SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU

PRESENT HON._____
JUSTICE OF THE SUPREME COURT

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Petitioners Pro Se,

Index Number
_____/_____

Memorandum of Law in Support of Verified Petition and Order to Show Cause

For Judgements and an Order Pursuant to Article 78, Section 3001 (Declaratory Judgement), Section 6311 (Preliminary Injunction) and Section 6313 (Temporary Restraining Order) of the Civil Practice Law and Rules ("CPLR")

-against-

THE TOWN OF NORTH HEMPSTEAD TOWN BOARD
a/k/a TOWN COUNCIL
by JUDI BOSWORTH, Town Supervisor
220 Plandome Road,
Manhasset NY 11030
Tel. (516) 869-6311

THE NASSAU COUNTY LEGISLATURE
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-CONTINUED-

NASSAU COUNTY EXECUTIVE EDWARD P. MANGANO
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THE ROSLYN WATER DISTRICT
by MICHAEL J. KOSINSKI, Chairman
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Respondents and Necessary Parties

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Table of Contents

Factual Summary

The Roslyn Water District ("RWD"), the Town of North Hempstead ("the Town") and the County of Nassau ("the County") have been in the process since late 2013 of funding and creating a facility to remove toxic chemicals from the water from one of the RWD's eight wells.

The water district had intended to place the so-called "air-stripper" on its own property and repeatedly asserted the emissions would be safe.

Faced with some vocal opposition to that plan, the Town, of which the water district is a Special Improvement District, extracted commitments in public from the RWD to make every effort to locate the facility in the adjacent public park, prior to agreeing on February 25, 2014, to fund it within an overall RWD capital budget.

The air-stripper would thus be located in a public park, Christopher Morley Park ("the Park"), in the center of a 33-acre recreational forest used by hikers, walkers, joggers, Boy Scouts and others. It is also one rare piece of habitat for wildlife in a heavily-developed part of Nassau.

On June 2, 2014 the County Legislature approved a Home Rule law supporting passage by the State Legislature of a parkland alienation bill to allow the transfer of the designated park forest-land to the RWD, and by June 18, 2014 the State Legislature had passed the bill.

Presently it only needs the Governor's signature to become law.

Environmental groups and individuals including the Petitioners, have

submitted testimony to the various agencies and to the State Legislature challenging the project on environmental grounds.

As currently described in public documents and by other evidence, the environmental impacts of the project would include:

(1) the loss of dozens of healthy trees, some of them 100-foot-tall Tulip-trees unique in New York to this part of the State;

(2) the clearing of a 320-foot-long access road through the woods;

(3) the clearing of a roughly half-acre area in the center of the forest, in all probability to be surrounded by a security fence and lighting;

(4) the construction of two buildings, one a 30-foot-tall structure that would emit a constant hum;

(5) the emission of unknown quantities of the potent greenhouse gas Freon-22,m and other toxic chemicals, into the atmosphere on a 24/7 basis.

Despite the multitude of known or likely environmental impacts connected with the project, only the most perfunctory environmental review has been performed at each level of official approval, clearly in violation of relevant law.

The detailed mandates of the State Environmental Quality Review Act ("SEQRA"), a law intended to bring environmental concerns openly before officials and the public have been violated in numerous respects.

The Town approved funding for the air-stripper with the explicit proviso that the RWD would make every effort to place it in the wooded Park location, yet it did so without the benefit of any SEQRA environmental review of what that action would do to the environment.

The only SEQRA documents before the Town policy-makers when they approved the appropriations spoke of the construction of the air-stripper on developed RWD property, outside the Park.

The RWD itself made several decisions that purported to discharge its duties under SEQRA, but which clearly failed to comply with basic procedural and substantive provisions of the law.

The RWD's most recent SEQRA efforts, approval of a Negative Declaration based on a half-completed Environmental Assessment Form, and self-designation as a lead agency with no consultation with other involved agencies, must be rendered legally invalid due to missing paperwork and legally-insufficient deliberation, among other flaws.

The County Legislature approved its Home Rule law regarding the parkland alienation, upon information and belief assented to by the County Executive, without even arriving at any SEQRA-mandated conclusions, and without having the benefit of, or deliberating upon, any SEQRA-mandated analytical documents.

Officials of the County and the RWD have stated their intent to employ a one-year "lease" or "use and occupancy permit" to allow the immediate launch of construction of the air-stripper and appurtenant roadway, the forest-clearing, and other work as quickly as possible. The RWD has said it expects to begin construction in July or August, 2014.

Without the Court's intervention, the impending actions of these agencies could have multiple "significant adverse environmental" impacts without policy-makers and the public having before them the proper facts, analysis and

mitigating alternatives, as required by SEQRA, until it is too late to prevent irreparable harm to Petitioners, and the public.

Legal Summary

One challenge to the Court's jurisdiction to be argued is whether the issues raised are ripe for review.

The Town took a facially final action of voting to appropriate funds for a capital budget that included the air-stripper in the Park, also voting to accept in full the RWD's SEQRA findings, flawed as they were.

The RWD has formally voted to place the facility in the designated Park area, and has also voted a SEQRA Negative Declaration for that action, albeit after the fact.

The County voted to ask State approval for its plan to alienate parkland in its Home Rule law, but it has not yet voted on or, upon information and belief, otherwise executed the legal conveyances to give the RWD the right to build the facility on such Park land.

For each action the required SEQRA protections and procedures, which were intended to help the public and officials protect the environment from undue damage, were violated.

Given the circumstances, the law allows the Court to rule upon the errors at this time, without awaiting further actions to occur more proximate to the commencement of construction.

In fact if the court were to wait further steps to assure the "finality" of any

agency's actions, the Statute of Limitations under CPLR article 78 would be expiring by about June 25, 2014 to review certain decisions taken by the Town. As such waiting for ripeness at this point would threaten Petitioners access to redress at all.

Petitioners have the requisite legal standing to prosecute this special proceeding, because they will demonstrate that the building of the air-stripper in the Park will cause them concrete harm, and that they use the Park more than most members of the public. It is beyond question that the challenge based on environmental harm is within the zone of interests protected by the SEQRA law.

As will be discussed, New York Courts have applied a "strict-compliance" standard to SEQRA when evaluating allegations of violations of its provisions.

If SEQRA violations are found, such as those in this proceeding, the courts are bound to invalidate any laws or other acts tainted by such a violation.

Among other violations demonstrated in the record, the RWD failed to make legally-sufficient findings of policy and fact as they reached various conclusions about the environmental impacts of their plans, to wit the need for a "hard look" and "reasoned elaboration" of their Determination of Significance.

Similar violations were committed by the other agencies.

Where SEQRA requires well-reasoned written elaborations of the grounds for a Determination of Significance, the RWD failed to do so.

As a consequence of that violation, the type of comprehensive, public environmental analysis mandated by law for such an environmentally-freighted project was unlawfully bypassed.

By law the actions that resulted therefrom are, and should be declared, legally invalid.

In sum, the various legal flaws in the process have denied Petitioners and the public the proper protections mandated by SEQRA, and could lead to irreparable harm if not rectified.

The law provides remedies for the various violations of SEQRA that Petitioners have outlined and proven, and permit the court to act now, before it is too late.

Thus the Court should issue an Judgements invalidating such flawed actions by the Town, the RWD, and the County in the furtherance of, and and Order enjoining them from performing any work to damage or alter the subject forest to effectuate the air-stripper project, unless and until the Court determines all SEQRA requirements have been complied with, and consistent with the Prayer for Relief in Petitioners ' Verified Petition.

Point I. The Issues Addressed by this Proceeding are Ripe for Judicial Review

The issues raised by Petitioners are ripe for review.

This special proceeding seeks review of "final determinations" (CPLR 7801) of three "agencies" (ECL 8-0105.2, 8-0105.3) made in violation of the requirements of SEQRA.

Each undertook a different improper step (6 NYCRR 617.3(g)) towards the ultimate action (ECL 8-0105.4), namely forest-clearing, an overall construction project, and the siting of the air-stripper, that was subject to the provisions of

SEQRA and will, if undertaken, cause irreparable concrete harm to the Petitioners.

The challenged step of each agency is a decision it made expressing its definitive position on whether to alienate land from the Park, clear it, and build a road and treatment facility thereupon.

To the extent there are subsequent steps to be taken by any one of the three agencies, they are all implementing activities that flow from the determinations already made.

Therefore, the agency decisions described in the Petition are ripe for review at this time.

There are decisions in New York law that situate justiciability at the point where concrete harm is suffered by a petitioner, but decisions dealing specifically with SEQRA issues have under many circumstances located that point early in the sequence of official actions.

In a line of cases including Eadie v. N. Greenbush Town Bd, 7 N.Y.3d 306 (2006), the Court has ruled that where an agency's flawed action may be "ameliorated" at a later time, the Statute of Limitations extends from that later time, although the Court did not rule directly on ripeness per se:

> "The issue to be decided here is whether petitioners suffered 'concrete injury' from the alleged SEQRA violations...when the SEQRA process culminated in the issuing of a findings statement...or...when the Town Board enacted the rezoning....We conclude that no concrete injury was inflicted until the rezoning was enacted...."
>
> (Eadie, *ibid*. at 316) (A case where a town's rezoning of a property was upheld because while the challenge was timely, the SEQRA issues raised were denied because the record showed diligent

analysis of the issues.) (emphasis added)

But the Court also ruled that it was possible a SEQRA violation could itself be the time of "harm" where one agency issued a SEQARA finding, and another agency acted upon that finding:

> Any injury to the petitioner that DEP inflicted was concrete when the [SEQRA declaration of significance] was issued. It did not depend on the future passage of legislation [based thereupon], and it was not subject to review or corrective action by DEP.
> .....
> ...[I]n some cases it may be the SEQRA process...that inflicts the injury of which the petitioner complains."
>
> (Eadie, *ibid.* at 317) (emphasis added)

In the case of the air-stripper project, the flaws in the Negative Declarations, Home Rule law and other actions led to the truncation of the process of environmental review, bypassing such steps as a full Environmental Impact Statement, thereby causing a concrete harm to Petitioners at that point.

The Court of Appeals has pointed to that exact harm in locating the point of "injury" at the occurrence of the SEQRA violation, and not later:

> "...[T]he issuance of the [Conditioned Negative Declaration] resulted in actual concrete injury to petitioners because the declaration essentially gave the developer the ability to proceed with the project without the need to prepare an environmental impact statement."
>
> Stop-The-Barge v. Cahill, 1 N.Y.3d 218 (2003), at 23-24

The Court of Appeals and appellate courts have found that a range of government decisions preliminary to any more "concrete" steps that would otherwise inflict injury still constituted final actions subject to challenge for their violation of SEQRA requirements.

The Court has ruled, for example, that the SEQRA process should have been completed prior to town board's passage of the resolution authorizing the creation of a sewer district, and prior to a public referendum affirming that decision.

The Court modified the prerequisite for "concrete" harm by recognizing the practical reality of public policy-making, and finding that the early step of approving a course of action was sufficiently final and hence harmful:

> "It is accurate to say, of course, that by acts of rescission later adopted the town board could have reversed the action.... As a practical matter, for several reasons, however, the dynamics and freedom of decision-making...are considerably more constrained than when the action is first under consideration for adoption. Thus...the initiatory action by the town board might well have been practically determinative.
>
> Tri-County Taxpayers Assn. v. Town of Queensbury, 55 NY 2d 41 (1982), at 46-47 (internal citations and quotations omitted, emphasis added)

In another case with circumstances similar to the instant Town, County and RWD votes in furtherance of the air-stripper project, the Third Department found that a "preliminary site selection" for a landfill was actually a final decision that required SEQRA compliance beforehand:

> "Passage of a resolution or an ordinance by a governmental unit can be an "action" as defined by SEQRA if it commits the unit to a definite course of future activities
> .....
> We perceive respondent's resolution, considered in its entirety, to be a broad-based grant of power...Although that site is labeled the preferred primary site, it is evident that, barring any unforeseen circumstances or field test results, the site has been selected."
>
> Seymour v. Saratoga County, 190 AD 2d 276 (3rd Dep't, 1993), acknowledged as "law of the case" in King v. Saratoga Supervisors, 89 N.Y.2d 341 (1996). (internal quotations and

> citations omitted) (Where the selection of a county-wide landfill site was challenged on grounds including lack of environmental compliance under SEQRA)(emphasis added)

In contrast to the present circumstances, in Seymour the approved-resolution also approved a set of activities related to acquiring and evaluating the 'potential' landfill site, while in Nassau those steps were not present, or not publicly apparent at present.

However, it was the *inexorable intent* of the actions taken that provided the standard to measure the action's finality, and all available evidence demonstrates that the steps taken by the agencies in Nassau are, despite the SEQRA flaws, leading inexorably to the imminent final approvals and construction of the air-stripper in the Park, barring legal intervention.

Returning to the question posed by Eadie as to whether the harms posed by the legally-flawed air-stripper decisions taken thus far could later be ameliorated, and therefore the "injury" avoided, one encounters additional issues of practical harm, equity, and statues of limitations that argue against waiting for some future 'perfect moment' to adjudicate.

It might be argued, for example, that the Town or the RWD could ameliorate the flawed SEQRA analysis by reversing the action, or denying some later contract approvals or other action.

Similarly it could be argued that the County could halt the process, denying a lease or land-transfer.

But such arguments are unrealistic, and impose significant risk to the rights of Petitioners, both from the standpoint of various Statues of Limitations and the

threat that irreparable actions will be taken to damage the forest at issue.

In the first place, as the various agencies continue their administrative processes, the likely reality is that no further environmental questions will be deemed germane, because it will be determined that the issues were already decided, for instance by the Town's deficient and flawed SEQRA determination on February 25, 2014, and by the RWD's deficient and flawed SEQRA determination on June 5, 2014, each dealing directly with the air-stripper in the Park.

Having demonstrated full-throated support for urgent action in the face of a purported "water crisis", a gross overstatement undermined by testimony to the contrary, the County Legislature has expressed its strong commitment to going forward, thus inevitably joining the Town in approving the RWD's status as lead agency, and thereby adopting the RWD's flawed Negative Declaration of June 5, 2014.

The RWD might argue that despite the multiple flaws they themselves introduced into the SEQRA process, they could ameliorate them at a later time either by failing to proceed, or by reversing their decision to locate the air-stripper in the Park, or otherwise.

Again that reading of the practical-reality seems fanciful.

The RWD is already on record exchanging verbal commitments with the Town, as a condition of the Town's capital appropriations, to construct the air-stripper facility in the Park. By the RWD's vote of May 1, 2014, to situate the facility in the Park, formally committed to do so.

Furthermore any challenges in the course of future deliberations by the RWD on contracts or the like, based on the inadequacy of the SEQRA process, would very likely be dismissed as settled and moot, pointing to the RWD's Negative Declaration, and purported lead-agency declaration, of June 5, 2014.

In a matter of days, the four-months Statute of Limitations period for CPLR article 78 review of the Town's SEQRA determination and other actions of February 25, 2014 will expire, thus potentially depriving Petitioners of their day in Court if this matter is not found ripe.

And as with the Statute of Limitations challenge posed by the Town actions, by the time of such hypothetical future actions by the County or RWD, an article 78 challenge to those actions or the SEQRA violations they were based on might have surpassed four months from the time of the flawed SEQRA votes of June 5, 2014, and thus be untimely.

The flawed and environmentally-harmful decisions of the Town, County and the RWD, as cited, are ripe for review because the harm occurred in the flawed SEQRA process, and from the flawed decisions based on that process.

The errors are not amenable to amelioration because those agencies are already fully, explicitly, and actively committed to the course of action that forecloses amelioration, namely de-foresting a valuable part of the Park, and constructing the air-stripper and all its appurtenances there as well.

To defer a decision would give rise to the paradoxical result that, on the one hand, the statute of limitations on review of the SEQRA flaws could expire and, on the other hand, the harms meant to be addressed by this special proceeding

might have already occurred.

Clearly any deference to ripeness should not jeopardize the legal review itself, and render the courts impotent to address the underlying legal deficiency which the statute is intended to address.

Point I-B. Ripeness with Respect to the Nassau County Legislature

There is an additional element that supports the ripeness of review with respect to the actions of the County, which is the determination by the Department of Environmental Conservation ("DEC") that a Home Rule vote on alienation is a final action.

The Home Rule resolution on alienation was approved by the County Legislature on June 2, 2014, and the resolution became law upon the presumed approval of the County Executive.

Both actions, however, occurred in the absence of any SEQRA determinations: there was no classification of the action, no determination of significance, and no designation of a lead agency.

The DEC has ruled that a Home Rule law on alienation is a final action, before which the full SEQRA process *must* be completed:

> "SEQRA contains several statements that strongly suggest that the [the SEQRA process] must be completed prior to the Municipal Home Rule resolution requesting authority to alienate parkland. The SEQRA regulations suggest that, [n]o agency involved in an action may undertake, fund , or approve the action until it has complied with the provisions of SEQRA...and'[t]he basic purpose of SEQRA is to incorporate the consideration of environmental factors ...at the earliest possible time...'...The phrase ';at the earliest possible time' means the point in time when SEQRA can still pay a meaningful role in the decision-making process....I conclude that a

> municipality must complete SEQRA before adopting its resolution pursuant to the Municipal Home Rule Law Section 40 to alienate parkland....SEQRA's timing policies are enhanced by having the SEQRA process completed at the municipal resolution stage as it helps to ensure that offsetting or mitigating measures for the lost parkland will be incorporated into the State Legislation."
>
> "Handbook on the Alienation and Conversion of Municipal Parkland in New York, New York State Office of Parks, Recreation and Historic Preservation", revised 2012, Appendix 14, Letter of DEC Deputy Commissioner and General Counsel, pp. 76-79. (emphasis added) (included as Petitioners' Exhibit 40)

The courts have ruled that agencies in New York are to be deferred to in interpreting their statutes and regulations:

> "By now it is settled law that the interpretation given a statute by the agency charged with its enforcement will be respected by the courts if not irrational or unreasonable."
>
> Fineway v. State Liq. Auth., 48 NY 2d 464 (1979), acc'd Lamboy v. Gross 126 AD 2d 265 (Appellate Division 1st Dep't 1987)

It is however for this Court to determine whether, as an agency that writes the regulations and provides interpretation and guidance about them, but on most subjects leaves enforcement to local agencies, the DEC is to be accorded the full measure of such deference.

One further element places the County's vote on Home Rule and alienation part of a special class of "final" actions requiring prior SEQRA completion, and that is the necessity of a vote by a second entity to confirm the action.

In this case of course the alienation required approval of the State Legislature and Governor. It now awaits the Governor's signature.

In Tri-County Taxpayers Association, the Court of Appeals took special note of the role of the SEQRA analysis were voters who would be called on to validate

the legislative decision of a town that was itself dependent on a SEQRA determination:

> "Aside from the significance of the availability of an environmental impact statement to the members of the town board at the time of action by the board ... there can be little doubt that SEQRA commanded the preparation and filing of an environmental impact statement for public inspection prior to the special election held on August 17, 1979. As differentiated from actions by the town board, there was but a single opportunity for the district voters to express opinions in the electoral forum."
>
> Tri-County Taxpayers Association, *ibid*., at 46-47 (internal citations and quotations omitted, emphasis added)

In the case of Tri-County Taxpayers the voters were the residents of the proposed sewer district, while in the case of the County's Home Rule law, the "voters" were the members of the State Legislature and the Governor.

Just as the absence of an EIS denied the voters in the sewer district the ability adequately to understand the environmental issues, so the lack of an EIS, or any other SEQRA-mandated analysis in the present case denied responsible officials in Albany, far removed from the local situation, the requisite information upon which to act.

As it was, instead of a proper complete environmental analysis, the State Legislature and Governor received a 'legislative analysis' claiming improperly that the forest was a "limited access" area in a remote part of the park, and contained other such questionable assertions.

Thus the lack of a SEQRA analysis left them in the dark, and made them vulnerable to casual misinformation, as to the true issues raised. SEQRA was meant to prevent that circumstance.

For the foregoing reasons it is clear the County's Home Rule vote decisions are ripe. This conclusion is based on:

(1) The practical issues of equity and preserving the court's prerogatives of review, (2) The opinion of the agency that oversees SEQRA and writes the regulations, (3) the Court's ruling in Tri-County Taxpayers, finding that a mere resolution by a town creating a sewer-district rose to the status of a final action, and (4) the need for a second, affirming vote by another entity to possess the requisite SEQRA analysis to properly discharge its duties in so voting.

Were the Court to delay adjudication until the RWD's flawed environmental review is formally adopted by the County, or the contract duly signed, with or without legislative deliberation, or a site plan approved, the delay would serve no equitable purpose, but on the other hand would risk the loss of the Court's prerogative should the obviously reckless rush to completion bypass, condense, or obscure such future procedures.

In conclusion, the law argues for review at this point in time of the errors in SEQRA compliance of the various inter-linked actions taken by all three agencies that are otherwise intent, notwithstanding their legal obligations, on rushing the air-stripper into the public Park, thereby causing irreparable harm.

Largely as a result of the failure to implement SEQRA in any meaningful way, the significant consequences of the planned actions have barely reached the consciousness of the various lawmakers and officials involved, let alone the general public.

To leave matters as they are because, under the hypothetical possibility the local agencies could turn 180 degrees and halt the project, or reject the lead agency, or overturn the defective but now-purportedly-controlling Negative Declarations, and therefore the Courts should simply wait for some additional steps to occur, is both unnecessary and reckless.

As it stands, destruction of dozens of trees that have already been tagged for removal could begin at any time under the County's own prerogatives.

Delay at this point will also threaten expiration of relevant statutes of limitations for CPLR article 78 review.

Point II This Special Proceeding is Timely under Relevant Statutes of Limitations

The Court of Appeals ruled in Eadie that the point of injury, and hence the time at which the Statute of Limitations begins to run, can be when a flawed SEQRA determination harms a petitioner.

In Eadie and in Stop-the-Barge, the Court of Appeals held that when one agency made a determination under SEQRA that another agency relied on, and the first agency's action was definitive, then the injury occurred at the point when the first determination was made and the statute of limitations commenced to run then.

Looking at the facts on their face, it could be argued that the RWD decisions in November, 2013, and December, 2013, with respect to two short EAF's addressing, respectively, (a) the capital budget plan, which included an air-stripper, and (b) an air-stripper at the site of wellhead by itself (in the RWD's own

property), could have started a Statute of Limitations clock ticking.

Based on such a clock it could be argued that the Town decision on February 25, 2014, to use those EAFs is beyond challenge because the EAF's themselves should have been challenged, not the subsequent decision of the Town, and hence the challenge is untimely.

But for many reasons such an argument would be profoundly unsound and unfair to Petitioners.

In the first place, the EAF's of the earlier time were never intended to address the construction of an air-stripper in the Park, nor any of the environmental issues or impacts that such a project would raise.

If the Statute of Limitations were to have begun to run at the point when those two EAFs were rendered, it would be tantamount to arguing that the Petitioners should have challenged those EAF's for insufficiency in failing to address an issue that was not even part of the EAF's, nor the intention or consequence of the agency's actions that the EAF was intended to address.

It would mean asking the Petitioners to have the clairvoyance to imagine that despite everything that the RWD had said about its plans to locate the air-stripper in its own gated compound, that in fact at some future point another agency would force it to change its plans, and would use the unchanged EAF's to prove the alleged harmlessness of an entirely different project at an entirely different location, and that Petitioners needed to challenge those EAF's on the basis of that future project, without even knowing what it was, or they would otherwise risk losing timeliness to a Statute of Limitations challenge.

Only at the point in time when, in the middle of the public hearing on February 25, 2014, the Town extracted a commitment that the RWD would attempt to build the air-stripper in the Park, did the EAF's suddenly "grow a new head" and become EAF's purportedly dealing with that new and different project.

It is that flawed interpretation of the EAF's and the SEQRA process that Petitioners are now challenging, in a timely fashion.

The fact and reality is that the earlier EAF's dealt with a different project on a different site, and never dealt with a project that involved tearing down trees, cutting an access road, clearing a half-acre of pristine woodland, and building facility in the middle of a Park. The EAF's had no language to that effect, and nor did the engineering reports they were based on.

In the Stop the Barge, *supra*, the earlier SEQRA decision that started the Statute of Limitations clock addressed the exact same project that the later decision by another agency relied on.

> In the fall of 1996, the [applicant] submitted an environmental assessment statement to DEP [of New York City] in order to obtain permits to install a power generator on a floating barge in Brooklyn, New York.... Upon receipt of the statement, DEP became the lead agency for purposes of conducting a coordinated environmental review of the project pursuant to the State Environmental Quality Review Act (SEQRA). In August 1997, DEP issued the first of three CND's, concluding that the project posed no significant adverse impact to the environment....
> .....
> DEC [of New York State] determined that the impacts of air emissions from the proposed facility would not contravene the standards imposed by the Environmental Protection Agency and ... issued an air permit for NYCE's facility.
>
> Stop-the-Barge, *ibid*., at 221.

Both agencies in Stop-the-Barge were addressing substantially the same project. Any changes that occurred, described as "modifications" in the decision, were followed by new DEP declarations of significance the last of which was determined to start the Statute of Limitations clock (*ibid*. at 221), and which also preceded the action by the second agency.

The RWD has effectively acknowledged that its earlier EAF's were not applicable to the current project, because it started the EAF process anew for its project to explicitly construct the air-stripper in the Park, resulting in its EAF of June 5, 2014.

That the Town pressed the earlier EAFs into service to perform the function of effectively 'white-washing' the impacts of the air-stripper project in the Park, when it unlawfully asserted that the new project had already passed all the SEQRA analysis that was required, does not make it so.

The Town in its records access disclosure did not reveal that it had in its possession the EAF of December 2013 in which the RWD addressed the construction of the air-stripper itself; but that EAF was in every way equivalent to the November 2013 EAF, because it dealt exclusively with the air-stripper located in the RWD compound, and said nothing about a project in the Park.

A further point in the Court of Appeals decision shows that the irrelevant earlier EAF's do not constitute a point of departure for this case: the element of "concrete harm".

The Court stated:

> "In Matter of Essex County v Zagata, we concluded that an agency action is final when the decisionmaker arrives at a "definitive

> position on the issue that inflicts an actual, concrete injury" (91 NY2d 447, 453 [1998])."
>
> Stop-the-Barge, ibid., at 223.

In the present case the earlier EAFs did not inflict harm on Petitioners because the EAFs did not place the air-stripper in the Park, nor did they on their face, or by their stated purpose, provide the RWD with any basis upon which to place the air-striper in the Park without additional environmental review, which deficiency is part of the harm Petitioners have suffered. and seek to redress.

The only harm those earlier EAFs inflicted on Petitioners and the rest of the Park's users was manufactured by the Town, on February 25, 2014, when it voted to apply those EAFs improperly to the brand new plan to build the air-stripper in the Park.

Clearly the Statute of Limitations clock, whether based on harm or based on the reality of the agency decision-making, cannot be properly started at the time of an action in essence and fact unrelated to a future action. That is why the Statute of Limitations in this case does not trace to the earlier EAFs performed by the RWD.

In this special proceeding, Petitioners challenge (a) the Town's appropriations of February 25, 2014, (b) the RWD's vote to site the air-stripper in the Park of May 1, 2014, (c) the County's Home Rule vote of June 2, 2014 and the County Executive's subsequent presumed assent thereto at a time unknown, and (d) the RWD's SEQRA findings of June 5, 2014.

All those actions fall within the four-month Statute of Limitations of the CPLR article 78 proceedings.

Petitioners do not challenge the wholly irrelevant and separate RWD EAF's of November and December 2013, because they did not deal with the air-stripper project as it was to be built in the Park -- the subject of this proceeding.

But in like measure, neither does any Statute of Limitations connected to those earlier actions in any way control this special proceeding.

Point III. Petitioners Have Legal Standing

Petitioners Brummel, Dicker and Greengold use the Park frequently and or live in close proximity, and have thus demonstrated that they have standing to challenge a violation of SEQRA that affects the Park.

The Court of Appeals has worked through the various requirements of standing for environmental litigation based on the legal tradition, but it has recently made a more resounding and categorical statement to clarify the law in SEQRA environmental cases, at the least:

> "...[A] person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing under the State Environmental Quality Review Act (SEQRA) to challenge government actions that threaten that resource....."
>
> Save the Pine Bush v. Common Council of Albany, 13 N.Y.3d 297, (2009), at 301

Prior to that ruling, the courts had stated the law in a more complex way that was taken to be more restrictive in practice, based more explicitly on legal tradition, and most dependably cited in Society of the Plastics Industry v. County of Suffolk, 77 N.Y.2d 761 (1991):

> "Injury in fact thus serves to define the proper role of the judiciary,

> and is based on sound reasons, grounded not only in theory but in the judicial experience of centuries, here and elsewhere...."
>
> *ibid*., at 773, internal quotations and citations omitted

The Court in Society of the Plastics Industry made a one modern era pass at defining standing in terms of SEQRA, analyzing the State Legislature's having followed a balancing act by choosing not to allow generalized citizen-standing with respect to litigation on the environment, but not making any other standard alternatively.

The Court ruled in that case that there were three tests: harm, the intent of the law whose protection is asserted, and in land-use cases harm that is different from the public-at-large:

> "The zone of interests test, tying the in-fact injury asserted to the governmental act challenged, circumscribes the universe of persons who may challenge administrative action. Simply stated, 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....
> .....
>
> One further established principle in the law of standing bears note.
>
> In land use matters especially, we have long imposed the limitation that the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large...."
>
> *ibid*., at 773-774 (internal quotes and citations omitted, emphasis added).

In Society of the Plastics Industry, the Court was denying standing rather transparently to a commercial interest that sought to use SEQRA to challenge on environmental grounds a plastics-related conservation law passed in Suffolk

County with the praise and support of the environmental community.

There is nothing in the decision of Society of Plastics Industry that suggests that litigants who reasonably demonstrated their basic injury and special use of a resource, in addition to the relevance of the law whose protection they sought, would not be able to sue.

The Court actually appeared to embrace the rights and utility of groups dedicated to the environment that legitimately challenged environmental issues. (*ibid*., at 776)

For some reason, though, Society of the Plastics Industry, became more of a cudgel to deny standing in many cases.

Possibly as a result, the Court of Appeals under new leadership seemed resolved to clarify litigants' rights to litigate environmental issues, free of an undue weight from challenges based on standing.

The decision in Save the Pine Bush was, perhaps by design, written by a judge, Mr. Justice Smith, who had elaborately dissented in a case that ruled parsimoniously on standing under the prior leadership, New York State Nurse Anesthetists v. Novello, 2 N.Y.3d 207 (2004)

In Save the Pine Bush, the Court neatly encapsulated the three elements of standing in a simple opening sentence (*supra*), and made it clear the hurdle was not especially difficult to reach.

The decision adds additional details about the petitioners, such as their affiliation with a nature group and their dedication to preserving natural space that is home to an endangered butterfly.

But such details served only to re-confirm the Petitioners' use and enjoyment of the affected area, and none of those additional details is a separate requirement except in the most contrived reading of the decision.

The sharpest caveat on standing in the decision is simply the reminder that injury-in-fact must be real. But there is no extension of that or any other standard beyond its facial meaning:

> "In recognizing that petitioners' alleged injuries are a sufficient basis for standing, we do not suggest that standing in environmental cases is automatic, or can be met by perfunctory allegations of harm. Plaintiffs must not only allege, but if the issue is disputed must prove, that their injury is real and different from the injury most members of the public face ."
>
> Save the Pine Bush, *ibid*., at 306 (emphasis added)

Petitioners Dicker and Greengold both live adjacent to the forest at issue and use it on a regular basis. They value characteristics of its solitude, quiet, and natural attributes that would unquestionably be diminished in many ways by the air-stripper project. Their affidavits clearly describe the injuries they would suffer if the dozens of trees were cut down, the long access road built, and the half-acre campus created for the air-stripper facility in the middle of that forest.

Petitioner Brummel has described his own affection for the woods, his long-standing connection to the Park, his clear record of environmental activism, and in the past months his more intensive use of the forest as it became a matter of greater public knowledge due to the plans afoot.

He has also described how his use and enjoyment of the forest would be harmed, and how he would thus suffer concrete harm if the air-stripper were built.

All three Petitioners thus demonstrate that they use and enjoy the forest resource more than most members of the public, and will suffer real harm from the proposed project. They thus have standing to pursue this special proceeding.

Point IV. SEQRA Requires Strict Procedural Compliance, and the Clear Violations by the Agencies in this Case Should Lead to Nullification of their Unlawful Actions

It is well established that SEQRA requires strict-compliance with its procedures. Where an action is taken without such compliance, it is voidable because it was made in violation of lawful procedure, and was affected by an error of law.

In the present case, there is a long chain of actions taken by the three Respondent agencies in which the agencies failed to follow SEQRA procedures in numerous respects, which circumstances would necessitate judicial nullification. To wit:

(1) The Town Board, a/k/a Town Council, approved funding for an air-stripper that was committed on the public record to be constructed with all due effort in Christopher Morley Park; it approved the peremptory self-designation of the RWD as "lead agency"; it approved the RWD's Negative Declaration as sufficient to approve its own resolution; and it concluded that the RWD had fully complied with SEQRA, despite the fact the RWD had analyzed, and its Negative Declaration applied to, a wholly different air-stripper project than the one the Town approved for funding.

(2) Prior to the Town vote, there was no SEQRA-recognized analysis or

statement of the fact that the air-stripper would be placed in the setting of a public park, requiring the destruction of dozens of massive healthy trees, requiring the construction of a 320-foot roadway, create a 30-foot tall building emitting constant noise near a scout camping area, among other elements that would tend unavoidably to create a significant adverse impact on the environment, or the possibility thereof. .

(3) The recognition of the RWD as lead agency in the Town's resolution occurred despite the absence of any lawful steps required to coordinate review. (See 6 NYCRR 617.6(b)). Such steps did not begin until June 5, 2014, when the RWD finally began circulating a letter for that purpose, effectively acknowledging that it had failed to do so earlier. (EX26 of Petition in Support of Order to Show Cause), and were never properly carried out or completed before that time.

(4) The RWD similarly failed to perform any SEQRA analysis of its proposed action when it voted May 1, 2014 to place the air-stripper in the Park.

(5) On June 5th, 2014, when the RWD made various findings and determinations -- declaring itself lead agency, determining the action to be Unlisted, and adopting a Negative Declaration of environmental significance, the RWD had only a fragment of the required environmental review it required, only Part 1 of the three-part Environmental Assessment Form, and no statement elaborating its reasons or showing it took a "hard look" at the environmental issues.

(6) As for the County, it approved the Home Rule law requesting permission to alienate the parkland -- a final action in the eyes of the DEC, *supra,* without

having performed itself, or adopted any other, SEQRA analysis of its action.

In Point IV we will show that the failure to identify the relevant areas of environmental concern, to take a “hard look” at them and provide a “reasoned elaboration” of a Determination of Significance is a separate SEQRA violation making all of the above actions of the RWD, the Town and the County similarly unlawful and voidable.

To summarize: the SEQRA procedures for establishing a lead agency (6 NYCRR 617.6(b)) , making a classification (6 NYCRR 617.6(a)), preparing an environmental assessment form (6 NYCRR 617.2(m)) and determining significance (617.7) were all either not followed at all or were the subject of improper shortcuts and failure to conform to specific requirements.

The Court of Appeals has stated clearly that strict-compliance is the standard for SEQRA cases:

> "SEQRA's policy of injecting environmental considerations into governmental decision-making is effectuated, in part, through strict compliance with the review procedures outlined in the environmental laws and regulations. Strict compliance with SEQRA is not a meaningless hurdle. Rather, the requirement of strict compliance and attendant specter 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."
>
> New York City Coalition to End Lead Poisoning v. Peter Vallone, *et al*.,100 N.Y.2d 337 (2003) at 348 (internal citations and quotations omitted, emphasis added) (Where the Court invalidated laws because SEQRA analysis was deemed incomplete, emphasis added)

Furthermore to have the desired effect and to uphold the protections that are

the law's end purpose, it is necessary to annul the action itself:

> "This case requires us to determine whether the New York City Council complied with the State Environmental Quality Review Act when it enacted Local Law No. 38 (1999)....We hold the City Council's negative declaration does not set forth an adequate explanation...that the new law would have no significant environmental effects. This failure to comply with statutory requirements renders Local Law 38 null and void."
>
> *ibid.,* at 342.

Similarly:

> "We agree with the unanimous determination at the Appellate Division...that, although the imprecision of the statutory provisions makes it difficult to identify the exact point at which an environmental impact statement must be prepared... this point had been passed.... On the appeal to our court the only question relates to the relief to be granted....On this issue we agree with the dissenters that Resolution Nos. 228, 229, 230, 318 and 319 and the special election of August 17, 1979 should be declared null and void...."
>
> Tri-County Taxpayers, supra, at 45. (emphasis added)

Given the Court's firm guidance that strict-compliance is required, and in its absence the agency actions are nullified, in the present special proceeding the actions that side-stepped and ignored the SEQRA duties should be invalidated.

To wit, the Town Board, a/k/a Town Council, appropriation of funds insofar as they apply to the air-stripper in the Park should be nullified; the County's Home Rule law as relates to alienation of parkland for the building of the air-stripper should be nullified; and the RWD Negative Declaration, assignment of the project to Unlisted status, and the self-designation as lead agency should be nullified on June 5, 2014

Further the RWD decision to move the air-stripper into the forest of the Park

should similarly be nullified.

And the Court should therefore issue an Order enjoining the respective parties from damaging or in any way altering the forest as currently designated for the project or possibly amenable to such use at another time; and from changing the use, ownership, or permission to use that forest from the exclusive control and use of the County of Nassau and the integrity of the forest as a wild-growing natural area.:

Point V. The Agencies Failed To Take A "Hard Look" at Environmental Impacts, And They Failed to Make A "Reasoned Elaboration" for their Negative Declarations, Hence Their Actions Are Invalid by Law

In deciding to proceed with the park alienation, forest destruction and water treatment facility construction, the Town and the RWD made or explicitly approved a “Negative Declaration ” under SEQRA's rules for making a "Determination of Significance" (6 NYCRR 617.2(y)).

In so doing they asserted the proposed project would not even potentially result in any significant adverse environmental impact.

The negative Determinations of Significance permitted the process to continue without any further environmental analysis, including for instance an Environmental Impact Statement.

The County neither addressed nor decided the issue of the environmental impact, which created a separate legal flaw, but also meant their decision lacked the required "hard look" and "reasoned elaboration."

While the agency conclusions seem absurd on their face given the nature of

what is proposed and the forested site to be disrupted, absurdity is not the legal test.

To facilitate the process of review, the courts early-on established the dual criteria of "strict compliance" with SEQRA rules (see Point III, above), and the straight-forward requirement that the record demonstrate an agency took a "hard look" at relevant environmental issues, and that it issued a "reasoned elaboration" in writing for its "Determination of Significance" thereof. (Jackson v. NY Urban Development Corp., 67 NY 2d 400 (1986) at 417.)

In the present case all three elements are missing in the actions of all three agencies.

A long line of SEQRA rulings requires that any Determination of Significance be based on a written "reasoned elaboration" that demonstrates the agency took a "hard look" at environmental issues, following a process and criteria prescribed by 6 NYCRR 617.7(b) and (c):

> "Judicial review of a lead agency's negative declaration is restricted to whether the agency identified the relevant areas of environmental concern, took a `hard look' at them, and made a `reasoned elaboration' of the basis for its determination. As we observed in Jackson, SEQRA guarantees that agency decision makers will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices."
>
> New York City Coalition to End Lead Poisoning, supra., at 348 (emphasis added)

The Second Department was more detailed:

> SEQRA was designed to insure that agency decision-makers --

> enlightened by public comment where appropriate -- will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices....In reviewing the lead agency's determination, the court must determine whether the lead agency identified the relevant areas of environmental concern, took a `hard look' at them, and made a `reasoned elaboration' of the basis for its determination.
>
> In the Matter of Halperin v. City of New Rochelle, 24 AD 3d 768, 809 N.Y.S.2d 98 (2nd Dep't 2005) (internal citations and quotation marks omitted, emphasis added)

Based on the record, the RWD made only one Negative Declaration specifically describing a plan to build the air-stripper in the Park, and that occurred at its meeting of June 5, 2014.

The RWD also made a negative Determination of Significance in the short EAF of November 26, 2013 (though the Determination is dated November 7, 2013), and a check box negative determination in the short EAF of December 20, 2013.

Of all three agencies, only the RWD made any explicit determinations of environmental significance; the County made none and the Town purported -- improperly -- to rely on those of the RWD, which it explicitly approved.

The documents reveal the RWD included only the most perfunctory statements with respect to its reasoning, and factual and scientific basis for its Negative Declarations, but it is well established that the law requires far more.

The law does not permit such conclusory findings in the absence of a reasoned analysis, which clearly is required for a project that would require numerous changes to the parkland at issue.

The RWD decision of May 1, 2014 was preceded, as far as indicated in documents disclosed, by only the general capital expenditure review presented to the Town in a short EAF dated November 26, 2013 (EX3) and a further short EAF dealing specifically with the air stripper dated December 20, 2014.

They did not describe a plan to put the facility in the Park or remove trees, clear a road, and other details connected with the Park site.

The November EAF contained a Notice of Determination of Non-Significance that stated:

> "The Roslyn Water District as lead agency, has determined that the proposed action described below will not have a significant adverse environmental impact...."

It thus lacked any elaboration and hard look that was required.

The December EAF contained only a check box indicating a negative finding, and had no discussion at all in the space provided for one.

The minutes of the RWD meeting of May 1, 2014, at which the RWD voted 2-1 to put the air-stripper in the Park, did not contain any discussion or formal declaration of reasons for, nor any evidence of a Negative Declaration with respect to that action.

It is however the full EAF dated June 5, 2014 that is the center of attention because it is the first EAF dealing directly with a plan to locate an air-stripper in the Park.

That EAF, also approved by the RWD board on June 5, 2014, lacked Parts 2 and 3, which are designed to analyze the environmental impacts and provide a space for discussion of the agency's findings, and a Declaration of Significance.

Those elements were simply absent from the documents as disclosed by the RWD. (Petitioners' EX1)

The Minutes of the June 5 meeting stated simply:

> "It is further resolved that the ":Unlisted Actions" will not have a significant environmental impact [sic] and, therefore, the Board of Commissioners, as lead agency, is adopting a "Negative Declaration" pursuant to SEQRA." (Petitioners' EX27).

Clearly the conclusory or missing elements of agency review and analysis reflect a failure to take a "hard look" and there simply was no written "reasoned elaboration."

Every one of the RWD's Negative Declarations were fatally-flawed and invalid.

But only the last one was relevant to the process of approving the air-stripper in the Park, because the others had been undertaken for a wholly different project, from an environmental and concrete standpoint, than that being construction of the air-stripper on the RWD's own developed property, outside the Park.

The Town effectively failed to make any "hard look" or "reasoned elaboration" in approving the funding for the air-stripper in the Park, because the documents available to it, and disclosed by it, never presented the case of building the air-stripper in Christopher Morley Park.

As has been discussed, all those earlier SEQRA-related documents that the Town disclosed, including the RWD's short EAF of November, 2013, addressing the capital budget and the engineering report describing the building of the air-stripper in the RWD Well No. 4 compound, did not contemplate or evaluate building the air-stripper in the Park.

For that reason the Town's vote failed to reflect a "hard look" and "reasoned elaboration". The Town may have adopted a set of SEQRA findings from the RWD -- but they were findings not related to the project upon which they voted.

As such their approval February 25, 2014 of the SEQRA finding for an air-stripper in the Park, and all its appurtenances, was fatally-flawed, and should be invalidated.

This failure also invalidates the Town's action on February 25, 2014 in approving funding for an air-stripper in the Park, and all its appurtenances. .

The County came to no environmental conclusions, and thus violated the requirements for full compliance before approving the Home Rule law.

In the absence of propers Determination of Significance under SEQRA, the legally required prerequisite for decision-making on funding, siting, park alienation, forest removal and construction is missing.

The decisions to place the air-stripper in the Park (by the RWD) and to fund the air-stripper in the Park (by the Town), are thus in violation of lawful procedure, affected by an error of law, arbitrary and capricious and an abuse of discretion. They must be invalidated and nullified.

Insofar as the County failed to issue any Determination of Significance prior to its actions, that too falls short of the need for a "hard look" and "reasoned elaboration," and so its Home Rule law as well was approved in violation of lawful procedure, is affected by an error of law, is arbitrary and capricious and an abuse of discretion, and must be invalidated.

Conclusions

Without action by the Court as requested by Petitioners, three local agencies that have hastily sidestepped the clear requirements of state environmental law will very shortly begin the process of bulldozing central parts of a valued public forest, creating a long access road and a highly visible, likely lighted and fenced building and compound, which will emit a constant hum of unknown intensity.

Where now Boy Scouts camp and explore, and Park users, including the Petitioners, seek tranquility and the complex-genius of undisturbed of nature, and where many species of wildlife find a home amidst constantly-expanding pavement, a wholly alien semi-industrial facility is proposed to be constructed over a nine month period and remain there for an indeterminate period of time.

The Court has authority to act to require that, at a minimum, the agencies involved observe the process outlined in SEQRA to publicly disclose, analyze and understand the likely environmental impacts of the proposed action.

Under SEQRA the agencies also have the legal obligation to seek the maximum mitigation of any such impacts, a process that cannot be accomplished in the absence of the foregoing analysis that is lacing.

Left to their own discretion, in the absence of judicial intervention, the agencies have arrived at none of those legally required steps.

As has been discussed, the issues presented by the Petitioners are both timely and ripe for review based both on explicit law, and also based the equity issue of legal practicality.

On the latter point, again, the imminence of the agencies' expected action,

and the possible opacity of the various steps that could permit irreparable harm prior to a point when the Petitioners or the Court could ideally intervene, argue for a prompt assertion of jurisdiction.

The Court of Appeals recognized the validity of that exact line of logic in Tri-County Taxpayers, as cited.

Petitioners have demonstrated they have standing to bring this special proceeding based on their use and enjoyment of the forest, and or the close proximity of their homes to it, and the value they attach to its aesthetic presence, and conversely the harm that would occur were the proposed actions to become a reality.

Finally, the law requires a full, written elaboration of the SEQRA determinations decided, and the violation of that requirement or any other requirement of the law, based on the strict-compliance standard, requires that such a decision be nullified, and that any law or other final decision growing out of the nullified SEQRA process be similarly invalidated.

For the foregoing reasons, the Court should exercise its authority to prevent the threatened harm and injury from occurring, in the absence of full compliance by the Respondent agencies with well-settled state law.

Petitioners request therefore that the Court issue an Order,

(1) Enjoining the Respondent agencies from in any way damaging or altering the forest and Park in the area designated for the proposed air-stripper and access road, and appurtenant facilities, or any area later chosen or otherwise amenable to such use, and

(2) Enjoining the Respondent agencies from changing the status of said forest from the exclusive use and ownership of the County, and its use exclusively as a natural forest area, and

(3) Enjoining the Town from disbursing funds for the purpose of building or acquiring land in the Park for that purpose; and

(4) Requiring the Respondent agencies to issue a Positive Declaration with respect to environmental significance and to undertake and complete an Environmental Impact Statement process under SEQRA.

Dated: June 22, 2014
Nassau County, N.Y.

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