Appellate Division Docket No. CA 13-01558
Steuben County Clerk's Index No. 2012-0810

# Court of Appeals

*of the*

# State of New York

In the Matter of the Application of the SIERRA CLUB; PEOPLE FOR A HEALTHY ENVIRONMENT, INC.; COALITION TO PROTECT NEW YORK; JOHN MARVIN; THERESE FINNERAN; MICHAEL FINNERAN; VIRGINIA HAUFF; and JEAN WOSINSKI,

*Petitioners-Respondents,*

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

– against –

THE VILLAGE OF PAINTED POST; PAINTED POST DEVELOPMENT, LLC; SWEPI, LP;

*Respondents-Appellants,*

and the WELLSBORO AND CORNING RAILROAD, LLC,

*Respondent-Respondent.*

## MOTION FOR LEAVE TO APPEAL

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Dated: July 17, 2014

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## I. PROCEDURAL HISTORY OF THE CASE

This proceeding was brought by the Petitioners-Movants [hereinafter cited as “Petitioners”] to require the Respondent-Respondent Town of Painted Post to engage in an environmental review pursuant to the New York State Environmental Quality Review Act, Environmental Conservation Law §8-101 et. seq. [hereinafter cited as SEQRA] prior to the sale of one million gallons of water per day from the Town’s public water supply, as well as the construction of a transloading facility where the water would be loaded on 40 rail cars per day and transported through the Village of Painted Post to Pennsylvania to be used in the hydrofracking process of natural gas drilling.

The trial court (Kenneth R. Fisher, J.S.C.) first determined that the Petition could proceed based upon the standing of Petitioner John Marvin. He then also determined that SEQRA had been violated and by Decision of March 25, 2013, enjoined the Respondents from further water withdrawals until Petitioners complied with SEQRA [R. 6].[1] A Notice of Appeal was filed by Respondents Village of Painted Post and Painted Post Development, LLC and SWEPI, LP on April 25, 2013. (R.2). (The Wellsboro and Corning Railroad, LLC did not appeal the trial court’s Decision).

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

On March 28, 2014, the Appellate Division, Fourth Department determined that none of the Petitioners, including John Marvin, had standing to pursue the Petition, and therefore reversed the trial court's Decision, annulled the injunction, and dismissed the Petition. (The Decision of the Appellate Division is attached hereto as Exhibit "A"). Service with Notice of Entry of the Appellate Division's Decision and Order was served by ordinary mail on the Petitioners on March 31, 2014.

On April 29, 2014, Petitioners moved in the Appellate Division, Fourth Department, to reargue or in the alternative seek leave to appeal to the Court of Appeals. On June 13, 2014, the Appellate Division denied Petitioners' Motion to reargue or for leave to appeal to the Court of Appeals, which was served by ordinary mail with Notice of Entry on June 16, 2014. (See the Appellate Division's Order denying Petitioners' Motion with service of entry at Exhibit "B").

Therefore, this Motion for Leave to Appeal to the Court of Appeals has been filed within 30 days of service of the entry of the Appellate Division's Order denying Petitioners' Motion.

## II. JURISDICTIONAL STATEMENT

The Order of the Appellate Division, Fourth Department, is a final determination of the instant proceeding, since it dismissed the Petition. As such, this Court has jurisdiction to consider this Motion for Leave to Appeal from the final determination of this case as rendered by the Appellate Division, Fourth Judicial Department pursuant to §5602(1)(ii) of the New York Civil Practice Laws and Rules and §500.22 of the Rules of this Court.

## III. STATEMENT OF QUESTIONS PRESENTED

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

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

(3) While the Appellate Court did not reach the merit issues since it dismissed the Petition based upon lack of standing, was the trial court correct in determining that the sale of one-quarter of the Village of Painted Posts' water supply was not exempt from environmental review pursuant to SEQRA as a type II exempt act of sale of surplus property?

(4) Was the trial court correct in determining that the sale of one million gallons of water per day from the Village of Painted Post's public water supply constituted an unlisted action pursuant to the SEQRA regulations, since it did not meet the type I threshold for the withdrawal of two million gallons?

(5) Did the Village of Painted Post improperly segment their environmental review of the sale of one million gallons per day from the public water supply from the separate consideration of the lease of Village land for

construction of the transloading facility when the construction of the transloading facility was preempted by federal law?

(6) Regardless of any other reasons for this Court to grant leave to appeal, is this case of such public significance that leave to appeal should be granted given the fact that whether or not SEQRA would apply to the sale of public water is likely to reoccur throughout the State of New York as villages, towns and cities decide to sell their public water to third party private interests to produce income to the villages, towns and cities?

## IV. STATEMENT OF FACTS

On February 23, 2012, the Board of Trustees of the Village of Painted Post adopted four resolutions. The resolutions related to a proposed water sale agreement with Respondent SWEPI LP, a subsidiary of Shell Oil Co. operating gas wells in Tioga County, Pennsylvania, and to a lease agreement with Respondent Wellsboro & Corning Railroad. (R. 111-119). Two of the four resolutions documented the Village's determinations regarding the need or lack of need for environmental review of the water sale agreement and the lease (R. 111-116). The other two resolutions documented the Village's decisions to enter into the water sale agreement and the lease agreement. (R. 117-119).

Following the adoption of these resolutions, also on February 23, 2012, the Mayor of the Village signed a water sale agreement effective March 1, 2012 (R. 141-147), and signed a lease agreement between the Village's wholly-owned subsidiary, Painted Post Development LLC, and the Wellsboro & Corning Railroad effective March 1, 2012 (R. 120-140).

The water sale agreement provided for sales of up to one million gallons per day from the Village water system to SWEPI with an option to increase the amount sold by an additional 500,000 gallons per day for a total amount of 314,000,000 gallons during the term of the agreement (R. 141-142). The lease agreement was for a parcel of 11.8 acres that was part of a former Ingersoll Rand foundry site

acquired by Painted Post Development from the Ingersoll-Rand Company in 2005 (R. 120-124 and 256-323). The wording of the lease acknowledged the connection between the lease and the water sales agreement. The second whereas clause of the lease stated: "WHEREAS, in connection with a certain bulk water sale contract, dated as of March 1, 2012, . . . the Village will sell a certain amount of surplus municipal water to SWEPI from its existing municipal water supply system at a filling/metering station to be constructed by the Lessee on a portion of the Premises and SWEPI has arranged to have the Lessee withdraw, load and transport such water via rail line from the Premises." (R.120).

A resolution captioned "Resolution: Determination of Non-Significance — Village of Painted Post Proposed Contract for the Sale of Surplus Water," adopted by the Village Board on February 23, 2012, determined that the water sale to SWEPI was a Type II action exempt from review under SEQRA. The resolution cited 6 N.Y.C.R.R. 617.5(c)(25) as the provision pursuant to which the Type II exemption was claimed. As a consequence of the Type II determination, the resolution stated, "The requirements of SEQRA . . . have been satisfied."

A second resolution captioned "Resolution: Negative Declaration — Village of Painted Post Lease by Painted Post Development, LLC" determined that entering into the lease was a Type I action under SEQRA and found that "the Lease will not result in any potentially significant adverse impact on the

environment." (R. 111-116). The negative declaration was based upon a review of a Full Environmental Assessment Form and other itemized documents. (R. 113). Much of the information required to be provided in the Environmental Assessment Form reviewed and signed by the Village Board on February 23, 2012 (R. 148-168), was either not supplied, was insufficiently supplied or was supplied incorrectly.

For example, in its responses to the EAF, the Village answered "No" to the question "Is the project located over a primary, principal or sole source aquifer?" (R. 150) In fact, the Corning aquifer, from which the water was proposed to be withdrawn and over which the water loading facility was to be located is designated as a primary water supply aquifer by the New York State Department of Health and the New York State Department of Environmental Conservation (see Primary and Principle Aquifer Determinations, DEC Division of Water Technical and Operational Guide and Series 2.1.3, available at http://www.dec.ny.gov/docs/water_pdf/togs213.pdf [accessed November 19, 2013], and is one of only 18 primary aquifers in New York. Id. Primary aquifers are designated "to enhance regulatory protection in areas where groundwater resources are most productive and most vulnerable." Id. Similarly, the Village responded "No" to the question, "Will Proposed Action affect any water body designated as protected? (under Articles 15, 24, 25 of the Environmental

Conservation Law, ECL.)" (R. 159) In fact, as a primary water supply aquifer, the Corning aquifer is a protected water body under the ECL. ECL § 15.0414 provides for the mapping of primary water supply aquifer areas and prohibits certain incompatible uses over primary groundwater recharge areas.

There were many other questions that were either answered improperly or left unanswered and without reiterating all of them, the Court can review those answers as indicated on page 6 of Petitioners' Brief in the Appellate Division.

Throughout the summer of 2012 the water loading facility was constructed. In mid-August 2012, notwithstanding the near drought conditions in the area, the first water shipments from the water-loading facility began. (R. 432). The shipments from the facility were conducted at night and created extremely noisy conditions for those who lived nearby the site. (R. 426-429, 432). Petitioner John Marvin was one of the neighbors of the loading facility who was affected by the noise. (R. 432) His affidavit stated, "Beginning in mid-August and continuing through mid-September, I heard train noises frequently, sometimes every night. I heard either the train whistle or the diesel engines themselves or both. The noise was so loud it woke me up and kept me awake repeatedly during that period." Id. Petitioner Marvin lives within 400 feet of the rail line and 500 feet from the edge of the water-loading facility. (The court determined that Petitioner Marvin lived less than 1000 feet from the facility.) The distance from Mr. Marvin's home to the

rail line and the site of the water-loading facility is demonstrated by the aerial photograph attached to Mr. Marvin's affidavit. (R. 434).

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

> "In sum, the Village Board acted arbitrarily and capriciously when it classified the Surface Water Sale Agreement as a type II action and failed to apply the criteria set out in the regulations to determine whether an EIS should issue, and when it improperly segmented the SEQRA review of the lease from the Surplus Water Sale Agreement. Accordingly, searching the Record, summary judgment is granted to petitioners as follows: The Village resolutions designating the surplus water agreement as a type II action is annulled. Similarly, the Negative Declaration as to the Lease Agreement must be annulled, as in reaching the decision as to a negative declaration, the Village Board improperly segmented its review of the lease from the Surplus Water Sale Agreement.
>
> Petitioners also seek the annulment of the Village approvals of the Surplus Water Sale Agreement and the Lease

> ….[H]ere … the Village short circuited the SEQRA process as to the Surplus Water Sale Agreement by an improper type II designation and failed to consider the Surplus Water Sale Agreement when issuing its negative determination as to the lease due to improper segmentation. Accordingly, the Village Board resolutions approving the Surplus Water Sale Agreement and Lease Agreement of February 23, 2012 are annulled.
>
> Petitioners are granted an injunction enjoining further water withdrawals pursuant to the Surplus Water Sale Agreement pending Respondents' compliance with SEQRA" (R. 36-38). (Citations omitted)

The Appellate Division reversed the trial court opinion, finding that Petitioner Marvin's claim of newly created noise fell within the zone of interest of SEQRA, but also finding that Petitioner Marvin did not have standing because his claim was no different than the public at large.

# V. ARGUMENT

## A. INTRODUCTION

Since this Court's Decision in Society of Plastic Indus. v. County of Suffolk, 77 N.Y.2d 761, 573 N.Y.S.2d 778 (1991), the courts in New York State have struggled with the second part of the standing requirement in environmental cases. Therefore, while the courts have had no problem determining whether or not the issues raised by a Petitioner falls within the zone of interest of SEQRA, the requirement that a Petitioner be injured in a manner different than the public at large has created significant contradictory decisions within the Appellate Division departments, and within each department. While this Court has recently gone a long way towards clarifying what is necessary for organizational standing, In the Matter Of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 N.Y.3d 297, 918, N.E.2d 917 (2009) and municipal standing Matter of the Association for a Better Long Island, Inc. v. New York State Department of Environmental Conservation, 23 N.Y.3d 1, 6 (2014, in SEQRA cases, this Court has not yet provided such clarifications concerning what was meant by an "injury different from that of the public at large" in an individual Petitioner's case. The instant case provides the court with an opportunity to provide such needed clarification.

Similarly, while this Court created a presumption of standing for individuals who live nearby an area that is requested to be rezoned, see, In Matter of Sun-Brite Car Wash, Inc. v. Board of Zoning of Appeals of Town of North Hempstead, 69 N.Y.2d 406 (1987) and In the Matter of Har Enterprises v. Town of Brookhaven, 74 N.Y.2d 524 (1989), both of these cases arose in the context of rezoning actions. This Court has not determined whether or not such presumption for standing applies in a land use case with similar proximity but not dealing with zoning issues. Again, this case provides the opportunity for the Court to clarify whether or not the proximity exception and presumption of standing should apply in non-zoning land use cases.

## B. STANDING

As previously indicated, New York State Courts and the Appellate Divisions within New York have issued many contradictory decisions concerning whether or not the proximity exception applied by this Court in zoning cases also applies to proximity cases in non-zoning land use cases raising SEQRA issues. Compare e.g., where the court determined that the proximity exception and presumption applies in the non-zoning context, e.g., Matter of Ontario Heights Homeowners Assoc. v. Town of Oswego Planning Board, 77 A.D.3d 1465 (4th Dept. 2010); Ziemba v. City of Troy, 37 A.D.3d 68 (3rd Dept. 2006); Long Island Contractors Association v. Town of Riverhead, 17 A.D.3d 590 (2nd Dept. 2005); Town of

Coeymans v. City of Albany, 284 A.D.2d 830 (3rd Dept. 2001); Matter of McGrath v. Town Bd. of N. Greenbush, 254 A.D.2d 614 (3rd Dept. 1998); Lordo v. Board of Trustees of the Incorporated Village of Munsey Park, 202 A.D.2d 506 (2nd Dept. 1994) with those cases that determined that the proximity exception only applies in zoning cases, e.g., Save Our Main Street Buildings v. Greene County, 293 A.D.2d 907 (3rd Dept. 2002); Rent Stabilization Ass'n of N.Y.C., Inc. v. Miller, 15 A.D.3rd 194 (1st Dept. 2005); Boyle v. Town of Woodstock, 257 A.D.2d 702 (3rd Dept. 1999); Barrett v. Dutchess County Legislature, 38 A.D.3d 65 (2nd Dept. 2007); Matter of Oates v. Village of Watkins Glen, 290 A.D.2d 758 and of course the Appellate Divisions' Decision in the instant case, (see Exhibit "A").

As previously indicated the two cases of the Court of Appeals determining that the proximity exception provides standing both arose from challenges to administrative actions taken under a zoning code. See Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of the Town of North Hempstead, 69 N.Y.2d 406 (1987) and Matter of Har Enterprises v. Town of Brookhaven, 74 N.Y.2d 524 (1989). Therefore, it is not surprising that the court in writing its decision, applied the facts in those cases and cast their decision in the light of zoning. Therefore, for example, in Sun-Brite Car Wash, Inc. supra at 413-414, the court indicated:

> "[W]hile something more than the interest of the public at large is required to entitle a person to seek judicial review - - the petitioning party must have a legally

> cognizable interest that is or will be affected by the zoning determination - - proof of special damage or in fact injury is not required in every instance to establish that the value or enjoyment of one's property is adversely affected . . . thus, an allegation of close proximity alone may give rise to an inference of damage or injury that enables a nearby owner to challenge a zoning board decision without proof of actual injury." (citations omitted)

The court in Har Enterprises, supra at 529 decided similarly. Given the reason indicated to provide a presumption in zoning cases in both Har Enterprises and Sun-Brite, it would appear that a distinction between zoning and non-zoning cases is a distinction without a difference. The presumption is granted to a resident that lives nearby property that is going to be rezoned, because it is assumed that because of such proximity, the rezoning may have negative affects upon the homeowner. Likewise, it should be assumed that the proximity of a homeowner to a land use action that is being taken in a non-zoning case, would also have the same potential negative effects, and therefore, the presumption should also apply. However, while the Court of Appeals has provided such exception in zoning cases, and while it has never indicated that such presumption does not exist in non-zoning cases, the Court of Appeals has never considered whether the presumption would apply in non-zoning cases, and therefore, this case gives the court the opportunity to determine whether or not such a presumption exists in non-zoning cases.

The other major standing issue which this case presents and for which leave to appeal is sought, is a clarification of what this court meant in Society of Plastics Indus. Inc. v. County of Suffolk, 77 N.Y.2d 761 (1991), when the Court determined that in order to have standing in a SEQRA case, the petitioner or plaintiff must show that the issue he raises in the case is within the zone of interest that SEQRA in intended to protect, and further, that the petitioner or plaintiff has been injured in a manner different than the public at large. Since 1991, this Court has not clarified this two prong test, especially as it concerns what type of injury is different than the public at large, and frankly, the trial courts and appellate courts are all over the place interpreting this requirement, and often, as in the instant case, issues a decision that would preclude any judicial review at all.

Therefore, in the instant case, acknowledging that the issue of newly created train noise raised by Petitioner John Marvin fell within the zone of interest of SEQRA, nevertheless, determined that Petitioner Marvin was not injured in a manner different than the public at large. Leaving aside for the moment the fact that the Appellate Division did not give any weight or other consideration to the fact of Petitioner Marvin's proximity to the transloading facility and the movement of the rail cars, they determined that since the rail cars moved throughout the Village along its main artery, that therefore everyone in the Village was similarly affected by the train noise. (Petitioner Marvin argued that the noise was much

louder because he lives close to the rail line and transloading facility, but this distinction was not discussed or adopted by the Appellate Division.)

While this Court has recently indicated that "we have been reluctant to apply these principles, [standing requirements] in an overly restrictive manner where results would be to completely shield the particular action from judicial review" Matter of the Association for a Better Long Island, Inc. v. New York State Department of Environmental Conservation, 23 N.Y.3d 1, 6, (2014) that is precisely what the court did in the instant case, as well as the very recent case in the Fourth Department of Kindred v. Monroe County, __ A.D.3d __, CA-13-01718 (4th Dept. July 3, 2014) (the slip opinion is attached hereto as Exhibit "C"), and which appears to be a trend in appellate divisions as well. See, e.g., Clean Water Advocates of New York v. New York State Department of Environmental Conservation, 103 A.D.3d 1006 (3rd Dept. 2013); Finger Lakes Zero Waste Coalition, Inc. v. Martens, 95 A.D.3d 1420 (3rd Dept. 2012); Matter of Powers v. DeGroodt, 43 A.D.3d 509 (3rd Dept. 2007); Matter of Many v. Village of Sharon Springs, 218 A.D.2d 845 (3rd Dept 1995); Long Island Pine Barrens Society v. Planning Bd. of the Town of Brookhaven, 213 A.D.2d 484 (2nd Dept. 1995).

Indeed, the interpretation of the Society of Plastics test of injury different than the public at large, has resulted in the absurd situation where the more people that are adversely affected by an environmental action, the less likely that anyone

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

## C. MERITS ISSUES PRESENTED BY THIS CASE

As indicated previously, since the court dismissed the Petition due to lack of standing, the Appellate Division did not reach the significant merits issues that lead the trial court to determine that SEQRA had been violated and issue an injunction. However, the issues discussed by the trial court are of great public importance, since these issues will repeat as each village, town or city in New York State decides to sell a portion of their public water supply for revenue purposes.

The first issue determined by the trial court is that the sale of a large quantity of the town's public water supply cannot be considered the sale of surplus property, and therefore, is not exempt from SEQRA review pursuant to the § 6 N.Y.C.R.R. § 617.5[c][25].

As indicated in Respondents' briefs below, they contended that the surplus water agreement, allowing the sale of one million gallons per day of public water, with the possibility of extending the agreement to allow for 1,500,000 gallons of

water per day, was a type II regulatory action because the sale of the public water was the sale of surplus property. (A type II action is an action that has been determined not to present a significant impact on the environment, and therefore, no further environmental review is necessary). The regulation dealing with the sale of the surplus property indicates that actions for: "Purchase or sale of furnishings, equipment or supplies, including surplus government property, other than the following: land, radioactive material, pesticides, herbicides, or other hazardous materials" are type II actions.

While the trial court indicated that the sale of one-quarter of the village's public water supply per day could not be considered "surplus property", that decision is well within the guidelines provided by the New York State Department of Environmental Conservation to interpret its own regulations. Therefore, the guidelines list "interior furnishings; fire trucks; garbage and recycling hauling trucks; school buses; maintenance vehicles; construction equipment such as bulldozers, backhoes, dump trucks; police cars; computers, scanners and related equipment; firearms, protective vests, communications equipment, fuel, tools and office supplies" as examples of surplus property covered by §617.5(c)(25). (The SEQR handbook p. 40 (3rd Dept. 2010).) The guidelines in the SEQR handbook went on to explain the rational for the type II categorization of these types of property: "[T]he simple purchase or sale of materials does not create an adverse

environmental impact" Id. By contrast, as the court below noted, "a significant daily withdrawal of water representing roughly one-fourth of the Village's total well capacity . . . is of an entirely different character than the simple purchase and sale of the materials that the DEC explains is the purpose of §617.5(c)(25). (R. 31-32).

Unfortunately, while the Appellate Division dismissed the Petition on other grounds than the merits of the case, by reversing the decision of the trial court, the precedent established by the determination that the sale of large quantities of the village's public water supply is not a type II action as the sale of surplus property has been significantly reduced by the Appellate Division's reversal. This issue is likely to reoccur a significant number of times, as indicated in the amicus curiae brief of the New York State Conference of Mayors and Municipal Officials:

> "All of the municipalities represented by the Conference of Mayors have the authority to enter into agreements to sell surplus water to public and private entities, the profits of which may be used for any municipal purpose. These water agreements are a significant source of revenue for local governments that are struggling financially during the current economic crisis faced by municipalities across this state." (p. 5).

The second merits issue that was determined by the trial court, but not discussed in the Appellate Division's Decision, deals with when an action should be considered an "unlisted action". (Unlisted actions are those actions that are not exempt as type II but do not meet certain regulatory thresholds so that a

presumption is created that the action may have significant adverse environmental consequences that would require the drafting of any environmental impact statement.) The SEQRA regulations consider the withdrawal of two millions gallons of water per day as a type I action 6 N.Y.C.R.R. §617.4(b)(6)(ii). Since the Respondents in this case will withdraw one millions gallons per day or more, but less than the two million threshold, the trial court considered the water withdrawal an unlisted action, citing this Court's opinion in City Council v. Town Board, 3 N.Y.3d 508, 517-518 (2004) (R. 29).

Therefore, this case presents the Court an opportunity to clarify whether or not an action taken that is regulated as a type I action if the action falls within certain regulatory limits, is an unlisted action if the same type of action falls below these regulatory limits.

Finally, this case also presents a factual circumstance where two actions took place, one of which was determined to require an environmental review (the sale of one million gallons per day from the public water supply) and the other was determined to be preempted by federal law (the construction of the transloading facility). However, both actions were dependent upon each other, and the trial court determined that review under SEQRA was necessary, and looking at the actions separately improperly segmented the two issues pursuant to the regulations promulgated under SEQRA. See 6 N.Y.C.R.R. §617.3(q)(1). Therefore, again

there are important issues concerning segmentation, where one of the two segmented actions is either preempted or not otherwise reviewable separately under SEQRA, whether the other dependent action would bring a non-reviewable action into the orbit of SEQRA review. This is an issue of first impression in New York State, and a decision from the Court of Appeals would clarify the law concerning segmented projects where one segment, standing alone, would not require environmental review.

### D. THE ISSUES IN THIS CASE HOLD SIGNIFICANT PUBLIC INTEREST AND CONSEQUENCES TO THE CITIZENS AND MUNICIPALITIES OF THE STATE OF NEW YORK

The issues in this case are significant and are of enough public interest so that besides the environmental organizations that were Petitioners in the case, the Natural Resources of Defense Counsel, Inc., Riverkeeper, Inc. and Community Watersheds Clean Water Coalition have provided amicus curiae briefs in support of Petitioners' positions in this case, and as previously indicated, the New York State Conference of Mayors and Municipal Officials has also provided an amicus curiae brief in support of Respondents' position. The reason for this significant public interest is the effect that this case will have on water withdrawals throughout the State of New York and what level of environmental review will be required, if any, prior to an agreement to sell water from the public water supply. There is no question that the sale of millions of gallons of public water may have

significant environmental effects on both the amount of drinking water available for public consumption, and the quality of the potable water that can be provided. The issues in this case will determine whether environmental review is necessary where these significant adverse environmental effects may exist. If the sale from the public water supply is considered the sale of surplus property so that it is exempt from environmental review as a type II action, all of the sales from the public water supplies will escape environmental review as a type II exempt action, regardless of the effects that such sale may have on quantity or quality of the state's drinking water supply.

Similarly, the standing issues raised in this case are of equal importance to the citizens of New York State. The confusing array of standing decisions, trending towards denying judicial review of adverse environmental consequences affecting a large number of people, is an issue that is ripe for this Court to provide much needed clarification.

## VI. CONCLUSION

For all of the foregoing reasons, it is respectfully requested that this Court grant leave to appeal so that the important issues in this case can be discussed and clarified for the courts in New York State.

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Respectfully submitted,

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