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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF SIERRA CLUB, ET AL.,

Appellant,

-against-

No. 151

VILLAGE OF PAINTED POST,

Respondent.

20 Eagle Street
Albany, New York 12207
October 13, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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1 CHIEF JUDGE LIPPMAN: Let's start with
2 number 151, Matter of Sierra Club v. Village of
3 Painted Post.

4 Counselor?

5 MR. LIPPES: Thank you, Your Honor, and may
6 it please the court, my name is Richard Lippes, and
7 I'm here with my co-counsel, Rachel Treichler. And I
8 would request three minutes for rebuttal.

9 CHIEF JUDGE LIPPMAN: Three minutes, go
10 ahead, counsel. You're - - - you're on.

11 MR. LIPPES: Thank you. The primary issue
12 in this case deals with whether or not Mr. John
13 Marvin had standing to pursue this petition, and we
14 believe that Mr. Marvin had standing for - - -

15 CHIEF JUDGE LIPPMAN: What's the test,
16 counsel? What's - - - well, how do you know whether
17 he had standing or not?

18 MR. LIPPES: Well, I think there's two
19 grounds upon which he had standing. The first one is
20 his proximity - - -

21 CHIEF JUDGE LIPPMAN: Is that enough in and
22 of itself?

23 MR. LIPPES: We believe that the proximity
24 test or the proximity presumption should, in fact,
25 apply not just to zoning cases, but also to any land

1 cases.

2 CHIEF JUDGE LIPPMAN: But there's no
3 precedent yet, beyond the zoning cases?

4 MR. LIPPES: There are - - - the - - - the
5 Appellate Divisions are mixed. There's no precedent
6 in this court - - -

7 CHIEF JUDGE LIPPMAN: Right.

8 MR. LIPPES: - - - because the two cases
9 that the court decided the proximity exception were
10 both zoning cases.

11 CHIEF JUDGE LIPPMAN: So - - - so one of
12 your grounds is that it should be just proximity
13 alone is enough. What if it's not? What else do you
14 have - - -

15 MR. LIPPES: Okay.

16 CHIEF JUDGE LIPPMAN: - - - that gives them
17 standing?

18 MR. LIPPES: All right, then - - - first of
19 all, we then go to the Society of Plastics
20 requirement.

21 CHIEF JUDGE LIPPMAN: What does that tell
22 us?

23 MR. LIPPES: Pardon me?

24 CHIEF JUDGE LIPPMAN: What does that tell
25 us in - - - about this situation?

1 MR. LIPPES: Okay, well, the Society of
2 Plastics, as it relates to John Marvin, we believe
3 John Marvin would also meet the Society of Plastics
4 test. Obviously, the - - - the first prong of the
5 test is easy in - - - in terms of being within the
6 zone of interest, noise, is it, in fact, considered
7 within the zone of interest according to the DEC
8 regulations under SEQRA. The second prong of the - -
9 -

10 CHIEF JUDGE LIPPMAN: Injury - - -

11 MR. LIPPES: Pardon me?

12 CHIEF JUDGE LIPPMAN: Is there an injury
13 here?

14 MR. LIPPES: Yes, the second prong of the
15 test is that Mr. Marvin had to be injured in a way
16 different than the public at large.

17 CHIEF JUDGE LIPPMAN: Right, so how was he
18 injured in a way different?

19 MR. LIPPES: All right, well, he indicated
20 in his affidavit that he heard noise both from the
21 engines and from the whistles of the trains; in the
22 evening, it woke him up at night. Clearly, excess
23 noise being an environmental - - - being
24 environmental pollution, his hearing that noise - - -
25 that noise would make him injured.

1 JUDGE ABDUS-SALAAM: Well, counsel, what if
2 it's the same noise - - -

3 MR. LIPPES: According to SEQRA, you on - -
4 -

5 JUDGE ABDUS-SALAAM: Counsel, what if it's
6 the same noise that everybody else near that station
7 hears?

8 MR. LIPPES: Right, well, that's where - -
9 - that's where the different than the public at large
10 issue comes in, and we have a number of things to say
11 about that. But as it relates to Mr. Marvin, first
12 of all, I think the court can take judicial notice of
13 the fact that people who live farther away from the
14 railroad lines would not hear the noise to the extent
15 that's - - -

16 JUDGE STEIN: Well, but here, didn't the
17 lines go right through the Village and - - - and then
18 - - - and my understanding is is that - - - that - -
19 - that there were houses really lined up all the way
20 along.

21 MR. LIPPES: The lines go - - - the lines
22 go through the business section of the Village but - -
23 - - throughout the Village until it leaves, so that
24 some people that live close by are going to hear the
25 noise to the extent that it would disturb them and

1 others that live farther away wouldn't.

2 JUDGE FAHEY: Well, but Paint - - - but

3 Paint - - -

4 MR. LIPPES: But clearly more than - - -

5 JUDGE FAHEY: - - - Paint - - - Painted

6 Post is in Steuben County, right? Is it in Steuben

7 County?

8 MR. LIPPES: I'm sorry?

9 JUDGE FAHEY: Is Painted Post in Steuben

10 County?

11 MR. LIPPES: Yes.

12 JUDGE FAHEY: Yes, so the - - - it's - - -

13 it's really how the - - - the zone of injury - - -

14 the zone is drawn to - - - to determine whether or

15 not there's an injury in fact here. He lives, what,

16 within a block of the railroad track?

17 MR. LIPPES: He lives about a half a block

18 from the railroad tracks and also close to the

19 transloading facility. And the Appellate Division in

20 this case ignored proximity completely. The trial

21 court issue - - - his - - - the trial judge - - -

22 Justice Fisher's test was proximity plus.

23 CHIEF JUDGE LIPPMAN: Let - - - let me ask

24 you a question. Does it matter, the distinction

25 between whether the noise comes from the - - - the

1 train itself or from the loading facility?

2 MR. LIPPES: Well, insofar as the train was
3 moving, the Appellate Division decided that since it
4 moved through the Village, everybody heard it.
5 However, if we're dealing with a stationary situation
6 where we are with the transloading facility and the
7 engines are being loaded and moving back and forth
8 and moving in and out, that's a stationary noise
9 problem.

10 JUDGE RIVERA: Did he complain about that?

11 MR. LIPPES: Yes, we did complain about
12 that.

13 JUDGE RIVERA: His affidavit, though; did
14 he complain about that?

15 MR. LIPPES: It's in the petition, it's in
16 his affidavit, and in his neighbor's affidavit. The
17 neighbor was not a petitioner in the case, but it's
18 still evidence.

19 JUDGE RIVERA: But what does his affidavit
20 say about the facility - - -

21 MR. LIPPES: His - - - his - - -

22 JUDGE RIVERA: - - - causing noise that
23 disturbs him?

24 MR. LIPPES: Yeah, his affidavit talks
25 about the noise from the train engines. It doesn't

1 specify where the train - - - where the noise came
2 from. It talked about the train whistles - - -

3 JUDGE RIVERA: But so how does that mean
4 it's about the facility?

5 MR. LIPPES: It could be at the
6 transloading facility; it - - - it was at the
7 transloading facility, and also, as it left the
8 transloading facility and went - - -

9 JUDGE RIVERA: But that's about location
10 not that - - - that somehow the - - - the sound is
11 still emanating from the train as opposed to what's
12 going on at the facility, which is what I thought you
13 were describing when you said, you know, the cars
14 come in and out, they're loaded, and so forth. I
15 thought that's the kind of noise you were referring
16 to when you were - - -

17 MR. LIPPES: Yeah, the noise is com - - -

18 JUDGE RIVERA: - - - talking about the
19 facility itself.

20 MR. LIPPES: That's correct. The noise is
21 not coming from the water going into the - - - out of
22 the spigots; the noise is coming from the train
23 engines, but the train engines were stationary when
24 they were in the transloading facility. He lives by
25 the transloading facility; not everyone in the

1 Village does. And in that sense, he's been injured -
2 - -

3 JUDGE ABDUS-SALAAM: So if the trains - - -
4 if the - - -

5 MR. LIPPES: - - - different than the
6 public at large from the transloading facility.

7 JUDGE ABDUS-SALAAM: Counsel, if the trains
8 were loaded not being on, if their engines were not
9 on, then he wouldn't suffer any noise from the
10 transloading facility? Is that what - - -

11 MR. LIPPES: Well, actually, the engines
12 were going back and forth as they're coming into the
13 - - - to the transloading facility and - - - and
14 they'd be idling and they'd also be coming out of the
15 transloading facility. And when they go out of the
16 transloading facility, they're then loaded with this
17 water.

18 JUDGE RIVERA: So there's no time, with
19 respect to what's going on at the facility, that
20 there's not train engine noise?

21 MR. LIPPES: As I said, be - - -

22 JUDGE RIVERA: Twenty-four hours a day,
23 seven days a week, nonstop?

24 MR. LIPPES: As I said before, you're - - -
25 you're - - - it seems to me you're making a dichotomy

1 between the facility like the - - - as I say, the
2 spigots with the water coming out - - -

3 JUDGE RIVERA: Well, I'm saying in the
4 location of the facility.

5 MR. LIPPES: The loca - - -

6 JUDGE RIVERA: It's your position that
7 there's always train engine sound in that area?

8 MR. LIPPES: That's correct. That's
9 correct.

10 JUDGE FAHEY: And it wasn't the case
11 before, was it? It wasn't twenty-four hours before?

12 MR. LIPPES: No, no. In fact - - -

13 JUDGE FAHEY: Before - - -

14 MR. LIPPES: - - - there wasn't anything
15 before.

16 JUDGE FAHEY: Before the - - - excuse me,
17 before this contract, before this decision was made
18 by the Village, it was not twenty-four hours. Now
19 it's going on day and night and that - - - in point
20 of fact, while the loading faci - - - or while the
21 facili - - - while the trains move through the
22 Village, there wasn't a loading facility and the
23 noise was not going on for twenty-four hours before.

24 MR. LIPPES: That's absolutely - - -

25 JUDGE FAHEY: That's the core of your

1 argument.

2 MR. LIPPES: That's absolutely correct.

3 JUDGE PIGOTT: Well, well, well, wait a
4 minute, Mr. Lippes. I - - - I didn't get that in the
5 record. I must have missed something. I - - - I - -
6 - as I understand it, the - - - the testimony is that
7 these trains have X number of - - - of cars and
8 they're all getting loaded at once, they all got
9 their own - - - and I had just assumed that if you
10 got eighty hours to fill a train, to fill these
11 things, that they don't leave the engine running.

12 MR. LIPPES: Yeah, they're all getting
13 loaded at once. There's a long line of trains.

14 JUDGE PIGOTT: Right.

15 MR. LIPPES: Forty-eight trains.

16 JUDGE PIGOTT: But nobody said in - - - in
17 that whole time, there's a diesel engine huffing and
18 puffing at the station. It sounded like, you know,
19 they fill it, then they start the engine, and - - -

20 MR. LIPPES: But even if it's not on - - -
21 even if it's not idling, the trains aren't idling
22 while the water - - - while they're being loaded, the
23 fact is that there's a different kind of noise coming
24 from the transloading facility.

25 JUDGE PIGOTT: Either Fisher or - - - or

1 the Appellate Division, I forget which, made the
2 comment that Mr. Marvin was not complaining about the
3 Ingersoll Rand site, he was complaining about the
4 trains going back and forth in - - - you know, half a
5 block from his house and - - -

6 MR. LIPPES: That is what the Appellate
7 Division said, no question. And - - - and where they
8 got that from, I don't know. It certainly is not - -
9 - it certainly is contrary to the record.

10 JUDGE PIGOTT: One of the things that
11 struck me, you - - - you make the point that there
12 were these four resolutions, that they - - - they
13 kind of - - - because what you're trying to do with
14 Mr. Marvin is get into the real body of this thing,
15 which is the transportation of - - - of literally
16 tons of water to - - - to a fracking outfit down in
17 Pennsylvania.

18 MR. LIPPES: That's correct.

19 JUDGE PIGOTT: And you're trying to do that
20 by saying I get awakened at night by a train, which -
21 - - I mean, that's a thin reed, it seems to me. But
22 when you - - - when you're talking about the fact
23 that in your view, the - - - the - - - the town or
24 the Village of Painted Post passed four resolutions
25 and - - - and - - - and addressed each one

1 individually in an effort to avoid SEQRA almost
2 entirely, going only with a - - - with I think a Type
3 II negative dec. on one and finding no - - - no
4 environmental impact on the other, a big part of this
5 thing, right?

6 MR. LIPPES: The other they said was they -
7 - - they acknowledged that they only looked at the
8 issues, the SEQRA issues, as - - - as constrained by
9 the ICCTA preemption.

10 JUDGE PIGOTT: Right. Is it - - - is it -
11 - - is it part of your argument that - - - let's
12 assume for a minute that that's what happened, that
13 everybody in Painted Post got together and said, you
14 know, we got to do it this way or we're going to be
15 stuck with a SEQRA that's going to go on for years
16 and we're never going to get this done. Who does
17 have standing to challenge something like that?

18 MR. LIPPES: Well, that's one of the
19 problems. If, in fact, you agree that the Appellate
20 Division decision is correct, then no one would have
21 the ability to - - -

22 CHIEF JUDGE LIPPMAN: Why? Because the
23 more people it affected, the less you're able to
24 complain?

25 MR. PICCIOTTI: That's correct, and that's

1 one of the issues, I think, that the court needs to
2 clarify. This - - - and not just for this case, but
3 there are many, many cases where the judge has stood
4 as a gatekeeper, and I don't think that was this
5 court's intention when it issued the - - - the - - -
6 the Society of Plastics case. And in fact - - -

7 JUDGE PIGOTT: Well, if - - - if - - - if -
8 - -

9 MR. LIPPES: - - - in Society of Plastics,
10 the court specifically acknowledged that it did not
11 want to do that, it did not want to be in a situation
12 where no one would have the ability to bring an
13 action.

14 JUDGE PIGOTT: But didn't - - - didn't the
15 majority there also say, that's what the hearings are
16 for, that's what town meetings are for, that's what
17 all of the - - - you know, the postings, et cetera,
18 to have to go into one of these are for so that you
19 can go - - - Mr. Marvin, at some point, could have
20 gone and said, you know, I get what you're doing here
21 but, you know, you're going to cause a lot of noise
22 and I don't - - - I don't like noise because I go to
23 bed early.

24 MR. LIPPES: That's actually - - - that's
25 actually not the case with SEQRA. SEQRA has a very

1 defined procedural mechanism which all of the courts
2 in New York state have consistently indicated are - -
3 - must be strictly complied with.

4 JUDGE PIGOTT: But isn't that what was said
5 in Society of Plastics? Didn't they - - - didn't
6 they say, that's - - - you know, don't come running
7 to court every time you don't like the fact that
8 somebody's building something around. There's
9 hearings that go on before.

10 MR. LIPPES: Well, first - - -

11 JUDGE PIGOTT: Isn't - - - isn't that what
12 Society said?

13 MR. LIPPES: First of all, the legislature
14 has determined already that - - - by passing SEQRA
15 that there's a certain amount of delay inherent in
16 the process, so that's not really the - - - the - - -

17 JUDGE PIGOTT: No, I'm - - - I'm talking
18 about Society. Am I misinterpreting Society when I -
19 - - when I'm reading into it the point that all of
20 the SEQRA - - -

21 MR. LIPPES: I think you are - - -

22 JUDGE PIGOTT: Okay.

23 MR. LIPPES: - - - misinterpreting Society
24 of Plastics. Society of Plastics, first of all, did
25 not grant standing based upon the fact that there - -

1 - it did not meet the first prong of the zone of
2 interest test because the issue was economic only.

3 JUDGE FAHEY: Yeah, it covered - - -

4 JUDGE STEIN: Do you disagree that - - -

5 JUDGE FAHEY: - - - it covered the whole
6 county, too, didn't it in Society of Plastics? Was
7 it Suffolk County?

8 MR. LIPPES: Suffolk County, yes.

9 JUDGE FAHEY: Yeah, so it - - - so it
10 covered the whole county.

11 MR. LIPPES: Yeah.

12 JUDGE STEIN: But do you disagree that here
13 there's a distinction, at least under how our - - -
14 how Society of Plastics is currently interpreted, do
15 you - - - do you disagree that there is a distinction
16 between allegations that the - - - the noise from the
17 operation of the loading facility, to which Mr.
18 Marvin lived at close proximity and may, in fact, be
19 affected more or in - - - in a greater - - - to a
20 greater degree than others in the Village, that
21 there's a distinction between that and the regular
22 noise of the trains going in and out and traveling by
23 his house?

24 MR. LIPPES: Yes, the - - - there - - -
25 there is a distinction.

1 JUDGE STEIN: Yes, you disagree? Oh, you -
2 - -

3 MR. LIPPES: Mr. Marvin does have standing
4 because of his proximity and hearing the noise from
5 the transloading facility. But we believe that this
6 court needs to clarify the issue of the injury
7 difference in the public at large, because the cases
8 are totally inconsistent - - -

9 CHIEF JUDGE LIPPMAN: Okay, counsel.
10 You'll have your rebuttal time.

11 MR. LIPPES: Yes.

12 CHIEF JUDGE LIPPMAN: Let's hear from your
13 adversary.

14 MR. LIPPES: Okay.

15 MR. PICCIOTTI: May it please the court, my
16 name is Joe Picciotti. I'm counsel for respondents.

17 CHIEF JUDGE LIPPMAN: What's the test here
18 as to whether Martin (sic) has standing?

19 MR. PICCIOTTI: The test, as I understand
20 it, Your Honor, is as the court has articulated it
21 time and time again since Society of Plastics, which
22 includes, most recently, Association for a Better
23 Long Island and Save the Pine Bush, which is the
24 petitioner has to demonstrate an injury within the
25 zone of interest of the statute here, it's the - - -

1 JUDGE PIGOTT: What was the injury in Save
2 the Pine Bush?

3 MR. PICCIOTTI: The loss of a butterfly, I
4 believe, the Karsten (sic) butterfly.

5 JUDGE PIGOTT: And - - - and we've - - -
6 and - - - and we have a - - - a gentleman here who
7 says, I'm - - - I'm losing my sleep.

8 MR. PICCIOTTI: Yes.

9 JUDGE PIGOTT: And it's his sleep. It's
10 not - - - the Save the Pine Bush people - - - you may
11 remember, I dissented in this because it seemed to me
12 that having people that said, well, we're worried
13 about the - - - the blue butterfly was, as I said to
14 Mr. Lippes, kind of a slender reed upon which to
15 build a - - - a SEQRA case, but we did. And it seems
16 to me here you got an awfully big project going with
17 a negative dec. and somebody's got to do something,
18 or at least take a look at it.

19 MR. PICCIOTTI: Fine, Your Honor. I would
20 say whether it's the loss of a butterfly, which is an
21 aesthetic concern, or train noise, the - - - the
22 issue - - - the - - - the second part of the test is,
23 is it an injury different than the public at large.

24 CHIEF JUDGE LIPPMAN: If we interpret it -
25 - -

1 JUDGE FAHEY: Well, it's funny; in - - - in
2 - - - in Society of Plastics, they say that the
3 residents it should be - - - "Those who would most be
4 affected would be the residents close to the
5 facilities", which, of course, he qualifies under
6 that criteria and under Society of Plastics. So
7 we're left with this contrary interpretation where
8 the closer you are, the more you hear the noise, but
9 then you argue that the noise occurs all the time and
10 therefore, it's - - - it's no different for anyone
11 who hears the noise. But if you draw the area of
12 affected residents large enough, that wouldn't be
13 true. It's - - - it seems to be no matter how we
14 would interpret Society of Plastics, it wouldn't
15 apply to this project under your theory.

16 MR. PICCIOTTI: Well, Your Honor, a couple
17 things. One, I - - - I strongly argue with that
18 there's anything in the record that indicates that
19 noise occurs twenty-four hours a day; that's not true
20 at all. And in fact - - -

21 JUDGE FAHEY: Are the trains - - - are the
22 trains going twenty-four hours a day there?

23 MR. PICCIOTTI: They are not. They - - -
24 they haven't been regularly. But at this - - - at
25 this time, when these noise effects were heard, they

1 were not going twenty-four hours a day. They were
2 going at night.

3 CHIEF JUDGE LIPPMAN: Counsel, if we - - -
4 if we take your interpretation of Society of Plastics
5 and our precedents here, aren't you going to void
6 judicial review all together? Is that consistent
7 with the whole theory in these kinds of cases - - -

8 MR. PICCIOTTI: Well, if - - -

9 CHIEF JUDGE LIPPMAN: - - - to just say no
10 one can challenge it because everyone's effective and
11 - - - affected, and then we just - - - we never have
12 it tested? Isn't - - - as - - - as Judge Pigott had
13 just said, it's a pretty big deal going on in that
14 town. You mean, nobody can challenge this?

15 MR. PICCIOTTI: Well, absolutely not, Your
16 Honor. Here - - - here's the - - - here's the point.
17 One, it's a canard to say they couldn't challenge.
18 They could challenge. They could have filed a suit
19 in the same court in Steuben County against the SRBC
20 withdrawals. They keep saying over and over again,
21 they don't care about train noise. They've said it
22 to the Fourth Department; they've said it to this
23 court.

24 JUDGE STEIN: Well, what - - - what if the
25 - - -

1 MR. PICCIOTTI: My response to that is, if
2 they don't care, why should you care? If - - -

3 JUDGE STEIN: What if the train noise was
4 the issue? How - - - who - - - what would have to be
5 alleged by Mr. Marvin or somebody else to get
6 standing to complain about that?

7 MR. PICCIOTTI: They would have to go, Your
8 Honor, to the Surface Transportation Board. The
9 Commerce Commission Termination Act provided that,
10 whereas here, you have a federally regulated
11 railroad, we don't want states - - -

12 JUDGE STEIN: Okay, well, you're talking
13 about the preemption now. But - - - but let's just
14 say, this is bef - - - the - - - the issue is before
15 the - - - the lease is even made. Then - - - then
16 nobody's running that property and the question is -
17 - - is, should that lease be granted.

18 MR. PICCIOTTI: With all due respect, Your
19 Honor, and it's throughout the SEQRA record, the
20 answer was always that federal law applied. It's in
21 our resolutions. Our resolutions said when we did
22 SEQRA, we're doing SEQRA on as much of this as we
23 can.

24 JUDGE RIVERA: But coun - - - counsel, let
25 me try it an easy way. Who's got standing? Who's

1 got standing?

2 MR. PICCIOTTI: In this case?

3 JUDGE RIVERA: Under your analysis. Yes,
4 who's - - - no, who's got standing to - - -

5 MR. PICCIOTTI: Any - - - what - - -

6 JUDGE RIVERA: - - - challenge this, what
7 is going on - - -

8 MR. PICCIOTTI: Someone who could - - -
9 someone who could articulate - - -

10 JUDGE RIVERA: - - - the - - -

11 MR. PICCIOTTI: Someone who could
12 articulate a harm based upon their proximity.

13 JUDGE RIVERA: And - - - and who would that
14 be - - -

15 MR. PICCIOTTI: You raised the issue under
16 Flegals - - -

17 JUDGE RIVERA: - - - if not the person who
18 lives - - -

19 MR. PICCIOTTI: You raised the issue - - -

20 JUDGE RIVERA: - - - yards away?

21 MR. PICCIOTTI: Okay, first of all, the - -
22 - the record shows that on page 23, which is the
23 judge's decision, our contention was he was more than
24 1,000 feet away. Judge Fisher says he was less than
25 1,000 feet away. He was clearly more than 500 feet

1 away.

2 JUDGE PIGOTT: So your argument is, no one
3 can challenge it?

4 MR. PICCIOTTI: No, my argument is if
5 someone is within that 500-foot parameter that you
6 identified in the - - -

7 JUDGE PIGOTT: There isn't anyone. If
8 there - - - excuse me.

9 MR. PICCIOTTI: Yeah, okay.

10 JUDGE PIGOTT: Let me just get my thought
11 out. No one is within that range. No one - - -

12 MR. PICCIOTTI: No, I think - - - I think
13 there were people. They just didn't - - - they just
14 didn't - - - they weren't parties to this lawsuit.

15 JUDGE PIGOTT: All right, assume for my - -
16 - think of my argument that there's nobody within 500
17 feet. There's no one in this record that's within
18 500 feet.

19 MR. PICCIOTTI: No. No, Your Honor, I - -
20 - that's not my position. My position is under Save
21 the Pine Bush, if they have an articulated - - -

22 JUDGE PIGOTT: Stick with me. I'm just
23 setting up the question.

24 MR. PICCIOTTI: Okay.

25 JUDGE PIGOTT: I haven't gotten to it yet.

1 MR. PICCIOTTI: Okay.

2 JUDGE PIGOTT: I'm saying that the way it's
3 being defined, as Judge Rivera's saying, apparently
4 no one can challenge this, and you've got a Village
5 that says we want to sell a million dollars - - - a
6 million gallons of - - - of water a day to a
7 Pennsylvania outfit and to do that, we've got to
8 construct a - - - a transportation facility and a
9 railroad, et cetera, and we're going to do all of
10 that on the evening of February 23rd when we're going
11 to pass these four resolutions and we're going to
12 dice them or slice them so that we don't have to do a
13 full SEQRA. Now, I'm not saying they did that
14 intentionally; I'm making this up for purposes of in
15 the worst-case scenario - - -

16 MR. PICCIOTTI: Okay, Your Honor.

17 JUDGE PIGOTT: - - - does everyone in the
18 Village of Painted Post then have to say, geez, those
19 five guys got together, they decided they were going
20 to do this, and now we've got this - - - this monster
21 in the middle of our village and no one can chall - -
22 - can challenge it unless we find Aunt Mabel who
23 happens to have a house within 500 feet of this
24 massive transportation facility?

25 MR. PICCIOTTI: No, Your Honor, again.

1 JUDGE PIGOTT: Right, so who - - - who can
2 do it?

3 MR. PICCIOTTI: Respectfully, they could -
4 - - the - - - the - - - the train - - -

5 JUDGE PIGOTT: Not they, not they, who?

6 MR. PICCIOTTI: Anyone could challenge the
7 train noise in front of the Surface Transportation
8 Board.

9 JUDGE PIGOTT: I don't want - - - I don't
10 want to challenge the train noise. I want to
11 challenge the fact that you're selling this - - - the
12 Village water, that you're building a railroad, that
13 you're - - - that you're taking over an old plant and
14 making something. This - - - as - - - as I say, it's
15 a slender reed, but you know what they're after here.
16 You know - - - I - - - I'm using they - - - you know
17 that the - - - the organizations, as we refer to
18 them, want to challenge this whole thing.

19 MR. PICCIOTTI: Agreed, Your Honor.

20 JUDGE PIGOTT: They don't want that water
21 to go, they don't want that - - - anything.

22 MR. PICCIOTTI: And again, they have the
23 ability to do that. They could have sued the SRBC,
24 the Susquehanna River Basin Commission - - -

25 JUDGE PIGOTT: That's what you count on

1 your Village to do. I mean you - - - you want the
2 Village to look at all of these organ - - - you - - -

3 JUDGE FAHEY: The - - - the county and the
4 Village are the ones who make the determination on
5 SEQRA, not - - - not - - - not the - - -

6 MR. PICCIOTTI: If - - -

7 JUDGE FAHEY: - - - I forget - - - the
8 Susquehanna River Basin Group, they're not the ones
9 who make that determination. SEQRA has decided
10 whether or not to declare the dec. and whether or not
11 you complied by the county and Village. They've got
12 to go after the county and Village.

13 MR. PICCIOTTI: Well, again, all I would
14 say is, again, to go back to Save the Pine Bush, if
15 there was somebody within - - - whether they were
16 within proximity or - - -

17 JUDGE RIVERA: Coun - - - counsel - - -

18 MR. PICCIOTTI: - - - without, if they had
19 an injury different to the public - - -

20 JUDGE RIVERA: Counsel - - -

21 MR. PICCIOTTI: - - - then they have a
22 standing.

23 JUDGE RIVERA: Counsel, why is Mr. Marvin
24 harmed any less because someone a few feet away is
25 similarly harmed?

1 MR. PICCIOTTI: They were. The Flegals
2 were twenty times closer than he was. The Flegals -
3 - - in the record - - - I'll give you the cite.

4 JUDGE RIVERA: Well, I'm not even talk - -
5 - I'm not - - - I'm not even talking about them; I'm
6 talking about anyone. Because in your scenario, the
7 fact that there are more people who are similarly
8 harmed - - - I'm just going to say similarly harmed -
9 - -

10 MR. PICCIOTTI: Sure.

11 JUDGE RIVERA: - - - I'm not even going to
12 say harmed more or less, just similarly harmed - - -
13 means that his harm is of no interest, has no legal -
14 - -

15 MR. PICCIOTTI: That's not true. If - - -
16 if he had pled the harm - - - if he had pled like in
17 Save the Pine Bush that - - - if he had the pled the
18 harm that - - - that was specific to the facility - -
19 -

20 JUDGE STEIN: How would he do that?

21 MR. PICCIOTTI: - - - and he pled what the
22 Flegals did, for example, then I would argue that he
23 would have standing here. He didn't plead it.

24 JUDGE RIVERA: But what did he not - - -

25 MR. PICCIOTTI: I presume because he

1 couldn't.

2 JUDGE RIVERA: What - - - what did he not
3 do here?

4 MR. PICCIOTTI: He never - - -

5 JUDGE RIVERA: Is it because his affidavit
6 is not clear enough? Is it because the petition is
7 not clear enough?

8 MR. PICCIOTTI: His affidavit never ever
9 alleges that there was sounds from the transloading
10 facility. People who lived twenty times closer - - -

11 JUDGE RIVERA: That disturbed him
12 specifically, is that what you mean?

13 MR. PICCIOTTI: That disturbed him
14 specifically or generally. People who were twenty
15 times closer to him, the Flegals, who are 30 feet - -
16 - he's more than 700 feet - - - they specifically
17 state in their affidavit that they heard noises from
18 the entering and leaving the facility.

19 JUDGE PIGOTT: Mr. Picciotti - - -

20 MR. PICCIOTTI: I presume - - -

21 JUDGE ABDUS-SALAAM: So why don't they have
22 standing?

23 MR. PICCIOTTI: - - - if he heard them, he
24 could have alleged it in his affidavit. That's all.
25 It's a pleading problem.

1 JUDGE ABDUS-SALAAM: So why - - - why don't
2 the Flegals have standing to sue here?

3 MR. PICCIOTTI: I'm sorry?

4 JUDGE ABDUS-SALAAM: Why don't the Flegals
5 have standing?

6 MR. PICCIOTTI: They're not parties. I
7 don't know they weren't named as parties, but they -
8 - - they - - -

9 JUDGE ABDUS-SALAAM: But - - - but
10 according to you, they would have to go to the
11 Surface Transportation Board, not come here.

12 MR. PICCIOTTI: Ultimately, yes, in terms
13 of it's - - - if it was simp - - - if - - - if their
14 only complaint was train noise, their remedy lies
15 within the Surface Transportation Board and those - -
16 - those - - - it is specifically charged under - - -

17 CHIEF JUDGE LIPPMAN: The trains are going
18 in and out of the station. Can you divide this so
19 finely as you're doing between the noises, that kind
20 of an artificial distinction between the trains
21 themselves and the station when the trains, they were
22 making - - - making the noise in the stations?

23 MR. PICCIOTTI: You probably can't, Your
24 Honor, and that's why the Comm - - - the Commerce
25 Commission Termination Act specifically says if you

1 have problems with reg - - - federally regulated
2 railroad operations, whether it's running along the
3 train, whether it's building a - - - a facility such
4 as this one, you have to take those issues to the
5 Surface Transportation Board. Judge Fisher dealt - -
6 -

7 CHIEF JUDGE LIPPMAN: But if the Appellate
8 Division is making - - -

9 MR. PICCIOTTI: - - - with that in his
10 opinion.

11 CHIEF JUDGE LIPPMAN: - - - an artificial
12 distinction, why would we uphold what they did?

13 MR. PICCIOTTI: Well, the - - - the
14 distinction - - -

15 CHIEF JUDGE LIPPMAN: You just acknowledged
16 that that's an artificial distinction.

17 MR. PICCIOTTI: No - - - no, I don't
18 believe I did. What I said was - - -

19 CHIEF JUDGE LIPPMAN: Well, what - - - what
20 did you do?

21 MR. PICCIOTTI: What I said was is they - -
22 - you - - - you said they wouldn't have any ability
23 to challenge it. I say they do.

24 CHIEF JUDGE LIPPMAN: No, no, no, no. What
25 I said is, is there a real distinction - - - since

1 the trains are what goes in and out of that station,
2 is there really a distinction between the noise from
3 the trains and the noise from the station, or is that
4 kind of a very fine artificial distinction?

5 MR. PICCIOTTI: I - - - I'm sorry, I see
6 what you're saying, Your - - - now, Your Honor. I
7 don't think it's a fine decis - - - distinction
8 because it's in the affidavits. So folks who heard
9 noises from the facility were able to articulate
10 those. Mr. Marvin wasn't able to articulate them.
11 It's a pleading problem, and my understanding is the
12 same counsel - - -

13 JUDGE RIVERA: But what's the problem? He
14 says I hear noise and I can't sleep and this wasn't
15 like this before. I - - - I - - - I cannot sleep, I
16 wake up in the middle of the night, it's this
17 constant noise, and it bothers me. How much more
18 simple can it be than that?

19 MR. PICCIOTTI: The - - - what the Flegals
20 did. They said they heard noises from - - - from
21 trains leaving and entering the station. So he was
22 free to make that allegation, if he could. I presume
23 he couldn't make the allegation.

24 JUDGE RIVERA: Well, he's woken up in the
25 middle of the night. Maybe he's not looking out the

1 window to see what - - - what is the actual source.
2 He knows it's this train noise, and he lives near
3 this. What could it possibly be?

4 MR. PICCIOTTI: I - - - I'm sorry it wasn't
5 pled correctly, if that's the case. But I presume
6 that the reason - - -

7 JUDGE RIVERA: You think this is a liberal
8 pleading problem?

9 MR. PICCIOTTI: I don't, because I - - - I
10 - - - what I believe is that Mr. Marvin, 7-, 800, 900
11 feet away didn't hear any noises from the
12 transloading facility. He heard general noises from
13 the train moving through the Village - - -

14 JUDGE RIVERA: Well, wait a minute - - -

15 MR. PICCIOTTI: - - - those are well-
16 documented in the record. There were hundreds of
17 people - - -

18 JUDGE RIVERA: There's no opportunity to
19 challenge that. So that - - - that's not, I think -
20 - - -

21 MR. PICCIOTTI: Yeah.

22 JUDGE RIVERA: - - - a proper approach from
23 your side.

24 MR. PICCIOTTI: Okay.

25 JUDGE RIVERA: But let me - - - let me ask

1 you - - - let me just clarify what your argument is.
2 Is your position that Society of Plastics is
3 dispositive?

4 MR. PICCIOTTI: I - - - I think Society of
5 Plastics, as upheld by this court in Save the Pine
6 Bush and last year in - - - in Better - - -
7 Association for a Better Long Island is dispositive,
8 yes.

9 JUDGE PIGOTT: Can I ask you one thing, Mr.
10 Picciotti, before you go? One of the things the
11 Village did was - - - with this water surplus
12 agreement was determine, you know, that it was - - -
13 that there's no SEQRA review because of an exemption
14 under the - - - under the regs. Who has standing to
15 challenge that determination?

16 MR. PICCIOTTI: They would have standing,
17 as I understand it - - -

18 JUDGE PIGOTT: Now they - - - they being?

19 MR. PICCIOTTI: Anyone could - - - could -
20 - -

21 JUDGE PIGOTT: Any - - -

22 MR. PICCIOTTI: - - - challenge the
23 approval if - - -

24 JUDGE PIGOTT: Anyone in the Village?

25 MR. PICCIOTTI: Anyone - - - my

1 understanding of the statute under the Susquehanna
2 River Basin Commission Compact, which is actually
3 statu - - - statutorily included in New York law
4 under the Environmental Conservation Law, it - - -
5 its standing requirements are anyone that's harmed,
6 so presumably anyone could have done that, and they
7 had - - -

8 JUDGE PIGOTT: So - - - what - - - what - -
9 -

10 MR. PICCIOTTI: - - - notice of that here.

11 JUDGE PIGOTT: All right, slow - - -

12 MR. PICCIOTTI: Yeah.

13 JUDGE PIGOTT: - - - slow down. Wait, what
14 I want to say is if the Village did that, which they
15 did, in - - - in their February resolution, could
16 anyone then sue the Village saying, you made a
17 mistake, you're saying that - - - that - - - that
18 this is exempt and it's not, you got - - - you got to
19 do - - - you got to do a - - -

20 MR. PICCIOTTI: The - - - the Village made
21 the mistake on the exemption, Your Honor?

22 JUDGE PIGOTT: You've got to do an
23 environmental impact on this, yes.

24 MR. PICCIOTTI: Well - - - well, again, if
25 - - - yeah, if the Village incorrectly relied on the

1 SRBC's approval, presumably that would be the avenue.
2 I don't believe it did, and I don't think that's
3 their argument.

4 JUDGE PIGOTT: You - - - no, no, I
5 understand. But what - - - what I'm saying is any
6 individual could sue on that?

7 MR. PICCIOTTI: They could, but I don't
8 believe that - - -

9 JUDGE PIGOTT: Could they do the same thing
10 with - - - with the determination of a negative dec.
11 with respect to the lease between Painted Post and
12 the - - - the development center and the - - - and
13 the - - - and the railroad?

14 MR. PICCIOTTI: They - - - they could if
15 they had injury, as outlined by this court.

16 JUDGE PIGOTT: No, that's not - - - that's
17 not what I mean. I'm saying the Village - - - the
18 Village took an illegal action; they did not - - -
19 they did not do a proper env - - - environmental
20 impact statement on the - - - on that lease.

21 MR. PICCIOTTI: Okay.

22 JUDGE PIGOTT: Who - - - who can sue on
23 that?

24 MR. PICCIOTTI: Again, anyone who has
25 standing under this court's jurisprudence.

1 JUDGE PIGOTT: No - - - yeah, I know, but
2 that's what we're trying to figure out.

3 MR. PICCIOTTI: Yeah, but I - - - but again
4 - - -

5 JUDGE PIGOTT: It can be anybody in the
6 Village saying I'm a taxpayer and they just - - -
7 they just - - -

8 MR. PICCIOTTI: Well, no, they would have
9 to have standing.

10 JUDGE PIGOTT: I know.

11 MR. PICCIOTTI: They would have to - - -
12 yeah.

13 JUDGE PIGOTT: I - - - what - - - you - - -
14 you keep saying that. I'm saying they're - - - they
15 - - - they say I have standing, I'm a taxpayer in the
16 Village of Painted Post, and my Village just entered
17 into a lease for a million gallons of water and it's
18 - - - and they didn't do an - - - and they didn't do
19 an appropriate environmental impact and I - - - and I
20 think they have to. Do they have standing to do
21 that?

22 MR. PICCIOTTI: I don't believe so unless
23 they have a particularized injury, Your Honor. No,
24 and I - - - and if they want to challenge the Village
25 and the - - - the challenge is that the Village acted

1 illegally by relying on the SRBC approval, that may
2 be a declaratory judgment kind of challenge. Again,
3 the SRBC is charged with doing this kind of approval.
4 These folks were aware. Jean Wosinski said that in
5 2010, she knew about the - - - the plans of the Town
6 of Erwin, and in 2011 of this Village, to sell water.
7 They were - - - they could have come to the same
8 courthouse and got - - - in Steuben County and made
9 that chang - - - challenge against the SRBC.
10 Instead, we're sit - - - sitting here in a pleading
11 environment. They're asking this court to change the
12 law in New York State, not for anything - - - they
13 say they don't care about - - - they've said three
14 times in their briefs, we don't care about that.

15 CHIEF JUDGE LIPPMAN: Okay, counsel.

16 Thanks, counsel.

17 MR. PICCIOTTI: Thank you.

18 CHIEF JUDGE LIPPMAN: Counsel, are you
19 asking us to change the law, or to clarify the law,
20 or what?

21 MR. LIPPES: Yes, Your Honor. Well, if I
22 had my druthers, it would be my position that this
23 court would - - - would adopt essentially the federal
24 standing requirements. And in fact, this court moved
25 in that direction in the Save the Pine Bush case and

1 quoted Sierra Club v. Morton with favor.

2 CHIEF JUDGE LIPPMAN: But - - - but your
3 view is we don't have to do that to find in your
4 favor?

5 MR. LIPPES: That's correct. You don't
6 have to do that to find in my favor.

7 CHIEF JUDGE LIPPMAN: Why not?

8 MR. LIPPES: Because, as I indicated
9 previous - - - in the - - - in the previous argument,
10 John Marvin does have standing under the current
11 record, even under the Society of Plastics rules.

12 CHIEF JUDGE LIPPMAN: We have to make clear
13 this business about general public versus the
14 individual?

15 MR. LIPPES: Yeah, that's correct. But you
16 wouldn't have to do that if you adopted the federal
17 rule for standing, which still requires a concrete
18 injury for addressability and the things that this
19 court also requires. And there's been a body of
20 forty or fifty years since NEPA that shows that
21 there's no floodgate to the federal courts that have
22 been opened by their standing requirements, and we
23 would - - - again, if I had my druthers and I was
24 sitting on this court, that's what I would decide.

25 I would also point out that as to the SRBC,

1 they waived this issue. The - - - the trial court
2 specifically indicated in no uncertain terms that
3 they said, the SRBC does not preempt, and if you look
4 at - - - in our brief, you'll see that the SRBC says
5 we don't do the environmental review, we leave that
6 up to the State of New York. As to ICCTA preemption,
7 the fact is that - - - that SEQRA requires two
8 things. One is that any environmental problem be
9 mitigated to the greatest extent practicable, but it
10 also requires a yes or a no decision as to whether to
11 go forward with the project. The first may be
12 preempted, the regulation, but whether or not the
13 Village - - - the Village isn't compelled because of
14 ICCTA to lease the land.

15 JUDGE STEIN: But isn't it only preempted
16 if the railroad is already leasing or owning or - - -
17 or doing something? How - - - how can - - - how can
18 it preempt when the Village hasn't - - - is making
19 the decision in the first place as to whether to
20 lease this property or not? Is - - - isn't - - -

21 MR. LIPPES: That's exactly my point.

22 JUDGE STEIN: Okay, all right.

23 MR. LIPPES: The - - - the - - - the
24 Village has to know all of the environmental
25 consequences of their action - - -

1 JUDGE STEIN: Before they do it.

2 MR. LIPPES: - - - to make that decision as
3 to whether or not we want to lease.

4 JUDGE PIGOTT: Mr. Lippes, if we agree with
5 you, this thing has to go back to the Fourth
6 Department, doesn't it?

7 MR. LIPPES: I'm sorry?

8 JUDGE PIGOTT: This - - - this case has to
9 go back to the Appellate Division? They made no - -
10 - no decisions other than standing.

11 MR. LIPPES: Well, I - - - I - - - I don't
12 know if this court follows the same rules of the
13 Appellate Division when the record is clear. And the
14 Appellate Division says when the record is clear, we
15 don't have to send it back to the trial court, we can
16 make that decision.

17 JUDGE PIGOTT: Yeah, that's because they
18 got all that power that we don't have.

19 MR. LIPPES: You know that.

20 JUDGE FAHEY: So what you're saying is we -
21 - - we can't - - - we can't reinstate Judge Fisher's
22 decision, we have to remit to the Appellate Division
23 for them to make a factual determination?

24 MR. LIPPES: I'm saying you don't have to
25 do that.

1 JUDGE FAHEY: Right.

2 MR. LIPPES: I'm saying - - -

3 JUDGE FAHEY: But Judge Pigott's probably
4 closer to what our - - - our powers actually are,
5 though, which are more limited.

6 MR. LIPPES: That's correct.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.

8 JUDGE FAHEY: Yeah.

9 MR. LIPPES: Thank you.

10 CHIEF JUDGE LIPPMAN: Thanks a lot. Thank
11 you both. Appreciate it.

12 (Court is adjourned)

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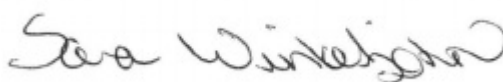
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Sierra Club, et. al, v. Village of Painted Post, No. 151 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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