SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF LIVINGSTON

In the Matter of the Application of SIERRA CLUB, PEOPLE FOR A HEALTHY ENVIRONMENT, INC., COALITION TO PROTECT NEW YORK; JEAN WOSINSKI; THERESA and MICHAEL FINNERAN; and VIRGINIA HAUFF, Petitioners, For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules -against- THE VILLAGE OF PAINTED POST; PAINTED POST DEVELOPMENT, LLC; SHELL WESTERN EXPLORATION AND PRODUCTION, LP; WELLSBORO AND CORNING RAILROAD, LLC; Respondents.	Index No. 2012-0810 **NOTICE OF MOTION REQUESTING LEAVE TO FILE MEMORANDUM OF LAW AS AMICUS CURIAE** Assigned Judge: Hon. Kenneth R. Fisher, J.S.C.

PLEASE TAKE NOTICE that the undersigned will move this Court at the Monroe County Hall of Justice, 99 Exchange Blvd., Rochester, New York on March 1, 2013 for an order granting the Croton Watershed Clean Water Coalition, Inc. (CWCWC) leave to file the herewith proposed amicus curiae memorandum of law in support of petitioners. You are hereby required to serve upon the undersigned any opposition pleadings at least seven (7) days prior to the return date pursuant to CPLR §403(b).

Dated: February 14, 2013

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

In the Matter of the Application of SIERRA CLUB, PEOPLE FOR A HEALTHY ENVIRONMENT, INC., COALITION TO PROTECT NEW YORK; JEAN WOSINSKI; THERESA and MICHAEL FINNERAN; and VIRGINIA HAUFF, Petitioners, For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules -against- THE VILLAGE OF PAINTED POST; PAINTED POST DEVELOPMENT, LLC; SHELL WESTERN EXPLORATION AND PRODUCTION, LP; WELLSBORO AND CORNING RAILROAD, LLC; Respondents.	Index No. 2012-0810 Assigned Judge: Hon. Kenneth R. Fisher J.S.C.

MEMORANDUM OF LAW IN SUPPORT OF PETITION and OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

The Croton Watershed Clean Water Coalition, Inc. ("CWCWC") seeks leave as amicus curiae to submit a brief concerning the respondent Village of Painted Post's (VOPP) decision to drain and sell 314 million gallons of water from the Corning aquifer. Because that aquifer is one of only 18 primary source aquifers in New York[1] and serves a population of over 31,000[2] the VOPP's decision is of significant public interest. Further, in making its decision, the VOPP bypassed fundamental administrative review procedures of the State Environmental Quality Review Act[3] (SEQRA).

A. Statement of Facts and *Amici* Interest

CWCWC is a not-for-profit corporation which includes 50 affiliated groups representing over 120,000 individuals working to protect and improve water supplies through 15 years of education and advocacy.[4] In 2012, CWCWC

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[1] New York State Department of Environmental Conservation (DEC) "Division of Water Technical and Operational Guidance Series (2.1.3.) [TOGS] Primary and Principal Aquifer Determinations," last accessed on February 12, 2013 from: http://www.dec.ny.gov/docs/water_pdf/togs213.pdf at Table 1.

[2] See *Chemung River Valley Water Study* prepared for the Town of Erwin by Stearns and Wheler, LLC and Leggette, Brashears & Graham, Inc., September 2002: "Fresh ground-water withdrawals from the Corning aquifer during 1985 totaled about 16 million gallons per day to supply industrial needs and a population of about 31,000 (table 4). Last accessed on February 10, 2012 at: http://www.treichlerlawoffice.com/pp/hydrogeology/chemungwaterstudy2002woutfigs.pdf.

[3] Statutory Authority at Environmental Conservation Law Article 8 implemented by DEC's regulations at 6 NYCRR §617.

[4] CWCWC's mission statement states: "[t]he Coalition strives to protect and improve the waters of NYC's Croton Watershed as well as all New York State watersheds. We are an alliance of individuals and groups who believe that safe, clean and affordable drinking water is a basic human right."

submitted comments to the Delaware River Basin Commission concerning the Chemung Watershed after determining that significant water withdrawals would negatively impact the safe yield of the Elmira -Horseheads-Big Flats aquifer, which DEC also designates as a "Primary Water Supply Aquifer."[5] CWCWC meets the criteria for amicus curiae status as the decision to draw 314 million gallons of water from a finite public water resource serving thousands is an unprecedented use of the Corning aquifer and the VOPP's failure to conduct a complete SEQRA review is of regional and state-wide concern.

> In cases involving questions of important public interest leave is generally granted to file a brief as amicus curiae. (*Colmes v. Fisher*, 151 Misc 222, 223 [Sup Ct, Erie County 1934].) Unlike the typical intervenor, *amici* are quite often large organizations or associations that represent a particular interest group. (Davies, Stecich, and Gold, New York Civil Appellate Practice § 8:4 [8 West's NY Prac Series 1996]).

Kruger v Bloomberg, 1 Misc.3d 192, 196 (Sup Ct, New York County 2003).

Here, the Corning aquifer spans a 28-square mile area generally following the river valleys in and around the City of Corning in New York's Southern Tier. (Attachment 1).[6] It is a highly productive system "vulnerable to contamination from the land surface."[7] Its vulnerability is due to its shallow depth which is just

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[5] TOGS at 2.1.3.
[6] United States Geological Service (USGS), *Groundwater Atlas of the United States,* available at: http://pubs.usgs.gov/ha/ha730/ch_m/M-text1.html GROUND WATER ATLAS of the UNITED STATES. Last accessed on February 12, 2013.
[7] TOGS 2.1.3 at pg. 3.

18 feet below the surface of the VOPP.[8] The aquifer serves eight municipalities including the City of Corning, the Towns of Corning, Campbell and Erwin and the Villages of Painted Post, Riverside, Addison and South Corning.[9] The VOPP's water treatment plant serves both the VOPP and the Village of Riverside (combined population 2,430).[10]

According to a November 11, 2011 report prepared by Hunt Engineers, Architects & Land Surveyors, PC[11] (Hunt report), there is an abandoned hazardous waste site in VOPP which was initially 57.4 acres ("the site") used for industrial and manufacturing purposes. The Hunt report discloses that beginning in 1985, DEC discovered that the site's soils and groundwater were contaminated with hazardous wastes, including lead, PCBs, toluene, benzene, petroleum products and other carcinogens, such as PAHs.[12] The site became the subject of extensive clean-up efforts and monitoring over the next 20 years in order to stabilize the contamination, limit future soil disturbance and reduce health risks.

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[8] Page 87, Figure 23, (Map Showing Calculated Water Level Contours in Layer 1 for Average Conditions with No Pumping Wells)

[9] Water Quality Strategy for Steuben County (April 2009); Available at: http://www.stcplanning.org/usr/Program_Areas/Water_Resources/Water%20Quality/Steuben_WQCC_Strategy_2009.pdf.

[10] *Id.* at Table 2-2.

[11] Administrative Record "Hunt Report November 11, 2011."

[12] Polynuclear Aromatic Hydrocarbons. According to the Agency for Toxic Substances and Disease Registry (ATSDR), a federal public health agency of the U.S. Department of Health and Human Services, PAHs include known animal carcinogens causing "increased incidences of skin, lung, bladder, liver, and stomach cancers," and "certain PAHs also can affect the hematopoietic and immune systems and can produce reproductive, neurologic, and developmental effects." PAHs include probable human carcinogens and mutagens. See ATSDR website at: http://www.atsdr.cdc.gov/csem/csem.asp?csem=13&po=11.

The Hunt report states that in 1986, a 7.5 acre parcel from the original 57.4 acres was conveyed to the VOPP for use as a recreational park (Hodgman Park)[13] which now has several sports fields for lacrosse and softball.[14] In 2005, the remaining site's acreage was conveyed to Painted Post Development, LLC (PPD), an entity wholly owned by the VOPP. The 2005 deed included extraordinary limitations upon the use of the site. For any soil disturbance, the deed required a "Remedial Work Plan" and a "Soil Fill Management Protocol" which action plans were attached to the deed.[15] The deed also prohibited disturbance of soils on the site without DEC's consent.[16] In the event of any soil disturbance, the deed included a schedule of annual inspection and reporting requirements.[17] The deed also stated:

> Notice and warning is provided that polynuclear aromatic hydrocarbons ("PAHs"), which are semi-volatile organic compounds, are located in soils at and below ground surface of the Premises. Notice and warning is provided that such PAHs may pose a risk to humans in a scenario where future use of the Premises includes invasive activities at or below the surface of the Premises, and appropriate precautions should be taken.[18]

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[13] The Hunt report misidentifies Hodgman Park as "Hogmen Park."

[14] See "Sketch Plan" included in Administrative Record and aerial photograph included herewith as Attachment D. A Town of Erwin website describes the park as located in the VOPP but that "the Town of Erwin maintains the basketball courts, box lacrosse facilities, playground area and picnic pavilion" and includes links to maps indicating the correct name is "Hodgman Park." See: http://www.erwinny.org/parks.htm and Attachment D herewith.

[15] See Section 2.2(b) of Lease between VOPP and WCS at page 5.

[16] Id. at §2.2(a)(4).

[17] Id. at §2.2(e).

[18] See Section 1.2(f) of Lease Agreement between Painted Post Development, LLC (owned entirely by the VOPP) and WSC attached to respondent VOPP affidavit of Roswell Crozier, Jr.

In early 2012, the VOPP decided to lease an 11.8-acre portion of the site to the respondent Wellsboro and Corning Railroad, LLC ("WCOR") and sell significant amounts of water from the Corning aquifer ("project") to the respondent SWEPI, LP ("SWEPI"). The project included disturbance to the site's contaminated soils by the construction of a water loading facility ("transloading facility" or "facility") immediately adjacent to Hodgman Park's recreational fields.[19] The facility would receive railroad tanker cars which would be filled with water from the VOPP's water treatment plant and transported out-of-state. The facility would operate on a 24-hr basis and be capable of loading 42 tanker cars every 16 hours using up to 1.5 mgd of water.

On February 23, 2012 respondent VOPP adopted four resolutions:

1) A finding that the sale of 314 million gallons of water drawn from the Corning aquifer at a rate of up to 1.5 mgd was a Type II action because the VOPP defined the water as "surplus property" under SEQRA and therefore required no environmental review ("Type II findings");

2) A contract to sell[20] 314 million gallons of water from the Corning aquifer to SWEPI ("water contract");

3) A negative declaration issued pursuant to SEQRA that the PPD/WCOR lease for the construction and operation of the transloading facility was a Type I action and that all potentially significant adverse environmental impacts would be

[19] See "Sketch Plan" included in Administrative Record.
[20] The water contract sets the price at just over one cent (.01106) per gallon with a term of five years and a right of extension. *Id.* at No. 7 and No. 14.

mitigated by compliance with the 2005 deed restrictions and DEC's continuing review ("negative declaration"); and

4) An agreement to lease 11.8 acres of the site to WCOR for a facility to load up to 1.5 mgd of water into railroad tanker cars from the VOPP's water treatment plant and distribution system for transport out of state. ("site lease")

B. The Village of Painted Post's Violations of SEQRA

SEQRA requires an agency to carefully review the potential adverse environmental impacts of its actions before taking them. "The primary purpose of SEQRA is 'to inject environmental considerations directly into governmental decision making.' " *Akpan v. Koch*, 75 NY2d 561, 569 (1990), quoting *Matter of Coca-Cola Bottling Co. of New York v. Board of Estimate,* 72 NY2d 674, 679 (1988).

To comply with SEQRA, agencies must strictly adhere to the procedures set forth in the statute and regulations. As the Court of Appeals has repeatedly explained, such compliance with the specified procedures is necessary to realize the goals of the statute:

> SEQRA's policy of injecting environmental considerations into governmental decisionmaking is "effectuated, in part, through strict compliance with the review procedures outlined in the environmental laws and regulations."

N.Y.C. Coalition to End Lead Poisoning. v. Vallone, 100 NY2d 337, 348 (2003).

> Strict compliance with SEQRA is not a meaningless hurdle. Rather, the requirement of strict compliance and attendant spectre of de novo environmental review insure that agencies will err on the side of meticulous care in their environmental review. Anything less than

> strict compliance, moreover, offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment.

Id. at 348 quoting *King v. Saratoga County Bd. of Supervisors*, 89 NY2d 341, 348 (1996). (citations and internal quotations omitted).

As a result, "[l]iteral compliance with the letter and spirit of SEQRA is required, and substantial compliance with SEQRA is not sufficient to discharge an agency's responsibility under the act." *Stony Brook Village v. Reilly*, 299 AD2d 481, (2nd Dep't 2002), *as amended*, (Jan. 9, 2003). Accordingly, where a lead agency has failed to comply with SEQRA's mandates, the determination must be nullified.

In reviewing the sufficiency of a negative declaration, courts uniformly apply the "hard look" test first set forth in *H.O.M.E.S. v. New York State Development Corp.*, 69 AD2d 222, 231-232 (4th Dept. 1979). The court scrutinizes whether the lead agency: 1) identified relevant issues, 2) took a "hard look" at the environmental impacts, and 3) gave a reasoned elaboration of the basis for its determinations. *Save the Pine Bush, Inc. v. Planning Bd. of the City of Albany,* 96 AD2d 986, 987, (3d Dept. 1981), *appeal dismissed* 61 NY2d 668, (1983).

Here, the VOPP's adoption of the 4 resolutions on February 23, 2012 violated SEQRA as the VOPP misidentified the water withdrawal as Type II action, improperly narrowed the scope of its SEQRA review, failed to identify all involved agencies and delegated its environmental review authority and mitigation

responsibilities to other agencies. As a result, each of the VOPP's four resolutions must be annulled.

i) <u>The Draining and Use of 314 Million Gallons of Water adjacent to a Village Park is a Type I Action</u>

SEQRA divides actions into three categories, Type I, Type II and Unlisted. Type I actions carry the presumption that they will require further environmental review by the production of an Environmental Impact Statement (EIS), Type II actions require no further review, and Unlisted actions must be analyzed to assess whether they present the potential to result in significant adverse environmental impacts requiring an EIS.

SEQRA's list of Type I actions includes:

> [A]ctivities, other than the construction of residential facilities, that meet or exceed any of the following thresholds…
>
> a project or action that would use ground or surface water in excess of 2,000,000 gallons per day [gpd].
>
> [A]ny Unlisted action, that exceeds 25 percent of any threshold in this section, occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area or designated open space.

6 NYCRR §617.4, (b)(6)(i),(ii) and (b)(10).

Here, the facility is immediately adjacent to the Village-owned 7.5 acre Hodgman Park. The Park's proximity to the proposed use of up to 1.5 mgd of water reduces the Type I water-use threshold from 2,000,000 to 500,000 gpd. Therefore, the VOPP proposal to supply the facility with volumes of water exceeding 0.5 mgd bordering Hodgman Park is a Type I action. The VOPP's

failure to designate the water withdrawal as a Type I action is a significant deviation from SEQRA's requirements requiring remand of its Type II findings.

Petitioners have also identified that the extraction of 314 million gallons of water from the Corning aquifer is not a Type II action because groundwater taken in excess of the needs of the VOPP and Village of Riverside is not "surplus property" as defined by SEQRA as respondents argue.

Further, of regional concern, the Corning aquifer is the only aquifer designated in New York State as a "Potentially Stressed Area," by the Susquehanna River Basin Commission (SRBC) - "areas in the basin where the utilization of groundwater resources is potentially approaching or has exceeded the sustainable limit of the resources."[21] In 2002, recognizing the need for greater regional cooperation and information-sharing, the VOPP participated in the Chemung River Valley Water Study which found:

> One of the largest disadvantages of the status quo structure is that there is no mechanism for centralized protection of the water source. Neighboring communities in the Chemung Valley all draw on the same aquifer for their own consumptive needs and there is no assurance that individual purveyors of water will not place these individual needs above the needs of the valley as a whole.

The VOPP's Type II findings bypassed SEQRA's required coordinated review for Type I actions thereby preventing other users of the aquifer from commenting on the VOPP's actions. The VOPP violated SEQRA's hard look

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[21] See Appendix 3 of the SRBC's Comprehensive Plan for the Water Resources of the Susquehanna River Basin, Available at: http://www.srbc.net/planning/assets/documents/Comprehensive%20Plan%20w%20Appendices%20Amended%20June%202012%20FINAL%208_27_12%20FINAL.pdf, p.95.

standard by failing to assess potential short and long term adverse impacts resulting from significantly drawing down the Corning aquifer over a five-year term, especially where the VOPP knew (or should have known) that the Town of Erwin had contracted to sell 400,000 gpd to out-of-district users and the City of Corning was also considering similar bulk water sales from the Corning aquifer[22] (*Village of Westbury v Department of Transportation*, 75 NY2d 62 (1989) where cumulative and future impacts from roadway construction projects were required to be addressed as part of the SEQRA process).

The VOPP's failure to consider potential impacts beyond its own in-district water users is a clear violation of SEQRA's review requirements. The *Matter of County of Orange v. Village of Kiryas Joel,* (Sup Ct, Orange County, Index No. 8513/09 is precisely on point. There, Orange County sent out an offer to out-of-district users for the purchase of surplus sewage treatment capacity. The Court annulled the offer ruling that the County was required by SEQRA to evaluate relevant environmental concerns and the needs of all users of the sewage plant prior to offering any additional capacity for sale outside of the sewer district. (See Decision and Order included herewith as Attachment B).

Consequently, the VOPP could not make a determination that the Village's water supply was "surplus" without conducting an environmental review of the

[22] Petitioners' memorandum of law in opposition to respondents' motion to dismiss at page 5.

needs of all users of the Corning aquifer as well as assessing the current and future water capacity requirements of the out-of-district users.

Further, while monitoring wells around the site have not detected a migration of PAHs or other hazardous chemicals, no study was conducted to examine potential chemical migration resulting from pumping the aquifer at 5 times more than its average daily volume. [23]

In sum, the VOPP failed to take the requisite hard look at its decision to drain an additional 314 million gallons of water from the Corning aquifer and therefore each of the resulting four resolutions adopted on February 23, 2012 must be annulled. (See *Chinese Staff and Workers Ass'n v. City of New York*, 68 NY2d 359, 369 (1986) and *Coca-Cola Bottling Co. of New York,* supra).

ii) Inaccurate Information in the EAF

The VOPP prepared an Environmental Assessment Form (EAF) for only the site lease.[24] Incredibly, the EAF stated that the site was not located over any aquifer and stated that the action would not result in the use of more than 20,000 gallons of water a day.[25]

The EAF's errors demonstrate the VOPP's approval of its negative declaration was arbitrary, capricious and an abuse of discretion requiring remand.

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[23] The VOPP water district's 2007 to 2011 average daily water demand was 286,203. Attachment C, information supplied by VOPP on January 3, 2013 pursuant to a Freedom of Information Law response to petitioner Sierra Club representative Kate Bartholomew.
[24] See Administrative Record.
[25] Answers in EAF at pg. 3, No. 9 and pg. 13, No. 5.

As an example, in *Matter of Kirk-Astor Drive Neighborhood Assn., et al., v Town Board of Pittsford* 106 A.D.2d 868 (4th Dept. 1984), the court annulled a negative declaration as the EAF:

> [F]ailed to provide complete information relating to water table, soil, surface water runoff, plant and animal life and other aspects of the proposed development... [and] did not include the detail required of an EAF; specific questions in the model form were not answered and incomplete information was provided.

The Court concluded:

> [The lead agency's] conclusions are not supported by the record due to the limited information before it and its failure to evaluate the potential impacts in the detailed, systematic fashion envisioned in Part II of the model EAF. In view of these deficiencies we conclude that the decision of the [lead agency] to issue a negative declaration was arbitrary and capricious. (*Id.* at 870).

iii) Failure to Identify Steuben County as an Involved Agency

The SEQRA regulations define "involved agency" in part as:

> [A]n agency that has jurisdiction by law to fund, approve or directly undertake an action. If an agency will ultimately make a discretionary decision to fund, approve or undertake an action, then it is an 'involved agency,' notwithstanding that it has not received an application for funding or approval at the time the SEQR process is commenced.

6 NYCRR §617.2(s).

The regulations further contain a number of provisions to ensure that involved agencies have an opportunity to comment on the SEQRA review of environmental impact, including the plenary requirement that "[t]he lead agency will make every reasonable effort to involve project sponsors, other agencies and the public in the SEQR process." 6 NYCRR § 617.3(d).

Agencies reviewing a Type I action must subject the action to coordinated review. See *Coeymans*, 284 AD2d at 831 (DEC determination that "a Type I action under [SEQRA] . . . requir[ed] coordinated review among all of the involved agencies"). See also *Munash v. Town Board of the Town of East Hampton*, 297 AD2d 345 (2nd Dep't 2002) (annulling negative declaration where agency "failed to comply with SEQRA regulations which mandate that an agency responsible for the approval of a type I action forward the EAF to all other involved agencies, so that agreement can be reached as to designation of a lead agency, and a coordinated review undertaken); 6 NYCRR §617.4(b)(3)(i) (requiring same).

Here, the Steuben County Planning Department was an involved agency under SEQRA because it had the discretion to approve the project's site plan pursuant to General Municipal Law §239-m (GML). Specifically:

> In any... village... which has a county planning agency... each referring body shall, before taking final action on proposed actions... refer the same to such county planning agency. *Id.* at (2).

Actions subject to referral include "approval of site plans." *Id.* at 3(a)(iv). The referral must occur if the site plan "appl[ies] to real property within five hundred feet of... the boundary of any... town; the boundary... of any other recreation area;... the right-of-way of any existing... state parkway, thruway, expressway, road or highway. *Id.* at 3(b)(i), (ii) and (iii). Following "receipt of a full statement of such proposed action" the County has thirty days to report its recommendations. *Id.* at 4(b). If the County recommends modification or

disapproval of the action, "the referring body shall not act contrary to such recommendation except by a vote of a majority plus one of all the members thereof." *Id.* at (5).

Here, the site is within 500 feet of the Town of Erwin, immediately borders Hodgman Park and is within 500 feet of a major highway - State Route 17. (Attachment D – Aerial Photograph and Hunt Associates' Overall Site Plan).

The Steuben County Planning department should have been included also because of its interest in protecting the Corning aquifer for all users. Indeed, the County's annual water quality report identifies protecting the aquifer as a "high priority."[26] Moreover, its "Water Quality Strategy for Steuben County" cites the County's task to "Incorporate Water Quality Considerations into Municipal Planning and Land Use Regulations" stating:

> In order to promote sound planning practices, the County Planning Department and Southern Tier Central Regional Planning and Development Board provide planning assistance to Steuben County municipalities. [27]

The report also describes the County's "Aquifer Protection" efforts:

> Because groundwater quality is intricately tied to land use, many communities are enacting land use controls (through zoning laws, local ordinances, and site plan review) that will protect the underlying groundwater resources. Southern Tier Central Regional Planning and Development Board provides municipalities with technical assistance in preparing these groundwater protection

[26] Available at :http://www.steubencony.org/Files/Documents/final_2010_steuben_water_quality_annual_report.pdf at pg. 8.

[27] Water Quality Strategy for Steuben County report at 47 available at: http://www.treichlerlawoffice.com/pp/hydrogeology/chemungwaterstudy2002woutfigs.pdf.

> guidelines and ordinances. Municipalities are provided with educational materials on groundwater protection. The STCRPDB also assists communities with preparation of Wellhead Protection Plans, which are required by Department of Health whenever a public water supply well is drilled or rehabilitated.[28]

However, the VOPP's Type II findings terminated its SEQRA review of water supply impacts and its EAF failed to identify Steuben County as an involved agency. The VOPP's failure to identify the County as an involved agency and supply it with a "full statement of such proposed action" including the site plan and EAF renders its negative declaration null and void.

In fact, in similar circumstances, the court in *LCS Realty Co. v. Inc. Vill. of Roslyn*, 273 AD2d 474 (2nd Dept. 2000), held:

> [I]t is clear that the [County Planning Commission] did not have these materials for the requisite 30-day period before the Village acted and adopted the subject zoning law. Under such circumstances, the Village did not comply with General Municipal Law § 239-m and, as a consequence, Local Laws, 1997, No. 4 of the Incorporated Village of Roslyn and the Comprehensive Master Plan were improperly adopted and are void (see, *Matter of Ferrari v Town of Penfield Planning Bd.*, 181 AD2d 149; see also, *Matter of Ernalex Constr. Realty Corp. v City of Glen Cove*, 256 AD2d 336).

While the construction of a rail facility may be exempt from local zoning review, the exemption does not apply to health and safety regulations. This is especially true here, where health and safety concerns relate to the 314-million-gallon drawdown of a public drinking water resource used by over 30,000 people. Therefore, the VOPP's violation of SEQRA by failing to comply with the referral

[28] Id. at 48.

requirements of GML §239-m renders its negative declaration and Type II findings null and void.

iv) The Lease Agreement as a Type I Action required further Environmental Review

A Type I action carries with it the presumption that it may have one or more potentially significant impacts on the environment requiring further review.

> There is a relatively low threshold for requiring an EIS before approving such actions because the designation of a proposed action as 'Type I' 'carries with it the presumption that it is likely to have a significant effect on the environment.

Matter of Miller v City of Lockport, 210 A.D.2d 955, 957 (4th Dept. 1994) *lv to app den,* 85 NY2d 807 (1995).

> In order to overcome the presumption, the government must properly identify the potential adverse environmental impacts, take a hard look at all of the evidence concerning them, conclude that—under the circumstances of that project—there really are no adverse impacts, and articulate in a written statement (called a negative declaration) a reasoned elaboration supporting that determination.

Id. citing *Merson v. McNally*, 90 NY2d 742 (1997), *Spitzer v. Farrell*, 100 NY2d 186 (2003) and *Mobil Oil Corporation v. City of Syracuse Industrial Development Agency*, 224 AD2d 15 (4th Dep't 1996).

Here, the 2005 deed indicates that virtually any disturbance of the site may result in the release of carcinogens – a significant adverse environmental impact. Consequently, to limit risks to humans, the 2005 deed includes a generic "Remedial Work Plan" and "Soil Fill Management Protocol." The VOPP's negative declaration ensured that these risks would not be weighed during the

SEQRA process despite the presence of recreational ballfields and play areas immediately adjacent to the proposed soils disturbance.

The 2005 deed's mitigation measures and self-policing measures required by the deed (annual reporting) cannot substitute for the lead agency taking a hard look at potential impacts and requiring mitigation. As the Court of Appeals stated in *Merson v. McNally*, 90 N.Y.2d 742, 750, 751 (1997):

> [M]itigating measures will not obviate the need for an EIS unless they clearly negate the continued potentiality of the adverse effects of the proposed action. Otherwise, the EIS process would be necessary to review the adequacy of the mitigating measures, and any environmentally compatible alternatives to the suggested mitigations."

Further, the lease allows the VOPP to sell up to 1.5 mgd of water from the Corning aquifer - more than 5 times the daily average water demand of both the VOPP and the Village of Riverside. Although the lease states the increase will not occur if there is a negative impact to in-district users or the aquifer, the metric to be used to gauge such impacts is not identified.

In sum, the VOPP relied upon self-policing mitigation measures in the 2005 deed and upon DEC's future review. As below, that delegation was improper and the VOPP's failure to examine how withdrawing 314 million gallons might further stress the Corning aquifer was irrational given the potential risks to groundwater quality as identified in the 2005 deed and new burden created by the 1.5 mgd water demand.

v) Deferral of substantive review

The project's site plan indicated that delineated zones of contaminated soils would be disturbed by construction. Concerning mitigation of the hazardous soil disturbance, the site lease relied upon post-SEQRA review and future mitigation implemented pursuant to boiler-plate requirements in the 2005 deed and future analysis by DEC:

> [T]he transloading facility at the Site will be operated in accordance with the 2005 Deed's requirements and in accordance with other requirements imposed by the New York State Department of Environmental Conservation as well as required by additional permits and authorizations sought and obtained for the Site by Hunt Engineers on behalf of the Site Lessee, including a permit issued under the New York State Pollutant Discharge Elimination System Program ("SPDES") whereby a Storm Water Pollution Prevention Plan ("SWPPP") has been developed and will be implemented and further detailed below, as well as the implementation of permanent stormwater measures on the Site have been designed and will be constructed as part of the Facility on the Site.

Lease Agreement at D.

Similarly, the Hunt report claimed construction would follow "DEC stormwater regulations for mitigating increased runoff rates and water quality requirements." Specifically:

> Runoff Reduction and Water Quality for this will be provided through a vegetated swales [sic] and a bioretention area. In addition to providing water quality, the bioretention area has been sized to contain the one-year storm to allow the channel protection volume to infiltrate through the bottom of the bioretention area. There are no water quantity increases created by the development of this section of the site. The proposed stormwater practices for this development have been designed according to the DEC standard specifications. Infiltration testing will be performed for the bioretention practice.

> The results of this testing will be used to complete the bioretention sizing calculations. *Id.* at Section 6.

Thus, when the VOPP adopted its negative declaration, stormwater design plans and mitigation measures were incomplete. While the 2005 deed included restrictions on any site disturbance, no party had conducted the required infiltration testing, and no party had completed "protocols for the handling and removal of certain soils," with particular regard to the facility construction plan. Further, the VOPP did not analyze the potential hazards associated with the disturbance of contaminated soils and air-borne soil particles upon recreational users of Hodgman Park.

Although a lead agency may rely on outside sources and the advice of others, it must exercise its critical judgment; the final determination on SEQRA issues must remain with the lead agency principally responsible for approving the project. (See, *Coca Cola Bottling Co. of New York,* supra; *Penfield Panorama Area Community, Inc. v. Town of Penfield Planning Board*, 253 AD2d 342,(4th Dep't 1999). (See also *Golten Marine Co. v. State Dept. of Envtl. Conservation*, 193 AD2d 742, 743 (2nd Dep't 1993); "The fact that other agencies may have had an independent obligation to analyze the potential impacts of the facility had no bearing on [the lead agency's] own obligation to analyze the listed areas of environmental concern" and also *Martin v. Koppleman*, 124 AD2d 24, 27 (2nd Dep't 1987) "delegation of [lead agency's] decision-making responsibilities is inconsistent with the SEQRA review and consideration functions" *West Branch*

Conservation Ass'n v. Planning Bd. of Town of Clarkstown, 207 AD2d 837 (2nd Dep't 1994) it is the lead agency which must "determine which method would most successfully 'mitigate' each environmental impact in question.").

In sum, by delegating its environmental review authority to other agencies, the VOPP failed to take the requisite hard look at the project's hazardous soils disturbance, reporting schedules and the potential PAH migration into the aquifer requiring judicial remand of the VOPP's adoption of the four resolutions on February 23, 2012. (See, *Penfield*, supra, citing *Matter of Tonery v. Planning Board of Town of Hamlin*, 256 AD2d 1097 [4th Dep't1998]).

CONCLUSION

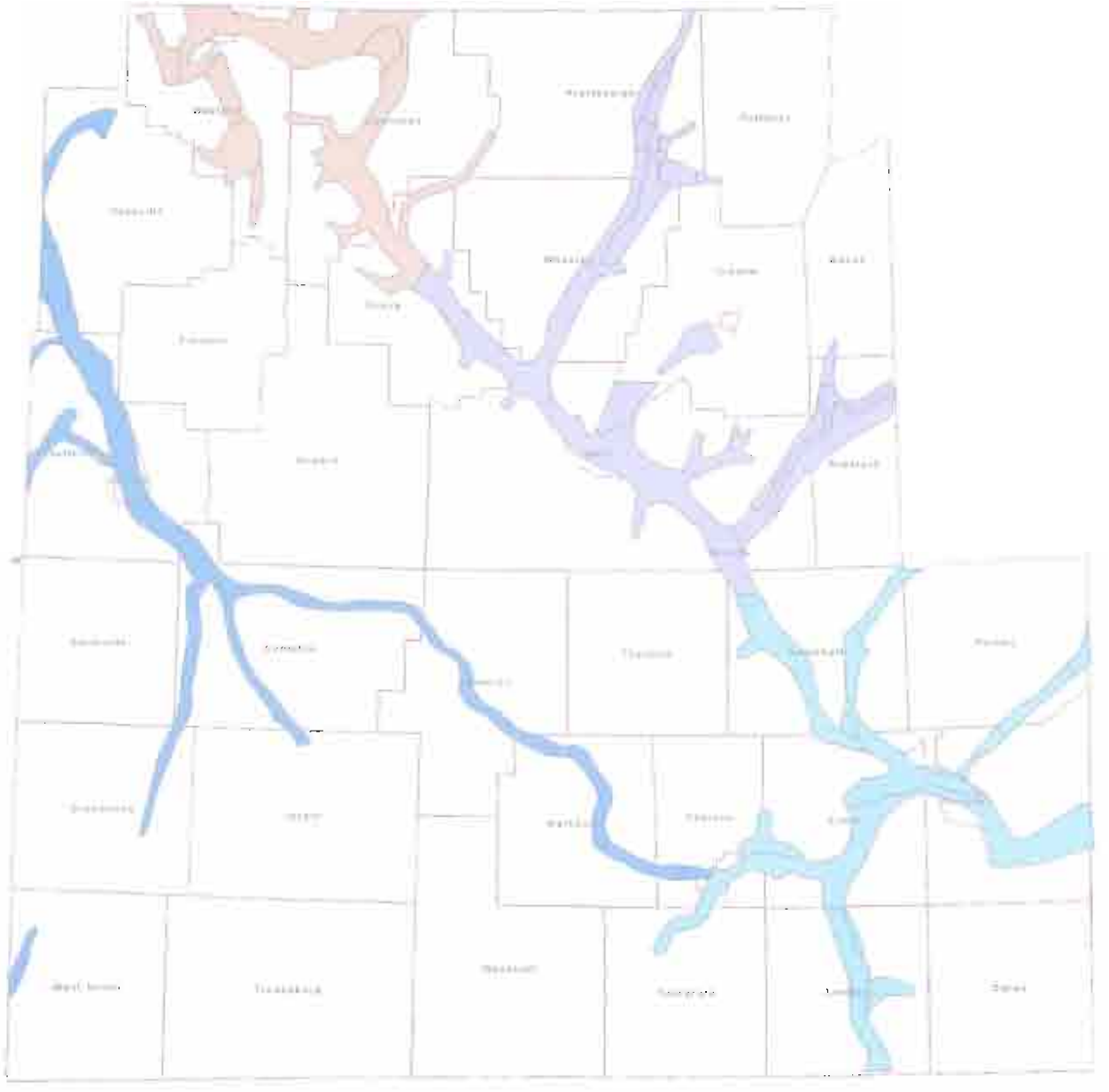
For all the above reasons, the Croton Watershed Clean Water Coalition respectfully requests that this Court accept this memorandum as amicus curiae and grant petitioners' requested relief for a permanent injunction and remand.

Respectfully submitted,

James Bacon
Attorney for *Amici* CWCWC
P.O. Box 575
New Paltz, New York 12561

Figure 5
Steuben County
Aquifers

Attachment "A"



Legend

Aquifers

- Canisteo River
- Corning Area
- Lower Cohocton River
- Upper Cohocton River
- Municipal Boundary

N

0 2.5 5 10 15 Miles

3-09

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
ENVIRONMENTAL CLAIMS PART

In the Matter of the Application of

VILLAGE OF KIRYAS JOEL and MAYOR ABRAHAM WIEDER; VILLAGE TRUSTEE JACOB MITTELMAN; VILLAGE TRUSTEE BARUCH MARKOWITZ; VILLAGE TRUSTEE SAMUEL LANDAU; VILLAGE TRUSTEE JACOB FREUND; and VILLAGE ADMINISTRATOR GEDALYE SZEGEDIN, each individually and in his official capacity,

Plaintiffs/Petitioners,

DECISION AND ORDER

For a Judgment Pursuant to Article 78 of the CPLR and a Declaratory Judgment Pursuant to Section 3001 of the CPLR

Orange County
Index Nos. 1892/07
3958/07
Motion Date: Jan. 21, 2008

- against -

COUNTY OF ORANGE, ORANGE COUNTY SEWER DISTRICT # 1, TOWN OF WOODBURY, TOWN OF CHESTER, TOWN OF MONROE, TOWN OF BLOOMING GROVE, VILLAGE OF CHESTER, (Moodna Defendants/Respondents) VILLAGE OF WOODBURY, and VILLAGE OF SOUTH BLOOMING GROVE (Non-Contract Defendants/Respondents),

Defendants/Respondents.

NICOLAI, J.

The following papers numbered 1 to 141 were read on this combined declaratory judgment action and CPLR Article 78 proceeding on plaintiffs'/petitioners' application pursuant to CPLR §6301 and §6311 for an order granting a preliminary

Attachment "B"

injunction and upon the defendants'/respondents' motions, pursuant to CPLR §3211(a) and §7804 for an order dismissing the complaint/petition.

Papers	Numbered
Respondents/Defendants County of Orange and Orange County Sewer District #1 Notice of Motion - Attorney Affirmation - Exhibits (OC Index No. 07/1892)	1-5
Respondents/Defendants County of Orange and Orange County Sewer District #1 Notice of Motion - Attorney Affirmation - Exhibits - Reply Memorandum of Law (OC Index No. 07/3958)	6-11
Respondents/Defendants County of Orange and Orange County Sewer District #1 Reply Memorandum of Law (OC Index Nos. 07/1892 and 07/3958)	12
Respondents/Defendants County of Orange and Orange County Sewer District #1 Notice of Motion - Attorney Affirmation - Exhibits - Affidavit of David Lindsey - Exhibits - Affidavit of Robert Jeroloman - Exhibits - Memorandum of Law - Reply Memorandum of Law (Previously Adjourned by the Court [Owen, J.]) (OC Index No. 07/1892)	13-43
Respondent/Defendant Town of Woodbury Notice of Motion - Attorney Affirmation - Reply Affirmation (OC Index No. 07/1892)	44-46
Respondent/Defendant Town of Woodbury Notice of Motion - Attorney Affirmation - Exhibits - Reply Affirmation (OC Index No. 07/3958)	47-60
Respondents/Defendants Town and Village of Chester Notice of Motion - Attorney Affirmation – Memorandum of Law - Reply Affirmation - Exhibit - Reply Memorandum of Law (OC Index No. 07/1892)	61-66
Respondents/Defendants Town and Village of Chester Notice of Motion - Attorney Affirmation – Memorandum of Law - Reply Affirmation - Exhibit - Reply Memorandum of Law (OC Index No. 07/3958)	67-72
Respondent/Defendant Town of Blooming Grove - Notice of Motion - Attorney Affirmation - Bohan Affidavit Memorandum of Law (OC Index No. 07/1892)	73-76

Upon the foregoing papers, it is ordered that this application is resolved as follows.

Facts and Procedural History

Plaintiff/petitioner, Village of Kiryas Joel (Kiryas Joel) is one among a number of municipalities within the defendant/respondent County of Orange and defendant/respondent County of Orange Sewer District #1 (OCSD) (collectively, the County). The individual plaintiffs/petitioners are Village Trustees and other officials of Kiryas Joel who have brought this action/proceeding individually and in their official capacity. They have brought a combined declaratory judgment action and CPLR Article

78 proceeding seeking to preliminarily or permanently enjoin the County from entering into a contract for sale or otherwise undertaking any further action towards the sale of wastewater treatment capacity from the County's Harriman Wastewater Treatment Plant to communities outside the OCSD. Petitioners contend that the County's efforts to allocate some of the OCSD's newly-acquired wastewater treatment capacity to non-OCSD municipalities violate County Law, General Municipal Law and SEQRA.

The OCSD has one water treatment facility, the Harriman Wastewater Treatment Plant, which serves Kiryas Joel, the Village of Harriman, the Village of Monroe and part of the Town of Monroe, all of which are located within the OCSD. The portion of the Town of Monroe that is outside the OCSD as well as the Town and Village of Woodbury, the Town of Blooming Grove, the Village of South Blooming Grove and the Town and Village of Chester, which have been joined in this action/proceeding as necessary parties, pursuant to the order of the Court dated July 2, 2007 (Owen, J.), are the municipalities outside the OCSD to which the County seeks to allocate some of the OCSD's wastewater treatment capacity. These out-of-OCSD municipalities that have been joined to this action/petition may be grouped into two categories for the purposes of this determination. The first group of these defendant/respondent municipalities are denominated as "the Moodna communities" and are comprised of the Town and Village of Chester, the Town of Monroe, the Town of Woodbury and the Town of Blooming Grove. They are so named because all are members of the Moodna Basin Joint Regional Sewerage Board and, along with the OCSD, were signatories to the 1978 Moodna Basin Inter-municipal Agreement (and its 1988 amendment), by which the OCSD agreed to enhance its wastewater treatment capacity by 2 million gallons per day and to allocate both the

expense and the expanded wastewater treatment capacity to these Moodna communities. The Villages of Woodbury and South Blooming Grove are the "non-contracting municipalities" which form the second group of out-of-OCSD municipal defendants/respondents. They are parties to this petition/action but were not signatories to the 1978 Inter-municipal Agreement (nor to the subsequent amendment).[1] Collectively, these two groups of defendants/respondents are referred to in this decision as the out-of-OCSD municipalities.

Pursuant to the terms of a Consent Decree and Order of the United States District Court for the Southern District of New York, the County was given until August 1, 2006 to expand the wastewater treatment capacity at the Harriman Wastewater Treatment Plant from 4.0 million gallons per day (the capacity which resulted from the expansion that followed the 1988 amendment to the 1978 Inter-municipal Agreement) to 6.0 million gallons per day. In 2001, Environmental Impact Statements were prepared as was the Statement of Findings. Notably, the Statement of Findings, as adopted by the Orange County Legislature, expressly states that the "purpose of the proposed enhancements [was] to meet the wastewater treatment needs of [the OCSD] and the Moodna Basin Southern Region Joint Sewerage Board sewer service areas." The Orange County

[1]It is useful to note that the non-contracting municipality of the Village of South Blooming Grove, which was incorporated on July 14, 2006, is located wholly within the Town of South Blooming Grove which is itself a Moodna Community. Moreover, the Village of South Blooming Grove is part of the Town of Blooming Grove's sewer district which discharges to the Harriman Sewer Treatment Plant pursuant to the inter-municipal agreement of 1978. As for the Village of Woodbury, it is subject to an inter-municipal agreement of its own with the Town of Woodbury. According to this agreement, the Village of Woodbury has undertaken the responsibilities, rights and obligations of the sewer district of the Town of Woodbury (a Moodna community) as of January 1, 2008.

Legislature then petitioned the New York State Comptroller for its consent to make the expenditures necessary to complete the expansion project. During the petition process, it R-0100 was the County's position that the then-current capacity of the Harriman Wastewater Treatment Plant was inadequate to serve the needs of the communities within the OCSD, that the Moodna Communities were allocated 2.0 million gallons of wastewater treatment per day and that it was the County's intention to provide the non-contracting municipalities a limited (maximum 189,000 gallons per day) portion of the expanded capacity of the Harriman Wastewater Treatment Plant. The County's petition also reflected that more than 1.0 million gallons per day of the yet-to-be-expanded wastewater treatment capacity was already accounted for with various pending in-OCSD development projects and existing in-OCSD properties which had not been able to receive OCSD services because of a lack of capacity. Following the approval of its petition and the adoption of the resolution by the Orange County Legislature, the Harriman Wastewater Treatment Plant was improved and expanded such that it now has a wastewater treatment capacity of 6.0 million gallons per day.

In 2006, after the OCSD completed the expansion project, the County initiated a plan to allocate more than 1.0 million gallons per day of the OCSD's newly-enhanced wastewater treatment capacity, and the associated costs, to the out-of-OCSD municipalities. Petitioners objected on the grounds that the County had not quantified the excess treatment capacity, had not determined that there was adequate capacity within the OCSD and had not conducted a SEQRA review. By letter dated January 8, 2007, the County informed the out-of-OCSD municipalities that the Harriman Wastewater Treatment Plant was on line and fully operational at a 6.0 million gallon per day capacity.

The letter stated that its purpose was to "inquire as to your interest in a) purchasing capacity; and b) consolidation of your sewer district into the [OCSD]." The letter specifically referenced the provision in the 1978 Inter-Municipal Agreement for allocating expanded wastewater treatment capacity and the associated costs among the participating Moodna communities.

Petitioners commenced the first proceeding/action (Orange County Index Number 07/1892) on March 1, 2007 by Order to Show Cause and Verified Petition and Complaint. Thereafter, the County moved to dismiss this petition/action inter alia, on the ground that petitioners had failed to join the Moodna communities as necessary parties pursuant to CPLR 1003 and 3211(a)(10). While that application was pending before the Court, petitioners commenced a second petition/action (Orange County Index Number 07/3958) on May 7, 2007 by Summons and Verified Petition and Complaint. This second proceeding/action is virtually identical to the first save that in addition to the County, it names the Moodna communities and the non-contracting municipalities as defendants/respondents. By Decision and Order of this Court dated July 2, 2007 (Owen, J.), the Moodna communities and the non-contracting municipalities were joined in the first action as necessary parties. The substantive aspects of the motion to dismiss were deferred until joinder was fully affected. On July 17, 2007, petitioners filed a Supplemental Summons and Notice of Petition and Amended Verified Petition and Complaint seeking injunctive relief, a judgment under CPLR Article 78 and a declaratory judgment against the County, the Moodna communities and the non-contracting municipalities. The County's original motion to dismiss has been deemed submitted as to petitioners amended petition/action. In addition to the County's motion to dismiss, similar

motions have been filed by the Village of South Blooming Grove, the Town of South Blooming Grove, the Town and Village of Chester, the Town of Woodbury and the Village of Woodbury. The Town of Monroe, which initially made a motion to dismiss, has withdrawn that application and submitted its Verified Answer. This matter has been transferred to the Environmental Claims Part and is resolved as follows.

Analysis

With respect to any Article 78 proceeding, it must be determined, as a preliminary matter, whether petitioners' proceeding is timely. An Article 78 proceeding "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner" (CPLR 217 [1]). *Save the Pine Bush v. City of Albany, 70 NY2d 193, 203 (1987).* Petitioners contend that the County's letter of January 8, 2007 to the out-of-OCSD municipalities offering the sale of wastewater treatment capacity derived from the completed expansion project built and financed by the OCSD property owners was the trigger to their right to commence this action.

Petitioners argue that the January 8, 2007 letter constituted "the County's first formal offer to convey to the Moodna Communities more than 1.0 million gallons per day (mgd) of the new capacity built and financed by the District property owners". Respondents contend that the Statement of Findings, adopted by the Orange County Legislature on August 10, 2001 for the first expansion of the wastewater treatment facility, which states that the "purpose of the proposed enhancements [was] to meet the wastewater treatment needs of [the OCSD] and the Moodna Basin Southern Region Joint Sewerage Board sewer service areas" was the event that should have triggered the injury and therefore the commencement of the Statute of Limitations.

Inasmuch as the apportionment of future wastewater treatment capacity between the County and the Moodna communities was undertaken in the 1978 Inter-municipal Agreement (IMA), a reasonable argument cannot be made that any concrete injury resulting from wastewater capacity allocation would have been incurred some thirty (30) years ago. Respondents cannot claim that the Statute of Limitations commenced in 1978 with the execution of the IMA. The County's contention that the January 8, 2007 letter merely effectuated a long standing provision in the IMA is not plausible.

The terms of the 1978 IMA may have anticipated the necessity of an elastic mechanism for constructing additional wastewater treatment capacity to serve OCSD municipalities as well as the Moodna communities, however, the County cannot act contrary to the applicable laws. The County must comply with the SEQRA process and a determination of excess must be made prior to the sale or offer to sell any excess wastewater treatment capacity. Although the County's January 8, 2007 letter seeks to allocate the additional wastewater treatment capacity in a manner that is consistent with the historical operation of the Harriman Sewer Treatment Facility and with the 1978 IMA, the County has failed to make the required determination for its actions under SEQRA, General Municipal Law §119 and County Law §253-a(1) and §266. The County never made a determination that the existing sewage treatment capacity at the Harriman Plant was adequate to meet the needs of the in-OCSD municipalities.

Extending the use of 1.0 mgd of wastewater treatment to out-of-OCSD municipalities requires a review of the circumstances surrounding the capacity. Circumstances have undoubtably changed for the OCSD members with regard to many instances including population and housing markets. At a bare minimum, the County

should have undertaken to prepare a Supplemental Environmental Impact Statement (SEIS) to evaluate relevant environmental concerns to the OCSD members and their proposed increased needs. *See Doremus v. Town of Oyster Bay, 274 AD2d 390, 393 (2d Dep't. 2000).* The County has made a determination to sell capacity at its wastewater treatment facility without consulting the members of the OCSD to see what, if any, projects are proposed that will add to the in-OCSD municipalities wastewater. There has been a history where in-OCSD municipalities have had moratoriums on construction due to a lack of capacity at the Harriman Wastewater Treatment Facility. The petitioners herein were subject to such limits on their development and therefore, the County must take all necessary steps to insure that the in-OCSD municipalities are adequately allocated with regard to their wastewater treatment needs and that is precisely an issue to be studied pursuant to the SEQRA process.

In addition to the environmental concerns that have to be addressed by the County, the sale of wastewater treatment capacity requires a determination from the County that the capacity to be sold is actually beyond the needs of the members of the sewer district. County Law § § 253-a and 266 and General Municipal Law § 119 require a determination be made by the OCSD that the treatment capacity actually be "in excess of its own needs". The County has an obligation to assess the treatment capacity needs of the district members and to make a reasoned determination of excess capacity on the record.

There is no indication in the record that the County undertook such a study or even discussed future needs of in-OCSD municipalities. Members of the OCSD financed and constructed the expanded capacity at the Harriman Plant for its own use and gain.

without an inquiry into proposed development plans for in-OCSD properties and a determination of that the existing sewage treatment capacity at the Harriman Plant is adequate for the needs of the OCSD members, the County cannot offer 1.0 mgd of wastewater treatment to out-of-OCSD municipalities.

Accordingly, the defendants'/respondents' motions to dismiss are DENIED and the defendants/respondents are hereby enjoined from selling any wastewater treatment capacity to any entity outside the OCSD without first complying with the provisions of SEQRA, the County Law and the General Municipal Law.

Dated: White Plains, New York
August 7, 2008

FRANCIS A. NICOLAI, J.S.C.

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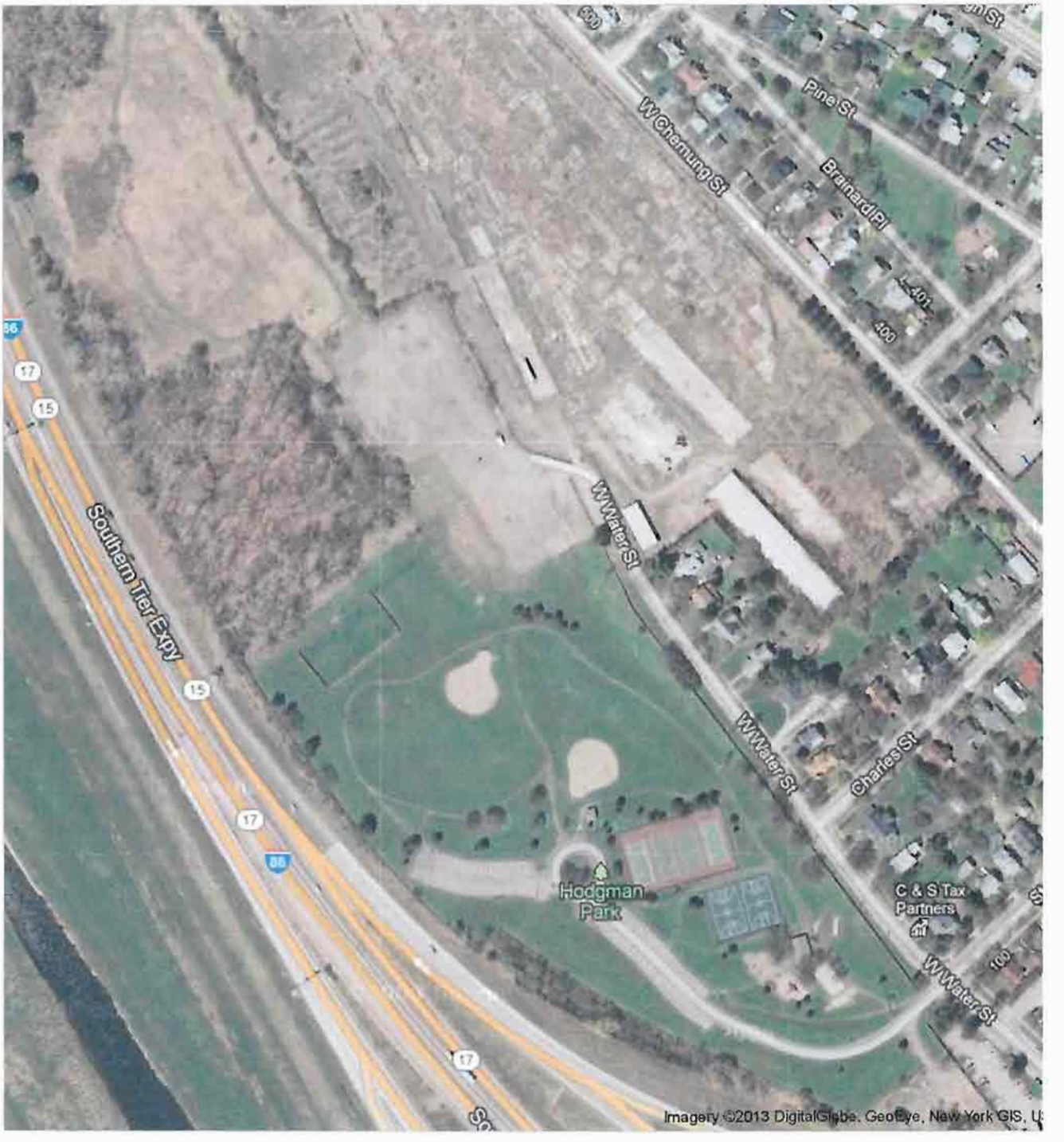
Descriptions	January	February	March	April	May	June	July	August	September	October	November	December	Monthly Ave	Descriptions	Ave Daily	PeakDaily
2000														2000		
Well # 2								228,000					228,000	Well # 2		
Well # 3 & 4	17,653,000	16,535,000	16,302,000	17,179,000	17,254,000	17,925,000	19,645,000	18,926,000	16,149,000	16,789,000	15,581,000	15,920,000	17,321,500	Well # 3 & 4	570,099	994,000
2001														2001		
Well # 2	432,000							228,000				84,000	248,000	Well # 2		
Well # 3 & 4	17,653,000	16,535,000	16,302,000	17,179,000	17,254,000	17,925,000	19,645,000	18,926,000	16,149,000	16,789,000	15,581,000	15,920,000	17,321,500	Well # 3 & 4	571,512	1,673,000
2002														2002		
Well # 2														Well # 2		
Well # 3 & 4	11,873,000	10,466,000	11,681,000	11,787,000	12,824,000		14,107,000	13,779,000	10,165,000	9,904,000	9,405,000	9,394,000	11,398,818	Well # 3 & 4	343,526	647,000
2003														2003		
Well # 2					803,000	276,000							539,500	Well # 2		
Well # 3 & 4	9,982,000	11,764,000	14,819,000	15,096,000	15,660,000	11,981,000	11,504,000	10,156,000	8,780,000	9,193,000	8,459,000	8,938,000	11,361,000	Well # 3 & 4	376,468	779,000
2004														2004		
Well # 2	270,000												270,000	Well # 2		
Well # 3 & 4	16,579,000	17,189,000	13,927,000	11,387,000	10,716,000	11,651,000	16,895,000	15,725,000	14,461,000	13,597,000	11,065,000	10,604,000	13,566,333	Well # 3 & 4	446,756	761,000
2005														2005		
Well # 2														Well # 2		
Well # 3 & 4	11,175,000	9,468,000	11,574,000	10,447,000	11,721,000	11,917,000	12,276,000	12,840,000	11,242,000	11,458,000	11,134,000	11,811,000	11,421,750	Well # 3 & 4	375,510	919,000
2006														2006		
Well # 2														Well # 2		
Well # 3 & 4	11,672,000	10,368,000	11,881,000	11,331,000	12,524,000	12,341,000	14,577,000	14,692,000	13,975,000	14,667,000	14,375,000	14,998,000	13,115,083	Well # 3 & 4	431,181	921,000
2007														2007		
Well # 2														Well # 2		
Well # 3 & 4	15,963,000	15,627,000	15,927,000	11,053,000	9,602,000	9,269,000	9,534,000	9,169,000	9,465,000	9,482,000	8,820,000	9,150,000	11,071,750	Well # 3 & 4	364,003	758,000
2008														2008		
Well # 2														Well # 2		
Well # 3 & 4	9,420,000	8,947,000	9,457,000	9,929,000	9,812,000	9,785,000	10,144,000	9,669,000	8,324,000	8,778,000	8,002,000	9,622,000	9,324,083	Well # 3 & 4	306,545	432,000
2009														2009		
Well # 2														Well # 2		
Well # 3 & 4	11,257,000	10,036,000	9,464,000	9,279,000	10,511,000	10,036,000	9,493,000	8,894,000	8,020,000	8,422,000	6,974,000	7,097,000	9,123,583	Well # 3 & 4	299,953	471,000
2010														2010		
Well # 2														Well # 2		
Well # 3 & 4	8,273,800	7,317,300	8,034,000	7,918,123	8,007,309	7,636,264	7,785,582	7,841,129	8,176,690	10,745,498	9,472,644	10,175,858	8,448,683	Well # 3 & 4	277,765	619,182
2011														201		
Well # 2														Well # 2		
Well # 3 & 4	11,094,157	9,917,100	8,355,696	7,451,288	8,346,168	8,868,300	8,983,759	7,865,078	6,319,998	6,191,365	6,066,985	5,641,360	7,925,105	Well # 3 & 4	260,551	
2012														201		
Well # 2														Well # 2		
Well # 3 & 4	6,441,495	6,169,128	6,638,103	6,167,484	6,739,696									Well # 3 & 4	93,581	

Well # 3 & 4 run together

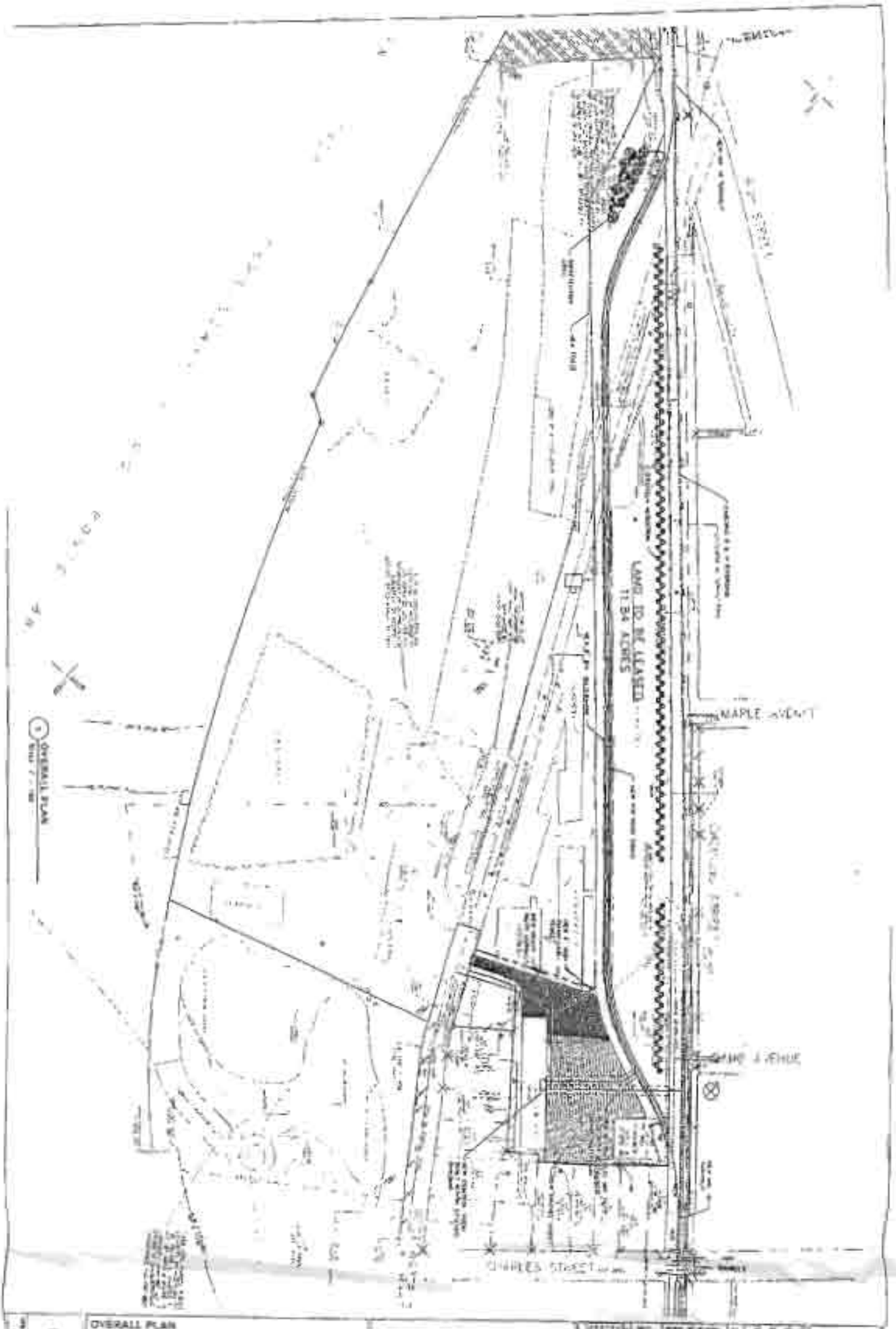
Attachment "C"

To see all the details that are visible on the screen, use the "Print" link next to the map.

Google



Attachment "D"



C1.1

OVERALL PLAN

PAINTED POST TRANSLOADING SITE
FOR WELLSBORO-CORNING RAILROAD

VILLAGE OF PAINTED POST

HUNT

Index No. Index No. 2012-0810 Justice Assigned: Hon. Kenneth R. Fisher, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

In the Matter of the Application of

SIERRA CLUB, PEOPLE FOR A HEALTHY ENVIRONMENT, INC., COALITION TO PROTECT NEW YORK; JEAN WOSINSKI; THERESA and MICHAEL FINNERAN; and VIRGINIA HAUFF,

Petitioners,

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

-against-

THE VILLAGE OF PAINTED POST; PAINTED POST DEVELOPMENT, LLC; SHELL WESTERN EXPLORATION AND PRODUCTION, LP; WELLSBORO AND CORNING RAILROAD, LLC;

Respondents.

NOTICE OF MOTION and
MEMORANDUM OF LAW IN SUPPORT OF PETITION and
OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

Signature Rule (Rule 130-1.1-a)

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