

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF STEUBEN

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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,

Index No. 2012-0810

Petitioners,

For a Judgment Pursuant to Article 78  
Of the Civil Practice Law and Rules

-against-

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

Respondents.

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MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS  
THE VILLAGE OF PAINTED POST, PAINTED POST  
DEVELOPMENT, LLC AND SWEPI, LP'S MOTION TO  
DISMISS AND/OR FOR SUMMARY JUDGMENT, AND IN  
OPPOSITION TO PETITIONERS' ARTICLE 78 PETITION

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	iv
PRELIMINARY STATEMENT .....	1
STATEMENT OF FACTS .....	3
A.    The Lease Between The Village And The Railroad For The Construction And Operation of The Transloading Facility And The Negative Declaration Issued By The Village.....	3
B.    The Sale Of Surplus Municipal Water By The Village .....	6
1.    The New York State Village Law.....	6
2.    The Susquehanna River Basin Commission’s Approval Of The Withdrawal of Water From The Village’s Municipal Water Supply .....	7
3.    The Surplus Water Supply Agreement Between The Village And SWEPI.....	8
C.    Completion Of The Transloading Facility And Commencement Of The Present Action.....	9
ARGUMENT.....	10
POINT I    PETITIONERS HAVE NO RIGHT TO MAINTAIN THIS PROCEEDING BECAUSE THEY DO NOT HAVE STANDING OR A PRIVATE RIGHT OF ACTION UNDER THE NEW YORK STATE ENVIRONMENTAL CONSERVATION LAW OR THE NATIONAL ENVIRONMENTAL POLICY ACT, AND THIS PROCEEDING IS BARRED BY THE DOCTRINE OF LACHES AND IS MOOT .....	10
A.    The First Cause of Action Should Be Dismissed Because Petitioners Lack Standing to Challenge the Village’s SEQRA Review .....	10

B.	The Third Case of Action Must Be Dismissed .....	14
1.	There is No Private Right. Of Action To Enforce ECL Article 15 Or The Regulations Promulgated Thereunder .....	14
2.	The Village Was Not Required To Obtain A Water Transport Permit .....	17
C.	The Third Cause of Action Should Be Dismissed .....	17
1.	The Third Cause of Action Fails to State A Claim Because The National Environmental Policy Act Does Not Apply.....	17
2.	No Private Right of Action Exists Under NEPA; And If Petitioners Sought To Enforce It Through The APA They Lack Standing To Do So.....	21
D.	Because Construction of The Facility Is Complete, This Proceeding Is Moot.....	22
POINT II	THE VILLAGE COMPLIED WITH THE REQUIREMENTS OF THE NEW YORK STATE ENVIRONMENTAL QUALITY REVIEW ACT .....	25
A.	The Village Completed A Comprehensive Environmental Review As Required And Issued A Negative Declaration In Compliance With SEQRA .....	25
1.	SRBC Is Charged With Authorizing Withdrawals Of Water From The Susquehanna River Basin.....	25
2.	The Construction, Development and Operation of the Transloading Facility By The Railroad Is Not Subject to SEQRA Because SEQRA Is Preempted By ICCTA .....	27
3.	The Necessary Permits Were Obtained And Extensive Studies Were Conducted To Ensure That No Significant Negative Impacts Would Occur.....	31
B.	The Village Properly Determined That Entering Into The Surplus Agreement Was A Type II Action Under SEQRA.....	35
C.	There Was No Segmentation of the Lease and the Surplus Agreement.....	36

POINT III PETITIONERS HAVE FAILED TO INCLUDE  
INDISPENSABLE PARTIES AND THUS MAY NOT OBTAIN  
RELIEF IN THEIR ABSENCE.....37

CONCLUSION..... 39

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Akpan v Koch</i> , 75 NY2d 561 [1990].....	32
<i>Alaimo v Town of Fort Ann</i> , 63 AD3d 1481 [3d Dept 2009] .....	15
<i>Aldrich v Pattison</i> , 107 AD2d 258 [2d Dept 1985] .....	31
<i>Atl. States Legal Found. v Babbitt</i> , 140 F Supp 2d 185 [NDNY 2001].....	21, 22
<i>Borough of Morrisville v Delaware Riv. Bas. Com'n</i> , 399 F Supp 469 [ED Pa 1975] .....	26, 27
<i>Borough of Riverdale Petition</i> , 1999 WL 715272 [STB 1999].....	19
<i>Brian Hoxie's Painting Co. v Cato-Meridian Cent. Sch. Dist.</i> , 76 NY2d 207 [1990] .....	16
<i>Buffalo S. R.R., Inc. v Vill. of Croton-on-Hudson</i> , 434 F Supp 2d 241 [SDNY 2006] .....	29
<i>Chu v N.Y.S. Urban Dev. Corp.</i> , 13 Misc 3d 1229(A), 2006 NY Slip Op 52055(U) (Sup Ct, New York County 2006).....	26
<i>City of N.Y. v Long Island Airports Limousine Serv. Corp.</i> , 48 NY2d 469 [1979] .....	38
<i>Coastal Distribution, LLC v The Town of Babylon</i> , 216 Fed Appx 97 [2d Cir 2007] .....	29, 30
<i>Concerned Taxpayers of Stony Point v Town of Stony Point</i> , 28 AD3d 657 [2d Dept 2006] .....	11
<i>Coon v Willet Dairy LP</i> , 2007 WL 2071746 [NDNY 2007] .....	16
<i>Flynn v Burlington Northern Santa Fe Corp.</i> , 98 F Supp 2d 1186 [ED Wash 2000] .....	19, 20
<i>Friends of the Aquifer, City of Hauser, ID, Hauser Lake Water District</i> , 2001 STB LEXIS 670 [STB 2001] .....	19, 20
<i>Green Mountain R.R. Corp. v Vermont</i> , 404 F3d 638 [2d Cir 2005] .....	28, 29

<i>Hamlet at Willow Creek Dev. Co., LLC v Ne. Land Dev. Corp.</i> , 64 AD3d 85 [2d Dept 2009] .....	36
<i>Hinsdale Cent. Sch. v Agway Petroleum Corp.</i> , 73 AD2d 1043 [4th Dept 1980] .....	26
<i>Jackson v N.Y. State Urban Dev. Corp.</i> , 67 NY2d 400 [1986] .....	31
<i>Kalden Constr. Co. v Hanson Aggregates New York, Inc.</i> , 634 F Supp 2d 319 [WDNY 2009] .....	16
<i>Karst Emtl. Educ. &amp; Prot., Inc. v U.S. Emtl. Prot. Agency.</i> , 403 F Supp 2d 74 [DCC 2005] .....	21
<i>Knowles v U.S. Coast Guard</i> , 924 F Supp 593 [SDNY 1996] .....	21
<i>Komyathy v Bd. of Educ. of Wappinger Cent. Sch. Dist. No. 1</i> , 75 Misc 2d 859 [Sup Ct, Dutchess County 1973] .....	25
<i>Matter of 27th St. Block Ass'n v Dormitory Auth. of the State of N.Y.</i> , 302 AD2d 155 [1st Dept 2002] .....	37
<i>Matter of Caprari v. Town of Colesville</i> , 199 AD2d 705 [3d Dept 1993] .....	24
<i>Matter of Citineighbors Coal. of Historic Carnegie Hall v N.Y. City Landmarks Pres. Comm'n</i> , 2 NY3d 727 [2004] .....	24
<i>Matter of Citizens Accord, Inc. v Town Bd. of the Town of Rochester</i> , 192 AD2d 985 [2d Dept 1993], <i>lv denied</i> , 82 NY2d 656 [1993] .....	31
<i>Matter of Danyla v Town Bd. of the Town of Florida</i> , 259 AD2d 850 [3d Dept 1999] .....	32
<i>Matter of Dental Soc'y of the State of N.Y. v Carey</i> , 61 NY2d 330 [1984] .....	11
<i>Matter of Develop. Don't Destroy (Brooklyn) v Urban Dev. Corp.</i> , 59 AD3d 312 [1st Dept 2009] .....	30
<i>Matter of Dreikausen v. Zoning Bd. of Appeals of City of Long Beach</i> , 98 NY2d 165 [2002] .....	23
<i>Matter of Dunk v City of Watertown</i> , 11 AD3d 1024, 784 NYS2d 753 [4th Dept 2004] .....	36

<i>Matter of Filmways Commc'ns of Syracuse, Inc. v Douglas,</i> 106 AD2d 185 [4th Dept 1985] .....	30
<i>Matter of Long Island Pine Barrens Soc'y, Inc. v</i> <i>Planning Bd. of the Town of Brookhaven,</i> 213 AD2d 484 [2d Dept 1995].....	10
<i>Matter of Marine Midland Nat'l Bank of Se. N.Y. v.</i> <i>Village of Liberty,</i> 58 Misc 2d 362 [Sup Ct, Sullivan County 1968].....	6
<i>Matter of Metro. Transp. Auth.,</i> 32 AD3d 943 [2d Dept 2006].....	28, 29
<i>Matter of Otsego 2000, Inc. v Planning Bd. of the Town of Otsego,</i> 171 AD2d 258 [3d Dept 1991] .....	11, 12
<i>Matter of Rizzo v Verizon CCC LLC,</i> 31 Misc 3d 1206[A], 2011 NY Slip Op 50505[U] [Sup Ct, Niagara County 2011].....	14
<i>Matter of Save the Pine Bush, Inc. v Common Council of the City of Albany,</i> 13 NY3d 297 [2009] .....	11, 12, 13, 14
<i>Matter of Save the Pine Bush, Inc. v N.Y. State Dep't of Envtl.</i> <i>Conservation,</i> 289 AD2d 636 [3d Dept 2001].....	22
<i>Matter of Save the Pine Bush, Inc. v Planning Bd. of</i> <i>the Town of Clifton Park,</i> 50 AD3d 1296 [3d Dept 2008].....	11
<i>Matter of Wallkill Cemetery Ass'n v Town of Wallkill Planning Bd.,</i> 73 AD3d 1189 [2d Dept 2010] .....	24
<i>Montecalvo v City of Utica,</i> 170 Misc 2d 107 [Sup Ct, Oneida County 1996].....	13
<i>N.Y. State Ass'n of Nurse Anesthetists v Novello,</i> 2 NY3d 207 [2004] .....	11
<i>Natural Res. Def. Council v U.S. Army Corp. of Eng'rs,</i> 457 F Supp 2d 198 [SDNY 2006] .....	21
<i>Nicholson v ICC,</i> 711 F2d 364 [DC Cir 1983] .....	19
<i>Noslen Corp. v Ontario Cnty. Bd. of Supervisors,</i> 295 AD2d 924 [4th Dept 2002] .....	36
<i>Nowak v Madura,</i> 304 AD2d 733 [2d Dept 2003].....	15

<i>Riverdale Envtl. Action Comm. Along the Hudson-R.E.A.C.H. v Metro. Transp. Auth.</i> , 638 F Supp 99 [SDNY 1986].....	22, 24
<i>Sheehy v Big Flats Cmty. Day, Inc.</i> , 73 NY2d 629 [1989].....	16
<i>Sierra Club v Alexander</i> , 484 F Supp 455 [NDNY 1980].....	22, 24
<i>Sierra Club v Morton</i> , 405 US 727 [1972].....	22
<i>Soc’y of the Plastics Indus., Inc. v Cnty. of Suffolk</i> , 77 NY2d 761 [1991].....	10, 11, 12
<i>Soo Line R.R. Co. v City of Minneapolis</i> , 38 F Supp 2d 1096 [D Minn 1998].....	28
<i>Sw. Williamson Cnty. Cmty. Ass’n, Inc. v Slater</i> , 173 F3d 1033 [6th Cir 1999].....	21
<i>The S. Bronx Coal. for Clean Air, Inc. v Conroy</i> , 20 F Supp 2d 565 [SDNY 1998].....	18
<i>Town of Brookhaven v Marian Chun Enters., Inc.</i> , 71 NY2d 953 [1988].....	38
<i>Town of Wilson v Town of Newfane</i> , 181 AD2d 1045 [4th Dept 1992].....	15
<i>United Transp. Union v Surface Transp. Bd.</i> , 183 F3d 606 [7th Cir 1999].....	19
<i>Weiss v Inc. Vill. of Sag Harbor</i> , 762 F Supp 2d 560 [EDNY 2011].....	18, 21
 <u>Statutes</u>	
5 USC § 706(2)(d).....	21
42 USC § 4321.....	2, 17
42 USC § 4332[2][C].....	18, 20
49 USC § 10101.....	6, 27
49 USC § 10102[9].....	28, 29
49 USC § 10501.....	19, 20, 28, 29
49 USC § 10901.....	19, 20

49 USC § 10906.....	20
49 USC § 20101.....	28
CPLR § 1001.....	37
CPLR § 3211(a)(3) .....	1
CPLR § 3211(a)(7) .....	1
CPLR § 3212.....	1
CPLR § 6313(a).....	24
ECL § 15-0507.....	15
ECL § 15-1501(7).....	17
ECL § 15-1505.....	2, 15
ECL § 21-1301.....	7, 17, 26, 27
ECL § 21-1307[2].....	17
ECL § 21-1321.....	27
ECL § 71-1103.....	15, 16
ECL § 71-1113.....	15, 16
ECL § 71-1127.....	15, 16
ECL § 8-0105.....	26, 30
ECL § 8-0105[3].....	26
ECL § 8-0109[2].....	26, 30
Village Law § 11-1120 .....	6
<u>Regulations</u>	
18 CFR § 806.22.....	27
18 CFR § 806.22[f].....	7

40 CFR § 1500.....	18
40 CFR § 1508.18[a].....	20
6 NYCRR § 617.5[c][25].....	35
6 NYCRR § 617.2[ag] .....	36, 37
6 NYCRR § 617.2[b] .....	30
6 NYCRR § 617.5[a] .....	35
6 NYCRR § 617.5(c) .....	35
6 NYCRR § 617.5(c)(25).....	9, 35
6 NYCRR § 617.7[b] .....	34
6 NYCRR § 617.12[a][2].....	34
CFR § 1508.18.....	18
CFR § 1508.18[a], [b][4] .....	18

Other Authorities

1965 Ops. Atty. Gen. 62 .....	6
1969 Ops. Atty. Gen. 93 .....	6

## PRELIMINARY STATEMENT

Respondents, the Village of Painted Post, Painted Post Development, LLC (collectively, the “Village”) and SWEPI, LP (“SWEPI”), submit this Memorandum of Law in support of their motion to dismiss pursuant to CPLR § 3211(a)(3) and (a)(7), for summary judgment pursuant to CPLR § 3212, and in opposition to the Article 78 Petition filed by Petitioners, Sierra Club, People for a Healthy Environment, Inc., Coalition to Protect New York (collectively, the “Organizational Petitioners”), John Marvin, Therese Finneran, Michael Finneran, Virginia Hauff and Jean Wosinski (collectively, the “Individual Petitioners”) (the Organizational Petitioners and Individual Petitioners are sometimes collectively referred to as “Petitioners”).

By their Verified Petition, Petitioners challenge the Village’s approvals concerning the sale of surplus water to SWEPI pursuant to a surplus water sale agreement between the Village and SWEPI (the “Surplus Agreement”). Petitioners also challenge a lease agreement (the “Lease”) between the Village and Respondent Wellsboro & Corning Railroad (“the Railroad”) for the construction and operation of a transloading facility that will load such surplus water from the Village’s water distribution system to railroad tanker cars for distribution by rail (the “Transloading Facility”).

In sum, the actions challenged by Petitioners include the sale of surplus municipal water that will be completed by the automatic loading of such water into train cars, using an existing industrial site served by an existing railroad line. The sale of the surplus water will result in the operation of but a single train per day into the Village of Painted Post, whereby empty rail cars will be brought to the Transloading Facility, loaded with water, and full cars taken to Pennsylvania. As discussed in more detail below, each required authorization or permit needed to operate the Transloading Facility and to sell the surplus water was obtained by the Village

from state and local agencies as required prior to construction of the Transloading Facility. Construction of the Transloading Facility was substantially complete prior to the first return date set for this Article 78 proceeding.

The Petition asserts three causes of action alleging that the Village or the Railroad: (1) violated the New York State Environmental Quality Review Act (“SEQRA”) by conducting an insufficient review of the Lease and/or other actors; (2) violated ECL § 15-1505(1) by failing to obtain a Water Transport Permit from the New York State Department of Environmental Conservation (“NYSDEC”); and (3) failed to obtain federal permits from the Federal Railroad Administration (“FRA”) and/or the Surface Transportation Board (the “Transportation Board”), and/or failed to comply with or otherwise violated the National Environmental Policy Act of 1969, 42 USC § 4321, *et seq.* (“NEPA”). For the reasons set forth below, Petitioners’ claims are meritless and should be dismissed in all respects because the record shows that required authorizations and permits were obtained, and any reviews required were appropriately undertaken, and Petitioners’ claims are barred because they have no standing, have no private right of action, and have failed to join necessary parties.

The pertinent facts are fully set forth in the Administrative Record (“R.”) which is provided with the joint Verified Answer filed by Respondents the Village and SWEPI (the “Verified Answer”), as well as the Affidavit of the Mayor of the Village, Roswell Crozier, Jr., together with the exhibits attached thereto, sworn to August 1, 2012 (the “Crozier Aff.”), the Affidavit of Larry E. Smith, Superintendent of Public Works for the Village, together with the exhibits attached thereto, sworn to August 1, 2012 (the “Smith Aff.”), the Affidavit of Robert Drew, P.E., together with attached exhibits thereto, sworn to on August 1, 2012 (the “Drew Aff.”), the Affidavit of William Myles, Vice President of Operations for the Railroad, sworn to

on August 2, 2012 (the “Myles Aff.”), the affidavit of Village Clerk, Anne Names, sworn to on August 1, 2012 (the “Names Aff.”), and the Affidavit of geologist William Gough, P.E., sworn to on August 1, 2012 (the “Gough Aff.”). For the Court’s convenience, a summary of those facts is provided here.

### STATEMENT OF FACTS

A. The Lease Between The Village And The Railroad For The Construction And Operation of The Transloading Facility And The Negative Declaration Issued By The Village.

The actions challenged by Petitioners include the installation of equipment and improvements by the Railroad, a federally regulated railroad, on an approximately 11.8 acre portion of a 50-acre industrially-zoned property (previously referred to as the Transloading Facility) at 350 West Water Street in the Village of Painted Post, Steuben County, New York (the “Property”) (the portion of the Property on which the Transloading Facility has been constructed and will be operated, shall be referred to as the “Transloading Facility Site”). The Transloading Facility will operate by automatically loading surplus water from the Village’s water distribution system to railroad tanker cars for distribution by rail to Pennsylvania. The Transloading Facility was constructed (and will be operated) to facilitate the Village’s sale of surplus water to SWEPI.

More specifically, the equipment and improvements at the Transloading Facility Site are limited to: (1) certain piping to allow water already available at the Transloading Facility Site from the Village distribution system to be loaded automatically onto rail cars; (2) electrical and computer equipment to meter the water; (3) landscaping and stormwater features; and (4) fencing and other security features. The Transloading Facility and the sale of surplus water allows a

small municipality with a shrinking tax base to generate income so as to allow it to provide needed municipal services and to hold the line on tax increases (Crozier Aff. ¶ 4; Smith Aff. ¶¶ 17-18).

As detailed in the Affidavits submitted herewith, including those of Robert Drew, Larry E. Smith and Mayor Roswell Crozier, the Property was the location of a former foundry plant facility, operated by Ingersoll-Rand, with industrial operations ranging back to 1848 (the “Ingersoll-Rand Facility Site”). The Ingersoll-Rand Facility Site operated on the Property (which encompasses the Transloading Facility Site) under Ingersoll-Rand’s ownership until approximately December 1986, when Dresser Industries merged with Ingersoll-Rand to become Dresser-Rand Company. During its active use, the Ingersoll-Rand Facility Site contained more than 280,000 square feet of industrial buildings and produced iron castings used in air compressors, and other products.

After Ingersoll-Rand idled the foundry in late 1985, an environmental investigation and cleanup was conducted under the inactive hazardous waste site program by NYSDEC. The Ingersoll-Rand Facility Site thereafter was the subject of extensive studies and remedial measures, which included, but were not limited to, the removal of soils, demolition and removal of contaminated walls and flooring, and the removal of other contaminated material (*see* Drew Aff. ¶¶ 14-17; R. at Ex. 9 [Report of Hunt Architects, Engineers and Land Surveyors dated November 11, 2011 (“the Hunt Report”)]). As a result of the remedial measures undertaken under NYSDEC’s auspices at the Ingersoll-Rand Facility Site, it was removed from the inactive hazardous waste list when NYSDEC determined that remediation of it had been completed to NYSDEC’s satisfaction. In particular, NYSDEC found that “[t]he contamination identified at the [disposal] site has been properly remediated.” In so de-listing the Ingersoll-Rand Facility

Site, the NYSDEC also found that “[n]o environmental problems associated with the disposal of hazardous waste remain at this site.”<sup>1</sup>

In 2004, in an attempt to revitalize the industrial/commercial base of the Village, the Village condemned the idled 50-acre Property, which comprised the Ingersoll-Rand Facility (and now includes the 11.8-acre Site on which the Transloading Facility is located), and acquired it through Painted Post Development, LLC pursuant to a Bargain and Sale Deed recorded in the Steuben County Clerk’s Office (*see* R. at Ex. 10 [Bargain and Sale Deed]). The Village of Painted Post is the sole member of Painted Post Development, LLC. To facilitate construction of the Transloading Facility by the Railroad, the Village and the Railroad entered into the Lease, made as of March 1, 2012, for the portion of the Property on which the Transloading Facility is located (*see* R. at Ex. 3 [the Lease]).

In connection with the Lease to the Railroad, the Village adopted a resolution on February 23, 2012, classifying the Lease as a Type I action pursuant to SEQRA, and thereafter issued a negative declaration based on its determination that the Lease would not have any significant adverse impact (the “Negative Declaration”) (*see* R. at Ex 1 [the Negative Declaration]). Importantly, and as more fully set forth in the Negative Declaration and below, the action associated with the leasing of the Transloading Facility Site by the Village to the Railroad was reviewed pursuant to SEQRA, but any activities conducted on the Transloading Facility Site associated with the Lease, including the construction, development, and operation of the Transloading Facility by the Railroad was not subject to compliance with New York State law requirements, including those under SEQRA, because those requirements were preempted

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<sup>1</sup> A copy of the NYSDEC’s determination removing the Ingersoll-Rand Facility Site from the inactive hazardous waste site list and determining that it was remediated to DEC’s satisfaction is available at the DEC web site (*see* <http://www.dec.ny.gov/cfm/external/derexternal/index.cfm?pageid=3> (site code 851012) (accessed on August 3, 2012).

by, among other laws, the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”) (*see* 49 USC § 10101, *et seq.*).

B. The Sale Of Surplus Municipal Water By The Village.

1. The New York State Village Law.

Preliminarily, the Village’s sale of water is governed by Article 11 of the New York State Village Law, which expressly permits a village to sell surplus water to private corporations beyond its borders, provided that the sale does not render the Village’s water supply insufficient to Village inhabitants. In particular, Village Law § 11-1120 provides as follows:

The board of water commissioners may sell to a corporation, individual or water district outside the village the right to make connections with the mains or reservoirs of such village for the purpose of drawing water therefrom and fix the prices and conditions therefor. . . . The board shall not sell nor permit the use of water under this section if thereby the supply for the village or its inhabitants will be insufficient.

There are numerous opinions from applicable authority, including the New York State Attorney General and the New York State Comptroller, which confirm the Village’s right to sell surplus water and to terminate such contracts upon reasonable notice (*see, e.g.*, 1965 Ops. Atty. Gen. 62 [“A village may sell only surplus water to outside users and may terminate any contract to sell water to outside users when the village supply has diminished so that no surplus exists”]; 1969 Ops. Atty. Gen. 93). Furthermore, courts have long held that the provision authorizing a village to sell water to an outside user is permissive in nature, and it places no obligation on a village to supply water should it decide that it no longer has the capacity to do so (*see Matter of Marine Midland Nat’l Bank of Se. N.Y. v. Village of Liberty*, 58 Misc 2d 362, 363 [Sup Ct, Sullivan County 1968]).

2. The Susquehanna River Basin Commission's Approval Of The Withdrawal of Water From The Village's Municipal Water Supply.

The Village's municipal water system and the wells which supply it are located in the Susquehanna River Basin (*see* Smith Aff. ¶ 14; Drew Aff. ¶ 14). The water withdrawn from the basin is managed by the Susquehanna River Basin Commission ("SRBC"), a regional agency created by a federal-state compact between the federal government, Pennsylvania, New York, and Maryland known as the Susquehanna River Basin Compact (the "Compact") (*see* ECL § 21-1301, *et seq.*). The purpose of the Compact was to create a single entity responsible for the use, management, development, control and conservation of the waters of the Susquehanna River (*see* ECL § 21-1301 [Preamble § 1]). Pursuant to the Compact, SRBC has the sole authority to approve "projects affecting the water resources of the basin" (*see* ECL § 21-1301[3.10]), as well as "[m]ake and enforce rules and regulations for the effectuation, application, and enforcement of [the Compact]" (*see* ECL § 21-1301[15.2(1)]). Those regulations include the "[a]pproval by rule for consumptive use related to natural gas well development" (18 CFR § 806.22[f]), which governed the approvals obtained by the Village in this case (*see* Smith Aff.; Gough Aff; R. at Ex. 12).

On or about December, 2010, the Village, as the permit holder, and Triana Energy, LLC, as the project sponsor, applied to SRBC for permission to withdraw 500,000 gallons of water per day (gpd) from the Village's municipal water system (*see* Smith Aff.). SRBC approved the Village's application to withdraw 500,000 gpd of surplus water for sale to Triana Energy, LLC on January 3, 2011,<sup>2</sup> over sixteen months before Petitioners commenced this proceeding

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<sup>2</sup> Subsequently, SRBC then approved the transfer of the approval originally issued for Triana Energy, LLC to SWEPI.

(see R. at Ex. 12). In April, 2011, SRBC similarly approved the Village's application to withdraw an additional 500,000 gpd for sale to SWEPI (*id.*). Thus, as of April, 2011, the Village currently has authorization to withdraw surplus water in the amount of 1,000,000 gpd beyond the needs of the current water uses within the Village's municipal boundaries based on SRBC's approval. As detailed in the affidavit of Larry Smith, the Village currently has permitted capacity to draw more than four 4,000,000 gallons per day from the Village water supply wells. Given the amount of usage by current Village water users, the withdrawal of 1,000,000 gpd will not effect in any manner the Village's ability to supply water to its inhabitants (*see* Smith Aff.; Gough Aff.).

3. The Surplus Water Supply Agreement Between The Village And SWEPI.

As a result of the approvals obtained by the Village from SRBC to withdraw up to 1,000,000 gpd from its municipal water system, the Village and SWEPI entered into the Surplus Agreement made as of March 1, 2012. The Surplus Agreement recites that:

The Village currently has capacity in its system and within its [SRBC] committed capacity to supply surplus water in the amount of 1,000,000 gallons per day [gpd] beyond the needs of the current water users within its municipal boundaries (the "Seller System Surplus Capacity") and the Village has the right to sell such surplus water . . .

(R. at Ex. 4). To that end, the Surplus Agreement expressly provides that SWEPI is entitled solely to the sale of surplus water (as defined in the Surplus Agreement and elsewhere), and such sale is subject to specific conditions, including that:

This agreement shall be subject at all times to the availability of the Seller System Surplus Capacity. In addition, the Seller shall not be required to supply [SWEPI] with such water in the event of a drought restriction, emergency, unforeseen operation problem requiring the suspension of surplus water sales, a refusal of Seller's water supplier to renew Seller's Supply Agreement, restriction on the sale of surplus water by SRBC or other applicable

governmental agency or in the event of “force majeure” beyond the control of the parties . . .

(R. at Ex. 4).

In connection with the approval of the Surplus Agreement, the Village adopted a resolution on February 23, 2012, whereby the Village considered the proposed sale of surplus water pursuant to the Surplus Agreement (R. at Ex. 2). Based on the Surplus Agreement’s terms and applicable law, the Village determined that entering into the contract to sell surplus water was a Type II action under SEQRA (*see* 6 NYCRR 617.5[c][25]) (*see* Crozier Aff.). Because Type II actions under SEQRA have been deemed by the legislature to have no significant environmental impact, the Village was not obligated to undertake any additional review.

C. Completion Of The Transloading Facility And Commencement Of The Present Action.

After the required resolutions were adopted by the Village on February 23, 2012, and after the receipt of necessary permits and approvals as required, the Railroad began construction of the Transloading Facility on or about the end of April, 2012 (*see* Drew Aff.). As set forth more fully in the Affidavit of Robert Drew, the construction schedule in place on or before May 30, 2012 called for the completion of the Transloading Facility by the beginning of the fourth week of July, 2012 or by July 23, 2012 (*see* Drew Aff. ¶ 3, Ex. A [copy of the May 20, 2012 schedule setting July 23, 2012 as the date of substantial completion]). In fact, construction of the Transloading Facility was substantially complete prior to the initial return date for this proceeding.

On June 25, 2012, on the last day on which the Petitioners could file before the statute of limitations to challenge the Village’s resolutions would have expired (in fact, the statute of limitations expired on Saturday but under New York law, Petitioners were allowed to file on

Monday), Petitioners commenced this proceeding seeking equitable relief to prevent Respondents from proceeding with activities “intended to culminate in the construction” of the Transloading Facility. Construction of the Transloading Facility, however, is now complete and was completed on a schedule in place prior to the receipt of the lawsuit by Respondents.

## ARGUMENT

### POINT I

PETITIONERS HAVE NO RIGHT TO MAINTAIN THIS PROCEEDING BECAUSE THEY DO NOT HAVE STANDING OR A PRIVATE RIGHT OF ACTION UNDER THE NEW YORK STATE ENVIRONMENTAL CONSERVATION LAW OR THE NATIONAL ENVIRONMENTAL POLICY ACT, AND THIS PROCEEDING IS BARRED BY THE DOCTRINE OF LACHES AND IS MOOT.

A. The First Cause of Action Should Be Dismissed Because Petitioners Lack Standing to Challenge the Village’s SEQRA Review.

Petitioners lack standing to challenge the Village’s SEQRA review. The law is clear — to demonstrate individual standing to challenge compliance with SEQRA, a petitioner must show:

(1) that they will suffer an environmental injury in fact, *i.e.*, an environmental injury that is in some way different from that of the public at large, and (2) that the alleged injury falls within the zone of interest sought to be promoted or protected by the statute under which the governmental action was taken.

*(Matter of Long Island Pine Barrens Soc’y, Inc. v Planning Bd. of the Town of Brookhaven*, 213 AD2d 484, 485 [2d Dept 1995] [internal quotations omitted]; *Soc’y of the Plastics Indus., Inc. v Cnty. of Suffolk*, 77 NY2d 761, 773 [1991] [stating that to establish standing a party must show that the “in-fact injury of which it complains (its aggrievement, or the adverse effect upon it) falls within the zone of interests, or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted”] [internal quotations omitted]). These standing principles apply to both individuals and associations of persons (*see id.* at 775).

In particular, courts have consistently held that in land use matters, the petitioner for standing purposes “must show that it would suffer direct harm, injury that is in some way different from that of the public at large” (*Matter of Save the Pine Bush, Inc. v Common Council of the City of Albany*, 13 NY3d 297, 304-306 [2009] [holding that petitioners who regularly visited the subject property “to study and enjoy the unique habitat” had standing to challenge a governmental entity’s SEQRA review]; *see also Matter of Otsego 2000, Inc. v Planning Bd. of the Town of Otsego*, 171 AD2d 258, 260 [3d Dept 1991] [stating that “generalized claims of harm no different in kind or degree from the public at large . . . are insufficient for standing purposes”]). A “private citizen who does not show any special rights or interests in the matter in controversy, other than those common to all taxpayers and citizens, has no standing to sue” (*Concerned Taxpayers of Stony Point v Town of Stony Point*, 28 AD3d 657, 658 [2d Dept 2006]).

Moreover, the Court of Appeals has held on numerous occasions that the standing of an organization to maintain an action on behalf of its members “requires that some or all of the members themselves have standing to sue, for standing which does not otherwise exist cannot be supplied by the mere multiplication of potential plaintiffs” (*Matter of Dental Soc’y of the State of N.Y. v Carey*, 61 NY2d 330, 333 [1984]; *see also N.Y. State Ass’n of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004] [finding that “[t]o establish standing, an organizational plaintiff . . . must show that at least one of its members would have standing to sue . . .”]; *Soc’y of Plastics Indus., Inc.*, 77 NY2d at 775 [finding that “standing cannot be achieved merely by multiplying the persons a group purports to represent”]; *accord Matter of Save the Pine Bush, Inc. v Planning Bd. of the Town of Clifton Park*, 50 AD3d 1296, 1297 [3d Dept 2008]).

Thus, where associations dedicated to environmental preservation seek to assert claims in such matters, “in-fact injury within the zone of interest of environmental statutes” can only be established by “proof that agency action will directly harm association members in their use and enjoyment of the affected natural resources” (*Soc’y of Plastics Indus., Inc.*, 77 NY2d at 776). Moreover, “plaintiffs may be put to their proof on the issue of injury, and if they cannot prove injury their cases will fail” (*Common Council of the City of Albany*, 13 NY3d at 306). This requires a demonstration that a plaintiff’s use of a resource “is more than that of the general public” (*id.*; *see also Soc’y of Plastics Indus., Inc.*, 77 NY2d at 774).

The Organizational Petitioners have alleged nothing — literally nothing — demonstrating that they have standing to challenge the Village’s SEQRA review. The Organizational Petitioners allege that their members “will be adversely affected by the actions complained of in this petition,” namely, alleged increases in rail traffic, noise and air contamination and/or alleged contamination of a supply of drinking water (*see* Pet. ¶¶ 2-4). Petitioners, however, have provided no information whatsoever as to how these alleged impacts would affect the members of the Organizational Petitioners. In other words, these alleged impacts are not specific to the members of the Organizational Petitioners, but rather are nothing more than generalized allegations of environmental injury that are no different than that of any other member of the general public, which is insufficient to confer standing (*see Common Council of the City of Albany*, 13 NY3d at 304; *Otsego 2000*, 171 AD2d at 260). Indeed, a cursory review of the Petition reveals that *none* of the Individual Petitioners are actually members of the Organizational Petitioners. Accordingly, the Organizational Petitioners have utterly failed to establish standing in this case.

Nor do the Individual Petitioners have standing. Petitioners “must specifically allege facts which demonstrate some ‘special injury’ beyond their bare identities as voters, taxpayers, rate payers, property owners, residents or citizens concerned about or involved in public affairs” (*see Montecalvo v City of Utica*, 170 Misc 2d 107, 116 [Sup Ct, Oneida County 1996]), which the Individual Petitioners have failed to do. For example, the Petition contains identical allegations that the Individual Petitioners are “concerned about adverse effects upon the quality and quantity of their drinking water resulting from the project” (*see* Pet. ¶¶ 5-8).<sup>3</sup> The Individual Petitioners’ “concerns” are unsupported by the record and are nothing more than generalized allegations that could be asserted by any member of the public at large. This is insufficient to confer standing (*see Common Council of the City of Albany*, 13 NY3d at 304).

Similarly, the Petition alleges that the Individual Petitioners will be adversely affected by rail traffic, and increased noise and air contamination, as well as raising concerns about road blockages caused by increased rail traffic and new traffic patterns (*see* Pet. ¶¶ 5-7). Petitioners “perfunctory allegations of harm” cannot support standing in this case (*see Common Council of the City of Albany*, 13 NY3d at 306). Again, not only could any member of the public allege that they are concerned about increased traffic or potential blockages, but the allegations in the Petition are utterly without merit because the operation of the Transloading Facility will result in the grand total of exactly one additional train per day into the Village. The point bears repeating — the Transloading Facility will result in *one* additional train per day into the Village.

As the Court of Appeals has made clear, a party must:

[N]ot only allege, but if the issue is disputed must prove, that their injury is real and different from the injury most members of the public face. Standing requirements are not mere pleading requirements but rather an indispensable part of the plaintiff’s case

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<sup>3</sup> In fact, one of the Petitioners — Jean Wosinski (the only Petitioner who executed a verification) — does not even live in the Village of Painted Post.

and therefore each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof.

(*Common Council of the City of Albany*, 13 NY3d at 306 [internal quotations omitted]).

In sum, the Individual Petitioners have failed to plead any special injuries beyond those that affect all residents of the Village of Painted Post, or for that matter all residents of Steuben County or the Susquehanna River Basin. Thus, the individual Petitioners in this case have “no more *real* interest in this matter than any other member of the public” (*Matter of Rizzo v Verizon CCC LLC*, 31 Misc 3d 1206[A], 2011 NY Slip Op 50505[U] [Sup Ct, Niagara County 2011] [emphasis in original]). Because their overgeneralized allegations do not establish special injury, the Individual Petitioners lack standing to bring this proceeding under SEQRA.

B. The Third Cause of Action Must Be Dismissed.

1. There is No Private Right Of Action To Enforce ECL Article 15 Or The Regulations Promulgated Thereunder.

The statute and regulations upon which Petitioners premise their second cause of action — Section 15-1505(1) of the Water Supply Law<sup>4</sup> — do not provide for any private enforcement action. Petitioners request an injunction until such time as the provisions of the Water Supply Law are complied with, but nowhere in their Petition do Petitioners cite to any provision of the ECL, any regulation, or any caselaw, authorizing a private cause of action to seek enforcement of ECL Article 15 — because they cannot do so.

The New York Legislature’s remedial scheme for persons who violate Article 15 and its implementing regulations is comprehensive and abundantly clear. That scheme spells out the civil remedies that may be imposed against a violator (fines), and provides that injunctive relief — the very remedy sought by Petitioners here — is available to compel compliance with Article 15, but that any such relief “*shall be recoverable in an action instituted in the name of the*

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<sup>4</sup> Section 15-1505(1) is found in ECL Article 15.

*department by the Attorney General upon the request of the department*” (ECL § 71-1127[2] [emphasis added]; *see also* ECL § 71-1103 [providing that “[t]he department may bring actions, suits or proceedings as in its judgment may be necessary and proper . . . to prevent the violation by any person or public corporation of any of the provisions thereof”]).

Indeed, the ECL expressly provides that enforcement of ECL § 15-1505 — the section relied on by Petitioners to support their second cause of action — vests exclusively with NYSDEC:

*The department shall enforce the provisions of section[ ] 15-1505 . . . of this chapter and the Supreme Court by injunction may upon application of the department prevent any unauthorized diversion or transportation.*

(ECL § 71-1113[1] [emphasis added]). Thus, the Legislature did *not* authorize private suits for alleged violations of Article 15 or its related regulations.

In light of the specific statutory enforcement mechanism of ECL §§ 71-1103, 1113 and 1127, there is simply no private right of action available to Petitioners to bring this Article 78 proceeding against Respondents requesting an injunction under ECL § 15-1505(1) (*see Town of Wilson v Town of Newfane*, 181 AD2d 1045, 1046 [4th Dept 1992] [dismissing a claim predicated on violation of ECL provisions because it “specifically authorizes the Attorney-General to enforce any rule or regulation promulgated pursuant to ECL article 27” and therefore “does not confer a private cause of action”] [internal quotations omitted]; *Alaimo v Town of Fort Ann*, 63 AD3d 1481, 1484 [3d Dept 2009] [holding that ECL § 15-0507 does not confer a private cause of action because only the Attorney General is “specifically authorized to bring an action to recover . . . penalties”]; *Nowak v Madura*, 304 AD2d 733, 733 [2d Dept 2003] [dismissing a claim alleging violation of ECL Article 15 because “[the] statute does not confer a private cause of action”]; *Kalden Constr. Co. v Hanson Aggregates New York, Inc.*, 634 F Supp 2d 319, 322

[WDNY 2009] [finding that “the weight of authority in New York is that the ECL does not provide a private right of action”]; *Coon v Willet Dairy LP*, 2007 WL 2071746, at \*7 [NDNY 2007] [stating that courts have held that the ECL does not confer a private cause of action].

Nor can Petitioners show that there is an implied right to a citizens suit to enforce Article 15 and the regulations promulgated thereunder. A private citizen may enforce a public law “only if a legislative intent to create such a right of action is ‘fairly implied’ in the statutory provisions” (see *Brian Hoxie’s Painting Co. v Cato-Meridian Cent. Sch. Dist.*, 76 NY2d 207, 211 [1990], citing *Sheehy v Big Flats Cmty. Day, Inc.*, 73 NY2d 629, 633 [1989]). “[T]he most critical inquiry in determining whether to recognize a private cause of action where one is not expressly provided is whether such action would be consistent with the over-all legislative scheme” (*Brian Hoxie’s Painting*, 76 NY2d at 212). Importantly, the Court of Appeals has cautioned that, “regardless of its consistency with the basic legislative goal, a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature” (*Sheehy*, 73 NY2d at 634-35).

Petitioners do not (and cannot) claim that ECL Article 15 and the applicable regulations were adopted for their particular benefit. These provisions were clearly adopted for the benefit of the public in general. More importantly, a private cause of action is entirely inconsistent with the enforcement scheme specified by the Legislature with regard to Article 15 and related regulations, which provide that claims for both civil fines and injunctive relief “shall” be brought by the Attorney General and/or the NYSDEC (see ECL §§ 71-1103, 1113 and 1127). On its face, the statutory scheme does not contemplate that private citizens or citizen groups have any right to enforce ECL Article 15.

2. The Village Was Not Required To Obtain A Water Transport Permit.

Even if Petitioners' had a private right of action under the ECL (which they do not), the Village was not required to obtain a permit from NYSDEC pursuant to Section 15-1505(1) because the withdrawal of surplus water is expressly exempt from such a requirement for withdrawals authorized by the Compact. The ECL is clear — Section 15-1505, the statutory provision upon which Petitioners base their claim, “shall not apply to any diversion or furnishing of water authorized or made pursuant to the compact” (*see* ECL § 21-1307[2]). To that end, ECL § 15-1501(7) similarly provides:

The following water withdrawals are exempt from the permit requirements established by this section:

(b) withdrawals that have received an approval from a compact basin commission which administers a program governing water withdrawals . . . .

As discussed above, the Village's water system is located in the Susquehanna River Basin, and the Village received approval for the withdrawal from SRBC pursuant to the Compact. Thus, based on the clear provisions of the ECL referenced above, the ECL does not apply in any fashion to the withdrawals in this case, because they were approved by SRBC and Article 15 specifically excepts such approvals by SRBC. As a result, Petitioners' second cause of action must be dismissed.

C. The Third Cause of Action Should Be Dismissed

1. The Third Cause of Action Fails to State A Claim Because The National Environmental Policy Act Does Not Apply.

The National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. § 4321, *et seq.*, requires federal agencies involved in “major Federal actions significantly affecting the quality of the human environment” to prepare detailed environmental impact statements (“EIS”) that discuss the environmental impact of such actions and the alternatives that may exist (*see*

42 U.S.C. § 4332[2][C]; *Weiss v Inc. Vill. of Sag Harbor*, 762 F Supp 2d 560, 579 [EDNY 2011] [stating that NEPA applies only to federal agencies undertaking “major federal action”]; *The S. Bronx Coal. for Clean Air, Inc. v Conroy*, 20 F Supp 2d 565, 570 [SDNY 1998] [stating that NEPA provides that all federal agencies upon proposing a “major federal action” that will “significantly affect the quality of the human environment” prepare an EIS]).

The regulations promulgated by the Council on Environmental Quality, 40 C.F.R. § 1500, *et seq.*, that implement the directives and purpose of NEPA and provide direction for an agency determination of whether to prepare an environmental impact statement are clear and provide that NEPA applies to “major federal actions” including “actions with effects that may be major and which are potentially subject to Federal control and responsibility” (*see* 40 CFR § 1508.18). These actions include “projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies,” as well as projects “approved by permit or other regulatory decision” (*id.* at § 1508.18[a], [b][4]).

The sole basis for Petitioners third cause of action is that the Negative Declaration states that ICCTA preempts the application of local and state laws to the construction and operation of the Transloading Facility, and that “on information and belief, none of the Respondents have requested any permit from [the Transportation Board] or the [FRA] even though permits are required for the installation of rail spurs and the construction and operation of rail loading facilities” (*see* Pet. ¶ 138-139). Petitioners allegation based “on information and belief” is patently insufficient to sustain their claim that federal permits were required (and, therefore, insufficient to show any NEPA review was necessary). Petitioners in this case have not identified any permit Respondents were required to obtain from FRA or the Transportation Board. The reason is obvious: no such permit of any kind was required (*see* Myles Aff. ¶¶ 7-8).

The Transportation Board has regulatory authority over rail line construction pursuant to 49 USC §10901, and as part of its review it may, depending on the nature of the action, conduct an environmental review pursuant to NEPA. However, the courts and the Transportation Board have consistently held that no approval is required from the Transportation Board for the construction of ancillary facilities, such as the Transloading Facility, where the facility is used to assist the railroad (*see Flynn v Burlington Northern Santa Fe Corp.*, 98 F Supp 2d 1186, 1190 [ED Wash 2000] [holding that “[a]ncillary facilities also not regulated by the [Transportation Board]; *Borough of Riverdale Petition*, 1999 WL 715272 [STB 1999] [stating that railroads do not require authority from the Transportation Board to “build or expand facilities such as truck transfer facilities, weigh stations, or similar facilities ancillary to their railroad operations, or to upgrade an existing line . . .”]; *see also Friends of the Aquifer, City of Hauser, ID, Hauser Lake Water District*, 2001 STB LEXIS 670, \*13 [STB 2001], *citing Nicholson v ICC*, 711 F2d 364, 368-370 [DC Cir 1983]).

To that end, ICCTA’s preemption of state and local laws pursuant to 49 USC § 10501<sup>5</sup> does not mean that Respondents were required to request a permit from the Transportation Board, nor did they undertake any action that would trigger NEPA review (*see* Pet. ¶¶ 138-139). Petitioners’ arguments confuse the *authority* of the Transportation Board to approve certain projects with the exclusive *jurisdiction* of the Transportation Board (*see United Transp. Union v Surface Transp. Bd.*, 183 F3d 606, 612 [7th Cir 1999]). For example, in language directly applicable to the present case, the Surface Transportation Board has held:

Where no license is required, there is no environmental review by the [Transportation] Board. . . . But the absence of environmental

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<sup>5</sup> ICCTA’s preemption provision provides that “[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” As discussed in Point II.A.2, *infra*, the construction, development and operation of the facility by the Railroad is not subject to SEQRA because SEQRA is preempted by ICCTA.

review by the [Transportation] Board does not mean that a project is open to environmental review at the state or local level. . . . Should the [Transportation Board] determine that [the facility] is an ancillary facility on a spur or side track, the [Transportation Board] may decide that while it has jurisdiction, it does not have regulatory authority over the facility.

(*Friends of the Aquifer*, 2001 STB LEXIS 670, \*14 [internal citations and quotations omitted]; see also *Flynn*, 98 F Supp 2d at 1189-1190). “In other words, the [Transportation] Board may not have regulatory authority under 49 U.S.C. 10901 or 49 U.S.C. 10906 but state and local activity is preempted under 49 U.S.C. 10501(b) because of the [Transportation] Board’s exclusive jurisdiction over rail transportation” *Friends of the Aquifer*, 2001 STB LEXIS 670, \*14).

Thus, applied to this case, while ICCTA preempts state and local laws, including SEQRA, the Transportation Board nevertheless does not have regulatory authority over the construction and operation of the Transloading Facility because it is an ancillary facility utilizing existing track that assists the Railroad in providing operations (*see Myles Aff.*). In other words, no federal permit was required from the Transportation Board for the Transloading Facility, and the Village was not required to undertake a review pursuant to SEQRA because of the Transportation Board’s exclusive jurisdiction over rail transportation. In sum, no action by the Railroad, nor the other Respondents, requires any federal permit for construction or operation of the Transloading Facility.<sup>6</sup> Because no “major federal actions” are involved in this case, NEPA does not apply (*see* 42 U.S.C. § 4332[2][C]).

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<sup>6</sup> Moreover, there was no federal funding associated with the construction of the Transloading Facility (*see Crozier Aff.* ¶ 4), such as to require a review under NEPA (*see* 40 CFR § 1508.18[a]).

2. No Private Right of Action Exists Under NEPA; And If Petitioners Sought To Enforce It Through The APA They Lack Standing To Do So.

NEPA does not provide a private right of action for violations of its provisions (*Weiss* 762 F Supp 2d at 579 n. 11 [stating that “there is no private right of action under . . . NEPA”]). Rather, a party seeking to challenge a NEPA determination must institute its challenge under the Administrative Procedure Act (“APA”), 5 USC § 706(2)(d) (*see id.*; *see also Natural Res. Def. Council v U.S. Army Corp. of Eng’rs*, 457 F Supp 2d 198, 220 [SDNY 2006] [finding that the APA “governs judicial review of an agency’s compliance with NEPA”]; *Sw. Williamson Cnty. Cmty. Ass’n, Inc. v Slater*, 173 F3d 1033, 1036 [6th Cir 1999] [stating that although “NEPA does not allow a private right of action, a person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action, can bring suit under the APA”] [internal quotations omitted]; *Karst Envtl. Educ. & Prot., Inc. v U.S. Envtl. Prot. Agency.*, 403 F Supp 2d 74, 79 [DCC 2005] [stating that “[j]udicial review of agency actions under NEPA is governed by the APA”]). Petitioners in this case, however, have not plead any claim pursuant to the APA. Thus, the third cause of action should be dismissed.

In any event, even if Petitioners had sufficiently pled a cause of action pursuant to the APA, Petitioners lack standing for many of the same reasons as set forth in Point I.A above. Petitioners, in order to seek relief under the APA for a NEPA violation, must show that their injury is within the “zone of interests” against which NEPA was designed to protect (*Atl. States Legal Found. v Babbitt*, 140 F Supp 2d 185, 189 [NDNY 2001]; *see also Knowles v U.S. Coast Guard*, 924 F Supp 593, 599 [SDNY 1996]).

Moreover, because the Organizational Petitioners are private environmental organizations and have not been directly injured by the Village’s actions, Petitioners must provide evidence that one or more of their members are “directly affected [by a government action] apart from

their special interest in the subject” (*Atl. States Legal Found.*, 140 F Supp 2d at 190 [internal quotations omitted]; *see also Sierra Club v Morton*, 405 US 727, 740 [1972] [“The requirement that a party seeking review must allege facts showing that he is himself adversely affected . . . . serve[s] as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.”]). Thus, for the same reasons discussed above (*see Point I.A., supra*), Petitioners lack standing under NEPA and the APA.

D. Because Construction of The Facility Is Complete, This Proceeding Is Moot.

Petitioners are not entitled to the equitable relief they seek because of their delay in commencing this proceeding constitutes laches, and the matter is now moot. The law is well settled that “where neglect in promptly asserting a claim for relief causes prejudice to one’s adversary, such neglect operates as a bar to a remedy as is a basis for asserting the defense of laches” (*Matter of Save the Pine Bush, Inc. v N.Y. State Dep’t of Env’tl. Conservation*, 289 AD2d 636, 638 [3d Dept 2001] [internal quotations omitted]).

Similarly, under NEPA, unreasonable delay in commencing an action, resulting in prejudice to a respondent bars any claim under NEPA (*see Sierra Club v Alexander*, 484 F Supp 455, 472 [NDNY 1980]; *see also Riverdale Env’tl. Action Comm. Along the Hudson-R.E.A.C.H. v Metro. Transp. Auth.*, 638 F Supp 99, 102-03 [SDNY 1986] [stating that the Second Circuit test for laches is whether “plaintiff’s delay in bringing the suit has resulted in construction proceeding to a point where any significant environmental damage has already been done and whether, in the alternative, construction may have gone so far that for economic reasons it would be impracticable or impossible to alter much of the basic plan”] [internal quotations omitted]).

Here, the original approvals for withdrawal of water from the Village’s municipal water supply — which forms the basis of Petitioners’ challenges — were issued by SRBC in 2011,

nearly a year before the Village adopted its resolutions approving the Lease of the Site to the Railroad and the Village resolved to execute the Surplus Agreement with SWEPI, and over sixteen months before commencement of this proceeding. Yet, although the approvals now challenged by Petitioners were issued as early as January 2011, and construction began on the Transloading Facility in the spring of 2012 after the Village adopted the necessary resolutions and received approvals needed to initiate construction, Petitioners waited until the very last day before the statute of limitations would have barred their claims before commencing this proceeding. Indeed, as of the original return date of this proceeding, the Transloading Facility was substantially complete (*see* Drew Aff. ¶¶ 3-4, Ex. A).

In fact, Petitioners were (or should have been) fully aware of the construction schedule and the status of the Transloading Facility. For example, Petitioners' counsel appears to have been tracking the approvals obtained by the Village and the progress of the Transloading Facility for several years.<sup>7</sup> Further, Jean Wosinski allegedly "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" (*see* Pet. ¶ 8). Having decided to wait until the last possible moment to commence this proceeding, and until the construction of the Transloading Facility had been substantially completed, Respondents submit that laches applies.

The Court of Appeals has held that a chief factor in evaluating claims of mootness "has been a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation" (*see Matter of Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172-73 [2002]). Similarly, the federal courts in this Circuit have held that the primary question is not how much earlier Petitioners should have brought this proceeding, but whether

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<sup>7</sup> *See* <http://treichlerlawoffice.com/pp/index.html>.

issuing an injunction at this point would be in the public interest and serve the purposes of NEPA (see *Alexander*, 484 F Supp at 472; see also *Riverdale Envtl. Action Comm. Along the Hudson-R.E.A.C.H.*, 638 F Supp at 103).

Thus, courts have consistently dismissed claims where petitioners have failed to request injunctive relief before completion of construction (see *Matter of Citineighbors Coal. of Historic Carnegie Hall v N.Y. City Landmarks Pres. Comm'n*, 2 NY3d 727, 728 [2004] [dismissing proceeding as moot where petitioners “did not apply for a temporary restraining order or preliminary injunction to halt the highly visible construction work by then underway at the site”]; *Matter of Wallkill Cemetery Ass'n v Town of Wallkill Planning Bd.*, 73 AD3d 1189, 1190-91 [2d Dept 2010] [dismissing proceeding where asphalt plant was not only built, but also operational for two years because petitioners failed to move for a preliminary injunction to enjoin construction of the plant]; *Matter of Caprari v. Town of Colesville*, 199 AD2d 705, 706 [3d Dept 1993] [holding that the proceedings and action are barred by the doctrine of laches and rendered moot because of “plaintiffs’ failure to timely safeguard their interests by seeking an injunction, despite the obvious presence of ongoing construction on [owner’s] property”]).

Despite over sixteen months elapsing since the Village obtained approval for the withdrawal of water from SRBC, and construction beginning on the Facility in the spring, 2012, Petitioners simply watched the construction proceed rather than promptly seeking a temporary restraining order concerning the construction. Moreover, any argument that Petitioners could not have requested that the Court grant a temporary restraining order should be rejected. Although CPLR § 6313(a) generally provides that “[n]o temporary restraining order may be granted in an action . . . against a public officer, board or municipal corporation of the state to restrain the performance of statutory duties,” courts have granted injunctive relief against such officers or

entities when the circumstances warrant it (*see generally Komyathy v Bd. of Educ. of Wappinger Cent. Sch. Dist. No. 1*, 75 Misc 2d 859 [Sup Ct, Dutchess County 1973]). In any event, without regard to the general statutory prohibition to seek such relief against municipalities, Petitioners certainly could have sought a temporary restraining order against the Railroad or SWEPI. Needless to say, a restraining order was not warranted here, given the deficiency of Petitioners' claims, but without making an attempt to secure such relief, Petitioners should be barred from recovery. Accordingly, the Petition should be dismissed as moot.

## POINT II

### THE VILLAGE COMPLIED WITH THE REQUIREMENTS OF THE NEW YORK STATE ENVIRONMENTAL QUALITY REVIEW ACT.

- A. The Village Completed A Comprehensive Environmental Review As Required And Issued A Negative Declaration In Compliance With SEQRA.
  1. SRBC Is Charged With Authorizing Withdrawals Of Water From The Susquehanna River Basin.

The fatal flaw in Petitioners' entire case is their failure to recognize (or even reference in their Petition) that SRBC — not NYSDEC or the Village — is the entity charged with authorizing withdrawals of water from the aquifer at issue. In 2011, SRBC reviewed the sale of surplus water by the Village and, specifically, whether there was sufficient excess capacity associated with the aquifer to support the requested bulk sale. SRBC then determined, consistent with the Compact and its implementing regulations, that the withdrawal of water from the aquifers would not result in any impact to the basin and accordingly approved the withdrawal of up to one million gallons per day (*see Smith Aff.* ¶¶ 4-16; *Gough Aff.* ¶ 5-6).

The approval issued by SRBC in 2011 for the withdrawal of water has nothing to do with the Village's obligations to conduct a review under SEQRA of the potential adverse environmental impacts associated with the Lease for the construction and operation of the

Transloading Facility by the Railroad. SRBC — the agency responsible for reviewing the impacts associated with the withdrawal of water from the basin — already conducted its required review pursuant to its regulations and approved the withdrawal in 2011; the Village was not required to undertake a further review of the withdrawal pursuant to SEQRA in connection with its issuance of the Negative Declaration in 2012 (*see* Smith Aff.; R. at Ex. 12).

Moreover, SRBC is not required to undertake a review pursuant to SEQRA in connection with issuing its approvals for the withdrawal of water from the basin. SEQRA mandates that “[a]ll agencies” shall provide an environmental impact statement for “any action they propose or approve which may have a significant effect on the environment” (*see* ECL § 8-0109[2]; *see also* *Hinsdale Cent. Sch. v Agway Petroleum Corp.*, 73 AD2d 1043 [4th Dept 1980]). ECL § 8-0105 defines an “agency” as “any state or local agency” (*see* ECL § 8-0105[3]). SRBC, however, is neither a state nor a local agency (*see Borough of Morrisville v Delaware Riv. Bas. Com’n*, 399 F Supp 469 [ED Pa 1975]), but rather is a federal-interstate compact authority created pursuant to a compact between the federal government and several states (*see generally* ECL § 21-1301, *et seq.*).

Case law precedent has consistently held that entities similar to SRBC are not agencies and, therefore, are not subject to SEQRA or similar law. For example, in *Chu v N.Y.S. Urban Dev. Corp.*, 13 Misc 3d 1229(A), 2006 NY Slip Op 52055(U) (Sup Ct, New York County 2006), the Court held that the Port Authority — a bi-state commission created by the states of New York and New Jersey, and approved by Congress was a “public authority, not an administrative agency” and did not “consider itself an agency for SEQRA purposes” (*see id.*, *aff’d* 47 AD3d 542 [1st Dept 2008]). Similarly, in *Borough of Morrisville*, the court stated that the analogous Delaware River Basin Commission is “neither wholly a federal agency nor a state one. It is a

body on which both the federal government and each of the four states through whose territory the Delaware River runs are equally represented” (*Borough of Morrisville*, 399 F Supp 469 at 470).<sup>8</sup>

Because SEQRA does not apply to SRBC,<sup>9</sup> any approvals obtained by the Village must instead satisfy the specific requirements of SRBC’s regulations, which occurred in this case. Consequently, this Court’s review is limited to whether the Village complied with SEQRA in undertaking a review of the potential significant adverse environmental impacts associated with the lease of the Transloading Facility Site to the Railroad, as applicable in light of other applicable law, including federal law.

2. The Construction, Development and Operation of the Transloading Facility By The Railroad Is Not Subject to SEQRA Because SEQRA Is Preempted By ICCTA.

Not only are Petitioners barred from challenging SRBC’s approvals of the withdrawal of water from the aquifer at issue, but Petitioners’ remaining challenges under SEQRA should also be dismissed because the requirements under SEQRA and its implementing regulations are preempted by ICCTA, 49 USC § 10101, *et seq.*, the Federal Railway Safety Act of 1976, 49

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<sup>8</sup> To that end, the ECL also expressly provides that no provision of the ECL (which, includes Article 8 governing environmental quality review) or any other law of New York “which is inconsistent with the provisions of the compact shall be applicable to the Susquehanna river basin commission or to any matter governed by the compact” (ECL § 21-1321). The regulatory scheme under SEQRA is entirely inconsistent with the provisions of the Compact and the regulations, which have separate requirements governing the approval of withdrawals related to natural gas well development (*see* 18 CFR § 806.22).

<sup>9</sup> Even if SEQRA applied to SRBC (which it does not), Petitioners appear to be time-barred from challenging their approval of the withdrawal of water from the basin. The Compact provides that:

Any determination of the commission pursuant to this article or any article of the compact providing for judicial review shall be subject to such judicial review . . . provided that an action or proceeding . . . for such review is commenced *within 90 days from the effective date of the determination sought to be reviewed.*

(ECL § 21-1301[3.10(6)] [emphasis added]). Here, SRBC authorized the withdrawal of water from the basin by two separate approvals issued in January and April 2011. Petitioner, however, commenced this proceeding in June 2012, well beyond the 90-day limitations period. As a result, Petitioners’ claims that the impacts of projected water withdrawals were not properly considered (whether it be by SRBC or otherwise) are time-barred.

USC § 20101, *et seq.*, and other federal law and regulations associated with the operation of rail facilities (collectively referred to as “ICCTA Preemption”). ICCTA was enacted to “deregulate the railroad industry by significantly reducing state and local regulatory authority over railroads and granting the United States Surface Transportation Board . . . exclusive jurisdiction over most railroad matters” (*Matter of Metro. Transp. Auth.*, 32 AD3d 943, 945 [2d Dept 2006]; *citing Green Mountain R.R. Corp. v Vermont*, 404 F3d 638, 645 [2d Cir 2005]). Accordingly, ICCTA vests the Surface Transportation Board (the “Transportation Board”) with exclusive jurisdiction over “transportation by rail carriers” and “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities . . .” (49 USC § 10501[b]; *Green Mountain*, 404 F3d at 642).

Transportation is “expansively defined” to include: “a locomotive, car, vehicle, vessel, warehouse . . . yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail” (*id.*, *citing* 49 USC § 10102[9]). ICCTA has also been held to apply to transloading facilities because they are considered “integral to the railroad’s operation” (*Green Mountain*, 404 F3d at 644; *see also Soo Line R.R. Co. v City of Minneapolis*, 38 F Supp 2d 1096, 1101 [D Minn 1998] [holding that ICCTA preempts any state or local regulatory authority over “the construction, development, and operation of [a] proposed bulk transfer facility”]).

The Transloading Facility in this case satisfies the statutory definitions. As a service necessary to the eventual interstate rail movement, the Transloading Facility will operate by automatically loading surplus water from the Village’s water distribution system to railroad tanker cars for distribution by rail to Pennsylvania. There can be no reasonable dispute but that

this simple movement from the water distribution system to rail for interstate distribution is “transportation” within the meaning of ICCTA (see 49 USC §§ 10102[9], 10501[b]; *Green Mountain*, 404 F.3d at 642).

ICCTA further provides for the express preemption of laws attempting to interfere with rail operations:

Except as otherwise provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(49 USC § 10501[b]). Courts have held that “the plain language of Section 10501 reflects clear congressional intent to preempt state and local regulation of integral rail facilities” (*Matter of Metro. Transp. Auth.*, 32 AD3d at 945, citing *Green Mountain*, 404 F.3d at 645; see also *Buffalo S. R.R., Inc. v Vill. of Croton-on-Hudson*, 434 F Supp 2d 241, 248 [SDNY 2006]).

In *Green Mountain*, the Court of Appeals for the Second Circuit held that notwithstanding ICCTA’s express preemption provisions, state and local authorities retain police powers to enforce regulations that “protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions” (*Coastal Distribution, LLC v The Town of Babylon*, 216 Fed Appx 97, 100 [2d Cir 2007], quoting *Green Mountain*, 404 F3d at 643). Therefore, state and local regulations withstand ICCTA Preemption when they are ministerial in nature and assessed according to objective criteria, such as “[e]lectrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety” (*Green Mountain*, 404 F3d at 643). Importantly, however, state

and local authorities “cannot subject the construction of railroad facilities to pre-permitting processes where there are no clear construction standards and where the permit depends on the discretion of a local agency” (*Coastal Distribution, LLC*, 216 Fed Appx at 100).

Here, SEQRA is exactly the type of law the Second Circuit has held is preempted by ICCTA. As discussed above, SEQRA mandates that all agencies provide an environmental impact statement for any “action” (*see* ECL § 8-0109[2]), which is defined as, among other things:

[P]rojects or activities directly undertaken by any agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or *projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies.*

(ECL § 8-0105[4][i] [emphasis added]; *see also* 6 NYCRR § 617.2[b]). Thus, SEQRA is implicated only where the approval was made within a state or local agency’s discretion (*see Matter of Develop. Don’t Destroy (Brooklyn) v Urban Dev. Corp.*, 59 AD3d 312, 315 [1st Dept 2009]). Indeed, SEQRA only applies to actions which are discretionary, insofar as the statute expressly excludes from the definition of the word “action” official acts of a “ministerial nature, involving no exercise of discretion” (*see* ECL § 8-0105[5][ii]; *Matter of Filmways Commc’ns of Syracuse, Inc. v Douglas*, 106 AD2d 185, 186 [4th Dept 1985]).

As a result, Petitioners’ contention that the Village failed to consider the potential significant adverse impacts associated with the Lease for the construction and operation of the Transloading Facility is meritless because ICCTA preempts application of SEQRA under these circumstances. The Village was simply not required to consider the potential significant adverse environmental impacts associated with the construction and operation of the Transloading Facility pursuant to SEQRA, even though it determined it would, as appropriate, assess impacts

and determined that said construction and operation would not result in any potentially significant adverse impact on the environment (*see* Point II.A.3, *infra*).

In fact, taking into account that: (1) SRBC had exclusive jurisdiction to review and approve the withdrawal of water from the aquifers; and (2) ICCTA preempts local and state laws, as well as approvals associated with the construction and operation of the Transloading Facility, the only approvals necessary were from NYSDEC and the New York State Department of Health (“NYSDOH”) associated with stormwater controls and construction at the Transloading Facility Site, and the extension of certain service connections and piping on the Transloading Facility Site (*see* Drew Aff.). It cannot be disputed that prior to construction those approvals were obtained by the Railroad and are not being challenged by Petitioners (*id.*).

3. The Necessary Permits Were Obtained And Extensive Studies Were Conducted To Ensure That No Significant Negative Impacts Would Occur.

Although the Village was not required to undertake a SEQRA review, the Village did so in order to evaluate impacts, and a review of the Administrative Record clearly demonstrates that the Village complied with SEQRA in this case. The law is well settled that SEQRA determinations should be upheld where, as here, the lead agency “identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination” (*Matter of Citizens Accord, Inc. v Town Bd. of the Town of Rochester*, 192 AD2d 985, 987 [2d Dept 1993], *lv denied*, 82 NY2d 656 [1993], *quoting Jackson v N.Y. State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]).

The “hard look” standard does not “authorize the court to conduct a detailed de novo analysis” of environmental impacts (*see Aldrich v Pattison*, 107 AD2d 258, 267 [2d Dept 1985]). Rather, the Court must defer to the agency’s judgment regarding environmental impacts and

resist the temptation to “weigh the desirability of any action” or “second-guess” the lead agency (*see, e.g., Akpan v Koch*, 75 NY2d 561, 570 [1990] [stating that “agencies have considerable latitude evaluating environmental effects” and “courts may not substitute their judgment for that of the agency”]; *Matter of Danyla v Town Bd. of the Town of Florida*, 259 AD2d 850, 852 [3d Dept 1999] [stating that “municipalities enjoy considerable discretion in their determinations as to substantive environmental matters”]).

Contrary to Petitioners’ contention, in the environmental review it conducted for the leasing of the Transloading Facility Site to the Railroad and construction of Transloading Facility, the Village clearly took the requisite “hard look” to determine the relevant areas of environmental concern, and analyzed potential concerns of significance, and made an appropriate determination based on its review. In particular, the Village involved the engineering firm of Hunt Engineers, Architects & Land Surveyors, P.C. (“Hunt”) to help the Village prepare and complete the Full Environmental Assessment Form (“Full EAF”), including Parts 1 and 2, which considered and discussed areas of potential significant environmental concern. Further, in addition to completing the Full EAF and reviewing the information associated with it, the Village also commissioned additional studies and reports for consideration by the Village, including the Hunt Report and other reports and analyses concerning the withdrawals associated with the sale of surplus water. Further, the Village considered the approvals by SRBC, as well as other issues associated with construction of the Facility, including, the conditions under the Bargain and Sale Deed associated with Transloading Facility Site (*see Crozier Aff.*).

Hunt was also involved with obtaining the required permits from NYSDEC, NYSDOH, and other agencies, including the local department of health, which were necessary to operate the Transloading Facility. In that regard, Hunt assisted the Village, as well as the Railroad, in coordinating and obtaining necessary permits needed to allow for water to be withdrawn and transferred onto railcars at the Transloading Facility. To that end, Hunt assisted the Village in sending out notice and coordination letters to NYSDEC for the purpose of insuring that storm water controls were in place, and letters and permit applications to NYSDOH to make certain flow preventers and other measures were in place at the Transloading Facility (*see* Drew Aff. ¶ 6-14).

Nevertheless, Petitioners assert that the Village failed to take a hard look at the potential significant adverse environmental impacts on the aquifers at issue in violation of SEQRA. First, the Village was not required to undertake such a review, as that review fell under the jurisdiction of SRBC. In any event, despite not being required to do so, the Village analyzed the impacts associated with the construction and operation of the Transloading Facility. In addition to informing applicable state and local regulatory agencies of the development and construction of the Transloading Facility and seeking their input, Hunt undertook an extensive study to insure that the withdrawals associated with the operation of the Transloading Facility would not result in any significant adverse impacts to the Village. Among other studies and analysis, Hunt undertook a modeling study of the entire Village water system in order to evaluate its capacity. The results of the extensive modeling undertaken by Hunt indicate that there would be no material impact on water pressures throughout the Village from such withdrawals (*see* Drew Aff. ¶ 4-19).

Petitioners also erroneously contend that the Village failed to consider the other impacts from the operations of the Transloading Facility, namely, the loading of the railcars and the potential noise impacts. First, contrary to Petitioners' contention, railcars are not vehicular "trips" under the EAF. Second, even if the EAF's definition of "trips" included railcars, the Village's attempt to assess the impacts of railroad operations under SEQRA or condition the Railroad's operations at the Facility are preempted by ICCTA. In any event, the Village, in consultation with the Railroad, determined that the operations at the Facility would add but *one* train a day to an already existing rail line and already established interchange and any impact would be minimal (*see* Drew Aff.). Thus, the Village properly determined that this would have no impacts of any kind, let alone a significant impact (*see* Crozier Aff.).

Based on the full EAF and the various analysis and studies undertaken, including but not limited to, the Hunt Report, the Village evaluated the Lease for the construction of the Transloading Facility and its potential to affect the environment, identified potential impacts, took the required "hard look" in analyzing potential impacts and measures to address them. The Village then issued a Negative Declaration for the Lease, which contained its reasoned elaboration of the environmental review it conducted and its analysis of why it found that the construction of the Transloading Facility would not result in any significant adverse impact.

The Negative Declaration was a comprehensive, painstaking analysis of the impacts that included the statutorily required reasoned elaboration of the Village's determination that no significant adverse impact would result from the development and construction of the Transloading Facility (*see* 6 NYCRR §§ 617.7[b] and 617.12[a][2]). Through this process, the Village fully executed and satisfied its obligations under SEQRA.

B. The Village Properly Determined That Entering Into The Surplus Agreement Was A Type II Action Under SEQRA.

6 NYCRR § 617.5(c) contains a list of actions under SEQRA that have been determined not to present significant impacts, including subpart twenty-five which provides in pertinent part:

[P]urchase or sale of furnishings, equipment or supplies, *including surplus government property*, other than the following: land, radioactive material, pesticides, herbicides, or other hazardous materials.

(6 NYCRR § 617.5[c][25] [emphasis added]). “These actions have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8” (6 NYCRR 617.5[a]).

Contrary to Petitioners’ contention, the sale of surplus water by the Village is not the sale of land such that it falls within the exception under 6 NYCRR § 617.5(c)(25). Petitioners’ entire argument relies on the erroneous contention that the Village granted SWEPI some form of riparian rights to remove water from the Village’s property, which is demonstrably not what occurred. The Village is expressly authorized under the Village law to sell its surplus water to a private corporation based outside of its geographic limits. The Village has chosen to do so in this case pursuant to the Surplus Agreement, which provides that SWEPI may purchase and take delivery of up to 1,000,000 gallons per day.

Nowhere in Village Law is the sale of surplus water deemed a real property interest and nowhere in the Surplus Agreement has the Village granted SWEPI a real property interest in the Site or in the Village wells (R. at Ex. 4)<sup>10</sup> Simply stated, the sale of surplus water by the Village pursuant to the Surplus Agreement is nothing more than the sale of surplus personal property. In executing the Surplus Agreement, the Village did not (and has not) granted any real property or

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<sup>10</sup> Indeed, the Surplus Agreement is not even in recordable form such that it could be recorded in Steuben County Clerk’s Office.

other interest in the Village wells (*see* Smith Aff.; R. at Ex 4). In an analogous case, it has been held that “soil or sand which has been severed from realty becomes personal property” (*Hamlet at Willow Creek Dev. Co., LLC v Ne. Land Dev. Corp.*, 64 AD3d 85, 114 [2d Dept 2009]). The sale of water to SWEPI is analogous: the withdrawal of water from the Village’s aquifer slated for sale as surplus water to SWEPI is water that has been severed or removed from the realty and is therefore the surplus personal property of the Village. Accordingly, the sale of surplus water pursuant to the Surplus Agreement is a Type II action not subject to SEQRA review.

C. There Was No Segmentation of the Lease and the Surplus Agreement.

Petitioners’ contention that the Village improperly segmented its SEQRA review by considering the Surplus Agreement separately from the Lease to build the Facility completely ignores that the Surplus Agreement, by definition, is a Type II action under SEQRA and, as a result, is deemed as a matter of law not to result in any significant adverse impact (Point II.B, *supra*). Petitioners’ claims of segmentation concerning the Surplus Agreement are contradicted by the law and the record in this matter.

Under the SEQRA regulations, “segmentation” of agency actions is defined as “the division of the environmental review of an action such that various activities or stages are addressed under this Part as though there were independent, unrelated activities, needing individual determinations of significance” (6 NYCRR § 617.2[ag]; *Matter of Dunk v City of Watertown*, 11 AD3d 1024, 784 NYS2d 753 [4th Dept 2004] [finding no segmentation where building demolition project took place directly adjacent to another project completed to improve the streets and sidewalks, and the city showed the projects were independent of each other]; *Noslen Corp. v Ontario Cnty. Bd. of Supervisors*, 295 AD2d 924 [4th Dept 2002] [finding no

segmentation associated with jail construction where it was shown that jail was not part of a larger project]).

In order for an action to constitute improper segmentation, it must be part of an action, and must in and of itself be deemed to have potential to cause an impact, or in the words of the regulation “needed individual determinations of significance” (*see* 6 NYCRR § 617.2[ag]) (and hence, as in a Type II action, no significance determination, *i.e.*, a positive declaration or negative declaration need be made). The Surplus Agreement, however, was a Type II action not subject to SEQRA review in the first instance. In any event, while the Transloading Facility will be used to deliver surplus water under the Surplus Agreement, the Village could have delivered said water in another manner from other water sale facilities. (*see* Crozer Aff.). Thus, there was no segmentation.

### POINT III

#### PETITIONERS HAVE FAILED TO INCLUDE INDISPENSABLE PARTIES AND THUS MAY NOT OBTAIN RELIEF IN THEIR ABSENCE.

This Court should dismiss Petitioners’ claims for each or any of the reasons set forth above. However, even if this Court allows Petitioners to proceed, this action must be stayed until the Susquehanna River Basin Commission, New York State Department of Environmental Conservation, the Surface Transportation Board and the Federal Railroad Administration can be joined.

Pursuant to CPLR § 1001, a petition can be dismissed where it fails to name one or more necessary parties. Necessary parties are those “who ought be parties if complete relief is to be accorded” or “who might be inequitably affected by a judgment in the action” (*Matter of 27th St. Block Ass’n v Dormitory Auth. of the State of N.Y.*, 302 AD2d 155, 160 [1st Dept 2002], *quoting* CPLR § 1001[a]). The failure to name a governmental agency in an action where the agency

may be inequitably affected by a judgment rendered in its absence is grounds for dismissal (*see Town of Brookhaven v Marian Chun Enters., Inc.*, 71 NY2d 953, 954-55 [1988] [dismissal for failure to join Commissioner of Social Services in action to enjoin motel for providing lodging to homeless]; *City of N.Y. v Long Island Airports Limousine Serv. Corp.*, 48 NY2d 469, 475-76 [1979] [dismissal for failure to join State Commissioner of Transportation who was responsible for issuing the license required to operate the service in issue]).

Here, Petitioners claims challenge the SRBC's approvals, as well as allege that the Village failed to obtain permits from the NYSDEC, Transportation Board and FRA. As a result, there is a quite possible, if not inevitable, that these governmental agencies will be inequitably affected by a judgment, as a judgment in this matter in favor of Petitioners would directly impact the various statutory and regulatory schemes of such agencies, and such judgment would have been rendered in their absence without their critical input. For example, the failure to join SRBC would potentially undermine its authority to approve withdrawals of water from the basin pursuant to the Compact and its implementing regulations. The same holds true for NYSDEC, the Transportation Board and FRA, each of which is charged with interpreting regulations and enforcing them in accordance with statutory provisions unique to each such department or agency. Respondents respectfully submit that the court should rule on its motion to fully dismiss the Petition, and then, if and of if it is necessary, compel SRBC, NYSDEC, the Transportation Board and FRA, indispensable parties, to be summoned in this case.<sup>11</sup>

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<sup>11</sup> That being said, it is likely that these parties cannot be joined in this case, insofar as any claim asserted by Petitioners will likely be barred by the statute of limitations or for failure of Petitioners to exhaust their administrative remedies before the various agencies.

CONCLUSION

Based on the foregoing, the Village of Painted Post, Painted Post Development, LLC and SWEPI, LP respectfully requests that its motion to dismiss and/or for summary judgment be granted in all respect and the Petition be denied in all respects, along with such other and further relief as this Court deems just and proper.

Dated: August 3, 2012  
Pittsford, New York

HARRIS BEACH PLLC

By: \_\_\_\_\_

  
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