluated in the context of the preemptive effect of federal law, the Record demonstrates that the Village "identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (*see Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231-32 [2007] [internal quotations and citations omitted]; *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]). "It is not the province of the courts to second-guess thoughtful agency decisionmaking" (*Riverkeeper, Inc.*, 9 NY3d at 232), and "the courts may not substitute their judgment for that of the agency . . ." (*Akpan v Koch*, 75 NY2d 561, 570 [1990] [citations omitted]).

Further, the Village's "compliance with its substantive SEQRA obligations is governed by a rule of reason and the extent to which particular environmental factors are to be considered varies in accordance with the circumstances and nature of particular proposals" (*see Akpan*, 75 NY2d at 570). In this case, the Village as Lead Agency had "considerable latitude in evaluating environmental effects" associated with the Project (*see Eadie v Town Bd. of Town of North Greenbush*, 7 NY3d 306, 318 [2006]). The Village properly issued the Negative Declaration because it "made a thorough investigation of the problems involved and reasonably

exercised [its] discretion" (*see Spitzer v Farrell*, 100 NY2d 186, 190 [2003] [citations omitted]).

Here, the Village took the requisite "hard look" by determining the relevant areas of environmental concern, analyzing the potential concerns of significance and making an appropriate determination based on its review (R. 109, 148-339). The Village analyzed studies and documents associated with the conveyance of surplus Village water into railcars for transport (R. 148-255), and the potential impact of water pressure on Village users associated with the operation of the Transloading Facility (R. 111-16, 212-55). The Village also analyzed potential storm water runoff during construction and operation of the Transloading Facility (R. 111-16, 148-68, 218-20); past uses of the Property and its previous remediation (R. 212-17, 256-327); and the character of the neighborhood in light of past and current uses (R. 112-114, 256-62). The Village also considered the impact of federal law as it relates to operation of facilities by federally regulated railroads (*see* R. 111-14, 156-57, 256-91).

Based on the foregoing, the Village evaluated the Lease and its potential effect on the environment, identified potential impacts, and took the required "hard look" in reviewing those potential impacts (R. 111-16). The Village then issued a Negative Declaration, which documented the comprehensive review undertaken by the Village and contained its reasoned elaboration of the environmental review and

analysis of why the development, construction and operation of the Transloading Facility would not result in any significant adverse impact (R. 111-16). In fact, Petitioners have conceded that the "issue complained of in this case is not the construction of the water loading facility" (*see* Pet.'s Br. at 20 [4th Dept Dkt No CA-13-01558]), and have raised no argument concerning the Transloading Facility in their brief submitted to this Court. Through the process discussed above, the Village fully executed and satisfied its obligations under SEQRA.

C. The Village properly determined that entering into the Surplus Water Agreement was exempt from SEQRA review.

1. The approval of the Surplus Water Agreement by the Village was not an "action" under SEQRA.

The Surplus Water Agreement did not authorize or effectuate any "action" as defined by SEQRA for three reasons, each of which standing alone provide a basis for the Village not reviewing the Surplus Water Agreement under SEQRA. First, the Village did not undertake any physical activity or construction in connection with the withdrawal of water, which was reviewed and approved by the Basin Commission. Second, the Basin Commission is not an "agency" under SEQRA. Third, the Surplus Water Agreement, which set the commercial terms of the sale of water, did not "affect the environment."

SEQRA defines an "action" as follows:

> Actions include:
>
> (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; . . .

(*see* 6 NYCRR § 617.2). Thus, an "action" under SEQRA requires (i) some physical alteration (ii) by an "agency" that (iii) may "affect the environment" (*see id.*). The Surplus Water Agreement fails to satisfy any of the foregoing requirements.

First, no physical activity or construction was undertaken in connection with the sale of water because by the Village because the withdrawals involved existing wells and were previously approved by the Basin Commission. The Village wells were constructed decades earlier, fully permitted by NYSDEC, and previously yielded volumes sold to industrial users on par with those to be sold to SWEPI (R. 328-34, 345-51, 550-54, 561-625). Petitioners acknowledge that "the bulk water sale did not require modification of the existing water withdrawal permits issued by [NYSDEC] . . ." (*see* Pet.'s Br. at 41), demonstrating that the Surplus Water Agreement did not effectuate any change in the permits or the use of Village

wells. As it had for over 50 years, the sale of surplus water by the Village is nothing more than a statutorily authorized municipal activity (*see* Village Law § 11-1120) that the Village is relying on to provide much needed revenue for its community.

Second, the Basin Commission is not an "agency" subject to SEQRA. SEQRA mandates that "[a]ll agencies" shall provide an environmental impact statement for "any action they propose or approve which may have a significant effect on the environment" (*see* ECL § 8-0109[2]). SEQRA defines an "agency" as "any state or local agency" (*see* ECL § 8-0105[3]). The Basin Commission is neither a state nor a local agency, but rather is a federal-interstate compact authority created pursuant to the Compact (*see* ECL § 21-1301, *et seq.*; *see also see Borough of Morrisville v Delaware Riv. Bas. Commn.*, 399 F Supp 469 [ED Pa 1975]). Because the Basin Commission is not an "agency" under SEQRA, the Village was neither required to identify the Basin Commission as an involved agency (*see* 6 NYCRR § 617.2[s]), nor was the review of water withdrawals by the Basin Commission subject to the requirements of SEQRA. Instead, any water withdrawal approvals must satisfy the requirements of the Compact.

This is consistent with the jurisdictional reach of SEQRA, which does not extend beyond New York State. SEQRA "[do]es not change the existing jurisdiction of agencies nor the jurisdiction between or among state and local

agencies" (*see* 6 NYCRR §617.3[b]; *White v Westage Dev. Group*, 191 AD2d 687, 689-90 [2d Dept 1993], *appeal dismissed*, 82 NY2d 706 [1993]), and thus does not authorize an analysis of potential impacts in other states (*see Niagara Mohawk Power Corp. v Public Service Commission of the State of New York*, 137 Misc 2d 235, 239 [Sup Ct, Albany County 1987], *aff'd* 138 AD2d 63 [3d Dept 1988], *appeal denied* 73 NY2d 702 [1988]).

The Village is simply not authorized, nor does it have jurisdiction, to review water withdrawals from the Basin spanning portions of three states, including New York. That is why the Basin Commission exists — to "effect comprehensive multiple purpose planning for the conservation, utilization, development, management, and control of the water and related natural resources of the Basin, which includes part of New York, Pennsylvania and Maryland" (*see* 18 CFR 801.0[a]). The Basin Commission approved the withdrawal of water pursuant to the Compact. Any impacts associated with water withdrawals fall under the exclusive jurisdiction of the Basin Commission.

Third, the Surplus Water Agreement did not "affect the environment." SEQRA defines "environment" as the "physical conditions that will be affected by a proposed action," including land, air, water, etc. (6 NYCRR § 617.2[l]). The withdrawal of water itself is the physical condition that would be affected, but the Village could not review impacts associated with water withdrawals because of

preemption by the Compact. Again, the Basin Commission reviewed the impacts associated with such withdrawals prior to issuing its approvals to the Village. Only after receiving the approvals from the Basin Commission to withdraw water did the Village approve the sale of water pursuant to the Surplus Water Agreement (R. 117). The Village approving the Surplus Water Agreement did not affect the environment because it fixed the economic terms of a bulk sale of water from existing, permitted wells. Accordingly, the Surplus Water Agreement does not constitute an "action" under SEQRA.

2. The Village's approval of the Surplus Water Agreement was a Type II action under SEQRA.

Even if the approval of the Surplus Water Agreement by the Village constitutes an "action" under SEQRA, the sale of water by the Village fits squarely within the Type II regulatory criteria under SEQRA. A Type II action is an action that has been determined not to present a significant impact or is otherwise precluded from environmental review under SEQRA (*see* 6 NYCRR § 617.5[a]). The SEQRA regulations contain a list of Type II actions that provide that the following is exempt from review under SEQRA: "[the] purchase or sale of furnishings, equipment or supplies, *including surplus government property*, other than the following: land, radioactive material, pesticides, herbicides, or other hazardous materials" (6 NYCRR § 617.5[c][25] [emphasis added]).

"The statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning" (*DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006] [citations omitted]). The Type II regulations specifically include the sale of surplus government property. The Village sale of surplus water, as authorized by statute (*see* Village Law § 11-1120) and the Basin Commission, is the sale of surplus government property. Because the Surplus Water Agreement was limited to setting the commercial terms of sale, the amount and use of which the Basin Commission previously approved, the subsequent sale of water by the Village constituted a Type II action.

Moreover, "where the Legislature lists exceptions in a statute, items not specifically referenced are deemed to have been intentionally excluded" (*Weingarten v Bd. of Trs. of the N.Y. City Teachers' Ret. Sys.*, 98 NY2d 575, 583 [2002]). The SEQRA regulations provide a list of Type II actions that will not present a significant impact on the environment, including the sale of surplus government property (*see* 6 NYCRR § 617.5[c][25]). The sale of surplus government property excludes "land, radioactive material, pesticides, herbicides, or other hazardous materials" (*id.*). The Village sale of surplus water is the sale of surplus government property; it is not land, radioactive material, pesticides, or

other hazardous materials. Therefore, the sale of surplus water is a Type II action exempt from SEQRA.

Finally, the sale of surplus water by the Village pursuant to the Surplus Water Agreement is neither the sale of land nor incidental to the ownership of land. The Village has never granted SWEPI an interest in Village wells. The water, once severed from the realty, is personal property (*see Hamlet at Willow Creek Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 114 [2d Dept 2009] [stating that "soil or sand which has been severed from realty becomes personal property"]; *see also Canavan v City of Mechanicville*, 229 NY 473, 481 [1920]). The sale of surplus water by the Village pursuant to the Surplus Water Agreement is the sale of surplus personal property and, therefore, constitutes a Type II action.

3. Petitioners' contention that the sale of water constitutes a Type I or unlisted action under SEQRA is not supported by the case law cited by Petitioners or any other authority.

Petitioners cite *Cross Westchester Dev. Corp. v Town Board of Town of Greenburgh*, 141 AD2d 796 (2d Dept 1988) and *City Council of City of Watervliet v Town Bd. of Town of Colonie*, 3 NY3d 508 (2004), for the contention that the sale of less than 2,000,000 gallons of surplus water is an unlisted action (*see* Pet.'s Br. at 44). The cases are distinguishable because they involved the annexation of real property, not the sale of surplus government property. SEQRA expressly provides that (i) the annexation of 100 or more continuous acres of land by a local

agency constitutes a Type I action (*see* 6 NYCRR § 617.4[b][4]); and (ii) transactions involving land are specifically excluded from the Type II surplus government property exemption (*see* 6 NYCRR § 617.5[c][25]). Thus, by express regulation, transactions involving the annexation of real property are specifically encompassed within SEQRA's parameters and may constitute a Type I or Unlisted action depending on the particular circumstances of the project.

Petitioners' reliance on *Wertheim v Albertson Water District*, 207 AD2d 896 (2d Dept 1994), is also misplaced because the project at issue consisted of the construction of a new pollution control device and water filtration system. In contrast, the Surplus Water Agreement did not authorize new construction, an expansion of wells, or action because the water withdrawals were approved by the Basin Commission from existing, permitted wells. To facilitate the sale of surplus water, the Village only needed to have the Railroad build the Transloading Facility, which was not subject to SEQRA because it was preempted by the Termination Act (*see* Point I.B above).

The New York Water Supply Law (*see* ECL § 15-1501, *et seq.*) confirms that the Village was not required to undertake a SEQRA review of water withdrawals. Omitted from Petitioners' brief is that portion of the statute providing that "withdrawals that have received an approval from a compact basin commission which administers a program governing water withdrawals" is exempt

from the permit requirements of the Water Supply Law (*see* ECL § 15-1501[7][b]). Thus, the New York State Legislature has recognized that no permit is required where, as here, withdrawals have received the approval of the Basin Commission. The statute applies to withdrawals outside of the Basin. If the Village wells were outside the Basin, then the NYSDEC would have jurisdiction to issue a permit and a SEQRA review would be required. However, no permit or corresponding SEQRA review is required here because the Village wells are in the Basin.

Petitioners contend that the Village failed to identify certain potential impacts or adequately complete the full EAF (*see* Pet.'s Br. at 55). For example, Petitioners claim the Village's review failed to recognize that the proposed withdrawals would come from a single source aquifer. However, the Record demonstrates that the Village relied on the approvals issued by the Basin Commission (R. 117) and the Basin Commission is fully familiar with the single source nature of the aquifer. Petitioners also claim that the EAF did not identify the amount of the withdrawals, but the full EAF specifically provides that water withdrawals would be up to 1,000,000 gallons per day (*see* R. 149, 154). Even if the Village had not identified such amounts, the Village was not required to do so because it was within the jurisdiction of the Basin Commission.

Petitioners' protracted argument that the Surplus Water Agreement is a Type I action because the Transloading Facility is allegedly located near a park

(*see* Pet.'s Br. at 45-48) misses the point. SEQRA provides that if a project is wholly or partially within, or substantially contiguous to, a park, it is a Type I action (*see* 6 NYCRR 617.4[b][10]). The Village treated the Lease with the Railroad, which included the construction and operation of the Transloading Facility, as a Type I action (R. 113), thereby undertaking the most heightened review available under SEQRA (*see* 6 NYCRR § 617.4). That the Transloading Facility is located near a park would not have changed the nature of the review undertaken by the Village of the Lease, or resulted in the Surplus Water Agreement being a Type I action because, again, it set the terms of sale and did not authorize the water withdrawals.

D. There was no segmentation of the SEQRA review conducted for the Lease and the Surplus Water Agreement.

The Village did not segment its review in connection with the Lease and Surplus Water Agreement. SEQRA defines "segmentation" as the "division of the environmental review of an action such that various activities or stages are addressed under this part [meaning SEQRA] as though they were independent, unrelated activities needing individual determinations of significance [under SEQRA]" (6 NYCRR §617.2[ag]). Thus, in order for an action to constitute improper segmentation under SEQRA, it must be a part of a larger action subject to SEQRA and must in and of itself be deemed to have potential to cause an impact

or in the words of the SEQRA regulations "needing individual determinations of significance" under SEQRA (*see* 6 NYCRR §617.2[ag]).

As discussed above, the approval of the Surplus Water Agreement was not subject to SEQRA review by the Village because the withdrawal was from existing, permitted wells and was previously approved by the Basin Commission. The Surplus Water Agreement did not provide approve the withdrawal or use of surplus water; again, it set the price and other commercial terms for the sale of surplus water to SWEPI. Moreover, the SEQRA review the Village conducted for the Lease specifically incorporated the approvals issued by the Basin Commission and its associated review under the Compact. Because no additional SEQRA review of the Surplus Water Agreement was required, there was no segmentation.

Further, the Village resolution approving the Surplus Water Agreement, which included a copy of the proposed contract, specifically incorporated by reference the Negative Declaration, and referenced the review and approvals issued by the Basin Commission (R. 117-18, 141-42, 144-45). Having considered such review and approvals, the Village could not have done anything more to review the Surplus Water Agreement than it did in undertaking a SEQRA review for the Lease (*see King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 347-48 [1996]). Because the Village procedurally and substantively performed each of the

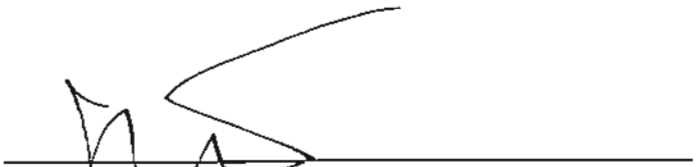
steps required under SEQRA as part of its collective review of the Lease and the Surplus Water Agreement, the Village complied with SEQRA.

CONCLUSION

Based on the foregoing, the Decision of the Appellate Division, Fourth Department, should be affirmed in its entirety.

Dated: March 19, 2015

HARRIS BEACH PLLC



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

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

COUNSEL PRESS

The Appellate Experts
460 WEST 34TH STREET, NEW YORK, NEW YORK 10001
(212) 685-9800; (718) 852-9800; (885) 232-6528; (800) 4-APPEAL
www.counselpress.com
(503884)