

STATE OF NEW YORK
SUPREME COURT : COUNTY OF STEUBEN

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,

~~JUDGE BRADSTREET~~
JUDGE LATHAM

Petitioners,

VERIFIED PETITION

For a Judgment Pursuant to Article 78 of the Civil Practice
Laws and Rules

Index No. 2012-0810 CV

RJI No.

-against-

THE VILLAGE OF PAINTED POST; PAINTED POST
DEVELOPMENT, LLC; SWEPI, LP; and the
WELLSBORO AND CORNING RAILROAD, LLC,

Respondents.

Petitioners, by their attorneys, RICHARD J. LIPPES & ASSOCIATES, Richard J.

Lippes, of counsel, and Rachel Treichler, respectfully allege as follows:

I. INTRODUCTION

1. This proceeding is brought pursuant to Article 78 of the Civil Practice Laws and Rules, seeking equitable relief to prevent the Respondents, and their agents and those acting in concert with them, from proceeding with activities intended to culminate in the construction of a new rail-loading facility in a residential area of the Village of Painted Post, New York, the transportation of water from the municipal water system by pipes and rail car from the rail-loading facility through the center of the Village to Wellsboro, Pennsylvania, and the distribution of the water transported to gas drilling sites in the Wellsboro area until such time as Respondents shall have fully complied with the New York State Environmental Quality Review Act, Environmental Conservation Law, Article 8 (hereinafter cited as "SEQRA"), the New York State

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Water Supply Law, Environmental Conservation Law, Article 15, Title 15 (hereinafter cited as “Water Supply Law”), the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. (hereinafter cited as “NEPA”), and all applicable requirements under the Interstate Commerce Commission Termination Act of 1995 and all other federal laws regulating railroads (hereinafter collectively cited as “ICCTA”).

II. PARTIES

2. Petitioner Sierra Club is a not-for-profit corporation organized under the laws of the State of California. It is the oldest and largest environmental organization in the country. The protection of water resources is a key aspect of the Sierra Club’s work. The Sierra Club, and its members, have long been concerned about both the quantity and quality of this country’s potable drinking water supplies, and have worked to educate the public to assure safe drinking water supplies for its members and the public, and have brought numerous lawsuits to protect those drinking water supplies under various federal, state and local laws. The Sierra Club has more than 600,000 members nationwide, including approximately 37,000 members in New York State, many of whom live in the Village of Painted Post and surrounding areas, and approximately 26,000 members in Pennsylvania, many of whom live in Wellsboro, Pennsylvania and surrounding areas.

Sierra Club members in the Painted Post and surrounding areas will be adversely affected by the actions complained of in this petition. Their drinking water supplies may be contaminated or diminished and they may be adversely affected by the increase in rail traffic, automobile traffic blockages, and the increased noise and air contamination that will be created in Painted Post by the water shipments from the rail loading facility and the receipt of empty railcars at the loading facility caused by the project complained of herein. Sierra Club members in Tioga

County, Pennsylvania and surrounding areas will also be adversely affected by the increase in rail traffic, automobile traffic blockages, and the increased noise and air contamination that will be created at the terminus of the rail line in Wellsboro, Pennsylvania by the receipt of the water shipments and the return of empty railcars. Moreover, Club members in Wellsboro and surrounding communities will be adversely affected by the many heavy tanker truck trips required to transport the water from the rail terminus to water impoundment facilities and subsequently to various gas well drilling and hydrofracking sites in surrounding areas.

3. Petitioner People for a Healthy Environment, Inc., is a New York State not-for-profit corporation, organized to advocate for the strengthening and effective enforcement of environmental and land use laws and regulations, and to assist communities, groups and individuals whose land, air, water, health, and quality of life may be subject to degradation by resource extraction activities. Aquifer protection is a key focus of People for a Healthy Environment activities. The membership of People for a Healthy Environment is centered in the Elmira, New York area, and the drinking water of those members may be adversely affected by the actions complained of in this Petition.

4. Petitioner Coalition to Protect New York is a coalition of local environmental groups in the Finger Lakes – Southern Tier area, and as such, is an unincorporated association. The members of Coalition to Protect New York work together to promote the health and vibrancy of our land and our resources, and to oppose the harms that will be caused by the hydrofracking and drilling of gas wells. The protection of water resources and water rights from the damaging effects of water withdrawals for hydraulic fracturing for gas drilling is a key focus of the work of the Coalition. Certain of the member organizations of the Coalition, and their

membership, obtain their drinking water from water supplies that may be adversely affected by the actions complained of in this Petition

5. Petitioner John Marvin is a long time resident of the Village of Painted Post. He resides with his wife at 240 Charles Street in the Village of Painted Post, New York, less than a block from the proposed rail loading facility, which is visible from his doorstep. The Marvins will be adversely affected by the significant rail traffic and the increased noise and air contamination caused by the project complained of in this Petition. The Marvins obtain their water from the Village water system and Mr. Marvin is concerned about adverse effects upon the quality and quantity of their drinking water resulting from the project. He is also concerned about the adverse effects the project may have upon his health and the health of his wife, who is in poor health. Mr. Marvin is the caretaker for his wife and is concerned about his ability to get her to a hospital in an emergency situation, due to the road blockages caused by increased railroad traffic and new automobile traffic patterns which will occur if the project goes forward.

6. Petitioners Therese Finneran and Michael Finneran are long time residents of the Village of Painted Post. Therese Finneran resides with her son Michael Finneran at 123 West Hill Terrace in the Village of Painted Post, New York. They obtain their water from the Village water system. The Finnerans are concerned about the adverse effects upon the quality and quantity of their drinking water resulting from the project complained of in this Petition, and are further concerned about the increased noise caused by the significant rail traffic created by the project. Mrs. Finneran is in her 80's and is in ill health requiring her to go to the hospital several times this year. The most direct route for her to travel to her doctors' office in the Town of Erwin requires that she cross railroad lines upon which the proposed water shipments will be made. The Finnerans are concerned that, to the extent that Mrs. Finneran is unable to cross the

railroad lines running through the Village in an emergency situation, due to the traffic blockages resulting from the increased railroad traffic and new automobile traffic patterns that will occur if the project goes forward, there may be serious adverse consequences to her health.

7. Petitioner Virginia Hauff is a long time resident of the Village of Painted Post. She resides at 116 Keefe Boulevard in the Village of Painted Post, New York and obtains her water from the Village Water System. Mrs. Hauff is in her 90's and is concerned about adverse effects upon the quality and quantity of her drinking water resulting from the project complained of in this Petition. She is also concerned about road blockages caused by the increased rail traffic and new automobile traffic patterns created by this project will cause and the increased noise and air contamination that will result from the operation of the project.

8. Petitioner Jean Wosinski is a long time resident of the City of Corning, and resides at 53 Houghton Circle, Corning, New York. Mrs. Wosinski obtains her water from the City of Corning municipal water system, which draws its water from the Corning aquifer, the same aquifer that serves the Village of Painted Post and that will be adversely affected by the actions complained of in this Complaint. Ms. Wosinski is a geologist. She who worked for nearly five years as a geologist in the USGS Water Resources Division – Groundwater Branch. She has attended many of the meetings held by the Village of Painted Post on the proposed water withdrawal project which is complained of herein, and objected to such project.

9. Respondent Village of Painted Post (hereinafter cited as “the Village”) is an incorporated village located in the Town of Erwin, Steuben County, New York at the confluence of the Cohocton River, the Tioga River and the Chemung River. The Village has the responsibility to assure that all actions taken by the Village Board of Trustees, are taken in accordance with the laws of the State of New York and the United States. More particularly, the

Village Board has the responsibility for assuring that prior to approving the sale of water from the Village water system and the leasing of Village land for the construction and operation of a water-loading facility in the Village, the Village has complied with all laws and regulations of the State of New York and the United States, including SEQRA and various permitting requirements of the State of New York and the United States.

10. Respondent SWEPI, LP (hereinafter cited as “SWEPI”) is a gas drilling company with its headquarters in Houston, Texas. SWEPI filed as a foreign limited partnership in 2000 in the State of Texas, and is active in gas drilling in the Marcellus Shale formation in Pennsylvania. SWEPI has signed an agreement to purchase water from the Village of Painted Post and an agreement to ship it to Pennsylvania for use in high-volume hydrofracking for gas drilling. SWEPI is made a Respondent as a party necessary to effectuate the equitable relief requested herein.

11. Respondent Wellsboro and Corning Railroad, LLC (hereinafter cited as “WCOR”) is a 35-mile short line railroad that operates between Corning, New York and Wellsboro, Pennsylvania. The rails line parallels U.S. Route 15 and Pennsylvania Route 287, following the Tioga River valley. WCOR is a Delaware limited liability company and a federally chartered railroad, headquartered in Exton, Pennsylvania. WCOR has agreed to carry the water at issue herein from the Village of Painted Post to Wellsboro, Pennsylvania, and has leased land from the Village on which to build a rail-loading facility to load the water. WCOR is made a Respondent as a party necessary to effectuate the equitable relief requested herein.

12. Respondent Painted Post Development, LLC (hereinafter cited as “PPD”), the sole member of which is the Village of Painted Post, is a limited liability development company. PPD is the lessor of the property upon which WCOR’s water filling and metering stations and

railroad trans-loading facility in the Village of Painted Post will be located. PPD is made a Respondent as a party necessary to effectuate the equitable relief requested herein.

III. FACTS

13. Upon information and belief, on or about January 23, 2012, the Village sent notice to several potentially involved agencies of its intent to act as Lead Agency for a SEQRA review of a lease of land in the Village by PPD to WCOR for a railroad transloading facility.

14. Upon information and belief, the Board of Trustees of the Village (hereinafter cited as “the Village Board” or the “Board”) adopted four resolutions on February 23, 2012.

15. One resolution adopted by the Village Board on February 23, 2012, was a resolution finding that the lease of land by PPD to WCOR for a rail loading facility was a Type I action under SEQRA. The resolution concluded that the lease would not have a significant adverse impact on the environment and adopted a negative declaration under SEQRA for the lease of land by PPD to WCOR.

16. The basis upon which the Board’s determination to issue a negative declaration was made was set forth in part 1 and part 2 of an Environmental Assessment Form prepared by the Board of Trustees on February 23, 2012 (hereinafter cited as the “EAF”). Much of the information contained in the EAF was either not supplied, or was mistakenly supplied or supplied incorrectly. Therefore, as will be further explained in this Petition, the basis upon which the determination to issue a negative declaration was made does not comport with SEQRA regulations and was factually incorrect.

17. Moreover, the EAF and the negative declaration exclusively considered impacts to the Village and did not identify or take a hard look at any potential adverse environmental impacts outside the confines of the Village, including any potential significant adverse

environmental impacts that might occur in communities surrounding the Village whose drinking water supplies might be affected by substantially increased withdrawals from Village wells or any potential significant adverse environmental impacts that might occur at the railroad terminus in Wellsboro, Pennsylvania, and in the areas surrounding Wellsboro resulting from the water being transferred from the rail unloading facility to a large water impoundment by many heavy tanker trucks and subsequently transported by many heavy tanker trucks to gas well drilling and hydrofracking sites in the Wellsboro area.

18. The Board's resolution to issue a negative declaration asserted that the Village was "not subject to compliance with SEQRA, or any other state or local law, since the development, construction, operation and maintenance of a transloading facility by the railroad is being undertaken under the jurisdiction of the interstate Commerce Commission Termination Act of 1995, the Federal Railway Act of 1970 and other federal laws and regulations associated with the operation of rail facilities (collectively referred to as 'ICCTA'), and therefore, local and state laws, regulations and requirements are pre-empted under ICCTA." Nevertheless, in spite of this contention, the Village in fact attempted to comply with SEQRA through its purported environmental review and its adoption of a negative declaration.

19. In spite of the Village's contention that ICCTA pre-empts all state and local laws, the true fact is that ICCTA does not preempt the police powers which protect public health and safety, including direct environmental regulations enacted for the protection of public health and safety. As previously indicated, the proposed project may contaminate the public water supply and create harmful noise levels, and therefore, state laws passed to protect public health and safety, including SEQRA would not be pre-empted.

20. Even if such pre-emption does exist, on information and belief, WCOR must seek one or more permits from the Surface Transportation Board (hereinafter cited as “STB”) or the Federal Railroad Administration (hereinafter cited as “FRA”), which has not been done as far as Petitioners have been able to determine. Moreover, prior to the STB or FRA granting any such permits, STB or FRA would have to engage in an environmental review pursuant to the National Environmental Policy Act, 42 U.S.C. §4321 et seq., which has also not been done as far as Petitioners have been able to determine.

21. A second resolution adopted by the Village Board on February 23, 2012, was a resolution determining that the water sale agreement with SWEPI was a Type II action under SEQRA and consequently determining that no SEQRA review was required of the water sale agreement. The resolution cited 6 N.Y.C.R.R. 617.5(c)(25) as the provision pursuant to which the Type II exemption was claimed. Section 617.5(c)(25) provides that actions for “purchase or sale of furnishings, equipment or supplies, including surplus government property, other than the following: land, radioactive material, pesticides, herbicides, or other hazardous materials” are not subject to review under SEQRA.

22. Notwithstanding the assertion by the Village Board that the water sale agreement falls within the exemption from SEQRA review contained in 6 N.Y.C.R.R. 617.5(c)(25), the true fact is that rights to withdraw water are incident to the ownership of land and are considered real property in New York. Actions involving sales of land and of rights appurtenant to land are not exempted from SEQRA review under Section 617.5(c)(25).

23. Moreover, by considering the water sale agreement separately from the lease to build a rail loading facility, the Village Board improperly segmented its SEQRA review of the proposed actions.

24. A third resolution adopted by the Village Board on February 23, 2012, was a resolution to enter into an agreement with SWEPI to sell water from the Village's water distribution system to SWEPI.

25. The fourth resolution adopted by the Village Board on February 23, 2012, was a resolution, on behalf of PPD, to enter into a lease between PPD and WCOR of approximately 11.8 acres of land located in the Village for the development, construction and operation by WCOR of a transloading facility whereby water from the Village's water distribution system would be loaded onto railroad cars for transport and distribution.

26. On March 1, 2012, the Mayor of the Village, Roswell Crozier, implemented the February 23, 2012, resolutions by signing two agreements on behalf of the Village.

27. One agreement signed by Mayor Crozier on March 1, 2012, was an agreement between the Village and SWEPI to sell 314,000,000 gallons of water from the Village water system in increments of up to 1,000,000 gallons per day. The agreement gives SWEPI an option to purchase an additional 500,000 gallons per day.

28. The second agreement signed by Mayor Crozier on March 1, 2012, was a lease agreement between PPD and WCOR (hereinafter cited as the "Lease Agreement"). The Lease Agreement leased 11.8 acres of land next to a residential housing area near the center of the village for the construction of water filling and metering stations and a rail-loading facility that would accommodate 42 railroad tank cars at a time.

29. The terms of the lease agreement make clear that the lease and the water sales agreement are two components of the same overall project. The lease states that it is entered into "in connection with a certain bulk water sale contract, dated as of March 1, 2012 (the 'Water Purchase Agreement'), by and between the Village and SWEPI LP ('SWEPI'), the Village will

sell a certain amount of surplus municipal water to SWEPI from its existing municipal water supply system at a filling/metering station to be constructed by the Lessee on a portion of the Premises and SWEPI has arranged to have the Lessee withdraw, load and transport such water via rail line from the Premises.”

30. While the Village passed a resolution to issue a negative declaration regarding the lease on February 23, 2012, the actual negative declaration was not prepared until March 9, 2012, and was not received by the New York State Department of Environmental Conservation (hereinafter cited as the “DEC”) until March 12, 2012.

Impacts from the Operations of the Rail Loading Facility in the Village

31. According to a diagram of the rail loading facility attached to the Lease Agreement, the rail loading facility will contain 42 loading stations that will be spaced approximately 55 feet apart.

32. The November 2011 Hunt Engineers report referenced in the EAF (hereinafter cited as “the Hunt Report”) states that, “Each railroad tanker, positioned at each station will be filled with approximately 23,100 gallons of water. The site is designed for 42 tanker cars and each cycle will fill all 42 tankers for a total of 970,000 gallons in approximately 16 hours. Once all 42 tanker cars are filled to capacity, the railroad will pull them off the new siding and replace them with empty tankers and the filling process will begin again.”

33. If 42 loaded railcars are being removed from the loading facility every 16 hours and replaced with 42 empty railcars, the total number of railcars entering and leaving the facility every 16 hours will be 84 cars.

34. The loaded rail cars will be heavy. The weight of one gallon of water is 8.345 pounds. The weight of a railcar loaded with 23,100 gallons of water would be 192,769.5 pounds. That is more than 96 tons of weight per car in addition to the weight of the car.

35. Moving cars loaded with more than 96 tons of weight on and off sidings can be expected to result in significant noise from coupling and uncoupling railcars, running the diesel engines required to move the railcars and from squealing wheels.

36. Upon information and belief, the Village did not conduct any studies of potential noise impacts resulting from the operations of rail loading facility on adjoining residential areas.

37. Upon information and belief, it may take more than one engine to move a train composed of 42 railcars loaded with water, and numerous locomotive engines may be required to move the rail cars required by the project.

38. The EPA website states that “Locomotive engines are significant contributors to air pollution in many of our nation's cities and ports. Although locomotive engines being produced today must meet relatively modest emission requirements set in 1997, they continue to emit large amounts of nitrogen oxides and particulate matter, both of which contribute to serious public health problems.” See <http://www.epa.gov/oms/locomotives.htm>.

39. Upon information and belief, the Village did not consider potential air quality impacts resulting from the operations of numerous locomotive engines at rail loading facility and on the rail tracks passing through the Village on air quality in residential areas adjoining the rail loading facility, or upon the air quality of the village in making its determination of no adverse environmental impact by the project.

40. Railcars will enter and exit the loading facility by means of a rail line that passes through the center of the Village.

41. The land leased for the loading facility is located on the western side of the center of the village, bordered on two sides by residential areas, and adjacent to a public park. The rail loading facility is being constructed on the southern side of Chemung Street. An existing railroad line runs down Chemung Street. New spurs are being constructed in the rail loading facility.

42. A row of residential homes faces the proposed rail loading facility on the northern side of Chemung Street and another row of residential homes adjoins the proposed rail loading facility on the eastern side of the facility along Charles Street.

43. Trains running to and from the facility will run down the existing rail line on Chemung Street to and from the center of the village.

44. Chemung Street is one of the principal streets of the village, running east and west through the village.

45. The rail line runs along one side of the Village Square Shopping Center, the main village shopping area, two blocks from the rail loading facility. Chemung Street parallels Interstate 86/State Route 15. After passing the Village Square, the rail line crosses Hamilton Street, the main street of the village. Two blocks south of the intersection with Chemung Street, Hamilton Street intersects with the entrance and exit ramps to Interstate 86/State Route 15.

46. Lengthy trains of 42 tankers running down Chemung Street will take considerable time to move through the Village causing significant automobile traffic tie ups during the time it takes for a train to move through the village.

47. When trains are running on Chemung Street, automobile traffic down Chemung Street and all cross traffic is blocked, including traffic entering or exiting Interstate 86 on

Hamilton Street. Automobile traffic seeking to cross Interstate 86 and travel to the shopping and office areas located in south Hamilton Street in the Town of Erwin is also blocked.

48. Large amounts of stalled traffic will create significant air contamination from idling motors. Because of concerns about the air pollution produced by idling motors, the New York air quality regulations prohibit heavy-duty vehicles, including diesel trucks and buses, from idling for more than five minutes at a time. 6 NYCRR, Subpart 217-3.

49. The automobile traffic blockages caused by increased rail traffic down Chemung Street will result in new traffic patterns being developed as motorists seek to avoid traveling through the center of the Village.

50. Upon information and belief, the Village did not consider the air quality impacts of increased amounts of idled traffic caused by the project or whether new traffic patterns might result from the project and the impact of those new traffic patterns might have on overall traffic flow in the region.

51. After passing Hamilton Street, the rail line runs past the Dresser Rand facilities.

52. Upon information and belief, the noise and rail line congestion will have a negative impact on Dresser Rand's operations, and will impede Dresser Rand's own rail shipments in and out of the Village, which will be blocked during the time rail cars are being moved to effectuate the project.

Impacts from the Operations in Wellsboro, Pennsylvania and Surrounding Areas

53. The loaded railcars will travel south from the Village to a rail unloading facility in Wellsboro, Pennsylvania.

54. Upon information and belief, the configuration of the unloading facility in Wellsboro will be similar to the configuration of the loading facility in the Village, with 84 railcars moving in and out of the facility every 16 hours.

55. Upon information and belief, there is likely to be automobile traffic blockage, altered traffic patterns and increased noise and air contamination from the increased rail traffic in Wellsboro.

56. In addition, the Wellsboro area will experience significant heavy truck traffic to transport the water unloaded in Wellsboro to a water impoundment site and from the impoundment site to various gas well drilling sites for purposes of hydrofracking gas wells for gas extraction.

Impacts of the Projected Water Withdrawals

57. The water that will be loaded onto the railcars at the loading facility in the Village for shipment to Wellsboro will be withdrawn from the Village water system.

58. The Village water system was authorized by the New York State Water Commission in 1909. Expansions to the system were approved by the Commission and its successors in 1941, 1947, 1949, 1956, 1975 and 1978. There have been no further authorized expansions to the system for 34 years.

59. The Village water system currently serves approximately 1,842 residents through approximately 769 service connections according to the Village's 2011 Annual Drinking Water Quality Report. In addition to servicing residents of the Village of Painted Post, the system provides potable water to the Village of Riverside and to portions of the Town of Corning.

60. A 2002 study of water supplies in the Village and surrounding municipalities states that the Village water system has four wells, "Well No. 1, . . . , is an abandoned well. Well

No. 2 has an approximate capacity of 0.58 mgd and is used only as a standby source of water. Well No. 3, with a capacity of 0.73 mgd, and Well No. 4, with a capacity of 1.5 mgd, are the main sources of supply for the village's water system." Chemung Valley Water Study: Town of Erwin, the Town of Corning, the City of Corning, the Village of Painted Post and the Village of Riverside, New York, Stearns and Wheler, LLC and Leggette, Brashears & Graham, Inc., September 2002 (hereinafter referred to as the "Stearns Report"), p. 3-2. The Stearns Report states that, "Most of the Village of Painted Post's distribution system is approximately 100 years old." *Id.*

61. The Hunt Report cited above states that the wells currently being used by the Village water supply system are wells that were constructed in 1941, 1956 and 1975.

62. Upon information and belief, the Village is bringing back into service a previously abandoned well, Well #1, to supply water to the rail loading facility. The age and capacity of Well #1 are not described in the Stearns Report or the Hunt Report.

63. The Village is connecting Well #1 to the rail loading facility through a new system of pipes.

64. The wells supplying the Village water system draw on the Corning aquifer. The Corning aquifer is designated as a primary water supply aquifer by the New York State Department of Health and the New York State Department of Environmental Conservation. The Corning aquifer one of three primary aquifers on the Cohocton River and one of 18 primary aquifers in New York. See 1990 DEC Division of Water Technical and Operational Guidance Document, on Primary and Principle Aquifer Determinations, TOGS 2.1.3 (hereinafter cited as "TOGS 2.1.3").

65. The Corning aquifer is in the Chemung River Basin, which is part of the Susquehanna River Basin.

66. The village water supply is both a “public water supply well head area” and a “primary water supply aquifer area,” under TOGS 2.1.3 and is entitled to a high level of protection.

67. The proposed water demand for the project is 1,000 gallons per minute according to the Hunt Report. One thousand gallons per minute is equivalent to 1,440,000 gallons per day.

68. TOGS 2.1.3 states that 1000 gallons per minute is the maximum yield of a well in the Corning aquifer. *Id.*, Table 1.

69. The water use of the village in 2001 was 440,000 gallons per day average use and 580,000 gallons per day maximum use. Stearns Report, Table 2-1. Thus it appears that the projected withdrawals of 1,000,000 to 1,500,000 gallons of water per day from Well #1 are two to three times recent rates of withdrawals by the Village from Well #2, Well #3 and Well #4 combined.

70. In making its review of possible environmental impacts of the project, the Village did not consider whether increased pumping activities from Well #1 or from the other Village water supply wells could result in contamination of the Corning Aquifer under different aquifer recharge conditions.

71. In particular, the Village failed to consider whether increased pumping from Village wells could result in contamination known to be located on or adjacent to the rail-loading facility site entering and contaminating the Corning aquifer under various climatic conditions, including flooding of the site.

72. The deed under which PPD took title in 2005 to a parcel of approximately 50 acres of land in the Village that was the site of an Ingersoll-Rand foundry closed in 1985, part of which parcel is being leased to WCOR for construction of the water filling and rail-loading facility, contains deed restrictions providing that:

1. Notice and warning is hereby provided that polynuclear aromatic hydrocarbons (“PAHs”), which are semi-volatile organic compounds, are located in soils at and below the ground surface of the Premises. Notice and warning is hereby provided that such PAHs may pose a risk to humans in a scenario where future use of the Premises includes invasive activities at or below the surface of the Premises, and appropriate precautions should be taken.

2. No disturbance or excavation of surface or subsurface soils or other materials at or below the Premises shall be conducted without prior notification thereof to or consent by the DEC. Any disturbance or excavation of surface or subsurface soils or other materials at or below the Premises shall be conducted (i) consistent with the Remedial Work Plan and the Soil Fill Management Protocol attached thereto, . . . , or (ii) as otherwise permitted by the DEC.

3. The Grantee, its successors and assigns, shall prohibit the use of ground water underlying the Premises (unless the Grantee, or its successors and assigns, first obtains permission to do so from the DEC)

73. Even though the proposed project will not withdraw water from wells located on the former foundry site, significantly increased withdrawals from Well #1 which is located near the foundry site, may cause ground contamination at the site to be drawn into the Corning aquifer.

74. Significantly increased withdrawals from Well #1 may also cause contaminants located in surface water to be drawn into the Corning aquifer.

75. The Stearns Report notes that new models of groundwater flow in the Corning aquifer need to be developed “to simulate the core of depressions and velocity fields around the production wells with enough accuracy so that the model results can be used as input for particle tracking and/or solute transport programs.” The Report states on page 64:

“Refinement of the model grid is necessary to simulate the core of depressions and velocity fields around the production wells with enough accuracy so that the model results can be used as input for particle tracking and/or solute transport programs. The use of a particle tracking and/or solute transport program is very important when trying to accurately map well capture zones in aquifers, such as the Corning aquifer, that have semi-confining layers that impact the horizontal and vertical flow field in the aquifer. . . . This analysis is essential to the identification of wellhead protection strategies and for the location of monitoring wells as early warning detectors of pollutants.”

76. The Stearns Report states on page 3-1 that groundwater supplies in all the communities in the study area, including the Village, “are fed primarily from river recharge, although some of the yield is contributed by upland precipitation and stream flow. The river recharge is important since it enables the sources to produce even during extended dry periods.”

77. A 1988 SRBC study of groundwater flow in the Corning aquifer determined that “under natural, non-pumping steady-state conditions, the [Corning] aquifers discharge to the major controlling rivers,” whereas, “[u]nder pumping conditions, induced infiltration from the Chemung and Cohocton Rivers enters the aquifer.” Groundwater Flow Model of the Corning, New York Area, Paula Ballaron, Susquehanna River Basin Commission, March 1988 (hereinafter cited as the “SRBC Report”).

78. The SRBC Report states that “Production wells of Corning Glass and Ingersoll-Rand, located in Gang Mills [a hamlet in the Town of Erwin] and Painted Post respectively, induce an estimated 90 percent of their discharge from adjacent reaches of the Cohocton River under average steady-state conditions. About 70 percent of total well discharges in Corning is diverted into the aquifer from river reaches in the vicinity of pumping wells.” *Id.*, p. 96.

79. The SRBC Report states that, “Associated with the high yield of surficial outwash aquifers is an inherent vulnerability to pollution from surface sources.” Thus, the study noted, “The quality of recharge must be protected to prevent degradation of ground-water quality.” *Id.*, p. 3.

80. The SRBC Report states that “Sand and gravel aquifer systems within the Chemung River basin have been used extensively for industrial and municipal supply. Ground-water withdrawals from the aquifer underlying the metropolitan Corning area totaled an estimated 10.2 Mgal/d in 1980. Although these aquifers are very productive, this heavy reliance on ground water has created depressed ground-water levels in the aquifers underlying the City of Corning and raises concern for the availability of the resource during an extreme drought.” *Id.*, p. 3.

81. “In addition,” the study states, “groundwater contamination has limited the supply of water that can be used without treatment. The City of Corning stopped using production well no. 6 in 1983 because volatile organic compounds were detected in the ground water . . .” *Id.*

82. Contamination of the Corning aquifer as a result of recharge from contaminated surface water was not considered by the Village in its environmental review of the project. If such contamination were to occur it would require that additional filtration systems be built by the Village and other municipal water systems drawing from the Corning aquifer at substantial costs to those municipalities. Similarly, local industries might find it necessary to build additional filtration systems to protect the quality of water used in their industrial processes.

83. Both the SRBC Report and the Stearns Report indicate that total daily withdrawals from the Corning aquifer at certain periods in past years have been greater than total current withdrawals. At no time in the past, however, have there been large-scale water exports from the Corning aquifer.

84. Previous large scale withdrawals by Ingersoll Rand and Corning Inc. were used primarily for cooling and were returned to the rivers above the aquifer after use. Thus these waters were available to recharge the aquifer.

85. Water withdrawn from the aquifer and exported to Pennsylvania for the purpose of high-volume hydrofracking of gas will not be returned to area rivers and thus will not be available to recharge the aquifer.

86. The consequences of large scale water exports upon the aquifer are unknown.

87. The importance of making withdrawals available for recharge is noted by the DEC in its 2011 revised Draft Supplemental Generic Environmental Impact Statement on the issue of hydrofracking in New York State (hereinafter cited as “RDSGEIS”). Section 6.1.1.6 of the RDSGEIS states that:

“[G]roundwater wells impact surface water flows by intercepting groundwater that otherwise would enter a stream. In fact, many New York headwater streams rely entirely on groundwater to provide flows in the hot summer months. It is therefore important to understand the hydrologic relationship between surface water, groundwater, and wetlands within a watershed to appropriately manage rates and quantities of water withdrawal.”

“Deletion of both groundwater and surface water can occur when significant water withdrawals are transported out of the basin from which they originated. These transfers break the natural hydrologic site, since the transported water never makes its downstream nor returns to the original watershed to help recharge the aquifer. Without the natural flow regime, including seasonal high flows, stream channel and riparian habitats critical for maintaining the aquatic biota of the stream may be adversely impacted.”

88. Section 6.1.1 of the RDSGEIS observes that, “Without proper controls on the rate, timing and location of [water withdrawals for hydraulic fracturing], modifications to groundwater levels, surface water levels, and stream flow could result in adverse impacts to aquatic ecosystems, down stream flow levels, drinking water assured yields, wetlands, and aquifers recharge”

89. Not only did the Village's environmental review neglect to consider cumulative, long term and secondary impacts of this project on the entire Corning aquifer, as required by SEQRA regulations, and on the aquifers downriver from the Corning aquifer, such as the aquifer under the City of Elmira, it also neglected to consider the cumulative effects on the aquifers of multiple municipal and other withdrawals for the consumptive use of gas drilling and hydrofracking.

90. It has been reported in the press that the Town of Erwin began selling 400,000 gallons of water per day to SWEPI in 2010 and that TerraAqua has a permit to withdraw over 500,000 gallons per day for hydrofracking, from the Tioga River in the Borough of Lawrenceville, Pennsylvania, upriver from Erwin and Painted Post. See discussion of Erwin water sales in "How much is Painted Post water worth?" Jeffery Smith, Corning Leader, April 30, 2012, page 1A, and discussion of TerraAqua water sales in "Lawrenceville, Pa. facility to recycle drilling wastewater," Derrick Ek, Corning Leader, Feb. 25, 2012, Also, according to media reports, the City of Corning and the Village of Bath are looking at the possibility of selling water to increase their municipal revenues. See "City Considers Selling Water: News of Painted Post Plan Has Corning Officials Interested," Jeffery Smith, Corning Leader, May 8, 2011, page 1A, and "Municipal water export: Whose water? Whose rights?" Steuben Courier Advocate, March 17, 2012.

91. Therefore, as can be seen, the Village failed to identify the full potential adverse environmental consequences of the cumulative impact of water withdrawals from the Corning Aquifer, and failed to take a hard look at its potential consequences.

Compliance with the Water Supply Law

92. Both the Village water system and the rail loading facility are transporting water through pipes to the railcars that will carry the water to Pennsylvania. Prior to transporting water to another state through pipes, a permit is required from the DEC pursuant to §15-1505.1 of the Water Supply Law. On information and belief, none of the Respondents have requested a permit from the DEC pursuant to this law in order to export water to another state, and therefore, Respondents are in violation of such law.

IV. FIRST CAUSE OF ACTION: RESPONDENT VILLAGE FAILED TO COMPLY WITH THE STRICT PROCEDURAL MANDATES OF SEQRA

A. Respondent Village Violated SEQRA When It Failed to Consider Even One of the Significant Adverse Environmental Impacts of Water Transports from the Proposed Water Loading Facility

93. The allegations contained in paragraph “1” through “92” inclusive are hereby realleged as more fully set forth herein.

94. As previously indicated, the Board of Trustees of the Village of Painted Post designated themselves as the “lead agency” to make SEQRA determinations. As lead agency, it is their responsibility to assure that all laws and regulations pursuant to SEQRA are carried out.

95. According to the regulations promulgated pursuant to SEQRA:

“The basic purpose of SEQRA is to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional, and local government agencies at the earliest possible time. To accomplish this goal, SEQRA requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an Environmental Impact Statement.”

6 N.Y. Codes, Rules and Regulations Part 617.1(c).

96. Further, the regulations indicate that:

“In adopting SEQRA, it was the legislature’s intention that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.”

6 NYCRR §617.1(b).

97. The SEQRA regulations require that a lead agency determine whether or not a proposed project is a “type I action”, which is an action that is more likely than not to require an environmental impact statement, or an “unlisted action.” As indicated in the regulations:

“The purpose of the list of type I actions in this section is to identify, for agencies, project sponsors and the public, those actions and projects that are more likely to require the preparation of an EIS than unlisted actions. All agencies are subject to this type I list. (1) This type I list is not exhaustive of those actions that an agency determines may have a significant adverse impact on the environment and requires the preparation of an EIS. However, the fact that an action or project has been listed as a type I action, carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS....”

6 N.Y.C.R.R. 617.4(a).

98. In the negative declaration promulgated by the Village on March 9, 2012, it is indicated that the proposed action is a Type I action, and therefore, according to the regulations, it is presumed that an Environmental Impact Statement will have to be drafted. Nevertheless, as previously indicated, and without rebutting the presumption contained in the regulations, the Village determined that there would be no adverse environmental consequences, and determined not to do an Environmental Impact Statement (hereinafter cited as “EIS”).

99. The regulations contained in 6 N.Y.C.R.R. 617.7 indicate that an environmental impact statement must be prepared if a proposed action “may include the potential for at least one significant adverse environmental impact.” 6 N.Y.C.R.R. 617.7(a)(1).

100. Conversely, to determine that an EIS will not be required for an action, “the lead agency must determine either that there will be no adverse environmental impacts or the identified adverse environmental impacts will not be significant.” 6 N.Y.C.R.R. 617.7(a)(2).

101. In the instant action, it is apparent that there will be at least one significant adverse environmental impact, since there will be a significant increase in rail traffic through the center of the Village of Painted Post on a daily basis, significantly causing automobile traffic tie ups. Similarly, there will be a significant increase in truck traffic at the Pennsylvania end of the rail line to bring the millions of gallons of water to a central water impoundment site and from there to individual gas well drilling sites.

102. In order to determine whether or not an environmental impact statement needs to be drafted, the lead agency is required to have prepared an Environmental Assessment Form, which would indicate the potential adverse environmental consequences which may ensue. 6N.Y.C.R.R. 617.7(a)(2)(3).

103. In the instant action, as previously indicated, the Environmental Assessment Form prepared by the Village was inadequately prepared, and did not include any adverse environmental consequences which may ensue outside the confines of the Village of Painted Post.

104. In performing its environmental review responsibilities, the universally accepted requirement is that the lead agency:

- i. Identify the areas of environmental concern;
- ii. Take a hard look at the environmental issues identified; and
- iii. Give a reasoned elaboration for the decision that is made.

105. Since the Village ignored any adverse environmental consequences outside the confines of the Village, for this reason alone the Village failed to identify areas of environmental concern, and failed to take a hard look at the potential significant adverse environmental consequences that would ensue outside the Village's borders, including the effects on the entire Corning aquifer, and the cumulative, long term and secondary effects that will be caused by the project in Pennsylvania, including the significant increase in truck traffic, the effects of such truck traffic on the rural roads and highways within Pennsylvania, and the adverse effects of increased well drilling allowed by the use of the 1,000,000 to 1,500,000 gallons per day of water coming from the Village water system.

106. Moreover, as previously indicated, besides the failure of the Village to review the adverse environmental effects outside the confines of the municipal boundaries of the Village, even within the Village the determination by the Village was erroneous due to the many inaccuracies and inadequacies in the drafting of the EAF. For example:

- a. In its responses to the EAF, the Village failed to recognize that the aquifer from which the water is being drawn and over which the rail facility is located is a primary aquifer as designated by the DEC.

- b. In its responses to the EAF, the Village failed to acknowledge that the proposed actions would affect surface or groundwater quality or quantity, and responded "Not Applicable" to a statement on the form that the "Proposed Action would use water in excess of 20,000 gallons per day." This response contradicted its response in another section of the EAF that total anticipated water usage per day would equal " 1×10^6 gallons/day."

c. In its responses to the EAF, the Village indicated that the question of maximum vehicular trips generated per hour was not applicable, even though there will be approximately 84 rail cars every 16 hours (42 rail cars leaving the facility and 42 rail cars arriving to take their place at the loading docks) moving down one of the main streets of the Respondent Village, passing next to the Village's major shopping area and crossing the main street of the Village, which is the access route to interstate 86 and state Route 15.

d. In its responses to the EAF, the Village indicated that the project will produce no operating noise exceeding local ambient noise levels. However, the Village does not appear to have done any noise studies to justify this conclusion. Indeed, the railroading facility borders a residential area of the town, and individual homes face the train lines and the railroading facility. It is obvious that there will significant noise associated with moving in and out the 84 rail cars every 16 hours and the loading of 42 rail cars with water will certainly exceed the ambient noise level, particular at night when people are sleeping.

e. The Village also maintained in the EAF that the proposed action would not affect air quality and indicated that the proposed action would not allow an increase in the amount of land committed to industrial use or allow an increase in the density of industrial development within existing industrial areas.

f. In its responses to the EAF, the Village indicated that the proposed action is compatible with adjoining and surrounding land uses within one-quarter mile. In fact, as previously indicated, the adjoining land uses are residential, and the surrounding uses within one-quarter mile are a park, a small shopping center, offices and churches.

g. The Village also maintained in the EAF that the proposed action will not create a demand for any community provided services. In fact, the project is putting a significant demand on the Village water system. Up to 1,500,000 gallons per day may be pumped from the system, an abandoned well is being brought back into service, a number of new water mains are being installed, and a permit is being sought from the Department of Health for installation of back/flow prevention devices. The water sales agreement provides that the water sold will be processed through the Village water treatment plant. Fulfilling these demands will be impose significant costs on the Village.

h. The Village indicated in the EAF that the project does not involve any local, state or federal funding, in spite of the fact that the Village is leasing the land to WCOR for \$10.00 plus \$1.00 per year, obviously providing local funding to the railroad.

i. The Village also indicated in the EAF that no federal approvals are required, when in fact permits are required from the Surface Transportation Board and the Federal Railroad Administration.

j. In fact, in response to the questions in Part 2 of the EAF, the Village marked “No” or “Not applicable” as its response to every question in the twenty categories of questions contained in Part 2, except for the questions contained in Category 1, Will the Proposed Action result in a physical change to the project site? and to three out of nine questions in Category 19, Impact on Growth or Character of Community.

k. The Village failed to complete Part 3 of the EAF, Evaluation of the Importance of Impacts.

107. Given all of these inadequacies of the EAF, it is not surprising that the Village erroneously determined that there will be no adverse environmental consequences that will ensue from this project.

108. Petitioners further allege that by issuing a negative declaration and by signing a lease of the rail loading facility in advance of compliance with SEQRA, the Village failed to perform its duty, proceeded in excess of its jurisdiction, rendered an arbitrary and capricious decision, and abused its discretion. Petitioners contend that the Village is required to prepare a full environmental impact statement (EIS).

109. Because the Village has failed to identify areas of environmental concern, and failed to take a hard look at clear and obviously significant adverse effects, the Village is in violation of the requirements of SEQRA and the regulations promulgated pursuant thereto, and it is respectfully requested that the inadequate negative declaration issued by the Village be annulled, that the lease agreement between PPD and WCOR be annulled, that the Village be directed to complete a full EIS and that an injunction against any further activity concerning the

construction or operation of the rail loading facility be entered until such time as the Village has fully and completely complied with the requirements of SEQRA.

**B. Respondent Village Violated SEQRA When It Improperly Claimed
a Type II Exemption from SEQRA for Its Action in Entering into an Agreement
to Sell 314,000,000 Gallons of Water from the Village Water System**

110. Petitioners repeat and reallege each and every allegation set forth in paragraphs 1 through 109 as if fully set forth herein.

111. The Village violated SEQRA when it failed to classify the water sale agreement as a Type I action, and issued a determination that it was a Type II action, which is exempt from SEQRA review. A Type II action is “a routine and continuing agency administration that does not reorder priorities in a manner that may affect the environment.” 6 NYCRR 617.51 [20].

112. As described above, the resolution by the Village designating the water sale agreement as a Type II action relies upon 6 N.Y.C.R.R. 617.5(c)(25) as the provision pursuant to which the Type II exemption was claimed. This reliance is not appropriate. Section 617.5(c)(25) provides that actions for “purchase or sale of furnishings, equipment or supplies, including surplus government property, other than the following: land, radioactive material, pesticides, herbicides, or other hazardous materials” are not subject to review under SEQRA.

113. Bulk water sales do not fall within the exemption provided in Section 617.5(c)(25). That section explicitly excludes actions involving the purchase or sale of land from the exemption contained in that section. Water rights are incident to the ownership of land and are considered real property in New York.

114. The Village does not have an ownership interest in the Corning aquifer. As an adjoining landowner and a permitted municipality, it has the right to withdraw water for its use and the use of its residents.

115. The designation by the Village of the pumping capacity of the Village water wells as “surplus water” has no basis in law or in fact.

116. The initial approval granted to the municipality of the Village of Painted Post in 1909 by the State Water Supply Commission to establish a municipal water system makes clear that the rights to withdraw water derive from the lands acquired by the Village to create the water supply system and that those rights are to be exercised in a manner that is “just and equitable to other municipalities and civil divisions of the State affected thereby and to the inhabitants thereof, particular consideration being given to their present and future necessities for sources of water supply.”

117. Petitioners allege that by issuing a Type II determination and by signing a water sale agreement in advance of compliance with SEQRA, the Village failed to perform its duty, proceeded in excess of its jurisdiction, rendered an arbitrary and capricious decision, and abused its discretion. Petitioners contend that the Village is required to prepare a full environmental impact statement (EIS).

118. Because the Village erroneously categorized the water sale agreement as a Type II action, the Village is in violation of the requirements of SEQRA and the regulations promulgated pursuant thereto, and it is respectfully requested that the improper Type II determination issued by the Village be annulled, that the water sale agreement between the Village and SWEPI be annulled, that the Village be directed to complete a full EIS and that an injunction against bulk water sales by the Village be entered until such time as the Village has fully and completely complied with the requirements of SEQRA.

**C. Respondent Village Violated SEQRA When It Impermissibly
Segmented its Review of the Water Sale Agreement and its
Review of the Lease Agreement for a Water Loading Facility**

119. Petitioners repeat and reallege each and every allegation set forth in paragraphs 1 through 119 as if fully set forth herein.

120. The Village violated SEQRA when it impermissibly segmented its review of its water sale agreement and its review of the lease agreement for a water loading facility.

121. SEQRA notes that “[a]ctions commonly consist of a set of activities or steps,” and specifies that “[t]he entire set of activities or steps must be considered the action, whether the agency decision-making relates to the action as a whole or to only a part of it.” 6 NYCRR 617.3.

122. SEQRA expressly provides that “[c]onsidering only a part or segment of an action is contrary to the intent of SEQRA.” SEQRA defines “segmentation” as “the division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing determinations of significance” 6 N.Y.C.R.R. § 617.2(ag).

123. In addition, SEQRA provides that, “If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance and any subsequent EIS the supporting reasons and must demonstrate that such review is clearly no less protective of the environment. Related actions should be identified and discussed to the fullest extent possible.” 6 N.Y.C.R.R. § 617.3(g)(1).

124. The connection between the lease agreement for construction of a water loading facility and the water sale agreement is manifest and is directly acknowledged in the Lease Agreement, which states that the lease states is entered into “in connection with a certain bulk water sale contract, dated as of March 1, 2012 (the ‘Water Purchase Agreement’), by and between the Village and SWEPI LP (‘SWEPI’), the Village will sell a certain amount of surplus

municipal water to SWEPI from its existing municipal water supply system at a filling/metering station to be constructed by the Lessee on a portion of the Premises and SWEPI has arranged to have the Lessee withdraw, load and transport such water via rail line from the Premises.”

125. Without a water loading facility, there would be no means for the Village or SWEPI to implement the water sale agreement.

126. As a result of Respondent’s failure to comply with the procedural prescripts of SEQRA, either individually or taken as a whole, its Negative Declaration, its Type II determination and any subsequent actions taken in reliance thereon was and will be arbitrary and capricious, affected by an error of law, and a violation of SEQRA and, therefore, must be declared null and void.

127. Because the Village erroneously conducted a segmented review of two aspects of the same project, and issued two separate determinations under SEQRA on the same day, the Village is in violation of the requirements of SEQRA and the regulations promulgated pursuant thereto, and it is respectfully requested that an injunction against bulk water sales by the Village and any further activities concerning the construction or operation of the water loading facility be entered until such time as the Village has fully and completely complied with the requirements of SEQRA.

V. SECOND CAUSE OF ACTION:
VIOLATION OF WATER TRANSPORT PERMIT REQUIREMENTS

128. The allegations contained in paragraph “1” through “127” inclusive are hereby realleged as more fully set forth herein.

129. Section 15-1505.1 of the Water Supply Law provides that “no person shall transport or carry through pipes, conduits, ditches or canals the waters of any fresh water lake, pond, brook, river, stream or creek in this state or any well, subsurface or percolating waters of

this state into any other state for use therein without first obtaining a permit from the Department [DEC] pursuant to this title.”

130. The proposed water withdrawal project will involve the transportation of water from Village water wells through pipes in the Village water system and through pipes in the rail loading facility to railcars that will carry the water into the state of Pennsylvania.

131. Because pipes are being utilized for the transport of water out of state, the plain wording of Section 15-1505.1 requires Respondents to obtain a permit from the DEC for such transports.

132. Upon information and belief, none of the Respondents have requested or obtained a permit from the DEC to transport water into the state of Pennsylvania.

133. The DEC has elucidated the intention of the legislature regarding transports of water for commercial, industrial, or oil or gas well development purposes outside of a public water supply system approved water service area concerning this section in its recently proposed amendments to 6 N.Y.C.R.R. §601.6. The proposed amendments provide that “except to the extent that is otherwise exclusively stated in this part, no person may take any of the following actions without having first obtained a water withdrawal permit: (f) for a public water supply system with a capacity equal to or greater than the threshold volume [100,000 gpd], to enter into a contract or other agreement for the bulk sale of water for a commercial, industrial, or oil or gas well development purpose outside of the public water supply system approved water service area.”

134. The proposed regulation is broader than Section 15-1505.1 and applies to all agreements for the bulk sale of water for commercial, industrial, or oil or gas well development purposes by certain public water systems outside of their approved water service areas.

135. Even though the new proposed regulations have not yet taken effect, the Village's bulk sale agreement falls within the requirements of Section 15-1505.1 and requires one or more of the Respondents to obtain a permit from the DEC for the transport of water to another state.

136. Since none of the Respondents has requested or obtained such a permit, an injunction against shipments of water from the Village water system to SWEPI should be entered until such time as the provisions of Section 15-1505.1 of the Water Supply Law concerning export of water to another state has been complied with.

VI. THIRD CAUSE OF ACTION:
FAILURE TO OBTAIN FEDERAL PERMITS AND
FEDERAL NEPA REVIEW

137. The allegations contained in paragraph "1" through "136" inclusive are hereby realleged as more fully set forth herein.

138. As previously observed, the Village in its negative declaration states that the Interstate Commerce Commission Termination Act of 1995, the Federal Railway Act of 1970 and other federal laws and regulations associated with the operation of rail facilities (collectively referred to as "ICCTA") preempt the application of local and state laws to the construction and operation of the rail loading facility.

139. Nevertheless, while claiming that these laws apply to the construction and operation of the facility, on information and belief, none of the Respondents have requested any permit from the Surface Transportation Board or the Federal Railway Administration even though permits are required for the installation of rail spurs and the construction and operation of rail loading facilities. In fact, the Village indicated in its EAF that no federal permits were required.

140. Moreover, prior to the STB or FRA granting any permit, an environmental review of the proposed action or actions must be conducted pursuant to the National Environmental Policy Act, 42 U.S.C. §4321 et seq., which has also not been done.

141. Therefore, since it is the intention of the Respondents to ignore the requirements of these laws, an injunction against operation of the rail loading facility should be issued until such time as ICCTA and NEPA are fully complied with.

WHEREFORE, Petitioners respectfully request that the Court enter an Order in this proceeding:

- (1) Annulling the Village's Type II determination for the water sale agreement;
- (2) Annulling the Village's negative declaration for the lease of the rail-loading facility site;
- (3) Annulling the Village's water sale agreement with SWEPI;
- (4) Annulling PPD's Lease to Respondent WCOR;
- (5) Requiring the Village to issue a Positive Declaration, and complete an EIS with respect to its plan as a whole and not merely segments thereof, pursuant to SEQRA;
- (6) Enjoining the Village from entering into an agreement to sell water and enjoining the Village and PPD from entering into a lease of Village land or land owned by PPD until Respondents have complied with all applicable federal and state laws; and
- (7) Imposing a preliminary injunction prohibiting Respondents from making shipments of water to SWEPI or working at the rail loading facility site until Respondents have complied with all applicable federal and state laws;
- (8) Allowing costs and disbursements; and

(9) Granting such other and further relief as the Court may deem just, proper and equitable.

The relief requested herein has not been previously requested from this or any other court.

DATED: Buffalo, New York
June 22, 2012

Respectfully submitted,



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

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

Attorneys for Petitioners

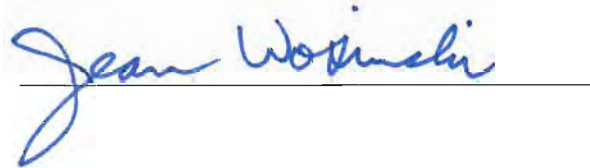
VERIFICATION

STATE OF NEW YORK)
COUNTY OF STEUBEN) SS.:

I, Jean Wosinski, being duly sworn, depose and state:

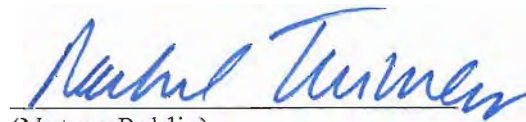
I am the Petitioner in the above-entitled action.

I have read the foregoing VERIFIED PETITION, and know the contents thereof, the same are true to my own knowledge, except as to those matters that are therein stated upon information and belief, and as to those matters, I believe them to be true.



STATE OF NEW YORK)
COUNTY OF STEUBEN) SS.:

On this 22nd day of June, 2012, before me, the undersigned, personally appeared Jean Wosinski, and personally known to me, or provided to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.



(Notary Public)

RACHEL TREICHLER
Notary Public, State of New York
No. 02TR5058999
Qualified in Steuben County
Commission expires 04/22/2014