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; THERESA FINNERAN;
MICHALE FINNERAN; VIRGINIA HAUFF, and JEAN WOSINSKI;,

Petitioner,

v.

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

Respondent.

DECISION AND ORDER

Index No. 2012/00810

Respondents move to dismiss this CPLR Article 78 proceeding on grounds that petitioners lack standing to maintain this proceeding, CPLR §3211(a)(3), and that petitioners fail to state a cause of action, 3211(a)(7). Alternatively, respondents move for summary judgment pursuant to CPLR §3212. The court turns first to the second and third causes of action, which easily may be disposed, and then returns to the difficult issues presented by the first cause of action on the record in this case.

Second and Third Causes of Action Dismissed

The second cause of action alleges that respondents violated the Water Supply Law, specifically §15-1505.1, by failing to

obtain a permit from the New York State Department of Environmental Conservation ("DEC"). Respondents argue that this cause of action must be dismissed because there is no private right of action to enforce the Water Supply Law. Petitioners concede this point, however. "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." Petitioners' Memorandum of Law in Opposition to Respondents' Motion to Dismiss and/or for Summary Judgment, and in Support of Petitioners' Article 78 Petition, fn. 31. The second cause of action is, therefore, dismissed.

Petitioners' third cause of action must be dismissed as this court is without jurisdiction to determine whether a permit is required to operate the transloading facility. That determination lies exclusively with the Surface Transportation Board and federal courts.

It is undisputed by the parties that the STB has jurisdiction over the transloading facility. See e.g., Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 640 (2d Cir. 2005). Petitioners' third cause of action asserts that respondent Wellsboro and Corning Railroad, LLC, ("WCOR") failed to obtain a permit from the Surface Transportation Board ("STB") or the Federal Railway Administration ("FRA") allegedly required for the installation of rail spurs and construction and operation of rail

loading facilities. Petitioners maintain that, prior to the granting of any permit by the STB or FRA, an environmental review under the National Environmental Policy Act, 42 U.S.C. §4321 et seq., is required and that respondents have thus avoided such review.

Respondents argue that, while STB has jurisdiction over the issue, it would not regulate or issue a permit in this case because the construction and operation of the water transloading facility qualifies as ancillary track for which an STB permit is not required, and authority to issue such a permit resides exclusively with the STB. Petitioners respond that such a permit is in fact necessary in this case.

The federal statute which relates to the questioned regulatory approval for the transloading facility is 49 U.S.C. §10101. The general jurisdictional provision of the ICCTA provides that "[t]he jurisdiction of the [STB] over . . . (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive." 49 U.S.C. §10501(b)(2). The statute further provides for the express preemption of other laws and remedies: "Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are

exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. §10501(b).

This preemption clause has been found to evidence a clear congressional intent to broadly preempt state and local regulation of integral rail facilities. Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co., 215 F.3d 195, 202 (1st cir. 2000); Wisconsin Cent. Ltd. v. City of Marshfield, 160 F.Supp.2d 1009, 1013 (W.D. Wis. 2000).

In Matter of Metropolitan Transp. Auth., 32 A.D.3d 943 (2d Dept. 2006), the Appellate Division considered whether it had subject matter jurisdiction to entertain a lawsuit concerning an eminent domain proceeding to acquire a railroad access easement by condemnation. Matter of Metropolitan Transp. Auth., 32 A.D.3d at 944. The Appellate Division found that "condemnation is regulation" and that the STB had exclusive regulatory authority. Id., 32 A.D.3d at 945-946. In that case, the court held that the ICCTA preempted the condemnation proceeding and it determined to dismiss the petition, reasoning that "no petition has been filed with the STB, nor has that board otherwise been consulted with regard to [the regulatory approval at issue here] . . . [and that] by reason of the exclusive jurisdiction over railroad matters which reposes in the STB, [] the courts of our State lack subject matter jurisdiction to entertain it." Id., 32 A.D.3d at 946. Petitioner's third cause of action must dismissed

for the same reason.

Respondent makes an alternative argument in Reply that, under the doctrine of primary jurisdiction, the court should defer the resolution of this cause of action pending a determination by the STB. The purpose of "[t]he doctrine of primary jurisdiction: [is] to "co-ordinate the relationship between courts and administrative agencies" and to give the principal responsibility for adjudicating the merits of disputes requiring special competence to the agency with the necessary expertise. Uniformed Firefighters Ass'n v. New York, 79 N.Y.2d 236, 241-242 (1992); United States v. Western Pac. R.r. Co., 352 U.S. 59, 63-64 (1956)(primary jurisdiction "comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body").

The court agrees that, although the regulatory scheme at 49 U.S.C. §10101 et seq. places with STB the determination whether STB need issue a permit to operate the transloading facility, deferral of this case is not appropriate. First, as noted above, issuance of permit is regulation every bit as much as condemnation, and STB's exclusive authority over railroad regulation has caused the Appellate Division to hold that New York courts are without subject matter jurisdiction. Moreover, the doctrine of primary jurisdiction provides for staying the

case pending the administrative determination. This the court cannot do for the additional reason that Congress has placed review of STB decisions exclusively in the hands of the federal courts at the Court of Appeals level pursuant to 28 U.S.C. §§2321(a) and 2342(5). The Court of Appeals "has exclusive jurisdiction to enjoin, set aside, suspend . . . or to determine the validity of . . . (5) all rules, regulations, or final orders of the Surface Transportation Board . . . ." 28 U.S.C. §2321(a).[1] Consequently, a stay of the action pending STB determination is not possible as this court has no jurisdiction to review STB

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[1] The statute provides that: [a] person . . . may file with the Board a complaint about a violation of [49 U.S.C. §§10101, et seq.] by a rail carrier providing transportation or service subject to the jurisdiction of the Board. . . . The Board may dismiss a complaint it determines does not state reasonable grounds for investigation and action. However, the Board may not dismiss a complaint . . . because of the absence of direct damage to the complainant. 49 U.S.C.S. §11701(b) (1998). If a violation is found, the STB "shall take appropriate action to compel compliance. . . . " 49 U.S.C.S. §11701(a) (1998). The STB may enter a declaratory order pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. §721(a).

Flynn v. Burlington Northern Santa Fe Corp., 98 F. Supp. 2d 1186, 1191 (E.D. Wash. 2000).

determinations.

As the District Court in Buffalo S. R.R. v. Vill. of Croton-On-Hudson, 434 F.Supp.2d 241, 253 (S.D.N.Y. 2006) observed:

> These are the exclusive, Congressionally-mandated remedies for [the railroad's] purported violation of the ICCTA. Significantly, Congress has not vested the federal courts with authority to impose penalties for a violation of Chapter 109's licensing regulations unless the STB brings a civil proceeding. Certainly nothing in the ICCTA suggests that a carrier's violation of the licensing provisions of that Act renders it and its facilities subject to the jurisdiction of states and localities, thereby thwarting Congress' clear intent that rail carrier facilities of all sorts be created, operated and discontinued only at the behest of the Surface Transportation Board. In fact, section 10501 clearly states that "remedies provided under this part… preempt the remedies provided under Federal or State law." 49 U.S.C. §10501(b). To put it succinctly, illegal operations by a rail carrier do not preempt preemption

434 F.Supp.2d at 253 (emphasis supplied).[2]

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[2] The situation would be different if there was any bona fide dispute that a rail carrier operated the transloading facility, or that STB might disclaim primary jurisdiction, in which case a stay rather than dismissal is appropriate. Pinelawn Cemetery v. Coastal Distribution, LLC, 74 A.D.3d 938, 941 (2d Dept. 2010). Here, however, no party suggests that there is a procedure for STB to disclaim primary jurisdiction in a case like this, and there is no question that respondent WCOR (to whom the property was leased for construction and operation of the transload facility) is a licensed rail carrier. New York & Atlantic Railway Company v. Surface Transportation Board (Pinelawn Cemetery Corporation), 635 F.3d 66, 74 (2d Cir. 2011)("where the railroad maintains the appropriate control over the transload facility, the STB exercises its exclusive

Further, the court does not find that petitioners have properly asserted a NEPA claim as such review is only triggered where STB determines that a permit is necessary. Consequently, the STB not having been consulted, and not having determined that a NEPA review is necessary, any NEPA cause of action is premature. Moreover, there is no private right of action under NEPA. Flynn v. Burlington Northern Santa Fe Corp., 98 F.Supp.2d at 1193 (citing Sierra Club v. Penfold, 857 F.2d 1307, 1315 (9th Cir. 1988[NEPA itself authorizes no private right of action]).

Accordingly, petitioners' third cause of action is dismissed.

SEQRA - STANDING

Respondents, the Village of Painted Post (the "Village"), Painted Post Development, LLC ("PPD") and SWEPI, LP ("SWEPI") move to dismiss the first cause of action challenging the Village's review pursuant to the New York State Environmental Quality Review Act ("SEQRA") on grounds that the petitioners lack standing. Although in the dissent on the issue of standing in Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 N.Y.3d 297 (2009), Judge Pigott summarized the primary rule of standing upon which the majority predicated its decision:

> SEQRA cases involving standing issues have

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jurisdiction and federal preemption applies").

> been decided under rules set down by this Court in Society of Plastics Indus. v. County of Suffolk (77 N.Y.2d 761 [1991]). In that case, we recognized that the Legislature did not intend every person or citizen to have the right to sue to compel SEQRA compliance (id. at 770). Rather, in order to have standing, a party must demonstrate an "injury in fact"--an actual legal stake in the matter being adjudicated--which falls within the "zone of interests, or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted" (id. at 772-773 [citations omitted]). With particular reference to land use cases, we held that the injury must constitute a "special harm" such that the party would "suffer direct harm, injury that is in some way different from that of the public at large" (id. at 774). In other words, the plaintiff must show a "direct interest in the administrative action challenged, different in kind or degree from the public at large" (id. at 775).

Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 N.Y.3d 297, 308-309 (2009)(Pigott, J., concurring). "These same principles of standing apply whether the party seeking relief is one person or . . . an association of persons." Soc'y of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 775 (1991). For organizational petitioners, it is also required "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." Dental Soc. of New York v. Carey, 61 N.Y.2d 330, 333 (1984).

The Village, PPC and SWEPI contend that the organizational petitioners have failed to allege that any of their members have

or would have standing in this action. That is, according to respondents, the organization petitioners have not alleged any harm to their members "different in kind or degree from the public at large." Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 N.Y.3d at 309.

Petitioners point out that the Court of Appeals has held that "an appropriate representative association should have standing to assert rights of the individual members of the association where such persons may be affected by a rezoning, variance or an exception determination of a zoning board." Douglaston Civic Association v. Galvan, 36 N.Y. 1, 14 (1974). They point to the affidavits of organization members who aver that members live above the Corning Aquifer or Elimra-Horseheads-Big Flats aquifer in Painted Post, in Corning, Elmira, Horseheads and Big Flats.[3] Those affidavits allege that members will be adversely affected by contaminated or diminished drinking water supplies, blockages associated with increased rail and automobile traffic, and noise and air pollution from the rail loading facility. These generalized environmental injuries are insufficient and not different than those suffered by the public at large, and petitioners adduce no probative evidence[4] that the

[3] See affidavits of Sierra Club member Kate Bartholomew, People for Healthy Environment, Inc. president Ruth Young.

[4] On the requirement of proof, as opposed to mere pleading, on the standing issue, see Matter of Noslen Corporation v.

injuries to its members are in any manner different than those impacting the public at large. Dental Soc. of New York v. Carey, 61 N.Y.2d at 333.

Further, as respondents point out, none of the individual petitioners assert that they are members of the organization respondents.[5] Accordingly, the organizational petitioners do not have standing to challenge respondents' SEQRA review. An association or organization "must show that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members." New York State Assn of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004). See Matter of Hudson Property Owners' Coalition, Inc. v. Slocum, 92 A.D.3d 1198, 1199 (3d Dept. 2012); In re Citizens Emergency Committee to Preserve Preservation v. Tierney, 70 A.D.3d 576, 576-77 (1st Dept. 2010). Petitioners fail on the first element.

Turning to the individual petitioners (excepting John

Ontario County Bd. Of Supervisors, 295 A.D.2d 924, 925 (4th Dept. 2002); Matter of Piela v. Van Voris, 229 A.D.2d 94, 95 (3d Dept 1997)("the distinction is particularly germane in a CPLR Article 78 proceeding").

[5] Eugene Stolfi, of Corning, alleges that he is a member of The Sierra Club, but he is not an individual petitioner. He only "speculates that water removal for rail shipments for fracking in Pennsylvania is increasing the hardness of the water in this aquifer." Stolfi affidavit.

Marvin, who is separately analyzed), respondents argue that they have made only generalized allegations of harm that are no different than that experienced by the general public. Respondents assert that concerns about quantity and quality of drinking water and new traffic patterns and noise pollution are unsupported and insufficient. The court agrees. Alleged harm associated with traffic patterns and noise levels and water quality in general are too generalized and are not distinct from the harm suffered by the public at large. Soc'y of Plastics Indus. v. County of Suffolk, 77 N.Y.2d at 775; Save Our Main Street Buildings v. Greene County Legislature, 293 A.D.2d 907, 909 (3d Dept. 2002)("standing cannot be based on the claim that 'a project would "indirectly affect traffic patterns, noise levels, air quality and aesthetics throughout a wide area"'")(quoting Oates v. Village of Watkins Glen, 290 A.D.2d 758, 481 (3d Dept. 2002) and Society of Plastics, 77 N.Y.2d at 775); Matter of Gallahan v. Planning Bd of City of Ithaca, 307 A.D.2d 684, 685 (3d Dept. 2003)("traffic patterns, noise levels, air quality and aesthetics throughout a wide area," [ ] generally are insufficient to establish standing"). "While standing has been afforded parties who have shown that the proposed action might affect the parties' water supplied by a well that could be impacted by storm water drainage (see Matter of Many v. Village of Sharon Springs Board of Trustees, 218 A.D.2d 845; Chase v.

Board of Education of the Roxbury School District, 188 A.D.2d 192), courts have denied standing where the injury alleged involves water supplied to the public at large. (See, e.g., Schulz v. Warren County Bd. Of Supervisors, 206 A.D.2d 672; Otsego 2000, Inc. v. Planning Bd. Of the Town of Ostego, 171 A.D.2d 259)." In re Application of Croton Watershed Clean Water Coalition, Inc. 2 Misc.3d 1010(A), 784 N.Y.S.2d 919 (Table), 2004 WL 829434 (Sup. Ct. West. Co. April 1, 2004).

As well explained by the Third Department, in Save the Pine Bush "the Court of Appeals did not remove the requirement that a member of the organization seeking standing experience actual harm, but, rather, held that such harm can be proven by a direct interference with an individual's ability to experience and enjoy a natural resource, even if that individual does not live in close proximity to that resource, so long as the individual can demonstrate that he or she regularly uses the area to be impacted." Finger Lakes Zero Waste Coalition, Inc. v. Martens, 95 A.D.3d 1420, 1422 n.1 (3d Dept. 2012).

Furthermore, contrary to petitioners' argument, the case of Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 N.Y.3d 297, supra, does not aid petitioners' standing argument. Petitioners seek to take advantage of the holding of Save the Pine Bush by reference to their members' use and enjoyment of the Corning and downstream aquifers and their

interest in a clean and adequate water supply. Standing predicated upon similar generalized allegations was rejected in Long Island Pine Barrens Society, Inc. v. Planning Board Town of Brookhaven, 213 A.D.2d 484, 485-86 (2d Dept. 1995)("generalized allegations that this project will have a deleterious impact upon the aquifer lying beneath South Setauket Pine Barrens are insufficient to establish their standing"). As in Clean Water Advocates of New York, Inc. v. New York State Dept. of Environ. Consv., 103 A.D.3d 1006, 2013 WL 626923 (3d Dept. Feb. 21, 2013), petitioners' allegations of harm to any individual petitioner, or to the organizations' petitioners' members, by reason of deleterious effects of the project on the water supply are wholly speculative and conjectural. Id. 103 A.D.3d at ___ ("any claim of environmentally-related injury to these water bodies as a result of DEC's acceptance of the SPPP is devoid of evidentiary support and far too speculative and conjectural to demonstrate a specific injury-in-fact"). Moreover, "[a]lthough petitioner[s] alleg[e] that its members use the water bodies for recreational purposes and as their potable water source, . . . [they] d[o] not allege, much less submit evidence, that any of . . . [their] members do so any more frequently than any other person with physical access to those same resources." Id. 103 A.D.3d at ___. Accordingly, Save the Pine Bush is unavailing to petitioners on this record.

Hoping that he will confer standing on all petitioners,

Matter of Humane Society v. Empire State Dev. Corp., 53 A.D.3d 1013, 1017 n.2 (3d Dept. 2008)("inasmuch as one of the petitioners has standing, it is not necessary to address respondents' challenges regarding the standing of the remaining petitioners"), the closest petitioner, John Marvin, asserts that he lives "one-half block" from the water loading facility, and in eye-sight of it across a school athletic field.[6] He avers that train noises have woken him up at night and that this is harm not suffered by the general public. Mr. Marvin does not distinguish this noise from that of the previous train noises associated with the existing rail line or from the former industrial use of the area. Matter of Finger Lakes Zero Waste Coalition, Inc. v. Martens, 95 A.D.3d 1420, 1422-23 (3d Dept. 2012) ("Roll's

[6] It is true that Marvin lives close enough that he can see the transloading facility from his front porch. The courts "have recognized standing based upon an allegation that a petitioner resides in the immediate vicinity of a project that will affect the petitioner's scenic view." Ziemba v. City of Troy, 37 A.D.3d 68, 71-72 (3d Dept. 2006)(citing Matter of Steele v. Town of Salem Planning Bd., 200 A.D.2d 870, 872 [3d Dept. 1994]; Matter of McGrath v. Town Bd. of Town of N. Greenbush, 254 A.D.2d 614, 616 [3d Dept. 1998]). However, if "a view of an abandoned landfill can hardly be characterized as the type of 'scenic view' that may be a relevant factor in establishing standing," Gallahan v. Planning Bd. of City Of Ithaca, 307 A.D.2d 684, 685 (3d Dept. 2003), neither can a view of the abandoned Ingersoll Rand foundry plant facility confer standing associated with proximity. Compare Ziemba v. City of Troy, 37 A.D.3d at 72 (standing conferred by scenic view of historic buildings proposed to be demolished). Nor does Marvin establish that his view of the facility involves "any adverse effects on scenic view [that] would be . . . different for [hi]m than for the public at large" in the area. Matter of Save Our Main St. Bldgs. v. Greene County Legislature, 293 A.D.2d at 909.

affidavit stating that she can presently hear some noise from the landfill does not indicate if, or to what extent, the noise level changed in November 2010 once work began in the soil borrow area. Roll's generalized assertions that the project will increase her exposure to noise and dust are insufficient to demonstrate that she will suffer damages that are distinct from those suffered by the public at large"). Marvin's undifferentiated complaint of train noise, however, may be considered in the context of an industrial and rail facility which fell into disuse for a considerable period of time prior to construction of the subject project, and thus his complaint of rail noise is availing to show harm distinct from that suffered by the general public.

It is urged in connection with Marvin that the inference of injury exception to the rule requiring proof of damages different than that to the public applies because he owns property in close proximity to the site where the action is carried out. See e.g., Matter of Sun-Brite Car Wash, Inc. v. Board of Zoning of Appeals of Town of North Hampton, 69 N.Y.2d 406 (1987). "[A] property owner in 'proximity to premises that are the subject of a zoning determination may have standing to seek judicial review without pleading and proving special damage, because adverse effect or aggrievement can be inferred from the proximity." Matter of Stumpo v. DeMartino, 283 A.D.2d 954, 954 (4th Dept. 2001)(citing Matter of Sun-Brite Car Wash, Inc. v. Board of Zoning of Appeals

of Town of North Hampton, 69 N.Y.2d at 409-410). On the other hand, "when no zoning-related issue is involved, there is no presumption of standing to raise a SEQRA challenge based on a party's close proximity alone." Save Our Main Street Buildings v. Greene County Legislature, 293 A.D.2d at 908. See Rent Stabilization Ass'n of N.Y.C., Inc. v. Miller, 15 A.D.3d 194, 194-95 (1st Dept. 2005)("Since the instant case does not involve a zoning enactment, petitioners are not entitled to the presumption that they have suffered harm").

According to his affidavit and the petition, John Marvin lives a half block from the water loading facility. No other measurement of distance is offered in Petitioners' papers. This alone might be fatal to his claim of standing, Matter of Piela v. Van Voris, 229 A.D.2d 94, 95 (3d Dept 1997), but respondents concede that he lives .3 miles, or 1,584 feet, from the transloading facility. Unfortunately, respondents measure that distance along Charles Street down from Marvin's address to the intersection of West Water Street and up West Water to the *address* of the transloading facility. This is a circuitous route, however, inasmuch as the facility was built between West Water and West Chemung Streets, and is actually closer to West Chemung Street where the old rail line is situated than West Water Street. Accordingly, the real distance must be considerably shorter than respondents estimate. Measurement of

the isololese of the triangle depicted in the Piccotti affidavit (Exh. B) would yield a distance as the crow flies to the West Water Street address of some 1,180.6 feet, and the court concludes that about a third of that distance needs to be subtracted given where the facility is situate between West Water and Chemung Streets. In any event, the true distance is less than 1,000 feet.

As observed in Finger Lakes Zero Waste Coalition, Inc. v. Martens, 95 A.D.3d at 1421-22, there can be found cases denying the proximity presumption on distance grounds shorter than the court concludes separates the facility from Marvin's house. See Matter of Gallahan v. Planning Bd. of City of Ithaca, 307 A.D.2d 684, 685 [3d Dept. 2003], lv. denied 1 N.Y.3d 501 [2003] [no presumption at 700 feet]; Matter of Oates v. Village of Watkins Glen, 290 A.D.2d 758, 760-761 [3d Dept. 2002] [no presumption at 530 feet]; Matter of Buerger v. Town of Grafton, 235 A.D.2d 984, 985 [3d Dept. 1997], lv. denied 89 N.Y.2d 816 [1997] [no presumption at 600 feet]; Matter of Burns Pharm. of Rensselaer v. Conley, 146 A.D.2d 842, 844 [3d Dept. 1989] [no presumption at 1,000 feet]), all cited in Finger Lakes Zero Waste Coalition, Inc. v. Martens, supra. See also, Matter of Rediker v. Town of Philipstown, 280 A.D.2d 548 (2d Dept. 2001)(one-third of a mile not in close proximity [586.66 yards]). Fourth Department precedent, however, would support application of the presumption

if the proximity presumption was otherwise available. Matter of Ontario Heights Homeowners Assoc. v. Town of Oswego Planning Board, 77 A.D.3d 1465 (4th Dept. 2010)(petitioner owning property 697 feet from the subject property line and 1,242 from the edge of the proposed building improvements, and who alleges injury from the decision to permit the developer to construct a private sewage treatment plant theron instead of using the municipal sewage system, has standing inferred from proximity); Matter of Michalak v. Zoning Board of Appeals of Town of Pomfret, 286 A.D.2d 906 (4th Dept 2001)(adverse affect or aggrievement can be inferred where petitioners own property 200 feet from the subject property).

Petitioners rely on another such case, Matter of La Delfa v. Village of Mt. Morris, 213 A.D.2d 1024 (4th Dept. 1995), but such reliance is misplaced as would be reliance on the last two cases cited in the immediately preceding paragraph. First, upon searching the Record on Appeal, specifically then Acting (now Appellate Division Associate) Justice Nancy Smith's decision, the cited case involved "legislative" municipal action which "effectively create[d] a change or amendment to the zoning ordinances of the municipality." Id. Record on Appeal, at 19 (Smith, J.). Accordingly, as alluded to above, an inference or presumption of injury by reason of proximity was permissible. Save Our Main Street Buildings v. Greene County Legislature, 293

A.D.2d at 908 ("when no zoning-related issue is involved, there is no presumption of standing to raise a SEQRA challenge based on a party's close proximity alone"); Rent Stabilization Ass'n of N.Y.C., Inc. v. Miller, 15 A.D.3d 194, 194-95 (1st Dept. 2005)("Since the instant case does not involve a zoning enactment, petitioners are not entitled to the presumption that they have suffered harm"). Here, no zoning related issue is present, and accordingly the court cannot credit petitioners' invocation of the inference of injury presumption.

The court is left, therefore, with Marvin's proximity and complaint of train noise newly introduced into his neighborhood, which he maintains, and the court finds, is different than the noise suffered by the public in general. In other words, this is not a proximity "without more" case; Marvin has standing. Compare Clean Water Advocates of New York, Inc. v. New York State Dept. of Environ. Consv., 103 A.D.3d 1006, at ___ (proximity . . . to the proposed project does not, without more, give rise to a presumption").

Because Marvin has standing, the court need not dismiss the other petitioners who do not have standing. Matter of Humane Society v. Empire State Dev. Corp., 53 A.D.3d 1013, 1017 n.2 (3d Dept. 2008)("inasmuch as one of the petitioners has standing, it is not necessary to address respondents' challenges regarding the standing of the remaining petitioners").

SEQRA - MERITS

The purpose of SEQRA "is to inject environmental considerations directly into governmental decision making." Matter of Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d 674, 679 (1988).

> It is well established that SEQRA "is a law of general applicability" (Matter of Sour Mtn. Realty, Inc. v. New York State Dept. of Envtl. Conservation, 260 A.D.2d 920, 923, 688 N.Y.S.2d 842 [1999], lv denied 93 N.Y.2d 815, 719 N.E.2d 923, 697 N.Y.S.2d 562 [1999]). Moreover, the Legislature has declared "that 'to the fullest extent possible' statutes should be administered by the State and its political subdivisions in accordance with the policies set forth in SEQRA and that environmental factors should be considered in reaching decisions on proposed projects." (Matter of Tri-County Taxpayers Assn. v. Town Bd. of Town of Queensbury, 55 N.Y.2d 41, 46, 432 N.E.2d 592, 447 N.Y.S.2d 699 [1982 of Tri-County Taxpayers Assn. v. Town Bd. of Town of Queensbury, 55 N.Y.2d 41, 46, 432 N.E.2d 592, 447 N.Y.S.2d 699 [1982] [quoting ECL 8-0103 (6)]).

City Council v. Town Bd., 3 N.Y.3d 508, 515-16 (2004)

"Under SEQRA, the individual agency having the primary authority to approve or disapprove a particular project application is responsible for making the environmental impact assessment (see, ECL §§8-0105[7]; 8-0109, 8-0111)." Matter of Long Island Pine Barrens Society, Inc. v. Planning Board of the Town of Brookhaven, 80 N.Y.2d 500, 515 (1992). "In reviewing whether a determination was made in accordance with SEQRA and its implementing regulations, the court is "limited to reviewing

whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." Matter of Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 688 (1996).

The court finds that the Village's Type II designation of the Surplus Water Sale Agreement ("Agreement") was arbitrary and capricious, but for reasons different than those posed by petitioners. The Village also violated SEQRA when it failed to consider the environmental impact of the Agreement with that of the Lease.

Under SEQRA, an action is either a Type I, Type II, or Unlisted. "[A] Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS. "For all individual actions which are Type I or Unlisted, the determination of significance must be made by comparing the impacts which may be reasonably expected to result from the proposed action with the criteria listed in section 617.7(c)." 6 NYCRR §617.4(a)(1). Type II actions are those actions that "have been determined not to have a significant impact on the environment." 6 NYCRR §617.5(a). The Type I and Type II actions listed in the regulations are applicable to all agencies. An Unlisted action is one that is "not identified as Type I or Type II action . . . ." 6 NYCRR §617.2(ak). "Unlisted actions range from very minor zoning

variances to complex construction activities falling just below the thresholds for Type I actions . . . .” SEQR Handbook, p. 27 (3d ed. 2010).

The SEQRA regulations specifically provide that a Type I action occurs when the agency directly undertakes, funds or approves “a project or action that would use ground or surface water in excess of 2,000,000 gallons per day [“gpd”].” 6 NYCRR §617.4(b)(6)(ii). Here, the Surplus Water Sale Agreement (sometimes the “Agreement”) calls for the sale of only 1,000,000 gpd. The Village designated the Agreement as a Type II action under 6 NYCRR §617.5(b)(25)[purchase or sale of “furnishings, equipment or supplies, including surplus government property . . . ”]. However, § 617.5(b)(25) is not applicable to the Agreement as the regulations implicitly designate water uses falling below the listed threshold as an Unlisted action, for the following reasons.

Numerous listed Type I actions involve specific thresholds. 6 NYCRR §617.4(b)(2), (4), (5), (6), and (7). The regulations further provide that an Unlisted action not meeting the threshold requirement may be elevated to a Type I action under certain conditions. 6 NYCRR §617.4(b)(8) through (10). For instance, a Type I action is “any Unlisted action (unless the action is designated for the preservation of the facility or site) occurring wholly or partially within, or substantially

contiguous to any historic building, structure, facility, site or district . . . ." 6 NYCRR §617.4(b)(9). Thus, the regulations evince a scheme whereby activities that would otherwise be Type I activities, but for falling short of the threshold requirements, should be categorized as Unlisted actions for the very reason that under certain conditions, those same activities may become Type I actions. *See* Wertheim v. Albertson Water Dist., 207 A.D.2d 896 (2d Dept. 1994)(DEC's designation of a water filtration system using less than 2,000,000 gallons of water per day as an Unlisted action was rational and reasonable even where such use occurred wholly or partially within or substantially contiguous to any publicly owned or operated parkland - only a water use of 25% of 2,000,000 and so situated would be a Type I action).

In an analogous case, the Court of Appeals noted that the "DEC amended its regulations to clarify that the annexation of 100 or more contiguous acres constitutes a Type I action (see 6 NYCRR §§617.4 [b] [4]). In doing so, DEC implicitly determined that an annexation of less than 100 acres is an 'unlisted action' (see Cross Westchester Dev. Corp. v Town Bd. of Town of Greenburgh, 141 A.D.2d 796, 797, 529 N.Y.S.2d 870 [1988]; SEQR Handbook, at 105 [1992 ed])." City Council v. Town Bd., 3 N.Y.3d 508, 517-518 (2004). Accordingly, the court holds that the DEC has implicitly designated a water use of 1,000,000 gallons per

day as an Unlisted action and, therefore, the Village's designation of the action as Type II was arbitrary and capricious. Id.[7]

Even if the DEC had not defined the water use at issue here as an Unlisted action, the Village's interpretation of §617.5(c)(25) cannot be credited.[8] The Department of

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[7] By designating a use of water in an amount below the Type I threshold as the Village did here, the Agreement was not able to be considered under 6 NYCRR §617.4(b)(10) which applies only to Unlisted actions and lowers the water use threshold to 500,000 gpd under certain conditions, which may be present here, as discussed below.

[8] The entire record of the Village's Type II determination, as found in the Administrative Record, is contained in the Village's resolution of February 23, 2012, authorizing the Mayor to enter into the Surplus Water Sale Agreement. Administrative Record, Ex. 2. The resolution reads:

> the Village has determined that based upon the findings made under the New York State Environmental Quality Review Act in another resolution enacted by the Village . . . and the Village's review of the appropriate documentation and information including but not limited to the negative declaration and Type II determination under SEQR the village makes the following findings.

Administrative Record, Ex. 2. The February 23, 2012, resolution provides no reference to any specific SEQRA regulation to justify the Type II designation. Similarly, the other documents included in the Administrative Record make no citation to any regulation relied upon in reaching the Type II designation. The Verified Petition asserts that a Village resolution adopted on February 23, 2012 specifically cites 6 NYCRR §617.5(c)(25), although the Administrative Record in this matter contains no resolution with such a reference. Verified Petition ¶21. In any event, both parties agree that the Village relied upon 6 NYCRR §617.5(c)(25). As set forth above, however, water use of a 1,000,000 gallons per day is an Unlisted action and the Village

Conservation, the agency responsible for issuing the SEQRA rules and regulations, provides in its commentary that §617.5(c)(25) is applicable to personal property such as "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." The SEQR Handbook, p. 40 (3d ed. 2010). The SEQR Handbook explains: "[T]he simple purchase or sale of materials does not create an adverse environmental impact." By contrast, a significant daily withdrawal of water, representing roughly one fourth of the Village's total well capacity [Affidavit of Larry E. Smith, August 1, 2012, ¶6], is of an entirely different character than the simple purchase and sale of materials the DEC explains is the purpose of the §617.5(c)(25). In fact, water use in the volume at issue here is highly regulated in this state. On February 15, 2012, the Legislature expanded the DEC's authority over water withdrawals (agricultural withdrawals are exempt from the permit program) to include all withdrawals of water or 100,000 gallons per day.[9] Such withdrawals will now require a DEC permit if they

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should have recognized it as such.

[9] In recognition of its sovereign duty to conserve and control its water resources for the benefit of all inhabitants of the state,

are not already regulated by the Delaware or Susquehanna River Basin Commissions. ECL §15-1501, et seq. Water withdrawals from the Corning Aquifer, at issue here, are regulated by the Susquehanna River Basin Commission ("SRBC"). ECL §21-1301. The SRBC purpose in regulating withdrawals is to "provide for the planning conservation, utilization, development, management, and control of the water resources of the basin . . . ." ECL §21-1301(1.3)(4). Accordingly, a large volume daily withdrawal of a resource vital to the well being of our state is not a mere surplus sale of Village property akin to selling a bus or fire engine no longer needed by the Village. "Given the circumstances

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> it is hereby declared to be the public policy of the state of New York that:
>
> 1. The regulation and control of the water resources of the state of New York be exercised only pursuant to the laws of this state;
>
> 2. The waters of the state be conserved and developed for all public beneficial uses;
>
> 3. Comprehensive planning be undertaken for the protection, conservation, equitable and wise use and development of the water resources of the state to the end that such water resources be not wasted and shall be adequate to meet the present and future needs for domestic, municipal, agricultural, commercial, industrial, power, recreational and other public, beneficial purposes

ECL §15-0105.

of this case, consideration should have been given to environmental concerns associated with the proposed action." Town of Bedford v. White, 204 A.D.2d 557, 559 (2d Dept. 1994)("we agree that the DOT's classification of the proposed action as a Type II action was arbitrary and capricious" as the "action does not fit 'squarely' within" the Type II regulatory criteria).

Segmentation

"Segmentation means 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 NYCRR §617.2(ag). It cannot be controverted that the sale of the water, and the lease of the land for the Railroad to build and operate the transloading of the water, are intrinsically related.

The Surplus Water Sale Agreement provides that "SWEPI LP may purchase and take delivery of up to 1,000,000 gallons per day . . . from the filling/metering station and transloading facility to be constructed and located in the vicinity of 450 West Water Street . . . ." Administrative Record, Ex. 4, Surplus Water Sale Agreement, March 1, 2012, ¶1. The Lease provides, in the second whereas clause on page 1, that the Lease is "in connection with a certain bulk water sale contract, dated as of March 1, 2012[ ] by and between the Village and SWEPI LP . . . . SWEPI has arranged

to have the Lessee withdraw, load and transport such water via rail line from the Premises . . . .” Administrative Record, Ex. 3, Lease Agreement, March 1, 2012. As explained in the Agreements at issue, there would have been no reason to lease the land to the Railroad, to allow the Railroad to build the facility, but for the Surplus Water Sale Agreement. In fact, respondents do not argue that the two actions are unrelated. Respondents argue, rather, that it was not necessary to consider the Surplus Water Sale Agreement together with the transloading facility lease because, as a Type II action, the Surplus Water Sale Agreement was exempt from further SEQRA review. As found above, the Surplus Water Sale Agreement should not have been classified as a Type II action. The court finds, therefore, that the two projects were improperly segmented.

Moreover, petitioners’ classification of the Surplus Water Agreement as a Type II action permitted it to avoid a possible “upgrade” from an Unlisted action to a Type I action had it been considered with the Lease. As noted, 6 NYCRR §617.4(b)(6)(ii) specifically defines a project or action that would use ground or surface water in excess of 2,000,000 gallons per day [“gpd”]” as a Type I action.[10] The threshold requirement is reduced from 2,000,000 gpd to 500,000 gpd, where the action occurs “wholly or

[10] Petitioners view of §617.5(b)(25) creates an unwarranted exception to §617.4(b)(6)(ii) where the water use is labeled “excess.”

partially within or substantially contiguous to any publically owned or operated parkland, recreation area or designated open space . . .," as may be the case here.

Here, Hogdmen Park is arguably substantially contiguous to the transloading facility where the water sold by the Village is loaded onto the trains. "[T]he Department of Environmental Conservation, the agency in charge of implementing SEQRA, has indicated that it interprets "substantially contiguous" to mean "in proximity to" or "near." Lorberbaum v. Pearl, 182 A.D.2d 897, 900 (3d Dept. 1992)(citing a 1991 Draft SEQR Handbook for definition of substantially contiguous). DEC provides that "[t]he term "substantially contiguous" as used in both section 617.4(b)(9) and (10), is intended to cover situations where a proposed activity is not directly adjacent to a sensitive resource, but is in close enough proximity that it could potentially have an impact." SEQR Handbook, p. 24 (3d ed. 2010); Matter of Jiles v. Flowers, 182 A.D.2d 762 (2d Dept. 1992)("It is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld").

The transloading facility is located at 350 West Water Street in Painted Post, New York and encompasses 11.4 acres of the former Ingersoll Rand Foundry property. Originally, the Ingersoll Rand Foundry property parcel was 57.4 acres, but in

1986 a 7.5 acre pacel was conveyed to the Village for use as a recreation park, now known as Hogmen [Hodgmen] Park." Administrative Record, Ex. 10, p. 1, ¶2. Review of the site plans at Exhibit 8 of the Administrative Record appears to show the transloading facility in close proximity to Hodgmen Park. Respondents argue that the park and the transloading facility are separated by West Water Street, and therefore are not substantially contiguous. Nevertheless, this lower threshold (500,000 gpd threshold found in §617(4)(b)(10), were the SEQRA review of the two contracts not segmented, would necessarily have to be considered depending upon whether the Village finds the park to be substantially contiguous to the transloading facility in an unsegmented SEQRA review.

In sum, the Village Board acted arbitrarily and capriciously when it classified the Surplus Water Sale Agreement as a Type II action and failed to apply the criteria set out in the regulations to determine whether an EIS should issue,[11] and when it improperly segmented the SEQRA review of the Lease from the Surplus Water Sale Agreement. Lorberbaum v. Pearl, 182 A.D.2d 897; Houser v. Finnerman, 99 A.D.2d 926 (3d Dept. 1984). Accordingly, searching the record, summary judgment is granted to

[11] "Type I actions require the preparation of a "full" EAF whereas unlisted actions may use either the "full" or "short" EAF (6 NYCRR 617.6 [a] [2], [3])." City Council v. Town Bd., 3 N.Y.3d at 520.

petitioners as follows: The Village resolutions designating the Surplus Water Agreement as a Type II action is annulled. Similarly, the Negative Declaration as to the Lease Agreement must be annulled, as in reaching the decision as to a negative declaration, the Village Board improperly segmented its review of the Lease from the Surplus Water Sale Agreement.

Petitioners also seek the annulment of the Village approvals of the Surplus Water Sale agreement and the Lease. In considering this, the court is mindful that

> The mandate that agencies implement SEQRA's procedural mechanisms to the "fullest extent possible" reflects the Legislature's view that the substance of SEQRA cannot be achieved without its procedure, and that departures from SEQRA's procedural mechanisms thwart the purposes of the statute. Thus it is clear that strict, not substantial, compliance is required.
>
> Nor is strict compliance with SEQRA a meaningless hurdle. Rather, the requirement of strict compliance and attendant spectre of de novo environmental review insure that agencies will err on the side of meticulous care in their environmental review. Anything less than strict compliance, moreover, offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment.

King v. Saratoga County Bd. of Supervisors, 89 N.Y.2d 341, 347-348 (1996). The Court of Appeals in King v. Saratoga County Bd. of Supervisors reviewed three of its leading cases finding SEQRA violations. In each case, the Court found essentially that

there is no support in the statute for a "cure of a SEQRA violation" and that annulment of the underlying approvals was required. King v. Saratoga County Bd. of Supervisors, 89 N.Y.2d at 348. But in the King v. Saratoga County Bd. of Supervisors case, the court found an exception to annulment where the lead agency had "both procedurally and substantively . . . actually performed each of the required steps in the SEQRA review process." Such is not the case here where the Village short circuited the SEQRA process as to the Surplus Water Sale Agreement by an improper Type II designation and failed to consider the Surplus Water Sale Agreement when issuing its negative determination as to the Lease due to improper segmentation. Accordingly, the Village Board resolutions approving the Surplus Water Sale Agreement and Lease agreement of February 23, 2012, are annulled. King v. Saratoga County Bd. of Supervisors, 89 N.Y.2d at 348; see also N.Y. City Coalition to End Lead Poisoning, Inc. v. Vallone, 100 N.Y.2d 337, 348 (2003)("Accordingly, where a lead agency has failed to comply with SEQRA's mandates, the negative declaration must be nullified (see e.g. Chinese Staff & Workers Assn. v. City of New York, 68 N.Y.2d 359, 368-369, 509 N.Y.S.2d 499, 502 N.E.2d 176 [1986])."

Petitioners are granted an injunction enjoining further water withdrawals pursuant to the Surplus Water Sale Agreement pending the Village respondent's compliance with SEQRA.

In so finding, it is not necessary to decide, and the court does not reach, the parties' arguments related to SRBC except to hold that compliance with SEQRA is not excused by the fact that the Susquehanna River Basin Commission must issue a permit for the subsequent water withdrawal.[12] Neither the Susquehanna River Basin Compact (ECL 21-1301) or its regulations (21 NYCRR §1806-8) provide for preemption of SEQRA. It is observed that, at oral argument of this matter, counsel for the Village emphatically stated that the Village did not contend that the SRBC compact or its regulations preempted SEQRA.

Nor does the court address whether compliance with SEQRA in this case means that the kind of comprehensive "cumulative impact study" proposed by petitioners is necessary. See generally, Matter of Long Island Pine Barrens Society, Inc. v. Planning Bd. Of the Town of Brookhaven, 80 N.Y.2d 500, 512-18 (1992); Matter of Saratoga Lake Protection and Improvement District v. Dept. of Public Works of City of Saratoga Springs, 46 A.D.3d 979, 986-87 (3d Dept. 2007); Long Island Pine Barrens Society, Inc. v. Town Bd. Of Town of East Hampton, 293 A.D.2d 616, 617 (2d Dept. 2002); Matter of North Fork Environ Mental Council, Inc. v. Janoski, 196 A.D.2d 590, 591 (2d Dept. 1993).

[12] "Traditional doctrine holds that a court should decide no more than necessary to resolve the dispute before it." Immuno AG v. Moor-Jankowski, 77 N.Y.2d 235, 261 (1991).

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: March 25, 2013
Rochester, New York