

SUPREME COURT  
STATE OF NEW YORK COUNTY OF STEUBEN

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In the Matter of the Application of the SIERRA CLUB;  
PEOPLE FOR A HEALTHY ENVIRONMENT, INC.;  
COALITION TO PROTECT NEW YORK; JOHN  
MARVIN; THERESE FINNERAN; MICHAEL  
FINNERAN; VIRGINIA HAUFF; and JEAN WOSINKSI,

Petitioners,

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

-against-

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

Respondents.

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AFFIDAVIT IN SUPPORT OF  
RESPONDENTS' MOTION  
TO DISMISS AND/OR FOR  
SUMMARY JUDGMENT,  
AND IN OPPOSITION TO  
THE PETITION

Index No.: 2012-0810

STATE OF NEW YORK )  
COUNTY OF STEUBEN) ss.:

ROBERT M. DREW, being duly sworn deposes and says:

1. I am a Principal with the firm of Hunt Engineers, Architects & Land Surveyors P.C. ("Hunt Engineers") and I submit this affidavit in support of Respondents' motion for summary judgment dismissing the Petition in all respects. The statements made in this affidavit are based upon my personal knowledge from working on the facility at issue, which I will refer to as the "Transloading Facility" located at 350 West Water Street in the Village of Painted Post New York ("the Village"). By way of background, I have my professional engineering license in New York and I belong to the New York State Flood Plain and Storm Water Managers' Association. I am fully familiar with all of the pertinent aspects of the Transloading Facility on which this affidavit is submitted based upon my work on that project over the last two years.

2. My affidavit will focus on several areas to correct the record in this matter, including certain incorrect statements made in the Petition. First, I will focus on the work performed by Hunt for Wellsboro & Corning Railroad LLC (“the Railroad”) concerning the Transloading Facility as well as the assistance Hunt provided to the Village and Painted Post Development LLC (“Painted Post Development” collectively the Village and Painted Post Development may be referred to as “the Village”), in completing required reviews under applicable law including to the extent applicable under the New York State Environmental Quality Review Act (“SEQRA”) as well as assistance we provided in obtaining permits and approvals for the Transloading Facility.

3. Preliminarily, it must be noted that construction on the Transloading Facility has been completed in accordance with the schedule established previously, with it being completed before the Petition in this matter was provided to me or the entities which employed my firm in this matter. Construction started on April 27, 2012 and in accordance with the schedule the Transloading Facility was substantially complete by the start of the fourth week of July (attached as Exhibit “A “is the construction schedule dated May, 2012 providing that construction was to be substantially complete by July 23, 2012, we have enlarged the one part of the chart to show that completion date ). The only remaining issues to be completed related to certain punch list items related to electrical connections, and similar non-substantive items.

A. Impacts Associated with the Operation Transloading Facility as well as the Sale of Surplus Water including any associated with withdrawal of water from the Village Water System and others Were Extensively Analyzed

4. As background, it is important to note that the Susquehanna River Basin Commission (“SRBC”) is charged with authorizing withdrawals of water from the aquifer at issue. As more fully set forth in the affidavit of Larry E. Smith, Superintendent of Public Works for the Village, the SRBC is responsible for approving withdrawals of water in the Susquehanna River Basin which

includes the aquifer from which the Village Water System draws its water, including any surplus water which will be sold by the Village.

5. As detailed in the SRBC documentation as well as additional correspondence provided by SRBC Manager Paula Ballaron, P.G., in reviewing and approving the sale of surplus water by the Village, SRBC specifically reviewed whether there was sufficient excess capacity associated with the aquifer to support the requested bulk sale among other considerations. Further, as detailed in SRBC's correspondence, SRBC also coordinated with the New York State Department of Environmental Conservation in reviewing the Village's application. It should be noted that as stated the Susquehanna River Basin Commission is not a municipality or a state agency.

6. As such, in reviewing actions associated with the construction and operation of Transloading Facility, Hunt was not requested, nor would it have been appropriate for Hunt to review impacts from the sale of surplus water under the circumstances to other geographic areas, as the Susquehanna River Basin Commission had already made that determination and had already approved same. Hunt was directly involved with obtaining required permits from the New York State Department of Health (NYSDOH) the New York State Department of Environmental Conservation ("DEC") and another local agency as appropriate to construct the Transloading Facility. In that regard, Hunt assisted the Village as well as the Railroad in coordinating and obtaining necessary permits needed so as to allow for water to be withdrawn and transferred onto train cars at the Transloading Facility site.

7. Hunt also assisted in sending out notice and coordination letters to various agencies including to DEC and NYSDOH as part of the New York State Environmental Quality Review Act (SEQRA) process in which the Village engaged. Further, Hunt was involved in obtaining permits from those agencies including to DEC to insure storm water controls were in place and acceptable,

as well as to the NYSDOH for back flow preventers and other permits needed at the Transloading Facility site. Copies of pertinent correspondence are attached hereto as Exhibit A, and they are also included in the administrative record in this matter.

B. The Transloading Facility Has Received Any Permits and Authorizations Required

8. At each turn, the Village and the Railroad as appropriate, received any permits appropriate to operate the Transloading Facility and to withdraw water from the Village Water System so as to allow for the sale of surplus water to SWEPI, LP. In fact, the Transloading Facility, as previously publicized in meetings and in the newspaper has been completed. The permits issued and authorizations sought included the filing of a notice of intent with the DEC as part of the permit needed for Transloading Facility Site under the New York State Pollutant Discharge Elimination System Program (SPDES) for stormwater discharges (the "SPDES Permit"). Hunt filed for and received protection under the SPDES Permit for the Transloading Facility Site before construction was initiated.

9. It should be noted that several months after Hunt received the SPDES Permit for the Site, it filed a supplement to that permit seeking authorization to disturb areas larger than 5 acres at a time. Subsequent to the filing of that request with DEC, there was an inspection at the Transloading Site by DEC, and approximately 10 days after that inspection, on July 23, 2012, a stop work order notice letter was transmitted to me directing that construction work cease. The stop work notice indicated that it was issued primarily because DEC contended that under the SPDES permit, the Railroad should have obtained a letter from the State Office of Parks Recreation and Historic Preservation acknowledging that developing the Site would not impact archeological resources (other minor issues were noted, but were disputed and did not appear to be the basis for the stop work notice). As discussed above, by the time we received the stop work notice, construction on the

Site was completed. We did not seek a letter from SHPO concerning such resources at the Site, because of previous disturbances on it associated with decades of industrial operations, previous investigations of it, and because the Site is the subject of to a land use control. We have already preliminarily conferred with a SHPO representative, who indicated he was inclined to agree with our approach. In addition, we have provided DEC with our position in writing as to why no violations occurred and no letter from SHPO is required, and while the construction to which the stop work notice was directed had already been completed, and as such any stop work notice is without affect, we have nonetheless requested that DEC rescind it, as in our view it was issued in error even if it had no effect.

10. In any event, in addition to informing the applicable state and local regulatory agencies of the Transloading Facility proposed construction and operation and seeking their input as well as obtaining each appropriate authorizations and/or permits for same, Hunt also at the insistence of the Railroad and the Village undertook an extensive study to insure that the withdrawals associated with the sale of surplus water would not have adverse impacts on the Village Water System and its users. As detailed in the November 11, 2011 prepared by Hunt entitled "Draft Engineering Report for the Wellsboro & Corning Railroad Painted Post Trans Loading Facility Village of Painted Post Steuben County New York" ("November 11, 2011 Hunt Report"). Hunt undertook among other studies and analyses, a modeling study of the entire Village Water System using a computer software program. In order to assess the withdrawal of water from the Village Water System so as to support the transfers of the surplus water contemplated under the agreement at issue, the model assumed a demand of 1,000 gallons per minute even though in many instances it is unlikely that 1,000 gallons per minute would be withdrawn under the circumstances here for conveyance for transfer to the Railroad. In any event, the results of the extensive modeling

undertaken demonstrate there would be no material impact on water pressures throughout the Village from such withdrawals and such withdrawals will not have a significant negative effect on the system.

C. The EAF Was Completed and Used to Evaluate Impacts As Required

11. It is also worth noting that we assisted the Village in completing the full environmental assessment form (EAF) and specifically Parts 1 and 2 of it for the Transloading Facility. The Petition takes issue with a number of the responses located on Part 1 and Part 2 of the EAF, and as Hunt assisted in that process, I wanted to provide some additional information regarding the nature of the responses in it. Further, it is important to note that the Village undertook the requisite review applicable, and that the EAF was completed in a sufficient manner under the circumstances.

12. The Petition claims the EAF contained errors, for example it claims that it was error to not identify the aquifer from which the withdrawals are proposed to take place as a primary aquifer, but as indicated previously, those issues were in fact considered by SRBC, as it is SRBC's regulatory role to determine whether such withdrawals from the aquifer at issue are appropriate and whether the aquifer can support same. In any event, failing to identify the primary aquifer had no impact on the Village's review or in Hunt assisting the Village in this regard. The Village considered the SRBC approvals when it undertook its review and issued its resolution.

13. In addition, the Petition criticizes the failure to consider Railroad cars as vehicular trips under the EAF. First, I will say that in the past that I am unaware of railroad cars being considered vehicular trips for purposes of the EAF; in any event, I am told that railroad operations are subject to other laws including other federal law and therefore, are not evaluated under SEQRA. In any event, in my conversations with Railroad representatives, based upon their experience with

rail operations, we determined that given that the Transloading Facility operation would add but one single train a day to an already existing rail line and already established interchange, this would not have an impact of any kind, let alone a significant impact. In addition, the Petition criticizes the failure to consider that there are residential areas “adjacent to” the site for the location of the Transloading Facility. I am not sure where this criticism comes from, since the former Ingersoll Rand site on which the Transloading Facility is located is zoned industrial and from reviewing the documents it fully appears it has been the location of industrial uses for decades. Similarly, complaints about noise and air quality relating to Railroad Operations again appear to relate not to SEQRA, but to other regulations and law which concern rail operations. In any event, we did consider and review issues concerning noise and air quality, and again because the addition of one single train a day (of approximately 42 cars), with but two locomotives, we concluded that it would not have any significant impact based upon past rail operations and current rail operations in the Village. Further, based upon the construction of the Transloading Facility, we did not believe that there would be any adverse noise impacts because the rail operations are similar to those that occur now in the Village, and because there is no excessive noise associated with the operation as it simply involves the filling of railroad cars with water.

D. There Have Been Extensive Investigations and Remediation Measures Implemented at the Former Ingersoll Rand Site, and Based on those and DEC’s De-listing of the Site, There is No Basis for any Environmental concern associated with the Operation of the Transloading Facility.

14. The Petition also alleges that the use of the former Ingersoll-Rand site for the Transloading Facility may result in contamination to the aquifer from which withdrawals are slated to be made. Based on SRBC’s authorization of the withdrawal, as well as the extensive investigations and remedial actions taken at the former Ingersoll-Rand site, we do not believe there is any basis that has been identified for the claim that contamination would result from the

withdrawals associated with the Transloading Facility. As detailed in the Administrative Record, due to past industrial operations at the former Ingersoll Rand site, it was listed on the State of New York's inactive hazardous waste site list, but due to extensive testing and remediation, DEC determined that the former Ingersoll-Rand site should be removed from such waste site list, based on DEC's careful review of the remediation undertaken under its auspices and its conclusion that due to the remediation completed, there are no environmental concerns associated with the Site..

15. Indeed, as set forth in detail in the November 11, 2011 Hunt Report, the former Ingersoll Rand site has been subject to extensive investigation and remediation activities. In fact, as detailed in such report, following completion of exhaustive investigations and remediation measures at such site, the DEC specifically found in delisting the site that "the contamination identified at the [disposal] site has been properly remediated" and in delisting the site the DEC found that: "no environmental problems associated with the disposal of hazardous waste remain at the site."

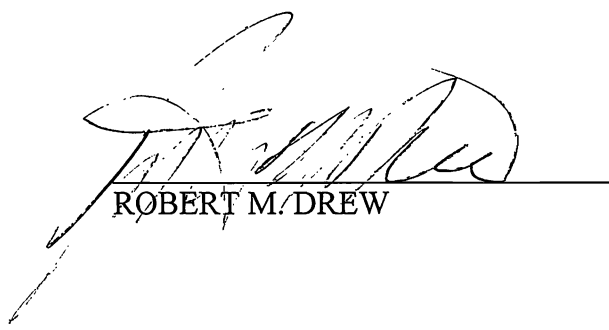
16. The Petition goes on to identify a certain area on the Site where potential compounds remain, but as detailed in the November 11, 2011 Hunt Report as well as in other documents comprising the administrative record, Hunt undertook coordination with DEC to implement measures (which is indicated and now been constructed) to prevent any storm water loss or other loss from the site that would cause adverse drainage conditions or any other adverse conditions. In particular, the site is covered by a Storm Water Pollution Prevention Plan ("SWPPP") as well as being subject to a Soil Fill Management Plan ("SMP") that's specifically designed for the former Ingersoll Rand site; the SWPPP and the SMP specifically address various earth disturbing activities and require that specific procedures be implemented to insure run-off does not occur and that any potential for stormwater discharges to affect the environment are eliminated or minimized. In any



event no restriction by NYSDEC or NYSDOH was placed on the use of existing water line connections on the former Ingersoll Rand to withdraw water from the Village System.

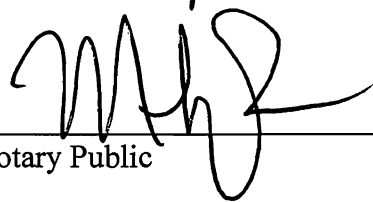
17. In addition, it should be pointed out that during construction, the general contractor that undertook the work on behalf of the Railroad hired an independent firm to complete extensive onsite daily testing of the soil and air born particles during the earth movement operations. In all, the testing firm, ERM, collected numerous samples during the earth movement operation. Each soil sample was sent to a NYDOH approved laboratory for testing of Volatiles, semivolatiles, pesticides, PCBS, metals and inorganics. All testing was in conformance to the detailed instruction of the soil management plan. Testing results and the Soil Management Plan have indicated that the former Ingersoll Rand site does not contain contaminants of concern, including those areas where the equipment associated with the Trans Loading Facility was constructed.

WHEREFORE, it is respectfully requested that this Court grant Respondents' motion and dismiss the Petition in its entirety, together with such other and further relief as this Court shall deem just and proper.



ROBERT M. DREW

Sworn to before me this  
1<sup>st</sup> day of August, 2012.



Notary Public

**MUNESH PATEL**  
Notary Public, State of New York  
No. 02PA6109397  
Qualified in Ontario County  
Commission Expires May 10, 2016

123	Area Light Poles	0% 4 days	Mon 6/25/12	Thu 6/28/12
124	Prep Form Pour Electrical Pads	100% 5 days	Fri 6/22/12	Wed 6/27/12
125	Prep, Form, Pour, Cure Sidewalks	100% 7 days	Sat 7/7/12	Sat 7/14/12
126	Fencing Demo & Install New	85% 14 days	Tue 6/26/12	Wed 7/11/12
127	<b>Site Finishes</b>	<b>42% 44 days</b>	<b>Tue 6/19/12</b>	<b>Wed 8/8/12</b>
128	Topsoiling	95% 7 days	Tue 6/19/12	Tue 6/26/12
129	Hydroseeding	80% 2 days	Wed 6/27/12	Thu 6/28/12
130	Bioretention Soils	100% 3 days	Wed 6/27/12	Fri 6/29/12
131	Subcontract Plantings	100% 14 days	Wed 6/27/12	Thu 7/12/12
132	Substantial Completion	0% 1 day	Mon 7/23/12	Mon 7/23/12
133	Turf Maintenance	0% 6.6 wks	Mon 7/2/12	Wed 8/8/12
134	Remove Silt Fence & Inlet Protection	0% 2 days	Sat 7/28/12	Mon 7/30/12

