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; JOHN MARVIN; THERESE FINNERAN; MICHAEL FINNERAN; VIRGINIA HAUFF; and JEAN WOSINSKI,

Index No. 2012-0810

Petitioners,

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

-against-

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

Respondents.

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

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PRELIMINARY STATEMENT

At issue in this proceeding are two actions taken by the Village of Painted Post (the "Village"): (1) the sale of surplus water for gas exploration from previously constructed and permitted Village Water Wells to SWEPI, LP ("SWEPI") (which sale was permitted by the authorized interstate compact agency authorized to issue such approvals) under a surplus water agreement (the "Surplus Agreement"); and (2) a lease agreement (the "Lease") between the Village and Wellsboro & Corning Railroad ("the Railroad") for the construction and operation of a transloading facility to be used to load surplus water on tanker cars which will then transport the water by rail pursuant to purchasers of it (the "Transloading Facility") (*see* the Administrative Record filed on August 1, 2012 by the Village at Exs. 1-4 (hereinafter references to such record will be referred to as "R. at Ex. ___")).

In connection with the Lease to the Railroad, the Village adopted a resolution on February 23, 2012, classifying the Lease as a Type I action pursuant to the New York State Environmental Quality Review Act ("SEQRA"), and thereafter issued a negative declaration based on its determination after a thorough review it voluntarily completed pursuant to SEQRA that the Lease would not have any significant adverse environmental impact (the "Negative Declaration") (*see* R. at Ex. 1). The Village also determined that same day that based on the Surplus Agreement's terms and applicable law, that entering into the contract to sell surplus water was a Type II action under SEQRA (*see* R. at Ex. 2).

Petitioners' entire case essentially boils down to one issue — what action, if any, was the Village required to undertake to review environmental impacts associated with the withdrawal and sale of surplus water from previously permitted Village Wells drawing water from the Susquehanna River Basin (the "Basin") in connection with the Lease and in connection with the

Surplus Agreement. The Administrative Record filed in this matter together with the Answer and affidavits submitted on behalf of the Village, Painted Post Development, LLC and SWEPI, LP (hereinafter may be referred to collectively as "Respondents") demonstrate that the Village took appropriate action in connection with the limited SEQRA review it voluntarily undertook concerning the Lease. The Record further shows that the Village correctly determined that the sale of surplus water was a Type II action under SEQRA. There can be no legitimate dispute but that under applicable law approval of the withdrawal of water from the Basin (where the Village Wells are located), including any review of potential impacts associated with such withdrawal, falls within the exclusive jurisdiction of the Susquehanna River Basin Commission ("SRBC"), which in February and April, 2011 approved the withdrawal of a total of 1,000,000 gallons per day of water from the Basin for gas exploration beyond the needs of the current water uses within the Village's municipal boundaries (*see* R. at Ex. 12) (as discussed in Respondents' motion papers filed in August 2012, one of SRBC's 2011 approvals was issued to another company and such approval was subsequently transferred to SWEPI).

SRBC — not the Village — was the entity responsible for reviewing the impacts associated with the withdrawal of water from the Basin, which it undertook prior to issuing its approvals of the withdrawal in 2011. Once SRBC issued its approvals, the Village was not required, nor was it authorized to undertake a completely new review of the impacts associated with the withdrawal of water and the sale of it for use in gas exploration. Instead, the Village was required to review the sale of surplus water — water that was previously authorized to be withdrawn by SRBC — and the Lease of property to the Railroad for the construction of the Transloading Facility to transport surplus water. Therefore, each of Petitioner's arguments concerning the alleged environmental impacts associated with the withdrawal of water from the

Basin, including those arguments concerning Petitioners' alleged potential injuries, and those directed to the merits of the Village's SEQRA review, are completely irrelevant and constitute no more than a collateral attack on SRBC's determinations. As noted, as SRBC is not a party to this proceeding, those claims cannot be heard here. Further, Petitioners have failed, despite the submission of over a dozen affidavits, to show that either the Organizational Petitioners or Individual Petitioners have standing to maintain this proceeding. In sum, the pleadings and affidavits submitted show none of the Petitioners have demonstrated injury different from that which may be suffered by the public, and for this and the other reasons set forth herein including that this proceeding is moot, the Petition should be dismissed in all respects.

Accordingly, for the reasons set forth in Respondents' motion papers filed on August 1, 2012, as well as the Answer and Administrative Record provided therewith, as well as the Reply Affidavit of Larry E. Smith, Superintendent of Public Works for the Village, sworn to on February 21, 2013 ("the Smith Reply Aff."), the Reply Affidavit of Robert Drew, P.E., sworn to on February 21, 2013 ("the Drew Reply Aff."), the Reply Affidavit of geologist William Gough, P.E., sworn to on February 21, 2013 ("the Gough Reply Aff."), as well as the Affidavit of Mayor Rozwell Crozier, sworn to on February 21, 2013 (the "Crozier Reply Aff."), and the Affirmation of Joseph D. Picciotti, dated February 22, 2013 ("Picciotti Aff."), together with the exhibits submitted with those affidavits, the Petition should be dismissed in all respects as Petitioners have raised no material issues of fact.

ARGUMENT

POINT I

THE SUSQUEHANNA RIVER BASIN COMMISSION — NOT THE VILLAGE — IS CHARGED WITH AUTHORIZING WITHDRAWALS OF WATER FROM THE BASIN AND BECAUSE PETITIONERS CHOSE NOT TO SUE SRBC, THEIR ATTEMPT TO CHALLENGE SRBC'S APPROVALS PURSUANT TO THIS PROCEEDING MERITS DISMISSAL AS IMPERMISSIBLE COLLATERAL ATTACK, AND IN ANY EVENT, DISMISSAL IS MANDATED BECAUSE SRBC IS AN INDISPENSABLE PARTY BUT IS NOT A PARTY TO THIS PROCEEDING

The Susquehanna River Basin Compact (the "Compact"), codified in New York at Environmental Conservation Law § 21-1301 *et seq.*, delegates authority to SRBC to regulate the withdrawal of water from the Basin. In particular, the Compact declares that because the water resources of the Basin are functionally interrelated, and the uses of the resources are interdependent, "[a] single administrative agency is therefore essential for effective and economical direction, supervision, and coordination of water resources efforts and programs of federal, state and local governments and of private enterprise" (ECL § 21-1301 [1.3(3)]). Accordingly, consistent with the purpose of the Compact, "[n]o projects affecting the water resources of the basin" may be undertaken without the approval of SRBC (ECL § 21-1301 [3.10]), which includes "requests for allocations, *withdrawals*, or diversions of water for in-basin or out-of-basin use" (18 CFR 801.3[a] [emphasis added]), as well as "consumptive use related to unconventional natural gas and other hydrocarbon development" (*see* 18 CFR § 806.22[f]).

Thus, there can be no question that SRBC is the sole agency responsible for approving the withdrawal of water from the Basin (including assessing the impacts associated with such withdrawal). And while Petitioners contend that "[t]he approval by the SRBC is simply not an issue in this case" (*see* Petitioners' Memorandum at p. 15), Petitioners' entire argument hinges

on that precise issue, *i.e.*, whether SRBC adequately reviewed the potentially significant environmental impacts associated with the withdrawal of water at issue. Petitioners' own affidavits confirm this. For example, Petitioner Jean Wosinski testifies in her affidavit that SRBC "misjudged the character of our local geology and the nature of our water supply" and that "[w]hether or not SRBC evaluated the aquifer in granting approvals for these withdrawals does not change the basic point . . . that the aquifer is not sufficient to support exports for hydrofracking in Pennsylvania by our municipalities" (*see* Wosinski Aff. ¶¶ 30, 32). Petitioners are free to disagree with SRBC's evaluation, but that does not change the fact that SRBC is the sole entity with jurisdiction to approve the withdrawal of water from the Basin and that SRBC, in fact, approved the withdrawal of water for the express purpose of natural gas development (*see* R. at Ex. 12).

A. Petitioners' Claims Are Predicated On Impermissible Collateral Attack.

Petitioners' claims in this matter are essentially that they believe further testing and analysis needed to be conducted before allowing the withdrawal of water from pre-existing and permanent Village Wells which take their water from the Basin (*see* December 19, 2012 Rubin Aff. ¶¶ 5, 43)—claims which arise solely out of SRBC's approval. By asserting that the Village did not adequately review the potentially significant adverse environmental impacts associated with the water withdrawal, Petitioners are collaterally attacking SRBC's determination by challenging the Village approvals of the Lease and Surplus Agreement. Petitioners cannot undertake make these claims here. The law is clear — when the determination of an administrative agency such as SRBC becomes final, it is conclusive and binding, and cannot be subjected to collateral attack (*see Steen v Quaker State Corp.*, 12 AD3d 989, 990 [3d Dept 2004]; *Brawer v Johnson*, 231 AD2d 664, 664-65 [2d Dept 1996]; *Matter of Joseph v Roldan*, 289 AD2d 243, 244 [2d Dept 2001]; *Matter of Rosen v City of New York*, 2011 WL 2595132,

2011 NY Slip Op 31683[U], *7 [Sup Ct, New York County 2011]). As such, Petitioners cannot use this proceeding to collaterally attack SRBC's approval of the withdrawal, which was relied upon by the Village in connection with the issuance of its approvals.

More fundamentally, had the Village conducted a subsequent SEQRA review targeting the evaluation of impacts on aquifers in the Basin, as Petitioners assert should have been done, any attempt to apply additional conditions to the withdrawal or otherwise limit the approval previously granted by SRBC would be preempted by the Compact (*see State Coll. Water Borough Water Auth. v Bd. of Supervisors of Halfmoon Township, Centre Cnty., P.A.* (*Halfmoon Township*), 659 A2d 640 [Pa Cmwlth 1995] [holding an attempt by a municipality to impose conditions on water resources subject to regulation by SRBC is preempted by the Compact and the promulgated regulations]; *accord Levin v Bd. of Supervisors of Benner Township, Centre Cnty.*, 669 A2d 1063 [Pa Cmwlth 1995], *affd* 547 Pa. 161, 689 A2d 224 [1997]).

In *Halfmoon Township*, the issue before the Commonwealth Court of Pennsylvania was whether a municipality could impose additional conditions on a use application where SRBC had previously granted permission to withdraw groundwater in certain amounts. The court in *Halfmoon Township* held in language directly applicable to the present case that:

> Our reading of the Compact as a whole satisfies us the state legislature indicated an intention that local governing bodies should not supplement [SRBC's] decisions with respect to its authority to manage the basin's water resources. No other conclusion is logical where the Compact evinces a frustration with splintered governmental authority and responsibility, and where [SRBC] has been given the power to regulate water withdrawals and diversions and to determine what areas should be designated as protected or involved in an emergency situation.

(*Halfmoon Township*, 659 A2d at 644). Thus, the court held that conditions imposed by a local governing body subject to SRBC's authority, which conditions interfere with SRBC's power to regulate area water resources, are preempted (*id.* at 645).

Applying *Halfmoon Township* to the facts here makes clear that the Village is preempted by the Compact from undertaking any subsequent SEQRA or other review that concerns withdrawal of water from the Basin. Petitioners' claims that additional measures should have been imposed by the Village such as the adoption of inter-municipal drought management plans, and a comprehensive study of water quality issues across municipal boundaries to gauge the impact of what they contend is large scale pumping (*see* December 19, 2012 Rubin Aff. ¶ 43), would constitute additional conditions for withdrawal that were not imposed by SRBC in its approvals. This is precisely why the Compact was enacted by Congress and several states, including New York — "to combat chaos and fragmentation in the management of the basin's water resources" (*see* ECL § 21-1301 [3.10]; *see also Halfmoon Township*, 659 A2d at 644).

Simply stated, in 2011, SRBC conducted its required review pursuant to its regulations, which review specifically contemplated use of the water for natural gas well development, and approved the withdrawal of water from the Basin (*see* R. at Ex. 12). Petitioners do not (and cannot) dispute that SRBC is the entity with the exclusive jurisdiction over the withdrawal of water from the Basin from which the Village Wells draw water. Once SRBC approved the withdrawal, the Village was not required, nor was it authorized to conduct a further analysis of any potential significant adverse environmental impacts associated with the withdrawal of water from the Basin.

Further, for the reasons set forth in detail in the Affidavits submitted pursuant to the Respondents' motion dated August 1, 2012, including those from Larry Smith, Director of Public Works for the Village, who has intimate knowledge of the Village Water Wells at issue here, as well as Bill Gough, an expert geologist, as well as the Reply Affidavits submitted from

Mr. Smith and Mr. Gough, there is no dispute but that the Village Wells have adequate capacity to produce more than sufficient water to meet the needs of Village residents as well as to supply surplus water pursuant to the Surplus Agreement (*see* August 1, 2012 Gough Aff. ¶¶ 3-4; *see also* August 1, 2012 Smith Aff. ¶¶ 4-8; Reply Gough Aff. ¶¶ 3-5; Reply Smith Aff. ¶¶ 3-6 and Ex. A). The basis for the Village's determination that there is more than sufficient water to supply surplus water pursuant to the agreement and SWEPI is based on decades of production data which shows that the Village Wells have previously provided significantly more volumes of water that are needed by the residents and which may be required to be provided under the Surplus Agreement (*id.*). This kind of production data is the standard for determining whether such wells have sufficient production capacity (*see* Reply Gough Aff. ¶ 5). In terms of impacts associated with such sale of water, the Village correctly relied on SRBC in making its determination that the sale of such water under the circumstances was appropriate and in keeping with applicable requirements.

Petitioners' claims that the Village should have evaluated the impacts from use of the surplus water in Pennsylvania or wherever it may be used by SWEPI not only finds no support in law including cases interpreting SEQRA, but also ignores the fact that part of SRBC's approval process associated with withdrawals of water such as the approvals issued by SRBC here is to regulate the manner in which purchasers like SWEPI use such water (*see* Reply Gough Aff. ¶ 4 [recounting the manner in which SRBC regulates SWEPI's use of the surplus water including requiring that it only be used at SRBC approved well pads, and requiring SWEPI to monitor amounts purchased, etc.]).

B. Petitioners' Failure To Name SRBC As A Necessary Party Requires Dismissal.

Moreover, the Petitioners' failure to name SRBC as a party given the allegations made in the Petition (as supported by Petitioners' Affidavits) dooms this proceeding because of the Petitioners' failure to name necessary parties pursuant to CPLR § 1001.

As set forth in detail in the memorandum submitted in support of Respondents' motions on August 1, 2012 at pp. 37-38, necessary parties include those who ought to be parties if complete relief is to be accorded, or who might be inequitably effected by a judgment in the action (*see* Respondents' Memorandum dated August 1, 2012 at pp. 37-38). Needless to say, the failure to name SRBC, a governmental agency charged with authorizing the approval of the withdrawal at issue here, would have the potential to have a devastating effect on SRBC's approvals in the future if any of the relief Petitioners seeks is granted including requiring municipalities in the Basin to mandate additional testing and other conditions on withdrawals that were already approved by SRBC. In their Memorandum of Law Petitioners' attempt to argue that SRBC is not necessary to this proceeding, but where, as here, Petitioners again and again attack the determinations made by SRBC by questioning whether the potential impact of withdrawals was properly evaluated (*see* Wosinski Aff. ¶¶ 31-33; *see also* December 19, 2012 Rubin Aff. ¶¶ 10-28), it is hard to fathom a party that would be more indispensable to this proceeding. SRBC has a direct and indisputable stake in this proceeding as its authority to permit withdrawals could be significantly undermined should any of the relief Petitioners seek be granted (*see City of New York v Long Island Airports Limousine Serv. Corp.*, 48 NY2d 469, 475-76 [1979]; *see also* Respondents' Memorandum dated August 1, 2012 at pp. 37-38).

POINT II

PETITIONERS HAVE FAILED TO ESTABLISH STANDING TO MAINTAIN THIS PROCEEDING AND THIS PROCEEDING IS MOOT

A. Petitioners Lack Standing to Challenge the Village's SEQRA Review.

Petitioners failed to plead in their Verified Petition facts showing direct harm distinct from that which may be suffered by the public which is required for them to have standing. In their opposition papers, Petitioners submit eleven (11) affidavits that suffer from the same fatal flaw – none allege anything more than general, conclusory claims of harm, and each fails to identify any harm that is distinct from that which that may be suffered by the public.

It should be noted that affidavits submitted from persons which are neither Individual Petitioners nor members of Organizational Petitioners are wholly irrelevant to the issue of standing because they are not parties to the proceeding (*see Soc'y of the Plastics Indus., Inc. v Cnty. of Suffolk*, 77 NY2d 761, 773 [1991] [stating that to establish standing "*a party* must show that the in-fact injury of which it complains (its aggrievement, or the adverse effect upon it) falls within the zone of interests, or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted"] [emphasis added] [internal quotations omitted]). While acknowledging that Mary Finneran's and Gerald and Teresa Flegal's affidavits are of no import here, their allegations are of the same general nature as the other affiants.

The Individual Petitioners Do Not Have Standing.

Individual Petitioners John Marvin, Therese Finneran, Michael Finneran, Virginia Hauff and Jean Wosinski submitted affidavits. For the reasons that follow, none has demonstrated that they have standing to maintain this proceeding.

Four of the Individual Petitioners reside within the Village. According to Google Maps, Petitioner Marvin lives .3 miles, or 1,584 feet, from the Property and he alleges that he can "see

the rail-loading facility from [his] front door across the lawn of the old high school" (*see* Marvin Aff. ¶ 5; *see also* Picciotti Aff. at Ex. B [attaching copies of computer map service showing the distances of certain Petitioners from the Transloading Facility]). Individual Petitioners Michael and Therese Finneran live in the Village at 123 West Hill Terrace (*see* Michael Finneran Aff. ¶ 1; Therese Finneran Aff. ¶ 1), approximately one and a half miles from 350 West Water Street (*see* Picciotti Aff. at Ex. B). Individual Petitioner Hauff lives in the Village at 116 Keefe Boulevard (*see* Hauff Aff. ¶ 1), approximately .7 miles from 350 West Water Street (*see* Picciotti Aff. at Ex. B).

Although Individual Petitioners John Marvin, Michael and Thesese Finneran, and Virginia Hauff live in the Village, the Court of Appeals has made clear that "[t]he status of neighbor does not . . . automatically provide the entitlement, or admission ticket, to judicial review in every instance" (*Matter of Sun-Brite Car Wash, Inc. v Bd. of Zoning & Appeals of the Town of North Hempstead*, 69 NY2d 406, 414 [1987]; *see also Matter of Barrett v Dutchess Cnty. Legislature*, 38 AD3d 651 [2d Dept 2007] [holding that petitioner lacked standing despite residing at principal intersection providing access to project]); *Matter of Kemp v Zoning Bd. of Appeals of Vill. of Wappingers Falls*, 216 AD2d 466, 467 [2d Dept 1995] ["[a]bsent demonstration of some other injury, [petitioners] lack standing . . . regardless of their proximity to the applicant's property"]).

Because neither Individual Petitioners John Marvin, Michael Finneran, Therese Finneran, nor Virginia Hauff has alleged injury different from the public at large, none is entitled to an inference of injury due to their proximity to the Transloading Facility (*see Matter of Oates v Vill. of Watkins Glen*, 290 AD2d 758, 761 [3d Dept 2002] [holding that petitioner who resided 530 feet did not articulate any specific harm that he would suffer based on proximity to the project];

Buerger v Town of Grafton, 235 AD2d 984, 984-985 [3d Dept 1997] [holding that a petitioner who resided 600 feet from the subject project was required to plead special injury]; *Matter of Concerned Citizens for Open Space, Inc. v City of White Plains*, 2003 WL 22283389, 2003 NY Slip Op 51288[U], *6-8 [Sup Ct, Westchester County 2003] [holding that petitioners, located between 832 feet and 2,519 feet from the project, were not entitled to an inference of injury, different in kind or degree from than that experienced by the public-at-large]).

Eugene Stolfi, Kate Bartholomew, Jack Ossont, Ruth Young, affiants of behalf of the Organizational Petitioners, and Individual Petitioner Jean Adair Wosinski do not reside in the Village of Painted Post (*see* Stolfi Aff.; ¶ 1 Wosinski Aff. ¶ 1; *see generally* Ossont Aff.; Bartholomew Aff.; Young Aff.). Because they reside outside of the Village, they cannot benefit from the injury-in-fact presumption established by close proximity to the subject property.

Further, their "perfunctory allegations of harm" are insufficient; each Individual Petitioner and member of an Organizational Petitioner "must prove that their injury is real and different from the injury most members of the public face" (*Matter of Save the Pine Bush, Inc. v Common Council of the City of Albany*, 13 NY3d 297, 306 [2009]; *see also Matter of Otsego 2000, Inc. v Planning Bd. of the Town of Otsego*, 171 AD2d 258, 259-60 [3d Dept 1991]).

Traffic Concerns Do Not Identify Harm Different From the Public.

Petitioner Therese Finneran alleges that increased traffic is a concern (*see* Therese Finneran Aff. ¶¶ 4-5). She claims she was late for a doctor appointment due to train traffic, but provides no details whatsoever as to how train traffic impacted her differently than any member of the public. In sum, any injury suffered by Individual Petitioner Therese Finneran would be no different from that suffered by all Village residents or anyone traveling near the Transloading

Facility. Courts have found that increased traffic and noise are not injuries different from those suffered by the general public and, therefore, Individual Petitioner Therese Finneran's allegations of injury do not meet the burden of proof to demonstrate standing (*see Matter of Shelter Island Ass'n v Zoning Bd. of Appeals of Town of Shelter Island*, 57 AD3d 907, 909 [2d Dept 2008] [holding that petitioners' generalized allegations of increased traffic and effect on the water table were insufficient to establish standing because did not demonstrate environmental harm different from that suffered by the public at large and that comes within the zone of interest protected by SEQRA]; *see also Croton Watershed Clean Water Coal., Inc. v Planning Bd. of the Town of Southeast*, 5 Misc 3d 1010[A], 2004 NY Slip Op 51312[U], *4 [Sup Ct, Westchester County 2004]) [alleging impacts such as increased traffic and noise "are not injuries which are different from those suffered by the public at large" and petitioner therefore lacked standing].

Accordingly, Individual Petitioner Therese Finneran has failed to show that as a result of vehicular traffic impacts caused by the trains, she would suffer an injury in fact of an environmental nature and that said injury would be different from that of the public at large (*Common Council of the City of Albany*, 13 NY3d at 306).

Concerns About Noise Which Impact Other Residents Does Not Show Harm Distinct From That Which May Be Suffered By The Public.

Individual Petitioner John Marvin wishes to avoid supposed adverse consequences of increased noise (*see* Marvin Aff. ¶¶ 15-16). He, too, lacks standing based on these general allegations because he has not identified how his concerns over noise differentiate any injury he might suffer from injury that may be suffered by the general public.

Individual Petitioners' Concerns About Water Are Not Any Different Than Concerns That May be Held By the Public at Large.

Individual Petitioners John Marvin, Michael Finneran, Therese Finneran, Virginia Hauff and Jean Wosinski have also failed to satisfy their burden to demonstrate that they have standing as they allege generalized concerns with the availability of water and related health concerns. Even assuming the truth of their allegations, "such generalized allegations of impact to a public drinking water supply are insufficient to establish standing to assert a SEQRA claim" (*Matter of Tuxedo Land Trust, Inc. v Town of Tuxedo*, 34 Misc 3d 1235[A], 2012 NY Slip Op 50377[U], *7 [Sup Ct, Orange County 2012], *citing Matter of Shelter Island Ass'n,* 57 AD3d at 909; *see also Matter of Powers v De Groodt*, 43 AD3d 509, 513 [3d Dept 2007] [holding that general allegations that well water would be potentially contaminated and wetlands located on property would be adversely impacted by escaping contaminants were no different in kind or degree from that suffered by the general public in the vicinity of the proposed project]; *see also Matter of Long Island Pine Barrens Soc'y, Inc. v Planning Bd. of the Town of Brookhaven*, 213 AD2d 484, 485-86 [2d Dept 1995]). The alleged injury Individual Petitioners would suffer as a result is precisely the same as may be suffered by every other Village resident.

General Concerns About Property Values And The Economy Are Not Different From The Public At Large.

Individual Petitioners John Marvin, Therese Finneran, Virginia Hauff and Jean Wosinski also allege concerns about the area's overall economy and property values. Again, as these affiants even acknowledge, the effect on the general public would be no different than the effect on them.

The Organizational Petitioners Do Not Have Standing.

Organizational Petitioners Sierra Club, People for a Healthy Environment, Inc. ("PHE"), and Coalition to Protect New York ("CPNY") cannot show standing because none of their

members has shown they will suffer the kind of injury necessary to indicate they have individual standing (*Matter of Dental Soc'y of the State of N.Y. v Carey*, 61 NY2d 330, 333 [1984] [the standing of an organization to maintain an action on behalf of its members "requires that some or all of the members themselves have standing to sue, for standing which does not otherwise exist cannot be supplied by the mere multiplication of potential plaintiffs"]; *see also Matter of Powers*, 43 AD3d at 513 [holding that "since the standing of the unincorporated association to which petitioner belongs hinges on petitioner's personal standing, the unincorporated association also lacks standing.")].

Members of Organizational Petitioners' Concerns Do Not Identify Harm Different From the Public.

Kate Bartholomew, member of Organizational Petitioner Sierra Club, alleges concerns regarding traffic and increased noise (*see* Bartholomew Aff. ¶ 7). Kate Bartholomew, Eugene Stolfi, member of Sierra Club, Ruth Young, member of Organizational Petitioner PHE, and Jack Ossont, member of Organizational Petitioner CPNY, claim generalized concerns about a possible diminishment of the water supply. Ruth Young and Jack Ossont also set forth concerns about the area's overall economy. Notably, none of these members of the Organizational Petitioners allege individual, unique injury and, as such, because none has demonstrated personal standing, none has standing that may be attributed to the Organizational Petitioners.

Similarly insufficient are Organizational Petitioners' attempts to show standing merely by claiming that a number of their members reside in Painted Post or Corning and surrounding areas, or by alleging that their members reside in Pennsylvania (*see Soc'y of Plastics Indus., Inc.*, 77 NY2d at 775 [finding that "standing cannot be achieved merely by multiplying the persons a group purports to represent"]).

Organizational Petitioners' Use of A Resource Is Not Different Than That Of The General Public.

The members of the Organizational Petitioners allege that the Organizational Petitioners seek to protect water resources (*see* Bartholomew Aff. ¶ 5; Ossont Aff. ¶ 2; Young Aff. ¶ 2). However, the members of the Organizational Petitioners have not demonstrated that "a plaintiffs [sic] use of a resource is more than that of the general public" and thus, because they are "organizations devoted to less specific environmental interests – the plaintiff in *Sierra Club* [*v Morton*, 405 US 727 [1972]], for example – plaintiffs may be put to their proof on the issue of injury, and if they cannot prove injury their cases will fail" (*Common Council of the City of Albany*, 13 NY3d at 306).

It bears repeating that the Organizational Petitioners have not submitted affidavits of any members showing that any of those members can demonstrate they will suffer direct harm within the zone of interests that SEQRA is designed to protect, including diminution of an individual's enjoyment of a natural or cultural resource, such as wildlife habitats, natural rock formations or man-made roads, trails and structures of historic significance (*Matter of Tuxedo Land Trust*, 2012 NY Slip Op 50377[U], *7 [to establish standing, a petitioner must "prove that the action of which she complains would have an adverse impact upon a particular resource, and that her use of said resource is repeated, not rare or isolated to such a degree that the adverse impact would for her constitute an injury distinct from the public in the particular circumstances"], *citing Common Council of the City of Albany*, 13 NY3d at 305-06).

Members of the Organizational Petitioners' speculative and conclusory allegations regarding concerns over protection of water resources are insufficient to prove adverse impact giving rise to the type of particularized harm which is different from that which may be suffered by the public. As with the other alleged injuries, these members have not shown that their

injuries due to alleged impacts to drinking water quality and availability are any different from the public at large. All residents of the Village use the water from the Village's wells. For the reasons set for above, and in Respondents' Memorandum of Law dated August 1, 2012, both the Individual Petitioners and Organizational Petitioners have failed to demonstrate that they have standing to pursue their claims in this proceeding which we submit requires dismissal of it.

B. This Proceeding is Moot.

Contrary to Petitioners' claims (*see* Petitioners' Memorandum at pp. 14-18), their delay in seeking injunctive relief constitutes laches, and has rendered this proceeding moot. Petitioners attempt to assert that their unreasonable delay in commencing this proceeding is obviated by the fact that they sought a preliminary injunction at the time they commenced it, but Petitioners completely ignore two critical facts: (1) that they could have, but failed, to seek a temporary restraining order at any time from the initial approval issued by SRBC in 2011 to the beginning of construction in the spring, 2012, despite the fact that they had knowledge of the approval and the construction of the facility; and (2) that they could have, but failed, to take any action during the pendency of this proceeding.

As Petitioners acknowledge, preliminary injunctive relief serves to "preserve the status quo *to prevent construction from commencing or continuing* during the pendency of the litigation" (*see Matter of Dreikausen v Zoning Bd. of Appeals of the City of Long Beach*, 98 NY2d 165, 172-73 [2002] [emphasis added]). Thus, while Petitioners make much of the fact that they moved by Order to Show Cause for a preliminary injunction on June 26, 2012, Petitioners have no explanation for why they did not seek such relief when SRBC issued its approval in 2011 or why it did not seek a temporary restraining order when construction began in the spring of 2012, despite the obvious presence of ongoing construction as evidenced by the timeline for

the project found on Petitioners' counsel's own website (*see* pp. 18-19, *infra*; Picciotti Aff. at Ex. A) (showing the timeline found on Petitioner Counsel Rachel Treichler's website which demonstrates that Petitioners and their counsel knew of the start of construction and the SRBC authorizations); *see also Matter of Caprari v Town of Colesville*, 199 AD2d 705, 706 [3d Dept 1993] [holding that the proceedings and action are barred by the doctrine of laches and rendered moot because of "plaintiffs' failure to timely safeguard their interests by seeking an injunction, despite the obvious presence of ongoing construction on [owner's] property"]). Petitioners cite to the CPLR for the proposition that temporary injunctive relief cannot be issued against a municipality, but as Respondents identified in the Memorandum filed in August, 2012 at pp. 24-25, there is an exception to that rule.

Further, Petitioners' delay continued after commencing this proceeding. Pursuant to a June 6, 2012 Freedom of Information Law Request by the Sierra Club, on June 22, 2012 the Village made documents available to Sierra Club relating to well production and other data. However, the Sierra Club neglected to contact the Village to obtain the records until December, 2012 (*see* Reply Smith Aff. ¶ 4 and Ex. A).

Moreover, Petitioners' contention that knowledge of SRBC's approval cannot be attributed to Petitioners because the approvals were somehow undertaken in a less than open manner (*see* Petitioners' Memorandum at p. 14) is without merit and contradicted by Petitioners' own opposition papers.[1] For example, Ms. Wosinski testified that she read in 2011 that the Village was considering plans to sell millions of gallons of water per day (*see* Wosinski Aff. ¶ 28; *see also* Wosinski Aff. at Ex. B). In fact, Petitioners' counsel's own website contains links

[1] It should be noted that the SRBC approvals in February and April 2011 of the applications to withdraw surplus water for sale, copies of which were made available to the Sierra Club in June, 2012, were in the amount of 1,000,000 gpd, not 1,500,000 gpd as Petitioners claim (*see* August 1, 2012 Gough Aff. ¶ 6).

to articles published as early as April 17, 2011 referencing the fact that SRBC approved the withdrawal of water from the Basin.[2] Further, pursuant to 18 CFR § 806.15, SWEPI provided notices of application to the surrounding municipalities and the county planning agency of each county in which the project is located, as well as published notice of submission in a newspaper, The Leader (*see* Smith Reply Aff. at Ex. A). Thus, the approvals of the withdrawal of surplus water to sell to SWEPI were made public sixteen months before the commencement of this proceeding. Petitioners were plainly aware of everything associated with the project; to suggest otherwise is not credible.

Therefore, because Petitioners did not exercise any diligence prior to initiation of the proceeding and during the pendency of it, including prior to the completion of construction of the Transloading Facility, they should be barred from recovery and the Petition should be dismissed as moot.

POINT III

PETITIONERS HAVE CONCEDED THAT THE THIRD CAUSE OF ACTION MUST BE DISMISSED.

Petitioners' third cause of action alleges that the Village was required to obtain a bulk sale permit for the sale of water to SWEPI from the New York State Department of Environmental Conservation ("DEC"), but Petitioners concede in their brief that the statute requiring this permit "does not provide a private right of action for its enforcement, and Petitioners' concede this point" (*see* Petitioners' Memorandum at 19 n. 31).

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[2] *See* http://treichlerlawoffice.com/pp/index.html, referencing http://www.the-leader.com/news/x1274027362/Water-station-could-help-Painted-Post-cash-in-on-fracking.

Respondents also reiterate that even if the private cause of action were available (and it is not), where, as here, the SRBC is charged with authorizing withdrawals of water, the bulk sale permit requirements do not apply (*see* Respondents' Memorandum dated August 1, 2012 at p. 17). Accordingly, for the reasons set forth in Respondents' Memorandum dated August 1, 2012 (*see* Point I.B), Petitioners' third cause of action must be dismissed.

POINT IV

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

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

Petitioners' attempt to classify the Village's sale of surplus water as real property within the "land" exception to Type II actions must fail because the Village did not grant (and has never granted) SWEPI any riparian rights or any other form of land rights, nor did it grant rights in the Village wells (R. at Ex. 4 [the Surplus Agreement]). New York State law expressly authorizes the Village to contract to sell excess water beyond the needs of the Village and its residents with customers outside of the Village's boundaries (*see* Village Law § 11-1120; *see also* General Municipal Law § 118). In compliance with Village Law § 11-1120, the Surplus Agreement provides that SWEPI is only entitled to *surplus* water, subject to specific conditions including most importantly that such water is available after Village residents receive the water they need (R. at Ex. 4). Further, the Surplus Agreement expressly provides that sales of water may be temporarily curtailed or permanently terminated due to various force majeure events. *Id.* The Village's Surplus Agreement with SWEPI, therefore, fulfills the Village's obligations under New York law.

It is well-settled under New York law that a village's sale of surplus water to a corporation outside of the village is proper and is considered village property (*see Simson v Parker*, 190 NY 19, 22 [1907] [finding that city's authority to sell its surplus water was constitutional because "[t]he sale of *city property* for which the city has no use is in no sense a gift to or in aid of the person to whom the sale is made"] [emphasis added]); *see also* 1981 Op. St. Comp., No. 81-251 [authorizing the City of Gloversville to contract with a private developer in the City of Johnstown for the sale of surplus water]). Furthermore, villages are entitled to sell water to anyone not within the village boundaries by means of contract freely entered into by the contracting parties (*see Vill. of Webster v Town of Webster*, 183 Misc 2d 956, 961, 962 [Sup Ct, Monroe County 1999], *affd as modified*, 270 AD2d 910 (4th Dept. 2000) [stating that "any Village effort to supply water outside of its municipal boundaries must be carried out in its proprietary capacity and depends upon the existence of a valid contract"]).

The sale of water by a municipality falls squarely within 6 NYCRR § 617.5(c)(25) as a Type II action not requiring SEQRA review. The regulation specifically designates certain actions as Type II, and includes exceptions that do not require further action and which therefore are not subject to SEQRA review:

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

(6 NYCRR § 617.5[c][25] [emphasis added]). There is simply no basis in law or common sense which indicates that the sale of surplus water constitutes a conveyance of "land" within the meaning of SEQRA. The Village's sale of surplus water to SWEPI pursuant to the agreement at issue is not a land transaction; it is the sale of surplus government property. Accordingly, the

sale of surplus water pursuant to the Surplus Agreement is a Type II action not subject to SEQRA review

Despite the clear statutory authority authorizing the sale of surplus water by the Village and the straightforward provisions identifying such sale as a Type II Action under SEQRA, Petitioners rely on DEC's SEQR Handbook for the contention that 6 NYCRR § 617.5(c)(25) does not include the sale of surplus water, but only applies to personal property and equipment (*see* Petitioners' Memorandum at pp. 32-33); *see also* The SEQR Handbook, 3rd Edition 2010, at p. 40). In fact, the SEQR Handbook list cited by Petitioners does not on its face purport to identify each Type II action under § 617.5(c)(25); instead, the Handbook serves as guidance for practitioners and sets forth some common examples of Type II actions; neither the Handbook, nor more importantly, the regulation purport to identify each type of surplus government property sale which is encompassed by the exemption. Rather, § 617.5c (25) provides a general description of actions which are exempt from SEQRA review (Type II actions), which includes sales of surplus government property and then identifies which surplus government property sales are not encompassed by the general surplus property exemption, and thus which are excluded from it, such as land sales. The sale of surplus water is not identified as an exclusion from the surplus government property sale exemption, and therefore sales of such surplus water are encompassed by that exemption. Thus, Petitioners' urge a reading of this regulation that is not only contrary to its plain terms, but is also contrary to well established principles of statutory construction. Section 617.5(c)(25) provides a non-exhaustive list of actions encompassed by the exemption. As a result, the sale of surplus government property which is not expressly excepted from the surplus government property exemption, such as land sales, qualifies as a Type II action.

When interpreting express exceptions made in a statute or regulation, "all doubts should be resolved in favor of the general provision rather than the exception. Where a general rule is established by statute with exceptions the court will not curtail the former nor add to the latter by implication and it is a general rule that an express exception excludes all others" (*Matter of Charles*, 200 Misc 452, 461 [Surrogate's Court, New York County 1951], *affd* 279 AD 741 [1951], *affd* 304 NY 776 [1952]; *see also Weingarten v Bd. of Trs. of the N.Y. City Teachers' Ret. Sys.*, 98 NY2d 575, 583 [2002] [discussing the "long-settled principle of statutory construction: where the Legislature lists exceptions in a statute, items not specifically referenced are deemed to have been intentionally excluded"]). Because the sale of surplus water is not included as an express exception under 6 NYCRR § 617.5(c) (25), it falls within the scope of the surplus government property exemption as a Type II action, and SEQRA does not apply (*see Maltbie v Comprehensive Omnibus Corp.*, 190 Misc 1017, 1019 [Sup Ct, New York County 1947], *citing Strauch v Town of Oyster Bay*, 263 AD 833, 833 [2d Dept 1941]).

Moreover, the repercussions of requiring municipalities such as the Village to undertake a SEQRA review of a simple contractual sale of water, where as here, the sale is from previously permitted wells and the withdrawal has been the subject of an authorization by an interstate agency would unduly burden municipal governments. The Village has been selling water for decades, including sales to customers within the Village and outside of it (*see* Smith Reply Aff. at Ex. A [referencing the annual Village Water Reports, the Village provides water to municipalities outside of the Village boundaries]), to now require municipalities like the Village to undertake a SEQRA review for mere sales of surplus water would place an additional burden on such municipalities.

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

As more fully discussed in the Village and SWEPI's initial brief (*see* Point II.C), because the Surplus Agreement, by definition, is a Type II action under SEQRA, no segmentation of the project could possibly exist. "Segmentation" of agency actions is defined as "the division of the environmental review of an action such that various activities or stages are addressed under this Part as though there were independent, unrelated activities, needing individual determinations of significance" (6 NYCRR § 617.2[ag]). As the regulations expressly provide, in order for an action to constitute improper segmentation, it must be part of *an action*. The Surplus Agreement, however, was a Type II action not subject to SEQRA review in the first instance and is deemed as a matter of law not to result in any significant adverse impact. Thus, there was no segmentation because no SEQRA review was necessary in connection with the Surplus Agreement.

Moreover, Petitioners argue that the Transloading Facility cannot operate independently from sales to be completed under the Surplus Agreement, but this is simply not true. Indeed, the Surplus Agreement specifically provides that surplus water may be sold to other purchasers besides SWEPI (*see* R. at Ex. 4 [providing that SWEPI has a right of first refusal for additional sales but that the Village may enter into agreements with other purchasers]). Thus, the Transloading Facility is not solely limited to providing water under the Surplus Agreement.

C. There is no Basis for Petitioners' Claims that an Environmental Impact Statement Should Have Been Prepared.

Petitioners' Memorandum in Opposition argues that the Village should have prepared a draft environmental impact statement ("DEIS") associated with the Lease arguing that a DEIS was required in order to evaluate water withdrawals through the Village Wells from the Basin. For the reasons set forth earlier in this Memorandum, including that SRBC is charged with

permitting and evaluating those withdrawals and sales, the Village was not in a position to undertake such an evaluation here as it was not authorized to do so (*see* pp. 4-9, *supra*).

Indeed, it would have been improper for the Village to usurp the specific authorization provided to SRBC, for the Village to invoke additional conditions or mandate additional requirements beyond the SRBC requirements. Moreover, for the reasons stated in the Affidavits submitted herewith, including Larry Smith and Robert Drew, sworn to on August 1, 2012, the Village properly reviewed the proposed impact associated with the Lease to the extent that same was subject to SEQRA review. In sum, the Village undertook a thorough review of the potential impacts associated with the Lease, including operation of the Transloading Facility to the extent it was required and authorized to do so.

Further, as discussed in the August 1, 2012 Memorandum submitted by Respondents, the Interstate Commerce Commission Termination Act of 1995, 49 USC 10101 and the Federal Railroad Safety Act of 1976, 49 USC (2010) (collectively referred to at "ICCTA Preemption") preempts state law as it relates to environmental reviews associated with rail facilities. As such, the Village could not impose additional requirements pursuant to local zoning law or under SEQRA on the operation of the Transloading Facility. Nevertheless, the Village did review the SEQRA requirements and undertook a thorough review by preparing, completing and reviewing the full Environmental Assessment Form, and also by requiring the Railroad to undertake an analysis of the potential impact of withdrawal of wells pursuant to the Hunt Report which was submitted to the Board in order to review potential impacts (*see* August 1, 2012 Crozier Aff. ¶¶ 5-8; *see also* August 1, 2012 Drew Aff. at ¶¶ 11-13). Moreover, in undertaking the voluntary SEQRA review, the Village included agencies that provided approvals and authorizations for the

Transloading Facility, including the Department of Health and therefore took part in the SEQRA review process (*see* August 1, 2012 Drew Affidavit; *see also* Reply Drew Affidavit).

On the other hand, each of the cases cited by petitioners in their opposition brief are distinguishable to the circumstances, where as here, ICCTA preempts any SEQRA review of the actions taken, and the approvals and the issues which Petitioners sought the Village to review were already reviewed pursuant to the SRBC approval process (*see* Respondents' Memorandum dated August 1, 2012 at pp. 25-30).

POINT V

PETITIONERS HAVE CITED NO AUTHORITY THAT WOULD AUTHORIZE AN INJUNCTION TO ISSUE CONCERNING THE OPERATIONS OF THE TRANSLOADING FACILITY IN THE FACE OF THE INTERSTATE COMMERCE CLAUSE TERMINATION ACT PREEMPTION WHICH APPLIES HERE

In their Memorandum, Petitioners argue that this Court should issue an injunction and require the Respondents to comply with the National Environmental Policy Act because the Wellsboro & Corning Railroad was required to obtain authorization from the Surface Transportation Board prior to constructing the Transloading Facility. For the reasons set forth in the Memorandum submitted by the Wellsboro & Corning Railroad dated February 21, 2013, Petitioners' claims in this regard are without merit. Respondents incorporate by reference the Wellsboro & Corning Railroad's Memorandum dated February 21, 2013.

CONCLUSION

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

Dated: February 22, 2013
Pittsford, New York

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