STATE OF NEW YORK
SUPREME COURT : COUNTY OF STEUBEN

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

Petitioners,

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

Index No. 2012-0810

-against-

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

Respondents.

MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT, AND IN SUPPORT OF PETITIONERS' ARTICLE 78 PETITION

I. INTRODUCTION

This Proceeding challenges various actions taken by the Village Board of the Village Of Painted Post which will allow the withdrawal of potentially 1.5 million gallons of water a day from the Painted Post public water supply, and allow the shipment of this water by rail through the center of the Village to Pennsylvania, where the water will be used for natural gas hydrofracking. Since Petitioners' believe that the actions taken by Painted Post were taken in violation of New York State environmental review laws, and that appropriate permits were never

obtained from the United States, they seek injunctive relief to enjoin the water withdrawal until these laws are fully complied with.

II. STATEMENT OF FACTS

In early 2011, because of financial pressures, the Painted Post Village Board began to discuss the possibility of selling large amounts of water from the village water system to a gas drilling company in Pennsylvania to use for hydrofracking. Residents of the area expressed concern that the Village's proposed plan to export water to Pennsylvania would reduce the drinking water supplies for the entire area.[1]

At its meetings, the Village Board displayed little understanding of the aquifer that provides the area's drinking water—the Corning aquifer—apparently assuming that because greater use of the aquifer had been made by certain industrial users in the past, there would be sufficient water in the aquifer for Painted Post to engage in bulk water sales to Pennsylvania.[2] The board did not consider the impact that high levels of pumping from a single well could have on flows in the aquifer or differences between uses within the aquifer that recharge the aquifer after use and the complete removal of water from the local water cycle, and it did not consider possible impacts of its proposed withdrawals on other users of the aquifer.[3]

The Village of Painted Post is located in a unique and historic location at the confluence of four important rivers, the Cohocton River, the Canisteo River, the Tioga River and the Chemung River. The name of the village comes from a painted post located at this junction in

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[1] See affidavit of Jean Wosinski, Dec. 18, 2012, pp. 6-8, "Don't Let Drillers Tap our Water," Jean Wosinski, Guest View, *Corning Leader*, p. 4A, Jan. 27, 2012, "Water Sale Plan Raises Concerns," Frances Mikolajczak, Letter to the Editor, *Corning Leader*, August 5, 2011, "What Are Legislators Thinking?," Virginia Wright, Letter to the Editor, *Corning Leader*, July 29, 2011, "Questions about Selling Water," Frank Anastasio, Letter to the Editor, *Corning Leader*, May 16, 2011 (PDFs of the letters are linked at http://treichlerlawoffice.com/pp/index.html).

[2] Affidavit of Jean Wosinski, op.cit., pp.. 7-8.

[3] See Resolutions adopted by the Village Board on Feb. 23, 2012, attached as Exhibits 1 and 2 to the Administrative Record, the Environmental Assessment Form conducted by the Village on Feb. 23, 2012, attached as Exhibit 5 to the Administrative Record, the affidavit of Roswell Crozier, Mayor of the Village, dated Aug. 1, 2012, and the affidavits of Larry Smith, Superintendent of Public Works of the Village, dated Aug. 1, 2012, and Jan. 9, 2013.

early times and still today marked by a monument. In her history of Painted Post, Audrey Phelps says the post was "a central crossing of the principal Indian trails, and a general resting place and rendezvous for Indians journeying east, west, north, and south."[4] In a 1796 map of New York State, Painted Post is the only settlement marked in the region.[5] At Painted Post, the Cohocton River and the Tioga River meet to form the Chemung River, just north of where the Canisteo River joins the Tioga River.

Underlying the confluence of these four rivers is the Corning aquifer.[6] The Corning aquifer is the principal drinking water supply source for six municipalities and two hamlets: the City of Corning, the Town of Corning, the Town of Erwin, the Village of Painted Post, the Village of Riverside, the Village of South Corning, the hamlet of Gang Mills and the hamlet of Coopers Plains, and for a number of industrial, governmental, business and private users in southeastern Steuben County along the rapidly developing corridor at the junction between Interstate 99 and Interstate 86. Just south of the Village border Interstate 99 coming up the Tioga River valley from Pennsylvania meets Interstate 86 which follows the Cohocton and Chemung river valleys across Steuben County from east to west..

As Petitioner and geologist Jean Wosinski explains in her affidavit, the Corning aquifer is "unlike the extensive, porous, water bearing rock layers that comprise what people most often think of as an aquifer."[7] Rather, "the Corning aquifer consists of relatively narrow branches of loose glacial fill located at the bottom of four deep river valleys" and is highly dependent on

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[4] Painted Post and its Monument, Audrey Phelps, *Crooked Lake Review*, June 1993, http://www.crookedlakereview.com/articles/34_66/63june1993/63phelps.html.

[5] See Denison's 1796 map of the State of New York, http://www.glenphotos.com/paintedpost/1796-map-small1.JPG.

[6] See Exhibit A to this Memorandum for a map of the Corning aquifer showing the boundaries of the aquifer in relation to the municipal boundaries and to the other aquifers in Steuben County, Fig. 5 from *Water Quality Strategy for Steuben County* by the Steuben County Water Quality Coordinating Committee, April 2009, http://www.stcplanning.org/usr/Program_Areas/Water_Resources/Water%20Quality/Steuben_WQCC_Strategy_2009.pdf.

[7] Affidavit of Jean Wosinski, December 18, 2012, page 5, para. 20.

sustained rainfall on the surrounding hills for its productivity. The surrounding hills shed most of the rainwater that falls on their slopes into the valleys because the bedrock is close to the surface of the hills and the bedrock does not hold water. [8]

As a valley fill aquifer, the Corning aquifer is constituted from the cumulative rainfall of the entire area and constitutes the principal water supply for the entire area. If the village takes excessive amounts of water from the aquifer compared to other users, the water reservoir for the entire region will be depleted. The ability of the Corning aquifer to withstand periods of drought is of concern as world climate conditions are becoming less stable than in the past.[9] Although the municipalities using the Corning aquifer developed a draft drought management plan in 2002, no plan has been adopted, and issues of allocation among users in times of drought have not been resolved.[10]

The Corning aquifer has been designated as a "Primary Water Supply Aquifer" by the New York State Department of Health (DOH) and the New York State Department of Environmental Conservation (DEC). Primary Water Supply Aquifers are defined in the DEC's technical guidance document TOGS 2.1.3 as "highly productive aquifers presently utilized as sources of water supply by major municipal water supply systems."[11] The Corning aquifer is one of three designated Primary Water Supply Aquifers on the Cohocton River in Steuben County and one of only 18 Primary Water Supply Aquifer designated in the state.[12]

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[8] Id.
[9] See "Water Law's Climate Disruption Adaptation Potential," Dan Tarlock, presented at the Research Roundtable on Climate Change, Adaptation, and Environmental Law, Northwestern Law School, April 7, 2011, http://www.law.northwestern.edu/academics/searle/papers/Tarlock_Water.pdf
[10] *Chemung Valley Water Study: Town of Erwin, the Town of Corning, the City of Corning, the Village of Painted Post and the Village of Riverside, New York*, Stearns and Wheler, LLC and Leggette, Brashears & Graham, Inc., September 2002, Chap. 8, Drought Management. To Petitioners' knowledge, this plan has not been adopted.
[11] 1990 DEC Division of Water Technical and Operational Guidance Document, on Primary and Principle Aquifer Determinations, TOGS 2.1.3, http://www.dec.ny.gov/docs/water_pdf/togs213.pdf.
[12] Id.

The Corning area has also been designated by the Susquehanna River Basin Commission (SRBC) as one of eight "Potentially Stressed Areas," the only such area in New York State. The SRBC defines "Potentially Stressed Areas" as "areas in the basin where the utilization of groundwater resources is potentially approaching or has exceeded the sustainable limit of the resources, defined as the average annual base flow (recharge) available in the 'local' watershed during a 1-in-10-year average annual drought.... Many of the Potentially Stressed Areas share characteristics such as rapid growth in development, low yield aquifers, and concentrated water uses."[13]

Painted Post is not the only municipality in the aquifer looking to bulk water sales as a source of income. The Town of Erwin, in which Painted Post is located, entered into a bulk water sale agreement in September 2010 to sell up to 400,000 gpd for export to Tioga County, Pennsylvania, and the City of Corning is reported to be studying the possibilities of similar sales.[14]

Notwithstanding opposition to the proposed water sales, the Painted Post Village Board voted at a meeting on February 23, 2012, to enter into a bulk water sales agreement with SWEPI LP, a subsidiary of Shell Oil Co. operating gas wells in Tioga County, Pennsylvania. The water sales agreement provides for sales of up to one million gallons per day with an option to increase the amount by an additional 500,000 gallons per day. To facilitate the bulk water sales, the Village Board also voted to approve the lease of a brownfield site located next to a residential area by its wholly owned subsidiary, Painted Post Development LLC to the Wellsboro &

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

[14] See discussion of Erwin water sales in "How much is Painted Post water worth?" Jeffery Smith, *Corning Leader*, April 30, 2012, page 1A, and discussion of Corning City sales in "City in Talks to Sell Water for Drilling," Jeffrey Smith, *Corning Leader*, Sept. 12, 2011, p. 2A. Both articles are linked on Rachel Treichler's website at http://treichlerlawoffice.com/pp/index.html.

Corning Railroad for the construction of a rail-loading facility so that water could be shipped by rail to Wellsboro, PA.

Oddly, the land leased for the rail-loading facility is located next to the tracks of the Bath & Hammondsport Railroad (B&H), several miles from the tracks of the Wellsboro & Corning Railroad, which are located across the junction of B&H with the main line, the Norfolk-Southern line.

At its meeting on February 23, 2012, the Village Board performed a cursory environmental review pursuant to the New York State Environmental Quality Review Act, finding that the bulk water sale agreement was an exempt Type II action and issuing a negative declaration regarding possible environmental impacts from the construction and operation of the rail-loading facility. On that same date, the Mayor of the Village signed a bulk water sale agreement and a lease effective March 1, 2012, and shortly thereafter, work began on the village water system and on construction of the rail-loading facility.

On June 25, 2012, Petitioners filed their petition challenging the adequacy of the environmental review conducted by the Village and seeking a preliminary injunction against the bulk water sales and continued construction of the rail-loading facility.

Unfortunately, Petitioners' request for a preliminary injunction has not yet been heard. Due to various scheduling difficulties, an unusual number of judicial recusals and an appointment to a higher court, the first hearing in the case has not yet been conducted.

Respondents Village of Painted Post and SWEPI filed their answer, the administrative record, and a motion to dismiss and/or for summary judgment on August 1, 2012. In support of their motion for summary judgment, Respondents Village and SWEPI provided certain

affidavits. Respondent Wellsboro & Corning Railroad (WCOR) filed its answer on September 10, 2012, and filed a motion to dismiss and/or for summary judgment on October 9, 2012.

Throughout the summer of 2012 while the legal proceeding was in limbo, the rail loading facility was constructed. In mid-August 2012, notwithstanding the near drought conditions in the area and SRBC restrictions on other water withdrawals for gas drilling from the Chemung River,[15] the first water shipments from the rail-loading facility began. The shipments from the facility were conducted at night and there were many complaints from residents who lived next to the facility about the noise waking them at night and keeping them and their children from getting sufficient sleep.[16] Some residents began testing the noise levels at night and tested levels as high as 102 db.[17]

Many residents complained about the noise at a village board meeting on September 10, 2012.[18] At that meeting, a representative of the Norfolk Southern Railroad (NS) explained that the night shipments were occurring because that was the only time NS had room on its main line to allow the water shipments to travel on the NS line from the B&H line to the WCOR line.[19]

Since the September 10, 2012, meeting, adjoining residents have noticed very few rail shipments from the water loading facility. A recent article in the *Corning Leader* reports a statement made at the recent December 12, 2012 meeting of the village board by village resident

[15] See SRBC Press Release, "37 Water Withdrawals for Natural Gas Drilling and Other Uses Suspended to Protect Streams," June 28, 2012, which stated, "The Susquehanna River Basin Commission (SRBC) today announced that 37 separate water withdrawals approved by SRBC are suspended due to localized streamflow levels dropping throughout the Susquehanna basin," http://www.srbc.net/newsroom/NewsRelease.aspx?NewsReleaseID=89, and "64 Water Withdrawals for Natural Gas Drilling and Other Uses Suspended to Protect Streams," July 16, 2012, http://www.srbc.net/newsroom/NewsRelease.aspx?NewsReleaseID=90.

[16] "Painted Post Water Sales: Late Trains Rattle Residents," Jeffrey Smith, Corning Leader, Aug. 26, 2012, http://www.treichlerlawoffice.com/pp/media/082612.pdf.

[17] See affidavit of Gerald and Teresa Flegal, December 18, 2012, page 2, para. 11.

[18] "Residents Weary of Night Trains," Jeffrey Smith, *Corning Leader,* Sept. 11, 2012, http://www.treichlerlawoffice.com/pp/media/091112.pdf

[19] See affirmation of Rachel Treichler, Jan. 28, 2013, p. 4, para. 10.

Phyllis Draper that "only 10 million gallons have been taken since operations began at the tanker train loading facility this summer, and no water has been taken since Sept. 30."[20]

Because of problems with high levels of total dissolved solids (TDS) at his job, Eugene Stolfi, a member of Petitioner Sierra Club who resides in the Town of Corning and worked for a time in the Town of Erwin, obtained a meter in June 2011 and began testing for TDS in municipal taps in the Town of Erwin and in rivers, streams and private wells in the area. Mr. Stolfi joined the Sierra Club's water monitoring program in June 2012. In August 2012, Mr. Stolfi shared his water testing results showing high levels TDS in Erwin's municipal wells with other petitioners. Several individual petitioners decided to join him in testing for TDS levels in area water supplies and acquired water testing meters and began their own water testing in October and November 2012. Mr. Stolfi prepared an affidavit describing his testing results, as did the others who joined in the testing. [21] Their testing results show 25 readings above 500 mg/L TDS, 20 readings above 600 mg/L TDS, 9 readings above 700 mg/L TDS and 3 readings above 800 mg/L TDS in water drawn from taps in the City of Corning and the Town of Erwin.

In December 2012, after discussions with petitioners' expert witness, hydrogeologist Paul Rubin, petitioners sought additional documents and subsequently on January 3, 2013, petitioners were provided with various documents by Respondent Village in response to a Freedom of Information Law request filed by a representative of Petitioner Sierra Club. On January 9, 2013, Respondent Village provided affidavits from Larry Smith, Superintendent of the Village's municipal water system, and William Gough, a hydrogeologist and expert consultant to the Village, supplementing their affidavits of August 1, 2012, and Respondent SWEPI provided

[20] "Painted Post's future debated at crowded forum," Derrick Ek, *Corning Leader*, Dec 12, 2012, http://www.the-leader.com/news/x719505317/Painted-Posts-future-debated-at-crowded-forum.

[21] See Affidavit of Eugene Stolfi, Affidavit of Jean Wosinski, Affidavit of John Marvin, Affidavit of Michael Finneran and Affidavit of Mary Finneran, each dated December 18, 2012, and the exhibits thereto.

copies of approvals issued to it by the Susquehanna River Basin Commission (SRB) and its applications for those approvals.

III. PRELIMINARY JURISDICTIONAL ISSUES

A. STANDING

Respondents in the instant case preliminarily raise the issue of whether or not the Petitioners have standing to bring this action. Petitioners seek to protect their drinking water, and the Corning aquifer, from both the loss of water quantity and water quality. The Petitioners also wish to avoid adverse consequences of increased noise pollution, and increased traffic which may be caused by the proposed project. In any event, Petitioners believe that these adverse environmental consequences may ensue, and therefore, should have triggered a full environmental review under the New York State Environmental Quality Review Act Environment Conservation Law § 8-0101, et seq. (SEQRA), which did not take place. Therefore, all of the organizational and individual Petitioners raise non-economic environmental issues in this Article 78 proceeding.

There are four landmark decisions dealing with standing requirements in environmental cases in New York State. The first case, and the one relied on most heavily by the Respondents, is the case of Society of Plastic Indus. v. County of Suffolk, 77 N.Y.2d 761, 573 N.Y.S.2d 778 (1991). In that case, the Court of Appeals determined that in a SEQRA case, in order for Petitioner to have standing, the Petitioner must show that their claims fall within the zone of interest of the statute which they are alleging was violated, and secondly, that they have been injured or will be injured in a manner different than the public at large.

Showing that the Petitioners' claims fall within the zone interest of the statute at issue is never a difficult proposition, if the Petitioner is claiming that the environment would be harmed,

as in this case. However, there have been cases where Petitioners were not able to show that they were injured in a manner different than the public at large.

In answering Defendants' claim of lack of standing pursuant to New York State standing rules, there are a number of salient points that should be brought to the attention of the Court. First of all, New York State courts have long accepted the concept of organization standing. Therefore, in the landmark decision of Douglaston Civic Association v. Galvin, 36 N.Y.2d 1, 364 NYSupp.2d 830 (1974), the Court of Appeals clearly indicated that an organization whose members have standing, would also have standing to bring an action on behalf of its members. Therefore, in the instant Petition, the organizations who have brought this proceeding have a number of members whose environmental interests would be adversely affected by the water withdrawal and railroad trips at issue herein. For example, in the Affidavit of Kate Bartholomew who is the Chair of the Finger Lakes Group of the Sierra Club, she states that as of December 9, 2012, the Club has 61 members whose zip codes show that they live in Painted Post or Corning , and thus that they live above the Corning aquifer.[22] The affidavit of Ruth Young, the president of petitioner People for Healthy Environment, Inc. (PHE) states that two of PHE's members live in Corning above the Corning aquifer and the majority of PHE's members live immediately downriver from the Corning aquifer in Elmira, Horseheads and Big Flats.[23] The affidavit of Jack Ossont, a founding member of the Coalition to Protect New York (CPNY), states that PHE is a member organization of CPNY.[24]

Similarly, the individual Petitioners have standing. The Affidavit of John Marvin states that the noise from the trains was so loud that it would wake him up and keep him up at night

[22] Affidavit of Kate Bartholomew, Dec. 18, 2012, p. 2.
[23] Affidavit of Ruth Young, Dec. 18, 2012, pp. 1-2.
[24] Affidavit of Jack Ossont, Dec. 18, 2012, p. 2.

when the trains were running during late evening and early morning hours, and further states that he lives only one half block from the railroad trans-loading facility.[25]

This brings us to a second salient point, that there has always been an exception to the Society of Plastics rule that a Petitioner must show damages different than the public in order to have standing, where the Petitioner owns property contiguous to or nearby the site where the action is to be carried out. Therefore, In Matter of Sun-Brite Car Wash, Inc. v. Board of Zoning of Appeals of Town of North Hampton, 69 N.Y.2d 406, 515 N.Y.S.2d 418 (1987), the Court indicated:

> "While something more than the interest of the public at large is required to entitle the person to seek judicial review -- the petitioning party must have a legally cognizable interest that is or will be effected by the zoning determination -- proof that special damage or in fact injuries is not required in every instance to establish that the value or enjoyment of ones property is adversely effected *** thus, an allegation of close proximity may raise to an inference of damage or injury that enables a nearby owner to challenge the Zoning Board's decision without proof of actual injury."

69 N.Y.2d 413-414 (citations omitted).

Since Sun-Brite, the courts have consistently upheld this inference of standing as an exception of a Petitioner from having to show injury in fact due to the proximity of the Petitioner to the project under consideration. See, for example Committee to Preserve Brighton Beach in Manhattan, Inc. v. Planning Commissioner of City of New York, 259 A.D.2d 26, 695 N.Y.S.7 (1st Dept. 1999); Masiello v. Town Board of Lake George, 257 A.D.2d 962, 684, N.Y.S.2d 330 (3rd Dept. 1999); King v. County of Monroe, 255 A.D.2d 1003, 679 N.Y.S.2d 779 (4th Dept. 1998); Parisiel v. Town of Fishtail, 209 A.D.2d 850, 649 N.Y.S.2d 169 (3rd Dept. 1994); Heritage Co. of Vecina v. Ballenger, 191 A.D.2d 790, 594 N.Y.S.2d 388 (3rd Dept. 1993);

[25] Affidavit of John Marvin, Dec. 18, 2012, pp. 1, 3.

Kuczinski v. Zoning Board of Appeals of the Town of Dover, 148 A.D.2d 612, 539 N.Y.S.2d 77 (2nd Dept. 1989).

This rule continues to be viable today, including in the Fourth Department. Therefore, in LaDelfa v. Village of Mount Morris, 213 A.D.2d 1024, 65 N.Y.S.2d 117 (4th Dept. 1995), the Petitioner challenged the village's decision not to do an Environmental Impact Statement pursuant to SEQRA for a complex for elderly and handicapped individuals and on appeal, the Respondent contended that the court below erred in concluding that the Petitioner had standing. The Fourth Department expressed its concise view of standing in SEQRA actions:

> "One of the petitioners owns property near the project site and alleges that his property would suffer non-economic harm from the environmental impacts of the project. That allegation is sufficient to show environmental harm that is different from that suffered by the public and to provide the requisite standing to pursue the claims."

213 A.D.2d 1025 (citations omitted).

Finally, the Court of Appeals has recently expanded the rule for standing for individuals and organizations, allowing standing in a much broader category of cases, and adopted a standing standard closer to that required in federal court as espoused in the landmark environmental standing case of Sierra Club v. Morton, 405 U.S. 727. Therefore, 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), the court started its decision by indicating that:

> "We hold that a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing under the State of Environmental Quality Review Act (SEQRA) to challenge governmental actions that threatens that resource. Applying that rule to this case, we hold that the individual petitioners who are members of petitioners Save the Pine Bush, Inc., and the organization itself, have standing to challenge an action alleged to threaten endangered species in the Pine Bush area. 13 N.Y.3d at 301."

The Sierra Club is the oldest and largest environmental organization in the country. The protection of water resources is a key aspect of the Sierra Club's work, at the national, state and local levels, since the Club's founding in 1892. The Sierra Club and its members have long been concerned about both the quantity and quality of this country's potable drinking water supplies, have worked to educate the public to assure safe drinking water supplies for its members and the public, and have brought numerous lawsuits to protect those drinking water supplies under various federal, state and local laws. The Club's Finger Lakes Group works to protect water resources in the Painted Post area. For several years, the group organized and sponsored an annual water day event on Keuka Lake to educate the public about local water issues. In June 2012 the Group teamed up with the Sierra Club's national water sentinels program to offer a water monitoring training that was held in Painted Post. The training program was attended by more than 30 concerned citizens from the area. Seventeen members of the water monitoring group met in Painted Post on December 10, 2012, to discuss their monitoring results and submit samples for laboratory testing.[26]

Similarly, protection of local drinking water supplies is a key focus of People for a Healthy Environment (PHE) activities.[27] Likewise, the Coalition to Protect New York (CPNY) has a mission to protect New York's water resources and water rights from the damaging effects of water withdrawals for hydraulic fracturing for gas drilling.[28]

Therefore, in the instant action, the long standing interest of Petitioner organizations in the preservation of abundant and clean drinking water supplies, and in assuring a healthful environment for its members, and where the individual members have raised non-economic environmental issues and how adverse environmental consequences would effect their

[26] Affidavit of Kate Bartholomew, December 18, 2012, p. 1.
[27] Affidavit of Ruth Young, December 18, 2012, p. 1.
[28] Affidavit of Jack Osson, December 18, 2012, p. 1.

environmental wellbeing, and finally where at least one Petitioner lives only one half block from the project site, clearly the Petitioners in the instant case meet the requirements for standing in New York State.

(B) LACHES OR MOOTNESS

Respondents next contend that Petitioners' action must be dismissed based upon the doctrines of laches or mootness. While Respondents acknowledge that Petitioners filed this proceeding within the four months statute of limitations, they claim that Petitioners knew, or should have known, that the water withdrawal had been approved by the SRBC in the spring of 2011, and waited nearly two years to bring this action. Of course, the approval by the SRBC was by emails that were transferred between the Respondents and the SRBC, and never made public (see Exhibit 12 to the Administrative Record and the attachments to the Letter of Joseph Picciotti to the Court, January 10, 2013). Moreover, the initial approval by the SRBC was not even to the Respondent SWEPI whose contract is at issue in this case, but rather was to Triana Energy LLC. The SRBC did not transfer approval of the amounts in the Triana approval to SWEPI until July 24, 2012. See email from Glenda Miller at SRBC to Stephen Wright at SWEPI, July 24, 2012, attached to the Letter of Joseph Picciotti to the Court, January 10, 2013. Finally, to make matters even more confusing, the initial approval issued by the SRBC to SWEPI on March 28, 2011was not for the up to 1.5 million gallons per day of water that ultimately might be withdrawn pursuant to the water sale agreement, but rather, for only 500,000 gallons of water per day. The July 24, 2012 approval issued by the SRBC was for an additional 500,000 gallons per day increasing the total amount approved to 1,000,000 gallons per day. Therefore, for all of these reasons, knowledge of SRBC's approval cannot be attributed to the Petitioners.

Of course, as much as the Respondents seem to want to blow a smoke screen concerning the issues in this case, the Petitioners in no way are challenging the approval of the SRBC, but

rather, the two independent approvals by the Village of Painted Post, as indicated in the Fact section of this Memorandum. The approval by the SRBC is simply not an issue in this case.

Therefore, any delay that would be attributed to the Petitioners bringing this proceeding must start from the date in which the Village of Painted Post actions took place, and as previously acknowledged the action was brought within the four months statute of limitations from the date of those actions. As indicated by the Court in Allison v. New York City Landmarks Preservation Commission, 35 Misc.3d 500 (Sup.Ct., NY CTY, 2011)"[t]he short, four months statute of limitations applicable to this proceeding, CPLR § 217(1), itself almost defies a laches defense. It ensures in the first instance against stale claims." 35 Misc.3d at 514.

Respondents next indicate that construction of the rail shipment facility had been started at the time that this action was brought, and that the Petitioners delayed in bringing this action while they knew construction was proceeding. Moreover, Respondents contend that construction was complete on the return date of Petitioners' Order to Show Cause, although the schedule attached to the affidavit of Robert Drew shows that construction was not scheduled for completion until July 30, 2012.[29] For those reasons, Petitioners again assert the doctrines of laches and mootness do not apply to Petitioners' actions in this case.

The landmark decision upon which Respondents rely is Matter of Dreikausen v. Zoning Bd. of Appeals of City of Long Beach, 98 N.Y.2d 165 (2002). In that case, where a developer had proceeded with construction at great expense, and with the knowledge of Petitioner, and the construction significantly had been completely while the Petitioner did not request a preliminary injunction, the court determined that the case was moot. The Dreikausen court determined that the most significant factor in that case was the fact that the Petitioner's had failed to seek a preliminary injunction.

[29] Affidavit of Robert Drew, Aug. 1, 2012, Appendix A.

Interestingly, Respondents in their instant claim of laches and mootness, neglect to inform the court that Petitioners proceeded by Order to Show Cause in this case, and the show cause Order signed by Judge Latham ordered the Respondents to show cause "why a judgment should not be made herein granting the relief sought in the Verified Petition and in particular grant a preliminary injunction enjoining all further work in furtherance of construction of the transloading facility in Painted Post, New York, which is referenced in the Petition." (See Order to Show Cause attached to this Memorandum as Exhibit "B"). Therefore, since the court in Dreikausen indicated that "the 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." 98 N.Y.2d 165, 172-73, quoted in Respondent's Painted Post Memorandum of Law at p. 23, the chief Dreikausen factor is lacking in the instant case, since Petitioners had in fact sought preliminary injunctive relief.

Moreover, in spite of the fact that the Order to Show Cause was signed on June 26, 2012, and Orders to Show Cause are normally made returnable at the earliest date possible, Judge Latham made the Order to Show Cause returnable on July 23, 2012. Exacerbating this late return date, was the fact that Judge Latham then recused himself from the case, as did two other judges to which the case was assigned, until the case was finally assigned to Judge Valentino, who then was elevated to the Appellate Division, before the case was finally assigned to this court. Certainly, the delay in the return date, as well as the various delays caused by the changes of the judges, cannot be attributed to Petitioners for laches or mootness purposes.

It also cannot be denied that the Respondents continued with their construction with full knowledge that the Petitioners were seeking preliminary injunctive relief, and therefore,

proceeded at their own risk. See Allison v. New York Landmarks Preservation Commission, Supra at 514, where the court indicated : "Although that period[of limitations] is now close to expiration, respondents weighed the risk against their business incentive not to wait for that period to expire, but to proceed immediately, at their own risk, to undertake costly work., despite the obvious opposition by members of the public, including Grunewald and petitioner organization's members, at LPC's hearings and meetings. Respondents continued the work despite petitioners' motion for a preliminary injunction and its partial and potential further success." (citations omitted). See also, e.g., Lucas v. The Board of Appeals of the Village of Mamaroneck, 2007 WL 6681711 (trial order, NY Sup., Jonathan Lippman, J 2007).

Finally, even if the Petitioners had not sought preliminary injunctive relief, the court in Dreikausen indicated various exceptions militating against laches or mootness, which included "where novel issues of public interest such as environmental concerns warrant continuing review... where a challenged modification is readily undone without undo hardship...." 98 N.Y.3d at 173 (citations omitted).

In the instant case, as can be seen, the gravamen of this proceeding is an attempt to assure abundant and clean water supplies for the Petitioners, members of Petitioners' organizations, as well as for the other residents of the area obtaining their drinking water supplies from the Corning aquifer. The potential adverse effects on both quantity and quality of water that will be drawn from the Corning aquifer has not yet taken place, (indeed, upon information and belief, no water withdrawals have been made by the Respondents since mid-October 2012, according to conversations had with the Respondents' attorney), and the issue complained of in this case is not the construction of the transloading or rail facility, but rather the withdrawal of huge amounts of water, a million gallons per day and perhaps more in the future, by the Respondent SWEPI.

Therefore, even if this Court granted the relief requested by Petitioners, enjoining further water withdrawals until the laws and regulations alleged to have been violated have been complied with, there is no need to undo the construction that has already taken place, and therefore, no need for the Respondents to expend any further costs inherent in deconstruction. Furthermore, the other exception noted by the court in Dreikausen, "where novel issues of public interest such as environmental concerns warrant continuing review" is also present in this case.

Finally, because the quantity and quality of water in the Corning aquifer has not yet been significantly and adversely impacted by the water withdrawals, and since the Petition attempts to assure that these adverse impacts will not take place, the issues in this case have not been mooted by the construction of the transloading facility, since the environmental damage has not yet been done, and injunctive relief can serve to avoid such environmental damage in the future.

(C) THERE ARE NO INDISPENSABLE PARTIES THAT HAVE NOT BEEN MADE RESPONDENTS IN THIS LAWSUIT

Respondents, in their shot gun approach to defending this proceeding, has requested that the court stay this action until such time as Petitioners join the Susquehanna River Basin Commission, the New York State Department of Environmental Conservation, the Surface Transportation Board and the Federal Railroad Administration.[30]

Apparently, Respondents claim that these parties must be sued because they may be "inequitably affected by a judgment in the action."

As to the SRBC, as previously indicated, Petitioners neither challenged the SRBC's grant of an approval to the Respondents, nor do they challenge the regulations or procedures under

[30] Even if an indispensable party has not been sued, that is not a basis for dismissing the action. Rather, Petitioners would have to be given the opportunity to bring the indispensable party into the case. See, Windy Ridge Farm v. Assessor of the Town Of Shandaken, 11 NY 3d 725. That is why Respondents request that the action be stayed, rather than dismissed.

which the approval was granted. Rather, Petitioners merely refer to the SRBC approval, and the manner in which the approval was delivered to the Respondents, to indicate that Petitioners were not on notice of the fact that the approval had been granted. The approval by the SRBC, as opposed to the implication that seems to be made by the Respondents, does not in anyway preempt or otherwise effect the requirements of the Village of Painted Post to comply with SEQRA. Therefore, since the actions of the SRBC are not in anyway effected by this lawsuit, they are not necessary parties, and indeed, it would be inappropriate to make them a party to this lawsuit.

As to the Department of Environmental Conservation, they have no role to play in this lawsuit.[31] The DEC was not required to review or provide input into the Respondents' decision-making process. Therefore, again, it is hard to see how the DEC would be potentially impacted and the Respondents do not provide any argument to this affect, other than the statement that this lawsuit would in some way "potentially undermine its authority to approve withdrawals of water" or the agency "is charged with interpreting regulations and enforcing them in accordance with statutory provisions to each such department or agency."

Finally, concerning the Surface Transportation Board and the Federal Railway Administration, while this lawsuit does claim that a permit was necessary to be obtained from the Surface Transportation Board, since no permit had ever been applied for by WCOR, any lawsuit concerning agencies would be premature. Likewise, while the Respondents also throw out the thought that Petitioners have not exhausted their administrative remedies, since no application has ever been made to these agencies, there is no administrative remedy to exhaust. If an

[31] While the Petition alleges that the DEC was required to provide a bulk sale permit for the sale of water to SWEPI, the Respondents have rightly pointed out that the statute requiring this permit does not provide a private right of action for its enforcement, and Petitioners' concede this point. Therefore, since Petitioners cannot sue the DEC directly concerning this issue, they can't be made a party to this proceeding because of it.

application was made to the Surface Transportation Board or the FRA, and one of hose agencies then granted a permit without engaging in the NEPA process, a lawsuit would be ripe at that time challenging the grant of the permit in federal court.

Respondents would seem to require any Petitioner who challenges a governmental or municipal action, would have to bring into the proceeding as a necessary party any agency who either drafted regulations, applies regulations, or interprets regulations, even if those regulations are not a part of the proceeding at issue. To put it more simply, for example, according to the Respondents, any time a municipality's action is challenged by claiming a violation of SEQRA or its regulations, the DEC would have to be a party. Similarly, anytime health issues are impacted, presumably the New York State Department of Health would have to be a party. Even if such a proposition were not so absurd, it would raise constitutional case or controversy issues, which of course are not necessary since the CPLR does not throw such a wide net over who must be parties to a lawsuit or proceeding.

The instant proceeding only deals with the improper manner in which the Village of Painted Post entered into the lease agreements and the contract to allow water withdrawals from the village's public water supply. It is those issues that the court must deal with in this proceeding, and not other issues that the Petitioners have not raised, and therefore, the governmental agencies indicated are not necessary parties to this proceeding.

IV. ARGUMENT

(A) THE NEW YORK STATE ENVIRONMENTAL QUALITY REVIEW ACT HAS BEEN VIOLATED

One of the major issues in this case is whether or not the Village of Painted Post has fulfilled its statutory duties as required by SEQRA and the regulations promulgated pursuant thereto. As previously indicated the Village of Painted Post has taken two actions that they have treated as separate and distinct from each other.[32] The first action taken by the Respondent Painted Post was an agreement by the Village Board to enter into a bulk water sales agreement with Respondent SWEPI, which provided for the sale and withdrawal of up to 1,500,000 gallons of water per day from the Painted Post public water supply. The second action taken by the Village was to approve the lease entered into by Painted Post Development LLC (essentially a development subsidiary of the Village) to the Wellsboro and Corning Railroad for the construction of a rail/loading facility so that the water withdrawn by SWEPI could then be deposited on the Wellsboro and Corning Railroad trains and shipped by rail to Wellsboro, Pennsylvania, where the water would then be transshipped to various wellheads to be used for natural gas hydrofracking. The Village has taken the position that SEQRA does not legally apply to these activities but nevertheless, voluntarily engaged in a SEQRA environmental review, and determined that there would be no adverse environmental consequences from these two actions, and therefore, determined that there was no necessity to draft an environmental impact statement or to engage in any further environmental review prior to taking the two actions indicated.

[32] As will be seen in this Memorandum of Law, Petitioners believe that these two actions are interrelated, and by treating them as separate and distinct, they have violated the SEQRA regulations as they relate to segmentation. See the argument concerning segmentation at p. 35, infra.

As will be established in this Memorandum of Law, the position taken by the Village in fact violates SEQRA and its regulations, for the reasons stated.

In 1976, New York State enacted the New York State Environmental Quality Review Act. While SEQRA was patterned after its Federal counterpart, the National Environmental Policy Act (NEPA), 42 USCA Section 4332 et seq., the New York State Legislature recognized that NEPA was merely a procedural statute that would assure that environmental issues were considered by a decision maker prior to taking any action. However, as opposed to SEQRA, NEPA was not a substantive act which would require any particular decision from the decision maker. However, New York wished to provide greater protection to the environment when it passed SEQRA, and therefore, made significant changes from NEPA, including the requirement that environmental impact statements must be prepared in a much broader category of actions, and the requirement of substantive duties on the part of the decision maker to assure that environmental consequences that are identified will be avoided or mitigated.

As pointed out in City of Buffalo v. New York State Department of Environmental Conservation, 184 Misc.2d 243, 707 N.Y.S.2d 606 (Sup.Ct., 2000):

> "The substantive mandate of SEQRA is much broader than that of the National Environmental Policy Act (NEPA). 42 USCA Section 4332 requires federal agencies to prepare an EIS [Environmental Impact Statement] for 'any major federal action significantly affecting the quality of the human environment.' This should be contrasted with Section 8-0109 of SEQRA which is more expansive it its terms. Subdivision 2 of this Section requires an EIS for 'any action which is proposed or approved which may have a significant affect on the environment.' Only a 'low threshold' is required to trigger SEQRA review." Onondaga Landfill Systems, Inc. v. Flack, 81 A.D.2d 1022, 440 N.Y.S.2d 788 (4th Dept., 1981)."

707 N.Y.S.2d at 611 (emphasis added).

The Legislature declared that the purpose of SEQRA was to:

> "Declare a State policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the State."

ECL, Section 8-0101.

The heart of SEQRA lies in its provision regarding Environmental Impact Statements. As previously indicated, the law provides that whenever an action may have a significant impact on the environment, an EIS shall be prepared. ECL, Section 8-0109(2). This document is to contain all of the information necessary to assure that the decision-making body, called the "lead agency," can ultimately determine to go forward or not with any project in a manner that will create the least negative impact to the environment. The "lead agency," that agency having principle responsibility for carrying out or approving the project or activity, in this case the Painted Post Village Board, is charged with the responsibility of determining whether the project under consideration may have significant adverse environmental effects, and if so, to prepare the EIS. The EIS is also made available to the public so that they are apprised of the adverse environmental consequences that might ensue and allow them to comment and propose mitigating measures.

The "lead agency" is also the entity that is charged with carrying out the procedures mandated by SEQRA. Therefore, the lead agency must "act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid environmental effects...." ECL, Section 8-0109(1).

It was the Appellate Division, Fourth Department that decided the early seminal and landmark decisions interpreting SEQRA. Therefore, since the early landmark cases of Town of Henrietta v. Department of Environmental Conservation, 76 A.D.2d 215, 430 N.Y.S.2d 440 (4th

Dept., 1980), and H.O.M.E.S. v. New York State Urban Development Corporation, 69 A.D.2d 222, 418 N.Y.S.2d 827 (4th Dept., 1979), the courts of New York State have had numerous occasions to comment upon the requirements and responsibilities of agencies pursuant to SEQRA. The courts early on in these cases recognized that because of the importance placed upon SEQRA responsibilities by the Legislature, substantial compliance with SEQRA will not suffice, and that the statute must be strictly and literally construed, along with the procedural requirements indicated in the regulations promulgated pursuant to statute, 6 N.Y.C.R.R., Part 617. Matter of Rye Town/King Civic Association v. Town of Rye, 82 A.D.2d 474, 442 N.Y.S.2d 67 (2nd Dept., 1981), app. dism. 56 N.Y.S.2d 985, 453 N.Y.S.2d 682 (1982); Schenectady Chemicals v. Flack, 83 A.D.2d 460, 446 N.Y.S.2d 418 (3rd Dept., 1991).

In the oft-quoted citation from Schenectady Chemicals, the court indicated:

> "By enacting SEQRA, the Legislature created a procedural framework which was specifically designed to protect the environment by requiring parties to identify possible environmental changes 'before they have reached ecological points of no return.' At the core of this framework is the EIS, which acts as an environmental 'alarm bell.' It is our view that the substance of SEQRA cannot be achieved without its procedure, and that any attempt to deviate from its provisions will undermine the law's express purposes. Accordingly, we hold that an agency must comply with both the letter and spirit of SEQRA before it will be found that it has discharged its responsibility thereunder."

446 N.Y.S.2d at 420. (citations omitted) (emphasis added).

The courts in New York State continue to adhere to this strict and literal compliance standard as necessary to fulfill the goals of SEQRA, and not just because the Legislature mandated that the act be carried out "to the fullest extent" practicable, E.C.L., Section 8-0103(6), but also in recognition that to assure that both the spirit and letter of SEQRA are followed, courts cannot allow a lead agency the rubric of "substantial compliance" to escape the environmental

goals of the Act. See, e.g., Stony Brook Village v. Reilly, 294 A.D.2d 481, 750 N.Y.S.2d 126 (2nd Dept., 2002); Matter of Rye Town/King Civic Association v. Town of Rye, supra.

Moreover, if a lead agency is allowed to rectify a SEQRA procedural violation without voiding the actions taken after the violation occurred and requiring it to be done properly, the lead agency would treat the renewed work as a mere post-hoc rationalization of what had gone on before. The Court of Appeals decision in Tri-County Taxpayers Association v. Town Board, etc., 55 N.Y.2d 41, 447 N.Y.S.2d 699 (N.Y., 1987) is instructive. In that case, the Appellate Division, with two judges dissenting on the issue of remedy, determined that nullifying a vote of the electorate that took place prior to SEQRA compliance "would serve no useful purpose to undo what has already been accomplished . . . ." 437 N.Y.S. 2d at 984. However, the Court of Appeals adopted the position of the dissenters, holding that in order to properly insure that the goals of SEQRA would be met, that the vote had to be nullified. The Court stated:

> "It is accurate to say, of course, that by actions of rescission later adopted the Town Board could have reversed the action authorizing the establishment of the sewer district. As a practical matter, for several reasons, however, the dynamics and freedom of decision-making with respect to a proposal to rescind a prior action are significantly more constrained than when the action is first under consideration for adoption."

55 N.Y. 2d, at 64.

Therefore, where a procedural violation of SEQRA is held to exist, in order to assure that the goals of SEQRA are met, the decision must be annulled.

While the procedural responsibilities of SEQRA require a strict standard of compliance, the lead agency is allowed to fulfill substantive duties in making its final decision and choosing from appropriate alternatives is within their discretion. However, the broader discretion that resides with an agency concerning its substantive duties does not insulate the agency from

judicial review. Indeed, in the case of Akpan v. Koch, 75 N.Y. 2d 561, 555 N.Y.S. 2d 16 (1990), the court elucidated the standard of review concerning substantive matters:

> "Nevertheless, an agency, acting as a rationale decision-maker, must have conducted an investigation and reasonably exercised its discretion so as to make a reasoned elaboration as to the affect of a proposed action on a particular environmental concern. Thus, while a court is not free to substitute its judgment for that of the agency on substantive matters, the court must insure that, in light of the circumstances of a particular case, the agency has given due consideration to pertinent environmental factors."

555 N.Y. 2d at 21. (Citations omitted)

The standard that is universally applied in determining whether or not a lead agency has fulfilled its SEQRA requirements was first espoused in the H.O.M.E.S. case, supra, and eventually memorialized in the SEQRA regulations at 6 N.Y.C.R.R., Section 617.7(b), commonly called the "hard look standard". That standard requires that the agency must:

(1) Identify all areas of relevant environmental concern; and

(2) Take a "hard look" at the environmental issues identified; and

(3) Present a reasoned elaboration for why these identified environmental impacts will not adversely affect the environment, in the event that it is determined that an Environmental Impact Statement need not be drafted.

In determining whether or not an Environmental Impact Statement needs to be prepared, the SEQRA regulations provide a detailed road map concerning the obligations of the lead agency. Therefore, after a lead agency is designated, and after an Environmental Assessment Form is prepared, the lead agency must first determine whether or not the proposed action falls within the categories of either "Type I", "Unlisted", or "Type II". Type II actions are those actions that are identified in Section 617.5 of the regulations, which have already been determined not to have an adverse effect on the environment, and therefore no further SEQRA

review is required. They include minor actions such as painting yellow lines on a highway or maintaining a public building. By contrast, Type I actions are those actions that because of their size, scope or type, are determined that more likely than not they may have adverse environmental consequences, and therefore require the drafting of an Environmental Impact Statement. (Unlisted actions are those actions that are neither Type I or Type II.) In the instant case, the Village determined that the lease agreement with the Wellsboro and Corning Railroad was preempted from any state or local regulation, including SEQRA, because of various federal laws and determined that the water withdrawal and sales agreement to SWEPI was exempt as a Type II action, and therefore, no environmental review was necessary.

The Village violated SEQRA when it failed to classify the water sale agreement as a Type I action, and issued a determination that it was a Type II action. The resolution by the Village designating the water sale agreement as a Type II action relies upon 6 N.Y.C.R.R. 617.5(c)(25) as the provision pursuant to which the Type II exemption was claimed. Section 617.5(c)(25) provides that actions for the "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 that are not subject to review under SEQRA. Apparently, the Village has taken the position that the sale of the public water to SWEPI is "surplus government property", and further, that it is not considered "land".

However, for various reasons, the bulk water sale at issue herein does not fall within the exemption provided in Section 617.5(c)(25). That section explicitly excludes actions involving the purchase or sale of land from the exemption contained in that section. Water rights are incident to the ownership of land and are considered real property in New York. Indeed, it has

long been established that riparian rights are classified as real property. In Tracey Development Co. v. People, 212 N.Y. 488 (1914), the Court of Appeals stated that:

> "[T]he right [to use water] as it flows over the lands of another is an incorporeal hereditament and in such hereditament is incident to land, it naturally passes with land, and, therefore, it is properly classified as real property in the 'Real Property Law'...."

212 N.Y. 488 at 500.

Similarly, in Matter of Van Etten v. City of New York, 226 N.Y. 483 (1919) the court again stated that:

> "The right of the owner of riparian land to the natural flow of water in a stream along the land is a corporeal hereditament and is an incident to and is annexed to the land as part and parcel of it; it is not an easement but an usufructuary right which is properly classified at common law and under this section, equally with the land itself, as real property."

226 N.Y. at 486.

The Van Etten case is cited with approval in Niagara Mohawk Power Corp. v. Cutler, 109 A.D.2d 403 (3rd Dept. 1985), where the court indicated that "the riparian right is natural and inherent, and a part of the estate of each riparian owner (Strobel v. Kerr Salt Co., 164 N.Y. 303, 320). "It is properly classified at common law, equally with the land itself, as real property (Matter of Van Etten v. City of New York, 226 N.Y. 483, 486 (1919)," Id. at 405. C.F. Lupo v. Board of Assessors of Town of Huron, 10 Misc.3d 473 (Wayne County 2005) holding that "riparian rights are regarded as a taxable part of the real property to which they attach and are properly considered in valuating that property."

Moreover, rights to groundwater are treated similarly in New York and are also considered incident to the ownership of land. See Smith v. City of Brooklyn (18 App. Div. 340, 32 App. Div. 257, affd. 160 N.Y. 357(1899) and Forbell v. City of New York (47 App. Div. 371, affd. 164 N.Y. 522 (1900), two landmark decisions in American groundwater law. The Smith

and Forbell cases are cited with approval in a more recent groundwater case, Stevens v. Spring Valley Water Works Co., 42 Misc. 2d 86 (2d Dept. 1964).

Indeed, groundwater is generally treated as a public resource held in trust for the use of all members of the public. For example, the New York State Department of Environmental Conservation has adopted a policy that identifies the commitment of the DEC to the operation of a comprehensive natural resource damages program to enable the Commissioner, as the designated trustee for New York State natural resources, to fulfill his legal obligation to act on behalf of the public to recover damages for injuries to natural resources and to use any recovered damages to restore or replace those injured resources, see, CP- 44 / Natural Resource Damages Policy, which states:

> "On November 30, 1987, Governor [Mario] Cuomo appointed the Commissioner of Environmental Conservation to be the trustee for New York State's natural resources under applicable federal law, Including the Comprehensive Environmental Response, Compensation And Liability Act, the Clean Water Act and the Oil Pollution Act, Complementing the Department's responsibilities under the New York Environmental Conservation Law, Article 12 of the New York Navigation Law, and other applicable law, to conserve, improve and Protect New York's natural resources. The purpose of this policy is to reaffirm the Department's commitment to a comprehensive program to pursue natural resource damage claims and to use damage recoveries to restore injured resources to the maximum extent possible."[33]

The DEC website affirms that groundwater is a natural resource:

> "New York State has a rich and diverse array of natural resources. From prominent resources, such as Long Island Sound, the Hudson River, the Adirondacks Park, and Niagara Falls to small rural ponds, creeks, wetlands and municipal parks – the Department of Environmental Conservation (DEC's) mission is to conserve, improve and protect all of the natural resources of New York State for the benefit of its citizens. The Commissioner of Environmental Conservation is the trustee for the natural resources of the State of New York, having been so designated by the Governor. In order to

[33] CP-44 / Natural Resource Damages Policy, http://www.dec.ny.gov/regulations/68567.html.

> aid the Commissioner in fulfilling his Trustee obligations, DEC's Natural Resource Damage Staff seek to recover damages from responsible parties when natural resources are injured and use such damages to restore or replace those resources....Natural resources that nay be subject to an NRD claim include, but are not limited to, land, water, groundwater, drinking water supplies, air, fish, wildlife, and biota"[34]

Respondent Village contends that the use of the terms "surplus water" in certain Attorney General Opinions and cases interpreting the provisions of Village Law § 11-1120 and its predecessor sections, are applicable to the interpretation of the SEQRA regulations. These cases have no bearing on the issue of whether a municipality's rights under its municipal permits should be categorized as "surplus property" for purposes of qualifying for a Type II exemption from SEQRA.[35]

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

As indicated in the Affidavit of Paul Rubin, until a cumulative impact analysis is done of all the withdrawals from the Corning aquifer, and of the impact of high levels of withdrawals

[34] Natural Resource Damages (NRD), http://www.dec.ny.gov/regulations/2411.html.

[35] The Village's sale of water is governed by Article 11 of the New York State Village Law. Village Law § 11-1120 expressly permits a village to sell water to private corporations beyond its borders, provided that the sale does not render the Village's water supply insufficient to Village inhabitants. Section 11-1120 provides that: "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 therefore .... 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."

from certain particular wells, it cannot be determined that the withdrawal of water allowed in the Village's lease to SWEPI will not in fact harm the Corning aquifer in terms of water quantity and water quality, for both the residents of the Village of Painted Post, and for the residents of all of the other municipalities who rely on water from the Corning aquifer for their drinking water and fresh water supplies, including residents in the City of Corning, the Town of Erwin, the Town of Corning, the Village of Riverside, and the Village of South Corning

Moreover, as is indicated by the testing results referenced in the Affidavits of Eugene Stolfi, Jean Wosinski, John Marvin Mary Finneran and Michael Finneran, the quality of the water in the Corning aquifer may have already been adversely impacted by the SWEPI water withdrawals in the Town of Erwin in that the of total dissolved solids (TDS) have been tested at significantly above recommended levels since the Town of Erwin began its sales to SWEPI in 2010. Petitioners found TDS levels of as high as 870 pp/M in water taken from municipal taps in the City of Corning in August 2012. As noted above, Petitioners' testing results from municipal taps in the City of Corning and the Town of Erwin show 25 readings above 500 mg/L TDS, 20 readings above 600 mg/L TDS, 9 readings above 700 mg/L TDS and 3 readings above 800 mg/L TDS.[36] The EPA has established a secondary maximum contaminant level of 500 mg/L of TDS. [37] The United States Geological Survey (USGS) defines freshwater as having a total dissolved-solids concentration of less than 1,000 mg/L and considers groundwater with a greater TDS level to be saline. [38] Petitioners test results are getting close to the 1000 mg/L level. Of course, Petitioners' results are not certified results, but they indicate a strong need for more cumulative impact analysis of the aquifer before extensive water exports are allowed.

[36] See affidavit of Paul Rubin, Dec. 19, 2012, and affidavit of Paul Rubin, Jan. 25, 2013.
[37] Secondary Drinking Water Regulations: Guidance for Nuisance Chemicals, Table I. Secondary Maximum Contaminant Levels, http://water.epa.gov/drink/contaminants/secondarystandards.cfm.
[38] Ground Water in Freshwater-Saltwater Environments of the Atlantic Coast, http://pubs.usgs.gov/circ/2003/circ1262/

Even if the groundwater in the Corning aquifer is not considered land so as to take the sale of the water by the Village of Painted Post to SWEPI outside of the 617.5(c)(25) Type II exemption, the provision in that exemption that includes "surplus water government property" was never intended to apply to natural resources such as a public water supply, but rather, to personal property such as furnishings, equipment and the like.

In fact, because of the complications inherent in the SEQRA law and regulations, the DEC has published a SEQRA handbook to provide guidance to local municipalities, and the handbook goes into each section of the SEQRA law and regulations. As it relates to § 617.5(c)(25) the handbook indicates as examples of types of materials that it covers as:

> "This section does include the purchase or sale of all:
>
> - Interior furnishings;
> - Fire trucks;
> - Garbage and recycling hauling trucks;
> - School busses;
> - 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 with investments and bargaining activities, the simple purchase or sale of materials does not create an adverse environmental impact. Also note that land transactions involving one or more government entities are not exempt from SEQR; this means that tax sales as well as other dispositions of excess property are subject to review under SEQR. In addition, note that government transactions involving specific hazardous materials also remain subject to review under SEQR."

The SEQR Handbook, 3rd Edition 2010, p. 40.

Therefore, as can be seen, the Type II exemption applies to what would be a common reading of the section, personal property and equipment , and not to natural resources, and

specifically not to the excepted provisions for land "as well as other dispositions of excess property." (emphasis added). Therefore, if what the Respondents call "surplus water" could be considered to be "surplus property", if it was considered at all as part of this section, would actually be considered "excess property" that runs with the land, which as previously indicated includes groundwater resources.

The cases cited by the Respondents do not require a different conclusion. Clearly, the nearly century old jurisprudence providing that water resources are in fact real property, coupled with the special status that the state places on water resources as public natural resources that require the protection and trusteeship of the state, are wholly distinguishable from the cases cited by the Respondents finding that, for example, sand is personality, or conversion of sand is considered personal property. Therefore, it is respectfully submitted that the Village's determination that the sale of up to 1.5 million gallons per day of public water resources to SWEPI for transportation out of state does not fall within the Type II exemption to SEQRA, and, because of the adverse environmental consequences that may ensue, should have required the Village as lead agency to determine that the sale was indeed a Type I action.

Once the lead agency determines that a project is either a Type I or Unlisted action, they then must review the list of criteria contained in the regulations to determine whether or not one or more adverse impacts may ensue if the project were to go forward. 6 N.Y.C.R.R. § 617.7. These regulations apply to both Type I and Unlisted actions. The regulations require, at Section 617.7(a) that:

> "(a) The lead agency must determine the significance of any Type I or Unlisted action in writing and in accordance with this Section.
>
> (1) To require an EIS for a proposed action, the lead agency must determine that the action may include the

potential for at least one significant adverse environmental impact.

(2) To determine that an EIS will not be required for an action, the lead agency must determine either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant."

The regulations then require that the lead agency compare the potential impacts with a list contained in Section 617.7(c). In the event that any substantial adverse environmental impacts may be created that fall within that list, then an Environmental Impact Statement must be drafted. That list includes, among other things, actions that may cause:

617.7(c)(i)

"A substantial change in existing air quality, ground or surface water quality or quantity, traffic or noise levels; ...."

Therefore, the regulations specifically indicate that an Environmental Impact Statement must be drafted for the specific adverse environmental consequences that are claimed by the Petitioners in their Petition, and unfortunately, that may have come to pass since the water withdrawal has begun. Therefore, as indicated in the Affidavit Gerald and Teresa Flegal, the trains have caused noise pollution of up to 102 decibels causing the Petitioners to be awakened from sleep and the inability to sleep during the evening hours, and further, have already caused adverse changes to groundwater quality. As such, since the Village only engaged in a cursory environmental review, without engaging in the hard look standard required, they should have determined that a Full Environmental Impact Statement was necessary.

Concerning the second action taken by the Village, the lease of land for the transshipment facility, as previously indicated the Village determined that the Federal Railroad laws preempted state and local laws, including SEQRA, and therefore, there was no necessity to do a SEQRA environmental review.

While Petitioners recognize that the Federal Railroad Laws do provide preemption of state and local laws in many circumstances, this preemption does not apply in every instance. For example, health and safety laws and regulations are not preempted. Furthermore, as explained below, an environmental review of the rail-loading facility was required under NEPA and was not conducted. (See p. 39, infra).

Even if one were to assume that SEQRA review was preempted concerning the lease of land for the transshipment loading facility, the attempt by the Village to look at the two actions that they have taken as separate and independent actions was directly contrary to the SEQRA regulations. Therefore, in determining whether a project will have a significant effect on the environment, the reviewing agency must consider all reasonably related long-term, short-term and cumulative effects, including other simultaneous or subsequent actions which are included in any long range plan of which the action under consideration is a part. Farrington Close Condominium Board of Managers v. Incorporated Village of Southampton, 205 A.D.2d 623, 613 N.Y.S.2d 257 (2nd Dept. 1994); Defreestville v. North Greenbush, 299 A.D.2d 631, 750 N.Y.S.2d 164 (3rd Dept. 2002); New York Canal Improvement Association v. Town of Kingsbury, 240 A.D.2d 930, 658 N.Y.S.2d 765 (3rd Dept. 1997).

What the Village did in the instant action was engage for SEQRA terms and what is called segmentation. Segmentation refers to the situation where a lead agency considers the environmental consequences of separate actions that are interrelated but are considered separately. Segmentation is defined in the regulations as "the division of the environmental review of an action such that various activities or stages are addressed under this part as though they were independent, unrelated activities, needing individual determinations of significance."

6, N.Y.C.R.R. § 717.2(ag). While segmentation is allowed in the regulations in certain instances, it is frown upon. Therefore, as indicated the regulations at 6, N.Y.C.R.R. 617.3(g):

> "Actions commonly consist of a set of activities or steps. The entire set of activities or steps must be considered the action, whether the agency decision making relates to the action as a whole or to only a part of it.
>
> (1) Ensuring only a part or segment of an action is contrary to the intent or SEQRA. If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance, and any subsequent EIS, the supporting reasons and must demonstrate that such review is clearly no less protective of the environment. Related actions should be identified and discussed to the fullest extent possible.'

There is no question that the two actions taken by the Village of Painted Post are interrelated and dependent upon each other. To put it another way, either action has any independent utility without the other action, and there would be no need for the water withdrawal without a transshipment loading facility, and likewise there would be need for transshipping loading facility for the water, without allowing for the water withdrawal. Therefore, since in determining whether a project will have a significant effect in the environment, as previously indicated, the reviewing agency must consider all reasonably related long-term, short-term cumulative effects, including other simultaneous or subsequent actions which are included in the action, considering these two actions separately, since they have no independent utility, the Village has engaged in segmentation. Even if they could correctly engage in segmentation, they certainly did not follow the regulations to indicate the reasons why they are segmenting, and why such segmentation would be equally protective of the environment as if they considered the action as one action and as a whole for an environmental review purposes. Indeed, since the sale of the water was in fact not exempt, and therefore SEQRA review would be required, the Village

would also have been required to consider the adverse environmental consequences that would ensue not just because of the sale of the water, but of entire project including transshipping loading facility. Certainly, there can be no claim that the sale of water was preempted by the Railroad laws, and therefore, SEQRA certainly does apply.[39]

After engaging in what they consider to be the voluntary SEQRA compliance for the transloading facility lease, the Village determined that an Environmental Impact Statement need not be drafted because there were no adverse significant environmental consequences that would ensue and issued a negative declaration of their explanation of why an Environmental Impact Statement need not be drafted. (See Administrative Record Exhibit "1").

However, even the voluntary compliance did not meet the requirements of SEQRA. Therefore, to reiterate for the third time, environmental review under SEQRA requires that the lead agency consider the environmental consequences of all reasonably related long-term, short-term and cumulative effects, including other simultaneous or subsequent questions which are included in any long range plan for which the action is a part. Even a cursory review of the Environmental Assessment Form shows that the Village only considered the potential environmental consequences that would happen within the Village of Painted Post boundaries. They completely ignored any adverse environmental consequences that might ensue at the other end of the rail line in Wellsboro, Pennsylvania, the environmental consequences of using the water for hydrofracking purposes in Pennsylvania, and the effects that might ensue concerning the water withdrawal in other municipalities such as Corning or Erwin. So at best, the voluntary environmental review engaged in the Village of Painted Post only considered half of the action that was being taken, that being the potential consequences within the Village of Painted Post,

[39] Indeed, implicit in the Village's determination that the sale of water is exempted from SEQRA as Type II, is an acknowledgment that SEQRA in fact applies and is not preempted as to the water sale contract.

and never considered either voluntarily or otherwise, the other potential adverse environmental consequences that might ensue outside the Village boundaries.

Of course, even those matters that were considered by the Village and its voluntary environmental review were not considered adequately. As can be seen from the expert Affidavit of Paul Rubin, he discusses at length the commonly accepted studies that would necessary to determine whether or not the water withdrawal would create adverse environmental consequences to the Corning aquifer, and which were not done. Therefore, the Village, even its consultants, did not have the information necessary to arrive at the conclusion that there would be no adverse environmental consequences from engaging in the water withdrawal and transshipping loading facility. Moreover, the Village simply either ignored the increased noise and traffic impacts, or they simply stated them that they would occur in a conclusory fashion without any support or study to support such conclusions. As we now know, their conclusions were simply false as it relates to the increase noise pollution, or the adverse effects upon the water supply.

Therefore, for all the foregoing reasons, it is respectfully submitted that the Village has failed its statutory responsibilities under its SEQRA, and this Court must void the actions taken and issue an injunction concerning any further water withdrawals until SEQRA has been fully complied with.

(B) THE CONSTRUCTION AND OPERATION OF THE RAIL-LOADING FACILITY ARE NOT EXEMPT FROM APPROVAL BY THE SURFACE TRANSPORTATION BOARD OR FROM REVIEW UNDER NEPA

In asserting that its actions are exempt from approval under the federal railroad laws, Respondent WCOR ignores the facts that remove this case from the exemptions that it cites. The exemptions that apply under the federal railroad laws are succinctly laid out in the 2007 decision of the Surface Transportation Board (STB) in Suffolk & Southern Rail Road LLC—Lease and

Operation Exemption—Sills Road Realty, LLC, STB Finance Docket No. 35036, November 16, 2007.[40]

> "There are three types of railroad track: (1) railroad lines that are part of the interstate rail network, which require a Board license under 49 U.S.C. 10901 to construct or acquire and operate, or 49 U.S.C. 10902 to acquire and operate, and an appropriate environmental review under the National Environmental Policy Act (NEPA) and the Board's environmental rules at 49 CFR Part 1105; (2) ancillary track, such as "spur," "industrial" or "switching" track, which does not require prior authorization from the Board to construct or remove under 49 U.S.C. 10906 (or an environmental review under NEPA), but is subject to the Board's jurisdiction under 49 U.S.C. 10501(b) so that most state and local regulation of such track is preempted; and (3) so-called "private" track, which is not part of the national rail transportation system or subject to the Board's jurisdiction because the track is not intended to serve the general public. State and local regulation is fully applicable to private track.[41]

Because the Painted Post loading facility represents an extension into new territory by WCOR, the acquisition and operation of the loading facility requires approval by the STB and the facility does not qualify as ancillary track so as to be exempt from prior authorization by the STB under 49 U.S.C. 10906. Consequently, WCOR's acquisition and operation of the loading facility is not exempt from environmental review under the National Environmental Policy Act (NEPA).

In its Suffolk & Southern decision, the STB explained the test for determining whether the construction and use of a track requires STB approval and a review under NEPA:

> "The key test to determine whether construction and use of a track requires Board approval (and an environmental review under NEPA) is whether the "purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory" not served by the carrier or already served by another carrier. Texas & Pac. Ry. v. Gulf, Etc., Ry., 270 U.S. 266, 278 (1925) [sic]."[42]

40

http://www.stb.dot.gov/decisions/readingroom.nsf/fc695db5bc7ebe2c852572b80040c45f/4266ac1e814daeb1852573950074496b?OpenDocument

41 Id. at footnote 1, page 1.

42 Id. at 4.

The construction and operation of the Painted Post rail loading facility meets this test. It is clear from an examination of the system map located on the WCOR website that the rail-loading facility built by WCOR in the Village of Painted Post represents an extension of WCOR's service area.[43] The system map shows that the Painted Post facility is located next to the tracks of the Bath & Hammondsport Railroad (B&H), several miles from WCOR's tracks, which terminate at their junction with the Norfolk-Southern line several miles away from the loading facility. The B&H is under different ownership than WCOR. B&H is owned by the Livonia, Avon and Lakeville Railroad. WCOR is 70% owned by RailAmerica, Inc. which has recently been acquired by Genesee & Wyoming Inc. (G&W). In its application for control of RailAmerica, G&W describes the operations of WCOR: "Wellsboro & Coming Railroad, LLC (WCOR) . . . is located in Pennsylvania. WCOR operates on the Corning Secondary Track between milepost 74.7 at Coming, NY and milepost 106.15 at Wellsboro, PA and the Wellsboro Industrial Track between milepost 0.3 and milepost 3.9 at Wellsboro, PA for an approximate total track distance of 35.35 miles. The principal commodities transported are non-metallic minerals. WCOR interchanges with CP and NS at Coming, NY."[44] The extension is substantial because a largc amount of service is contemplated from the loading facility, up to 42 railcars a day or as many as 15,300 railcars annually.[45]

In Texas & P. Ry. v. Gulf, Colo. & S.F. Ry., 270 U.S. 266 (1926), the case cited by the STB in Suffolk & Southern, the United States Supreme Court addressed at some length a factual situation very similar to the present case. In Texas & P. Ry., the Court looked at whether a

[43] See http://www.railamerica.com/Files/WCOR/WCOR_May01_2012_NN.pdf, attached as Exhibit __.to the Affidavit of Rachel Treichler, January 28, 2013.
[44] See Application for Control, page 23-24, http://www.stb.dot.gov/filings/all.nsf/d6ef3e0bc7fe3c6085256fe1004f61cb/3c1c56777bdc842585257a520069cf63/$FILE/232649.PDF.
[45] See Hunt Engineering Report, Nov. 11, 2011, attached to the Administrative Record as Exhibit 9.

section of track proposed to be constructed by the Santa Fe Railroad constituted industrial track that would be exempt from approval by the Interstate Commerce Commission ("ICC", the predecessor commission to the STB), or whether the proposed trackage extended into territory not previously served by the carrier, and already served by another carrier and therefore did require ICC approval. The Court stated:

> The carrier was authorized by Congress to construct, without authority from the Commission, "spur, industrial, team, switching or side tracks . . . to be located wholly within one State." Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. . . . But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension, it cannot be built unless the federal commission issues its certificate that public necessity and convenience require its construction. The Hale-Cement Line is clearly an extension within this rule.

Id. at 278-279. In the instant case, WCOR's trackage at the rail-loading facility meets the conditions identified in the Texas & P. Ry case. The trackage extends into territory not previously served by WCOR and it extends into territory already served by another carrier, B&H. The facility should not have been built until the STB had issued a certificate that public necessity and convenience require its construction. It appears that WCOR has failed to obtain the required STB approval and NEPA review. Petitioners have not been able to find any record

at the STB that WCOR sought or obtained STB approval to construct the Painted Post rail-loading facility.

Because the required STB approval has not been obtained, this court may issue an injunction against continued operation of the loading facility until the required approval is obtained. In similar circumstances, the Supreme Court in Texas & P. Ry. determined that it could order an injunction before the ICC reviewed the transaction. The court said:

> Paragraph 18 prohibits construction of an extension without obtaining the certificate. Paragraphs 19 and 20 provide that a carrier desiring to construct one may apply for the certificate and prescribe the method of proceeding.
>
> The function of the Court upon the application for an injunction is to construe a statutory provision and apply the provision as construed to the facts. The prohibition of paragraph 18 is absolute. If the proposed track is an extension and no certificate has been obtained, the party in interest opposing construction is entitled as of right to an injunction.

For the reasons above stated, Respondent WCOR must be enjoined from operations at its Painted Post rail-loading facility until it has obtained the necessary approval by the STB to acquire and operate the loading facility and until an appropriate environmental review has been conducted under NEPA.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should issue an order enjoining any further water withdrawal until all of the laws at issue have been fully complied with.

DATED: Buffalo, New York
January 28, 2013

Respectfully Submitted,

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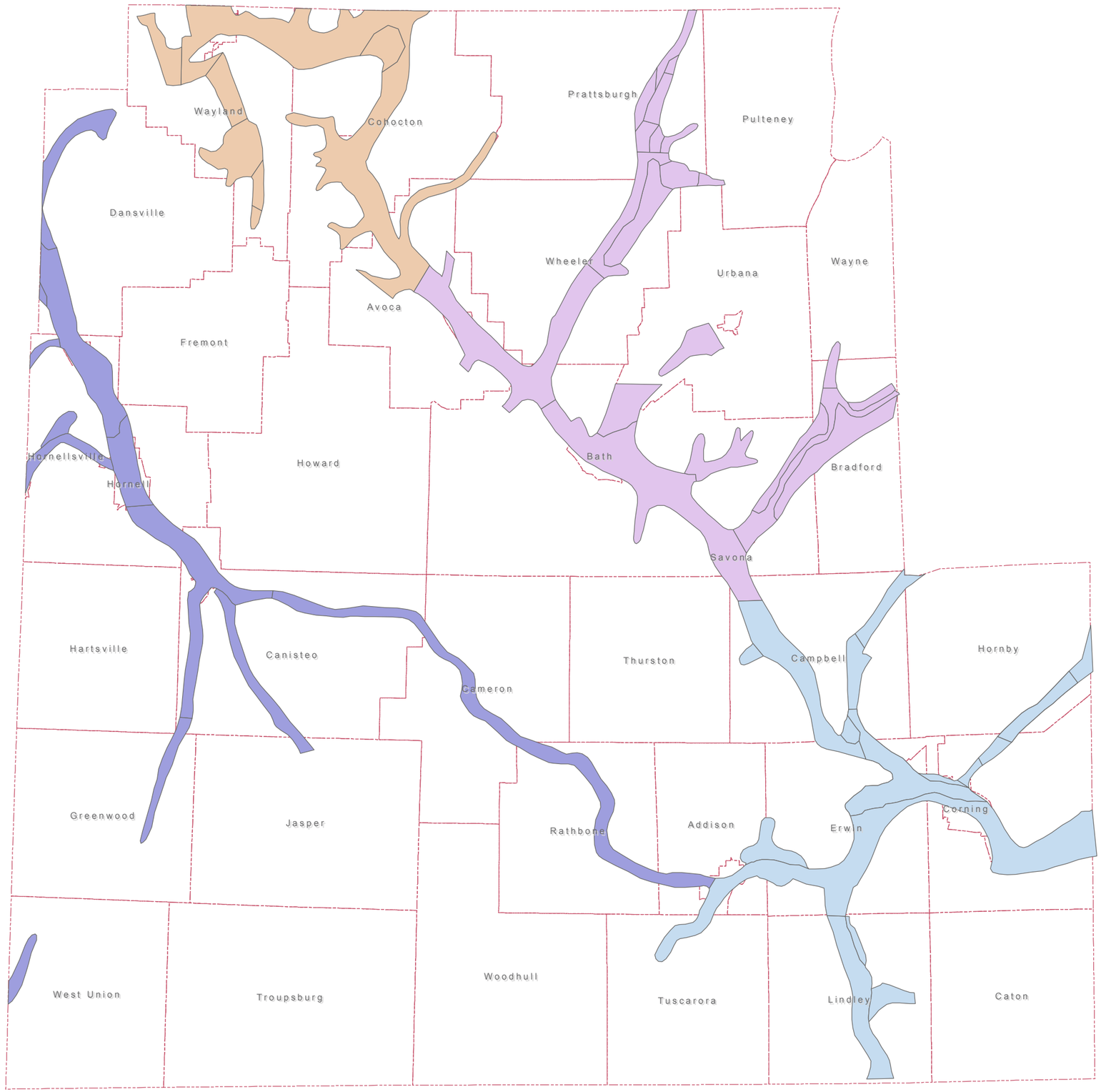
Attorneys for Petitioners

Exhibit A

Figure 5
Steuben County
Aquifers



Legend

Aquifers

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

N

0 2.5 5 10 15 Miles

Southern Tier Central Regional Planning & Development Board 3-09

Data Sources:
Streams,Lakes,Ponds, Basin and Watershed data NYS DEC.
Soils: USDA
Roads and Parcels:Steuben County

Exhibit B

n/c

STATE OF NEW YORK
SUPREME COURT : COUNTY OF STEUBEN

JUDGE BRADSTREET

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

JUDGE LATHAM

Petitioners,

ORDER TO SHOW CAUSE

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

Index No. 2012-0210 CV

RJI No. _____

-against-

JUN 26 2012

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

Respondents.

Upon reading the attorney's affidavit of Richard J. Lippes, Esq., one of the attorneys for Petitioners herein, let the Respondents herein, or their attorneys, show cause at a special term of this Court, at the courthouse located at 3 E. Pulteney Sq., in the ~~Town~~ Village of Bath, County of Steuben, State of New York on the 23rd day of July, 2012 at 1:30 p.m. why a judgment shall not be made herein granting the relief sought in the Verified Petition, and in particular grant a preliminary injunction enjoining all further work in furtherance of the construction of the transloading facility in Painted Post, New York, which is referenced in the ~~Attached~~ Petition.

Further, let personal service of this Order to Show Cause and supporting papers on the Clerk of the Village of Painted Post serve as adequate service upon both the Village of Painted Post and Painted Post Development, LLC, let personal service upon CT Corporation System, the registered agent in New York for SWEPI, LP serve as adequate service upon SWEPI, LP, and let

personal service upon Myles Group LLC, the parent company of Wellsboro & Corning Railroad, LLC, serve as adequate service upon Wellsboro & Corning Railroad, LLC. Personal service on each of the respondents to be made on or before July 10, 2012.

DATED: Bath, New York
June 26, 2012

Justice of the Supreme Court

ENTER