New York County Clerk's Index No. 120911/99

NEW YORK COURT OF APPEALS

In the Matter of the Application of NEW YORK CITY COALITION TO END LEAD POISONING, INC. et al.,

Petitioners-Plaintiffs-Appellants

for a Judgment pursuant to Article 78 and § 3001 of the CPLR,

-against-

PETER VALLONE, as Speaker of the New York City Council; THE NEW YORK CITY COUNCIL; RUDOLPH GIULIANI, as Mayor of the City of New York; and the CITY OF NEW YORK,

Respondents-Defendants-Respondents.

MOTION OF *AMICI CURIAE* FOR (I) LEAVE TO SUBMIT BRIEF IN SUPPORT OF PETITIONERS' MOTION FOR LEAVE TO APPEAL AND (II) LEAVE TO SUBMIT BRIEF AND PARTICIPATE IN ORAL ARGUMENT IN CONNECTION WITH PETITIONERS' APPEAL

ATLANTIC STATES LEGAL FOUNDATION

CENTER FOR CHILDREN'S HEALTH AND THE ENVIRONMENT

CHILDREN'S AID SOCIETY

CHILDREN'S DEFENSE FUND

CITIZENS COMMITTEE FOR CHILDREN OF NEW YORK

CITIZENS ENVIRONMENTAL COALITION

COMMITTEE FOR HISPANIC CHILDREN AND FAMILIES

COMMUNITY SERVICE SOCIETY OF NEW YORK

ENVIRONMENTAL ADVOCATES OF NEW YORK

NATURAL RESOURCES DEFENSE COUNCIL

NEW YORK LEAGUE OF CONSERVATION VOTERS

PHYSICIANS FOR SOCIAL RESPONSIBILITY

PUBLIC HEALTH ASSOCIATION OF NEW YORK CITY

WEST HARLEM ENVIRONMENTAL ACTION, INC.

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919 Third Avenue
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September 10, 2002

NEW YORK COURT OF APPEALS

In the Matter of the Application of NEW YORK CITY COALITION TO END LEAD POISOINING, INC.; NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.; NEW YORK STATE TENANTS & NEIGHBORS COALITION, INC.; MET COUNCIL, INC.; SINERGIA, INC.; ALIANZA DOMINICANA, INC.; CITY PROJECT, INC.; EAST NEW YORK UNITED FRONT, by its Chairperson, CHARLES BARRON; EL PUENTE OF WILLIAMSBURG, INC.; GREATER NEW YORK LABOR-RELIGION COALITION, INC.; MAKE THE ROAD BY WALKING, INC.; NEW YORK CITY ENVIRONMENTAL JUSTICE ALLIANCE, INC.; SOUTH BRONX COALITION FOR CLEAN AIR, INC.; QUEENS LEAGUE OF UNITED TENANTS, INC.; INOCENCIA NOLASCO, GRECIA MARIA VASQUEZ, and her minor child, KATHERINE FIGUEREO by her next friend and mother, GRECIA MARIAVASQUEZ; CATHERINE RODRIGUEZ, and her minor children, DESTINY ALONSO, BIANCA RODRIGUEZ, and JOANNE MARRERO, by their best friend and mother, CATHERINE RODRIGUEZ; ANA GOMEZ, and her minor children, CHRISTIAN GOMEZ and STEPHANIE GOMEZ, by their next friend and mother, ANA GOMEZ; MARIA CELIA NOLASCO and her minor grandchildren JUSTIN AGRAMONTE and JUAN NOLASCO, JR., by their next friend and guardian, MARIA CELIA NOLASCO; and DAVID M. MONAHAN and JULIE MONAHAN, and their minor child IRIS EVE MONAHAN, by her next friends and parents, DAVID M. MONAHAN and JULIE MONAHAN,

Petitioners-Plaintiffs-Appellants

for a Judgment pursuant to Article 78 and § 3001 of the CPLR,

-against-

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New York County Clerk's Index No. 120911/99

NOTICE OF MOTION

PLEASE TAKE NOTICE that for the reasons set forth in the accompanying Brief of *Amici Curiae* in Support of Petitioners' Motion for Leave to Appeal to the Court of Appeals, dated September 10, 2002, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court at a term to be held at the Courthouse, Court of Appeals Hall, 20 Eagle Street, Albany, New York, on the 23rd day of September, 2002, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an Order pursuant to § 500.11(e) of this Court's Rules of Practice, granting (i) leave to submit the attached proposed Brief In Support of Petitioners' Motion for Leave to Appeal; and (ii) leave to submit a brief and participate in oral argument in connection with any appeal from the Order of the Appellate Division, First Department, dated March 26, 2002, on the grounds that the questions presented are of great public importance and that the participation of *Amici* will be of assistance to this Court; and (iii) such other and further relief as to the Court seems just and proper.

Dated: New York, New York
September 10, 2002

DEBEVOISE & PLIMPTON

_____

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TO:

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS' MOTION FOR LEAVE TO APPEAL

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September 10, 2002

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Amici Curiae Atlantic States Legal Foundation, Center for Children's Health and the Environment, Children's Aid Society, Children's Defense Fund, Citizens Committee for Children of New York City, Citizens Environmental Coalition, Committee for Hispanic Children and Families, Community Service Society of New York, Environmental Advocates of New York, Natural Resources Defense Council, New York League of Conservation Voters, Physicians for Social Responsibility, Public Health Association of New York City, and West Harlem Environmental Action, Inc. respectfully request that this Court (i) accept the following proposed Brief of *Amici Curiae* In Support of Petitioners' Motion for Leave to Appeal; (ii) grant Petitioners' Motion for Leave to Appeal; and (iii) grant *Amici Curiae* leave to submit a brief in connection with such appeal and to participate in the oral argument of the case.

Preliminary Statement

- Gregory was a healthy baby, developing normally and just learning to crawl and walk, when his mother first noticed him chewing on the cracked paint of the window sill. Soon after, he began to exhibit digestion problems and crankiness. Unable to convince their landlord to undertake the necessary repairs to eliminate the cracked paint, within seven months the family left the apartment, to protect their children from the hazard. Nonetheless, four years after his last exposure to lead paint, Gregory exhibited "borderline intellectual functioning" due to his early lead exposure. Almost six years after the family vacated the apartment, Gregory was attending first grade *for the fifth year in a row*. Despite what his teacher described as "great enthusiasm" he was, once again, unable to move on with his class. Tragically, Gregory is fully aware of his intellectual deficits and inability to keep up with his peers. [701].[1]

- Sheila's mother struggled to provide her child with the tools to succeed academically. When Sheila first began to give evidence of difficulties in school,

[1] References to the Record on Appeal are indicated in brackets [].

her mother posted the alphabet on the wall and purchased "Hooked on Phonics" to help her with basic skills. As a result of early childhood lead poisoning, however, neither the efforts of mother nor daughter can restore Sheila's lost intellectual capacity. [714].

- Sisters Jenifer and Jessica were exposed to lead paint in the Brooklyn apartment where they lived in their early childhood. By age 19, Jenifer was pregnant with her first child, whom she would never be able to support financially. Her cognitive deficits and learning disabilities were so severe as to preclude education or employment of any value or duration. Worse, the lead exposure suffered by Jenifer threatens the next generation as well: during pregnancy, the lead remaining in her bones from her childhood exposure can leach into her bloodstream and further poison both her and her baby. The baby is at a high risk for miscarriage and, if miscarriage is averted, birth defects. [703].

- Jessica's situation is no better. Her memory is so impaired that she has difficulty answering even simple questions. One of her only clear childhood memories is of the trauma of the painful chelation procedures that she underwent in a largely futile effort to reduce the lead levels in her blood. Jessica failed second grade twice, and ninth grade three times. She went to a specialized school but still could not learn to read, spell or do math. The children taunted her, calling her "dummy." She has failed, despite years of effort, to obtain her G.E.D. Jessica is embarrassed at her lack of educational achievement; her face lit up as she reported her most notable academic success – that she managed to graduate from pre-kindergarten. She has constant migraines. She describes her difficulties in a voice so soft and sweet as to be barely audible: the lead paint poisoning she suffered has robbed her of the ability to speak any more loudly or clearly. [704].

- Debora was first diagnosed with lead poisoning at the age of three. At 17, she left school, which for her had consisted exclusively of special education classes. Debora was never integrated into a mainstream class. Her short term memory is so impaired that she cannot undertake simple errands; chores like cooking – even boiling water – are not only impossible but dangerous for her as she cannot stay focused long enough to recognize or recall the hazards posed by a lit burner. She is a social misfit: she has never been on a date and has no friends. She attempted to go to a movie once with her parents, but was asked by the theater management to leave because she could not sit still. [705-06].

Although the impairments suffered by Gregory, Sheila, Jenifer, Jessica, and Debora may leave them feeling isolated and lonely, in one critical regard they are not alone. Every year over one thousand children in New York City are discovered to have

so much toxic lead in their blood that they require medical intervention. An estimated 30,000 children in the five boroughs have elevated lead levels in their blood.

This Court has recognized that the disease that has devastated the potential of these thousands of children is possibly "the most significant environmental disease in New York City." Juarez v. Wavecrest Management Team Ltd., 88 N.Y.2d 628, 641 (1996). New York law requires that local legislators who contemplate any action that may result in a significant adverse impact on the environment undertake a comprehensive, evidence-based analysis of the proposed action and prepare an Environmental Impact Statement ("EIS"). See Environmental Quality Review Act, Environmental Conservation Law § 8-0101 et seq. ("SEQRA"), 6 N.Y.C.R.R. Part 617, 43 R.C.N.Y. § 6-01 et seq and 62 R.C.N.Y. § 5-01 et seq. ("CEQR"). Nonetheless, in 1999, the New York City Council significantly altered the obligations of landlords, tenants and City agencies regarding the inspection, maintenance and removal of lead paint, without issuing an EIS. Instead, the Council issued a negative declaration, reciting that the change from Local Law 1 to Local Law 38 "would have no significant adverse impact on the environment." Petitioners in the present case urged that the Council had not complied with SEQRA in that the City Council had failed to take the "hard look" at potential environmental consequences that is required prior to dispensing with an EIS. The Supreme Court agreed and on October 11, 2000, issued a decision striking the new law for failure to comply with SEQRA.

The Appellate Division reversed, finding that the City Council had adequately determined that no EIS was required. See 293 A.D.2d 85 (1st Dep't 2002). The Court's

rationale was three-fold: (1) it identified the hazard to human health at issue as the presence of peeling lead paint and noted that the new law was designed to control and ameliorate that hazard; (2) it believed that the containment approach of the new law was so preferable to the "abatement" approach that it characterized the old law as embracing as to necessarily reduce rather than create environmental hazards; and (3) it noted that nothing in SEQRA mandated the adoption of either the old or the new law since "the hazards were not created by municipal action." Moreover, the Appellate Division found that the Council's legislative debate sufficed to show that no EIS was necessary, even though the statute and interpretive caselaw prescribe a different procedure to determine whether an EIS is warranted.

All of the Appellate Division's underlying premises are fundamentally flawed, as a matter of law. Indisputably, a governmental agency can contemplate a method of controlling or reducing a hazard to human health that, however well-intentioned, has the potential to adversely impact the environment. Second, an EIS is intended to assess the merits of potential legislation; it makes no sense, therefore, to conclude that because in the reviewing court's view a particular enactment is, overall, meritorious, no EIS is required. Third, SEQRA jurisprudence has always contemplated that the adverse impact on the environment that a proposed governmental action might have could be mediated through the actions of third parties. SEQRA would be a narrow law indeed if it only addressed the unusual circumstance where the governmental actor itself proposes to pollute the air or waters or undertake some direct action that creates a public heath risk. Finally, by substituting legislative debate about the merits of a proposed law for the

statutorily required determination of whether an EIS is needed, the Appellate Division read into SEQRA and CEQR an exemption for local legislators that the statute's implementing regulations explicitly refuse them. Each of these changes to SEQRA jurisprudence, standing alone, distorts the statute; cumulatively, they render SEQRA virtually irrelevant to governmental decision-making.

This case presents issues of extraordinary significance to children in New York City, not just children like Gregory, Sheila, Jenifer, Jessica, and Debora who have already suffered the devastation of lead poisoning, but their children, siblings, cousins, friends, and neighbors, who can still be protected from this entirely preventable disease. SEQRA requires that the City Council take a measured account of their risks prior to enacting legislation that affects them so profoundly. The Appellate Division decision, however, permits lawmakers to reduce consideration of these children's risks – and other environmental considerations implicated in other enactments – to nothing more than a bureaucratic obstacle that can be overcome by the perfunctory recital that the proposed enactment will have "no significant adverse impact on the quality of the environment." *Amici Curiae* urge this Court to accept this case for review, reverse the Appellate Division's dangerous and unfounded construction of SEQRA, and restore environmental considerations, including public health considerations, to the calculus of governmental decision-making, as SEQRA intends. See Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d 674, 679 (1988).

Statement Of Interest Of Amici

Amici are well-established advocates for the protection of children and the environment. Because of their long history of community presence and environmental advocacy, they are uniquely aware not only of the devastation to children and families that results from lead poisoning but also of the vulnerability of at-risk populations (including children, the elderly, the poor, women and minorities) to environmental hazards generally. Pursuant to Section 510.11(e) of the Rules of this Court, *Amici* believe that their participation in the case will be of assistance to the Court, both in determining whether the case merits review and in evaluating the novel interpretation of SEQRA adopted by the Appellate Division opinion and its consequences for children, communities and the environment in New York State. The following organizations respectfully request the Court's permission to participate in these proceedings:

- Atlantic States Legal Foundation was established in 1982 to provide legal, technical and organizational assistance to citizen organizations (NGOs), local governments, and others in connection with environmental issues. ASLF has long been concerned about the need for stringent and appropriate regulation of the hazards posed by lead paint: in 1996, the organization succeeded in obtaining a consent decree obligating the Environmental Protection Agency to promulgate regulations identifying lead-based paint hazards, lead-contaminated dust and lead-contaminated soil. Atlantic States Legal Foundation, Inc. v. Browner, No. Civ. A. 95-CV-1788FJSDNH, 1996 WL 6620 (N.D.N.Y. Jan. 3, 1996).

- Center for Children's Health and the Environment located at the Mount Sinai School of Medicine in Manhattan, is dedicated to the goals of identifying, elucidating and preventing impairments of neurological development in urban children that result from exposures to developmental toxicants in the inner-city environment. The Center and its personnel have consistently worked to reduce and prevent the devastation caused by childhood lead paint poisoning; most recently, the Center's director testified on behalf of the Attorney General in Rhode Island's lawsuit against the paint industry.

- Children's Aid Society, founded in 1853, serves more than 120,000 children and their families each year. The Society's mission is to ensure the physical and emotional well-being of children and to provide each child with the support and opportunities needed to become a happy, healthy, and productive adult.

- Children's Defense Fund-New York has as its mission to Leave No Child Behind and to ensure every child a Healthy Start, a Head Start, a Fair Start, a Safe Start, and a Moral Start in life and successful passage to adulthood with the help of caring families and communities. CDF provides a strong, effective voice for all children of America who cannot vote, lobby, or speak for themselves. CDF pays particular attention to the needs of poor and minority children and those with disabilities. In 1992, CDF opened a state-based office in New York. The organization's unique approach to improving conditions for children by combining research, public education, policy development, community organizing, and advocacy activities has made CDF-NY an innovative and tireless leader for New York's children.

- Citizens Committee for Children of New York City, founded in 1944, works to improve the well-being of all New York City children and ensure that they are healthy, housed, educated and safe. CCC's activities and programs combine the best features of public policy advocacy with a long tradition of citizen activism. Many of CCC's activities directly affect the lives of individual children but most of the organization's efforts are spent identifying the causes and effects of vulnerability and disadvantage, promoting the development of services in the community, and working to make public and private institutions more responsive to children.

- Citizens Environmental Coalition is a statewide grassroots environmental organization of 110 groups and over 13,000 individual members working to eliminate pollution in New York State through a community assistance program, publication clearinghouse, and statewide advocacy campaigns.

- Committee for Hispanic Children and Families, Inc. has worked since 1982 to improve the lives of Latino children and families. The agency was founded by a group of Latino health and human service professionals in response to the lack of culturally sensitive and linguistically appropriate services. In recognition of the disproportionate devastation that lead poisoning has inflicted on the Latino community, CHFC also served as an amicus in one of this Court's seminal cases on lead poisoning, Chapman v. Silber, 97 N.Y.2d 9 (2001).

- Community Service Society of New York is a not-for-profit corporation that has been working to ameliorate or eliminate poverty in New York City for over 150 years. CSS addresses issues in the areas of housing, income security, education,

and community development through research, advocacy, volunteer service, community organizing, direct service, and litigation.

- Environmental Advocates of New York serves the people of New York state as a watchdog and advocate on important environmental issues. It has over 130 organizational members and thousands of individual supporters. Environmental Advocates works to preserve New York state's unique natural heritage and to safeguard public health.

- Natural Resources Defense Council, founded in 1970, is a national non-profit advocacy organization dedicated to protecting public health and the environment. For many years, NRDC has utilized and defended SEQRA to ensure that environmental considerations are injected into decision-making by state, regional, and local government agencies. In addition, NRDC has a long-standing commitment to reducing the public's exposure to lead, including efforts to remove lead from gasoline, advocacy in connection with Title X of the Housing and Community Development Act of 1992 (which improved the federal response to lead poisoning), and a pending lawsuit against the City of Albany for operating a faulty lead abatement program in violation of the federal Toxic Substances Control Act.

- New York League of Conservation Voters was established in 1989 as a non-profit, nonpartisan organization that seeks to make environmental protection a priority with New York's elected officials, political candidates, businesses and voters by mobilizing New Yorkers on behalf of the environment.

- Physicians for Social Responsibility represents more than 20,000 physicians, nurses, health care professional, and concerned citizens. PSR tackles a variety of challenges to human health posed by environmental pollution. The mission of the organization's Environment and Health Program is to offer resources and information for physicians and the general public on environmental health issues of concern and to bring the voice of the healthcare community to the forefront of environmental policy debate.

- Public Health Association of New York City has worked for more than 60 years for improved health of the people of New York City, by promoting conditions and policies supportive of health. It fosters informed public dialogue on important public health issues. Most of its members are engaged professionally in practice, research, education, or advocacy in public health. PHANYC is especially concerned with the needs of those New Yorkers whose health is at greatest risk, whether from unhealthy conditions, limited access to healthcare, or other factors – typically poor people, immigrants, minorities, low wage workers, the chronically ill, the elderly, and children.

- West Harlem Environmental Action, Inc. is a non-profit organization that works to improve environmental quality and to secure environmental justice in predominantly African-American and Latino communities. Since 1988, WE ACT has worked with citizen groups, youth, community residents, environmentalists, federal, state and local governments, and educational and medical institutions to enhance community awareness of environmental hazards.

Statement Of Facts And Procedural History

Amici adopt the Statement of Facts and Procedural History contained in Petitioners' Brief In Support of Motion for Leave to Appeal.

Questions Presented

1. Whether the Appellate Division undermined SEQRA by exempting governmental agencies from the necessity of preparing an EIS where the proposed action is intended to remedy an existing environmental hazard?

Yes. Both SEQRA and common sense dictate that good intentions alone are not enough. Efforts aimed at remedying an environmental hazard can present opportunities for inflicting further – and sometimes even greater – harm to the environment. SEQRA mandates the preparation of an EIS wherever the potential for such a significant adverse environmental impact is present.

2. Whether the Appellate Division erred in excusing the City Council from compliance with SEQRA because, in the court's view, the new law represented an improvement over the old one and therefore the change would reduce rather than create environmental hazards?

Yes. Under SEQRA, an EIS is intended to give decision-makers the data needed to make an informed judgment about the merits of a proposed action in light of its effects on the environment. It is therefore completely contrary to SEQRA for a court to predetermine that the proposed action is meritorious and on that basis conclude that no EIS is required.

3. Whether the Appellate Division erred and adopted an unsupported construction of SEQRA by holding that no EIS is required where proposed legislation addresses a "primary" hazard that was "not created by municipal action"?

Yes. SEQRA is not limited to the rare circumstance where a governmental actor itself proposes to undertake an action that may have a direct adverse effect on the environment. Rather, SEQRA is implicated whenever a governmental agency – including a local legislative body – contemplates a policy or regulation that has the potential to adversely impact the environment even where that impact results more directly from the actions of the regulated third party.

4. Whether the Appellate Division erred in concluding that the hard look at potential environmental consequences of a proposed action that SEQRA requires prior to dispensing with an EIS can be accomplished by legislative debate rather than the methods prescribed by SEQRA and the courts that have previously considered the question?

Yes. SEQRA expressly requires that local legislators follow the same procedures as other governmental actors to determine whether an EIS is warranted. Under those procedures, the potential for adverse environmental impact is the sole factor in determining whether an EIS is required. Legislative debate of necessity imports other considerations. Moreover, the substitution of legislative debate for the methods prescribed by SEQRA and the courts is particularly inappropriate where, as here, the class most directly affected by the proposed legislation – children – is excluded from the political process.

Argument

I. Good Intentions Are Not Enough: SEQRA Contains No Exception For Legislative Enactments That Seek To Ameliorate An Existing Hazard.

The Appellate Division opinion carved out a dangerous and completely unfounded exception to SEQRA for local legislative action that is aimed at containing or correcting an existing environmental hazard and found that such enactments do not require an EIS because they perforce "reduce, not create" hazards. 293 A.D.2d at 93. The court noted that:

> The potential environmental harm that is addressed by SEQRA review is that which may be created by the government. Where, as here, governmental action concerns remedies for existing environmental harm, it is important to keep the existing harm separate from the governmental action. The government has not been made responsible for environmental risks created by third parties as a result of SEQRA.

Id. at 90. In fact, the court went so far as to state that "[w]hen considering discrete methods of identifying and ameliorating hazards, all of the alternatives would result in a reduction, not a creation, of hazards to human health." Id. at 93 (emphasis added). Thus, under the Appellate Division's reasoning, any contemplated governmental action that concerns the "identif[ication] and ameliorat[ion] of existing hazards" is necessarily exempt from the EIS requirement, since by definition such actions cannot have a significant adverse effect on the environment.

Amici, with combined experience of hundreds of years of efforts on behalf of the environment and the protection of children's health, are well aware that it is all too

possible for governmental actions intended to ameliorate a children's health crisis or remedy an environmental hazard to do more harm than good. Vaccines can have side effects; clean-ups can cause the release of toxins into the air or water. Through the EIS procedure, however, a governmental agency must study the environmental and health impact of the proposed action, including the potential for unintended adverse effects, and gather the data to inform the determination whether, on balance, such an action is advisable. Nothing in SEQRA excuses a government agency from compliance simply because its intentions are remedial. Put another way, SEQRA recognizes that good intentions alone are not enough, and that governmental actors (including local legislators) are best able to effectuate those intentions when they make informed, evidence-based determinations.

Indeed, the Appellate Division's rationale flies in the face of SEQRA itself, which conspicuously omits such an exemption, and common sense: just as the cover-up can be worse than the crime, the clean-up can be as – if not more – hazardous to the environment than the conditions that prompted it. Other courts have readily recognized that disturbing toxic materials – even where that disturbance is intended to remove, repair or contain the environmental hazards – can have the potential for adverse environmental impact and thus present a proper subject for evaluation pursuant to an EIS.

In Williamsburg Around the Block Bridge Association v. Giuliani ("WABBA"), 223 A.D.2d 64 (1st Dep't 1996), for example, the Appellate Division found that SEQRA required that the EIS procedure be followed when the City adopted a "Protocol" governing the "procedures and methodologies . . . [to be] utilize[d] during all lead paint

removal activity on the City's bridge structures," including the Williamsburg Bridge. Id. at 67. Prior to adoption of the Protocol, City contractors had attempted the removal of lead-based paint – a preexisting hazard – by sandblasting. The sandblasting method had some very limited advantages: it was more efficacious at removing encrusted, "rusted-on" paint than other removal methods. However, sandblasting caused the release of a cloud of toxic lead dust in the area surrounding the bridge, which included homes, schools, open-air markets, parks, and playgrounds. The effect was, as the court wryly noted, a "public relations and public health nightmare." Id. In response to the public outcry, the City formed a task force and issued the Protocol, which included, *inter alia*, a "General Policy Statement for Lead Paint Removal, Compliance and Containment Procedures, Air/Surface Soil Monitoring Procedures, and Clean-Up Procedures." Id. Thus, the Protocol established policies designed to ameliorate perceived hazards resulting from the previously-adopted methods for the removal of lead paint; the parallels to Local Law 38 could not be clearer. The Appellate Division nonetheless required the City to follow the EIS procedure. The court noted that not only the City's removal activities at the bridges but its adoption of the Protocol implicated SEQRA:

> By adopting [the Protocol], the DOT has set forth a City-wide policy under which it will conduct all future lead paint removal operations on City bridges. Given the effects of the respondents' extensive plan, we conclude that this is precisely the environmental policy-making which, pursuant to SEQRA and CEQR, requires a full environmental study and an opportunity for public feedback.

Id. at 71.

In fact, the Appellate Division in the present case itself recognized that methods aimed at the control or remediation of an existing hazard can have a significant adverse impact on the environment, asserting at several points:

- "Removal of intact lead-based paint poses a greater public health risk than containment," 293 A.D.2d at 88-89;
- "Critical to our analysis is the undisputed fact that total abatement, the underlying premise of Local Law 1, had proven itself over two decades to be an unintended health hazard," id. at 93;
- "The only environmental hazards which may be, in some fashion, attributed to action of the municipality actually arose from Local Law 1's now discredited resort to total abatement, a practice repudiated by the proposed ordinance," id. at 91.

Thus, the Appellate Division readily acknowledged that removal or abatement of lead-based paint can create hazards to human health. Yet, paradoxically, the court apparently would not have required the City Council to undertake the EIS procedure prior to enacting Local Law 1 – the earlier lead paint statute that it (unfairly) characterized as nothing less than an environmental disaster – because "[w]hen considering discrete methods of identifying and ameliorating hazards, all of the alternatives would result in a reduction, not a creation, of hazards to human health." Id. at 93.

The presence of lead paint is an undisputed and indisputable hazard to human health. "The danger that lead-based paint presents to human health and safety, especially with regard to children, is today virtually beyond dispute." City of New York v. Lead Industries Ass'n, Inc., 190 A.D.2d 173, 176 (1st Dep't 1993). The removal of lead paint also presents the potential for a hazard to human health, if performed under the wrong circumstances or with inadequate controls, as the Appellate Division opinion in this case

recognized. See, e.g., WABBA, 223 A.D.2d at 67 (ingested or inhaled lead dust created by removal technique causes central nervous damage, loss of intelligence, and behavior disorders among other irreparable adverse health impacts). But the containment or repair of lead paint – the very subject of Local Law 38, according to the Appellate Division's reading of the enactment – also presents the potential for hazards to human health, depending on how and under what controls it is carried out.

Substantial evidence of this potential for harm was available both to the City Council and the courts below. For example, when the Council considered a very similar provision to Local Law 38 in 1996, then-Health Commissioner Margaret Hamburg stated:

> Our first concern is that the safety procedures required when an owner repairs peeling paint voluntarily . . . are not adequate. Unfortunately, the risk to young children is actually increased by work that disturbs lead-based paint if it is done without appropriate safety precautions.

[621] (emphasis added). Dr. John Rosen, described by the Court of Appeals for the Second Circuit as a "preeminent expert in the field relied on by all the relevant government agencies to establish the science for the policies that the government has adopted," Campbell v. Metropolitan Property and Casualty Insurance Co., 239 F.3d 179, 186 (2d Cir. 2001), advised the Council:

> [I]mproper work practices and the lack of proper lead dust controls will often result in the increase of lead contaminated dust and children's blood lead levels, sometimes dramatically. On the other hand, careful removal of lead paint is effective in reducing children's blood lead levels and the dust lead levels in their homes.
>
> These outcomes are not dependent on whether the paint is peeling or intact; instead, they are dependent on the amount

> of care used (1) in preparing the work area; (2) in using proven safe work practices; (3) in properly cleaning the work site at the work's conclusion, and (4) in verifying that the work site is safe for re-occupancy by having an independent party conduct sufficient lead dust clearance tests.

[3540-41] (emphasis in original).

Undoubtedly, then, by adopting a "protocol" affecting the repair or containment procedures to be used with respect to intact lead paint (as well as the removal of peeling lead paint), the City Council was contemplating an action that had the potential for a significant adverse impact on the environment. Had the Council taken the "hard look" at potential environmental consequences that SEQRA requires, it could only have concluded that an EIS was required to study the potential for such negative effects and the best methods for minimizing or eliminating them. Accordingly, *Amici* urge this Court to accept this case for review, reverse the Appellate Division, and order the City Council to comply with SEQRA.

II. A "Good" Law Is Not Enough: Whether An EIS Is Required Does Not And Should Not Depend On The Court's View Of The Merits Of The Proposed Action.

The Appellate Division's alternative basis for its determination that the City Council was not required to undertake the EIS procedure prior to adopting the law at issue here was likewise in error and similarly threatens to dangerously narrow the scope of SEQRA's protections. The court found that because the prior law advocated the removal or "abatement" of lead paint, which "had proven itself over two decades to be an unintended health hazard," substitution of the containment approach that it characterized

the new law as adopting, "would reduce, not create hazards." 293 A.D.2d at 93. The court proclaimed that "the salient, undisputed point here is that moving from abatement to containment reduces environmental threats to human health." Id. at 89. Under the court's reasoning, then, no EIS was required because of necessity the new law, by repudiating the allegedly discredited abatement approach, presented no risks to human health "beyond those already existing due to the use of lead-based paint by third-parties." Id.

The Appellate Division's approach begs the question in a way that is completely at odds with SEQRA. *Amici* urge the Court to accept this case for review to affirm that SEQRA mandates that evaluation of the merits of proposed legislation be undertaken in light of – rather than instead of – consideration of that legislation's potential environmental impact.

The Appellate Division should not have been engaged in an effort to gauge whether abatement or containment is more desirable. [2] The fact that certain experts prefer

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[2] In fact, the Appellate Division created a false dichotomy between an abatement ordinance and a containment ordinance, and misstated the evidence with respect to their respective advantages. In particular:

- Local Law 1, the old lead-paint law, which the Appellate Division characterized as one requiring "abatement," actually required that the "owner of a multiple dwelling shall remove or cover in a manner approved by the department any paint" having a lead content over a certain amount [2383] and defined "abatement" as including "encapsulation or enclosure" of lead based paint. 24 R.C.N.Y. § 173.14(b)(1) (emphasis added) [2363].

- Local Law 38, the new lead paint law, which the Appellate Division characterized as one requiring "containment," actually mandates the removal of peeling lead

abatement or containment does not compel the City Council to adopt one approach or the other. But the substantial testimony that containment presents a greater threat to health than abatement in certain circumstances does serve as evidence that – even if the Appellate Division overstated the nature of the shift – the change from abatement to containment had the potential to adversely impact the environment.

Under SEQRA, a lead agency must issue a positive declaration and prepare an EIS if it contemplates an "action" that "may include the potential for at least one significant adverse environmental impact." 6 N.Y.C.R.R. § 617.7(a)(1) (emphasis added); see also ECL § 8-01009(2). SEQRA requires only "a very low threshold" of environmental impact before mandating an EIS. Desmond-Americana v. Jorling, 153 A.D.2d 4, 10 (3d Dep't 1989), lv to app. den., 75 N.Y.2d 709 (1990); Chinese Staff & Workers Ass'n v. City of New York, 68 N.Y.2d 359, 364-65 (1986); Omni Partners, L.P. v. County of Nassau, 237 A.D.2d 440, 442 (2d Dep't 1997) ("Because the operative word

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paint; containment is not a permissible alternative for paint that is peeling or cracked. Admin. Code § 27-2056.2.

- The record available both to the City Council and the Appellate Division demonstrated that no universal agreement had been reached about the preferability of "containment" over "abatement." For example, Dr. Herbert Needleman testified that "the permanent removal of all lead paint from dwellings, when conducted using safe work protocols, is the best long-term solution to childhood lead poisoning." [192].

Thus, the old law is not wholly about abatement; the new law is not wholly about containment; and the experts disagree about whether, and in what circumstances, containment is preferable to abatement.

triggering the requirement of an EIS is 'may' there is a relatively low threshold for the preparation of an EIS.").

This low threshold makes perfect sense, given that an EIS is meant to be an early step in the formulation of governmental action and to provide the data to assess whether such action is, on balance, advisable in light of its environmental impact. See, e.g., 6 N.Y.C.R.R. § 617.6(a)(1) (agency is required to determine "[a]s early as possible in [its] formulation of an action it proposes to undertake" whether the action is subject to SEQRA and whether an EIS is required). The EIS is intended to enable the agency to assess the merits of the proposed action; it is therefore completely backwards to determine that because the proposed action is meritorious, no EIS is required.

But that is precisely the inversion that the Appellate Division accomplished: it prejudged the merits of the proposed law, deemed it worthy, and dispensed with the requirement of an EIS because "[t]he City Council was, then, faced with a situation where it was considering an ordinance which would undoubtedly reduce health hazards." 293 A.D.2d at 93. In doing so, the Appellate Division undermined one of the principal purposes of SEQRA: to inject environmental consideration into decision-making, see Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d 674, 679 (1988), and to provide decision makers with information about the environmental consequences of a proposed action before they undertake it. See WABBA, 223 A.D.2d at 69 ("Then Governor Hugh Carey noted in his memorandum in support of SEQRA that the information contained in the impact statement would allow State and local officials to better assess environmental factors in conjunction with social, economic and other relevant considerations, to be in a

better position to make decisions which are in the best over-all interest of the people of the State.") (citing 1975 N.Y. Legis. Ann. at 438-39).

The determination of whether an EIS is required should not depend on whether the legislation at issue is, in the view of the Appellate Division or anyone else, good or bad. See New York City Coalition to End Lead Poisoning v. Vallone, attached as Exhibit A to Petitioner's Brief in Support of Motion for Leave to Appeal, at 2 (Sup. Ct. N.Y. Cty. 2000) (noting that "it is not the role of this court to second-guess the councilmembers . . . ."). Rather, the question is simply whether the action proposed has the potential for a significant adverse impact on the environment and whether the agency has followed SEQRA's procedures in assessing that potential. Here, petitioners have identified a number of ways in addition to the change from abatement to containment in which the change from the old lead paint law may increase the hazards to human health, including but not limited to:

- Eliminating lead dust and related conditions from the definition of lead-paint hazards;
- Removing six-year-olds from the class to be protected from lead-based paint;
- Establishing a 21-day period in which landlords cited for violations could escape the Health Code standards for safe removal of lead-based paint;
- Allowing inordinately long periods for lead hazard removal and enforcement;
- Eliminating the deadline for enforcement of lead-based paint violations in one and two-family dwellings.

Petitioners might well urge that all of these circumstances, taken together, make the new law an unwise one. But that is not the point at the present juncture.

More to the point, the evidence demonstrates at least the potential for some negative environmental impact arising from these changes, and that is all that is required to necessitate the preparation of an EIS. The very purpose of the EIS is to examine these effects to determine whether the potential hazards are in fact likely to materialize, in what numbers or with what frequency, and what if any remedies are available to minimize or eliminate the hazards. Then, and only then, can legislators and other interested parties make a well-informed evaluation of whether the new law is one that serves the City's children well. As the trial court noted:

> Whether all these changes pose a possible hazard for human health is something to be determined by careful consideration of expert opinion, available scientific data and pertinent statistical information – a review properly made by respondents through SEQRA rather than by this court. For purposes of the issues before the court, it suffices that on their face these changes could pose such a hazard.

Id. at 8 (emphasis added).

SEQRA would be undermined by the Appellate Division's novel construction. The purpose of SEQRA is not only to inject environmental issues into the consideration of "bad" ordinances – that is, those that are certain to have massive adverse environmental consequences not offset by any benefit. Indeed, it is *Amici*'s experience that it may often be the cases where the questions are closest that the careful, evidence-based analysis that SEQRA mandates is most valuable. *Amici* urge this Court to accept this case for review in order to correct the Appellate Division's insupportably restrictive construction.

III. SEQRA Contains No Exception For Government Actions With Effects On The Environment That Are Mediated Through Third Parties.

The Appellate Division offered yet another flawed rationale for its decision that is, once again, based on a misconception of SEQRA: The court found that the "primary environmental hazards addressed by Local Laws 1 and 38 have arisen from pre-existing lead-based paints" and cautioned that:

> Where, as here, governmental action concerns remedies for existing environmental harm, it is important to keep the existing harm separate from the governmental action. The government has not been made responsible for environmental risks created by third parties as a result of SEQRA.

293 A.D.2d at 90. The court further declared that:

> SEQRA, by its own terms, would not have required the City Council to adopt either Local Law 1 or Local Law 38 since the hazards were not created by municipal action. The City Council has done nothing to create the hazards posed by lead based paint but has sought, first through Local Law 1 and then by the amendments of Local Law 38, methods of reducing those hazards.

293 A.D.2d at 93-94.

The Appellate Division thus excused the City Council from the EIS procedure in part because the hazards inherent in lead paint were created in the first instance by non-governmental actors. This implicit "third party" exception to SEQRA is irreconcilable with the statute and its implementing regulations. First, the SEQRA regulations define the proposed governmental "actions" that may prompt an EIS to include "agency . . . policy making activities that may affect the environment," 6 N.Y.C.R.R. § 617.2(b)(2), as

well as "adoption of agency rules, regulations, and procedures, including local laws, codes, [and] ordinances . . . that may affect the environment." § 617.2(b)(3). Second, in order to determine whether a proposed action may result in a significant adverse environmental impact – and thus whether an EIS is required – an agency "must consider reasonably related long-term, short-term, direct, indirect and cumulative impacts . . . ." 6 N.Y.C.R.R. § 617.7(c)(2) (emphasis added).

Moreover, the "third party" exception created by the Appellate Division is at odds with the application of SEQRA, including the EIS requirement, to local legislators. As discussed more fully below, although it exempts state legislators from compliance with the EIS procedures, SEQRA expressly requires local legislators to comply with such procedures. See Michael B. Gerrard, et al., 1 Environmental Impact Review in New York § 2.01[4][e], at 2-34 (1999) (noting that SEQRA's implementing regulations expressly extend to local, but not State, legislative bodies). While the executive branch may act directly in ways that impact the environment – as a landlord, for example, or in undertaking waste disposal methods – the legislature will more usually have its effects on the environment mediated through the actions of third parties: corporations whose waste policies it dictates, contractors whose environmental clean-up activities it regulates, and industries whose product standards it sets, to give just a few examples.

It is inconceivable that the drafters of SEQRA very explicitly subjected the City Council and other local legislative bodies to that law's mandate because of a concern that the councilmembers themselves were taking actions that might adversely impact the environment. Rather, SEQRA recognizes that by setting policies and penalties that affect

third parties, local legislators can and do impact the environment both positively and negatively. The Appellate Division's novel and unsupported construction unduly narrows SEQRA and must be rejected.

IV. By Substituting Legislative Debate About The Merits Of Proposed Legislation For The Statutorily Required Method Of Determining Whether An EIS Is Necessary, The Appellate Division Rewrote SEQRA.

The Appellate Division not only redefined and unduly narrowed the situations in which an EIS is required in contravention of SEQRA, it also rewrote the procedures for determining whether a proposed action falls into one of those situations. The implementing regulations under SEQRA set out a three-step process that an agency must follow in determining whether a proposed action necessitates the preparation of an EIS: First the agency "must . . . identify the relevant areas of environmental concern," 6 N.Y.C.R.R. § 617.7(b)(2), by reviewing the Environmental Assessment Form, the criteria contained in § 617.7(c), and any other supporting information. Second, the agency "must . . . thoroughly analyze the identified relevant areas of environmental concern to determine if an action may have a significant adverse impact on the environment." § 617.7(b)(3) (emphasis added). Third, the agency "must set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation." § 617.7(b)(4); see also H.O.M.E.S. v. N.Y.S. Urban Dev. Corp., 69 A.D.2d 222, 232 (4th Dep't 1979).

The Appellate Division, in upholding the Council's conclusion that no EIS was required, acknowledged that prior to dispensing with an EIS the Council was required to

"take a hard look" at relevant areas of environmental concern. 293 A.D.2d at 94. The court went on to state, however, that:

> A "hard look" need not follow any particular format . . .[Here,] [a]reas of environmental concern were identified early in the ordinance drafting process, explicitly and exhaustively addressed through witnesses and written submissions and considered through debate and proposed amendments.

Id. at 95 (emphasis added).

By concluding that legislative debate can serve as an after-the-fact stand-in for the required procedures, the Appellate Division bestowed on the City Council an exemption that SEQRA and the implementing regulations expressly denied it. In so doing, the Appellate Division substituted a political process – in which all interests should appropriately be represented – for one in which consideration of environmental and public health consequences is to be given exclusive attention.

Although local legislators routinely debate the merits of proposed legislation, and such debates are open to the public by law, the drafters of SEQRA nonetheless required local legislators to conform to the EIS requirement where a proposed enactment has the potential to adversely impact the environment. This could not have been an oversight, because the state legislature is exempted. See 6 N.Y.C.R.R. § 617.5(c)(37); 6 N.Y.C.R.R. § 617.2(v); see also Matter of West Village Committee Inc. (Zagata), 242 A.D.2d 91, 98-99 (3d Dep't 1998), lv. to app. den., 92 N.Y.2d 802 (1998); Matter of Cerro (Town of Kingsbury), 250 A.D.2d 978, 979 (3d Dep't 1998), appeal dismissed, 92 N.Y.2d 875 (1998), lv. to app. den., 92 N.Y.2d 812 (1998). Thus, the drafters of SEQRA

determined that legislative debate – however extensive – is no substitute for a thorough, dispassionate analysis of whether a proposed enactment implicates potential environmental hazards. Moreover, the Appellate Division's novel holding would create the anomaly that a legislative body could automatically bypass the EIS requirement where, as here, there was a substantial public outcry against the proposed enactment that generated substantial debate, i.e., that such outcry could be an effective substitute for SEQRA's procedures.[3]

Courts have held that "literal compliance" is required with SEQRA's directives. Glen Head v. Town of Oyster Bay, 88 A.D.2d 484, 490 (2d Dep't 1982). According to those courts, "[s]ubstantial compliance will not do, for that would conflict with SEQRA's underlying purposes and tempt State and local agencies to circumvent SEQRA's mandates." Id. at 491; see also Matter of Rye Town/King Civic Ass'n v. Town of Rye, 82 A.D.2d 474, 481 (2d Dep't 1981) ("Uniform and literal enforcement of the provisions of SEQRA would render environmental review more objective, standardized, and consistent, and would be more certain to promote the policies of the legislature."), appeal dismissed, 56 N.Y.2d 985 (1982); Matter of Schenectady Chems. v. Flacke, 83 A.D.2d 460, 463 (3d Dep't 1981) (agency must have complied with both the letter and the spirit

[3] In point of fact, public controversy is one of the criteria favoring preparation of an EIS under the procedures that the City Council failed to follow. See official Environmental Assessment Forms (EAF) in 6 N.Y.C.R.R. § 617.20, App. A (EAF long form) Part 2 ("20. Is there, or is there likely to be, public controversy related to potential adverse environmental impacts?") and App. C (EAF short form), Part II ("E. Is there, or is there likely to be, controversy related to potential adverse environmental impacts?").

of SEQRA to discharge its responsibility). The Appellate Division created just such a temptation, by authorizing local legislators to evade the mandatory evaluation of potential environmental consequences and justify that evasion, after the fact, by pointing to legislative debate (not to mention several failed attempts to improve the legislation through the amendment process).

Moreover, the dangers of substituting legislative debate for the careful determination of a proposed enactment's potential impact are particularly acute in the circumstances presented by this case. The class most directly affected by the law at issue is one that does not vote and does not make campaign contributions: children. As the City has itself advocated in another case, "[t]he danger that lead-based paint presents to human health and safety, especially with regard to children, is today virtually beyond debate." City of New York v. Lead Indus. Ass'n, Inc., 190 A.D.2d 173, 176 (1st Dep't 1993). "[Y]oung children are more sensitive to lead exposure than adults, particularly their brain and nervous system, which are especially vulnerable in their developmental stages. Lead exposure . . . in children under seven years old lowers IQ, stunts growth and causes behavioral disorders." WABBA, 223 A.D.2d at 66. "Children under the age of six, whose nervous systems are still developing, are particularly vulnerable to the damage caused by lead poisoning. High blood levels can produce brain damage, coma or death and even relatively low levels can lead to significant nervous system damage." Juarez, 88 N.Y.2d at 640-41.

Moreover, the children who are most vulnerable to lead paint poisoning are the City's youngest and poorest children. [2551]. They are overwhelmingly children of

color. Department of Health statistics reveal that at least 81% of children afflicted with elevated blood lead levels are African-American, Latino, or Asian/Pacific.[4] [1022]. In at least some cases, they are the children of immigrants who are themselves ineligible to vote. They are not powerful political players, and it is precisely because their voices may not be heard that SEQRA explicitly directs governmental decisionmakers to take stock of their risks and those of other groups vulnerable to environmental hazards.

Of course, "[i]t is not the intention of SEQRA that environmental factors be the sole consideration in decision-making." 6 N.Y.C.R.R. § 617.1[d]. Environmental factors are, however, the sole consideration in determining whether an EIS is warranted. Where a proposed action may present the potential of an adverse environmental impact, an EIS is mandatory to explore the contours of such impact and the ways, if any, that it might be avoided or ameliorated. Once the EIS has been performed, then the local legislature is free to consider non-environmental factors, although this Court has held that SEQRA requires governmental actors to "act and choose alternatives which, consistent with social, economic, and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects." Apkan v. Koch, 75 N.Y.2d 562, 569-70 (1990).

[4] These are the statistics available to the City Council at the time that it made the negative declaration at issue. More recent New York City statistics reveal that in fact at least 90% of the children afflicted with elevated blood-lead levels are African-American, Latino, or Asian/Pacific. Department of Health and Mental Hygiene, Surveillance of Childhood Blood Lead Levels in New York City, July 2002, at 31 (available online at www.ci.nyc.ny.us/html/doh/html/lead/12002.html).

The impairments suffered by lead-poisoned children – children like Gregory, Sheila, Jenifer, Jessica and Debora – are irreversible and lifelong. It is not too much to ask that prior to enacting legislation that has the demonstrated potential to adversely affect thousands of such children, the City Council take the time – apart from the political and often partisan clamor of legislative debate – to review the risks to which the proposed legislation might expose such children. In fact, SEQRA requires just such a dispassionate, empirical review.

Conclusion

This Court should grant Petitioner's Motion for Leave to Appeal and should grant the Motion of *Amici Curiae* for leave to submit a brief and participate in oral argument *amici curiae* in connection with that appeal.

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Respectfully Submitted,

DEBEVOISE & PLIMPTON

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