

**Supreme Court Of The State Of New York
Appellate Division: Fourth Judicial Department**

In The Matter of the Application of the Sierra Club; People for a Healthy Environment, Inc.;
Coalition to Protect New York; John Marvin; Theresa Finneran;
Michael Finneran; Virginia Hauff; and Jean Wosinski;

Petitioners,

-Against-

The Village of Painted Post, Painted Post Development, LLC;
SWEPI, LP; and Wellsboro and Corning Railroad, LLC.

Respondents.

Docket # CA 13-01558

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Jane E. Tsamardinos, Esq.
*New York State Conference of Mayors
and Municipal Officials*
119 Washington Avenue
Albany, New York 12210
Telephone: (518) 463-1185

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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; Theresa Finneran;
Michael Finneran; Virginia Hauff; and Jean Wosinski,;

Petitioners,

Notice of Motion

-Against-

The Village of Painted Post, Painted Post Development, LLC;
SWEPI, LP; and Wellsboro and Corning Railroad, LLC.

Respondents.

PLEASE TAKE NOTICE that upon the annexed affirmation of Jane E. Tsamardinis, dated the 23rd day of October, 2013, and the papers annexed thereto, and upon all prior papers and proceedings had in this case, the undersigned will move this court, at the courthouse thereof, located at 50 East Avenue, Rochester, NY 14604 on Monday, the 28th day of October, at 10:00 in the forenoon, or as soon thereafter as counsel may be heard, for an order granting the following relief:

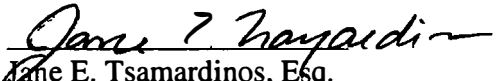
1. Granting leave to New York State Conference of Mayors and Municipal Officials leave to file the required number of copies of a brief *amicus curiae*, in support of Appellant Village of Painted Post, herein;
2. And for such other and further relief as to the Court may seem just and equitable.

Please take further notice that, pursuant to Appellate Division Fourth Department Rule 1000.13, this motion is submitted without oral argument, that personal appearance in opposition to this motion is neither required nor permitted, and any papers in opposition to this motion must be

served and filed at the Appellate Division Fourth Department on or before the return date of this motion.

Dated: Albany, New York
23rd day of October, 2013

Yours, etc.:


Jane E. Tsamardinos, Esq.
*New York State Conference of
Mayors And Municipal Officials*
119 Washington Avenue
Albany, New York 12210
(518) 463-1185

TO: Frances E. Cafarell, Clerk of the Court
Sue Lerkins
Appellate Division, Fourth Department
50 East Ave
Rochester, New York 14604
(585) 530-3100

Joseph D. Picciotti, Esq.
John Mancuso, Esq.
A. Vincent Buzard, Esq.
Harris Beach PLLC
Attorneys for the Respondents
99 Garnsey Road
Pittsford, New York 14534
(585) 419-8629

Richard, J. Lippes, Esq.
Lippes & Lippes
Attorney for the Petitioners
1109 Delaware Ave.
Buffalo, New York 14209
(716) 884-4800

Rachel Treichler, Esq.
Attorney for Petitioners
7988 Van Amburg Road
Hammondsport, New York 14846
(607) 569-2114

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Michael Finneran; Virginia Hauff; and Jean Wosinski,;

Petitioners,

Amended Attorney Affirmation

-Against-

The Village of Painted Post, Painted Post Development, LLC;
SWEPI, LP; and Wellsboro and Corning Railroad, LLC.

Respondents.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

JANE E. TSAMARDINOS, duly affirms under penalty of perjury pursuant to CPLR 2106:

1. I am an attorney duly licensed to practice in the State of New York and am Counsel to the New York State Conference of Mayors and Municipal Officials, hereinafter referred to as NYCOM.
2. I submit this affidavit in support of the instant motion of NYCOM seeking leave to participate in this appeal, and to file a brief as *amicus curiae* in support of the Respondent, the Village of Painted Post.
3. NYCOM is a not-for-profit, voluntary membership association consisting of 580 of the State's 614 cities and villages, thereby representing the vast majority of such municipalities. NYCOM's mission is to "improve the administration of municipal affairs in New York State by providing courses of training for municipal officials in New York State cities and villages." NYCOM provides its members with legislative advocacy at both the state and federal levels on issues of concern to local government. In its 101-year existence, NYCOM has consistently been granted permission to submit briefs *amicus curiae* to the New York State Court of Appeals and the New York State Appellate Courts in cases of statewide importance affecting villages and cities throughout the State.
4. The instant motion is derived from the Petitioners' challenge to the Respondents' surplus water sale agreement between the Village and SWEPI, in which the Village agreed to sell 1,000,000 gallons per day to SWEPI for use in hydraulic fracturing in Pennsylvania. The Village also entered into a lease agreement with Wellsboro & Corning Railroad for the construction and operation of a transloading facility that would load surplus water for distribution by rail.

5. The Petitioners alleged that the Village violated SEQRA when it designated the surplus water sale agreement as a Type II action not subject to further review. While the Petitioners allege harms such as diminished drinking water supply, increased rail and automobile traffic, and noise pollution, the trial court held that all but one petitioner had cited only generalized grievances not distinct from the public at large and thus had failed to establish standing under SEQRA. However, the court improperly held that the remaining Petitioner, John Marvin, established standing based on a generalized, meritless complaint of rail noise not within the zone of interests sought to be protected by SEQRA. The trial court failed to dismiss the proceeding for lack of standing and erroneously affirmed the petitioners right to sue under SEQRA as a means to challenge action occurring in another state.
6. Furthermore, the rail agreement is not governed by SEQRA, as the law has been preempted by the Interstate Commerce Commission Termination Act of 1996, the Federal Railway Safety Act of 1976, and other federal laws. The lower court's holding represents a drastic departure from previous decisions governing standing under SEQRA and will inspire potential litigants with similarly generalized grievances or motivations outside the realm of SEQRA's protections to sue local governments. Municipalities are frequently sued based on alleged SEQRA violations, resulting in costly, protracted litigation. Thus, if the Appellate Division does not reverse the lower court's holding, municipalities will face an increased probability of litigation under SEQRA and incur substantial costs defending their actions.
7. The trial court held that the use of one million gallons of water per day by a municipality constitutes an unlisted action under SEQRA and that the Village's classification of the surplus water agreement as a Type II action was arbitrary and capricious. To support its decision, the Court created a standard that the 1,000,000 gpd withdraw makes it an unlisted action, contending that the DEC "implicitly" determined that such a sale is an unlisted action. DEC rules have specifically established that a 2,000,000 gpd withdrawal threshold triggers a Type I classification, but neither case law nor guidance from the DEC provide that the sale of surplus water below the 2,000,000 gpd threshold is "implicitly" an unlisted action. Allowing courts to create actions that are unlisted, thereby adding to those actions that are expressly enumerated as unlisted in DEC rules, would have a severe impact on New York's local government actions, further complicating an already complex and intimidating process for local governments.
8. Upholding the lower court's decision will result in upheaval of well-settled case law and the intricate regulatory scheme that was carefully crafted by the State Legislature. Fearing the possibility that a court will create its own standard for SEQRA actions, local governments will inevitably over-classify actions as unlisted, unnecessarily delaying municipal projects and activities. New York boasts 1,515 municipally-owned water systems. If the lower court holding stands, the day-to-day operations of these systems will be subject to heightened scrutiny and liability beyond what is required by state laws and regulations. Furthermore, this holding could apply to any of the other hundreds of thousands of actions subject to SEQRA review. Allowing the courts to step into the shoes of the DEC and create new standards for the myriad of municipal actions subject to

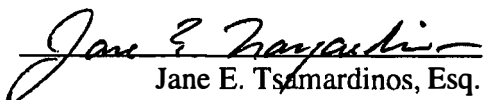
SEQRA will open the floodgates to excessive and unwarranted litigation, encumbering both local governments and the already over-burdened court system.

9. Finally, 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 struggle financially amidst the economic crisis faced by municipalities across this state. A holding in favor of the petitioners could apply with equal force to other surplus municipal water agreements and would thus have a chilling effect on such agreements across the State.
10. This appeal involves a matter of concern to all of New York's cities and villages. The Conference of Mayors' proposed *amicus curiae* brief will invite the Court's attention to law and arguments that might otherwise escape its consideration, particularly those that reflect the statewide impact of this decision on the 614 villages and cities across the state, and bring to light important public policy implications that result from the decision.
11. Upon information and belief, this motion is being made sufficiently in advance of oral argument to enable this Court to review the motion and set a date for submission of a brief *amicus curiae*. One original and one copy of the motion is enclosed herewith.

WHEREFORE your deponent respectfully requests that this Court render an order granting the New York State Conference of Mayors and Municipal Officials,

- (1) leave to file the required number of copies of a brief *amicus curiae*, and
- (2) such other and further relief as to the Court may seem just and proper.

DATED: Albany, NY
23rd Day of October, 2013


Jane E. Tsamardinos, Esq.
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