

SUPREME COURT
STATE OF NEW YORK COUNTY OF STEUBEN

In the Matter of the Application of the SIERRA CLUB;
PEOPLE FOR A HEALTHY ENVIRONMENT, INC.;
COALITION TO PROTECT NEW YORK; JOHN
MARVIN; 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.

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.:

LARRY E. SMITH, being duly sworn deposes and says:

1. I am the Superintendent of Public Works for the Village of Painted Post ("Village") and I have held this position since 2006. I have been a resident of the Village of Painted Post and the surrounding area for over 25 years. The statements made in this Affidavit are based upon my personal knowledge, including my knowledge of the Village Water Supply System ("the Village System") and its capacity (the capacity of the Village System may be referred to as "the Village Water Supply").

2. My responsibilities as the Superintendent of the Department of Public Works include overseeing the operation of the Village System. Further, as Superintendent, I have knowledge of the construction of equipment and facilities (the "Transloading Facility") at the former

Ingersoll- Rand site located on 450 West Water Street in Painted Post, New York comprising the Transloading Facility (the “Transloading Facility Site”) that will be operated by Respondent Wellsboro & Corning Railroad, LLC (the “Railroad”) and used to transport surplus water to be sold under the Village’s contract with Respondent SWEPI, LP (“SWEPI”).

3. I submit this Affidavit in Support of Respondents’ motion to dismiss and/or for summary judgment, and in opposition to the Petition. In particular, I submit this Affidavit to correct a number of erroneous statements contained in the Petition in this matter. The errors and misstatements include incorrect assertions concerning the Village System, including the capacity of it, the approval process associated with the sale of surplus Village water, as well as operations associated with the Transloading Facility.

A. As Confirmed By The Approvals Issued By The Susquehanna River Basin Commission, And Analyses Completed By The Village Including At Its Direction, The Village Has More Than Adequate Capacity To Supply Surplus Water To SWEPI And There Is No Basis For Any Claims That Such Surplus Water Sales Will Result In Adverse Consequences.

4. The Petition erroneously implies that the Village System does not have sufficient capacity to provide surplus water under the Surplus Water Sale Agreement executed by the Village and SWEPI (the “Surplus Agreement”), by citing to carefully excerpted passages taken out of context from various reports, with some of the reports cited being more than 20 years old. In fact, the Village Water Supply has more than adequate capacity to provide surplus water as provided for in the Surplus Agreement. In any event, as provided for in the Surplus Agreement, the Village is not required to supply such surplus water unless certain conditions are met, including that the Village is not required to sell such surplus water if in doing so it would adversely impact current users of the Village System or the Village Water Supply is for some reason unable to provide such water.

5. By way of background, the Village Water Supply is drawn from (3) wells located in the west end of the Village. Village Well No.1, which is not operational and has not been for some

time was abandoned and removed from service and is the current location of the Village Water Treatment Plant. Village Well No. 2 (WSA-1508) is located near the intersection of Steuben Street and Fairview Ave. Village Well No. 3 (WSA-2996) is located along Craig Park Drive adjacent to New York State Route 415. Village Well No. 4 (WSA-6474) is located at the intersection of Maple Ave and West High Street.

6. Well Nos. 2 through 4 is permitted wells and each is currently in service with a total authorized production capacity of over 4 million gallons per day. Specifically, Well No 2 has a capacity of 1000 gallons per minute (gpm) for a daily total of 1.44 million gallons; Well No. 3 has a capacity of 700 gpm for a daily total of 1.008 million gallons; and Well No. 4 has a capacity of 1200 gpm for a daily total of 1.728 million gallons. Thus, the total capacity of the three wells is more than 4.17 million gallons per day. Village Wells Nos. 3 and 4 are the primary production wells for the Village, with Well No. 2 serving as an emergency backup well.

7. Contrary to allegations in the Petition, Well No. 1 is not being used for withdrawal of water for any purpose. Further, no new piping was added as part of the existing Village wells to pump water to be used to supply surplus water, rather some piping extending existing pipes so water can be loaded onto rail cars was added as part of the Transloading Facility. Further, despite allegations to the contrary, the Village is not leasing or selling any components of the Village System to the Railroad or to SWEPI. As detailed in the Administrative Record in this matter, the Railroad constructed certain equipment and improvements at the Transloading Facility Site simply to facilitate the conveyance of surplus water from the Village System for transport by rail and to meter same.

8. The Petition also claims there is increased risk that the Village Water Supply or aquifers associated with it will be contaminated from the withdrawal of such surplus water due to the

conditions at the Transloading Facility Site. In sum, the Petition claims that because the Transloading Facility site is located on a portion of the former Ingersoll-Rand site (which was formerly listed as an inactive hazardous waste site due to contamination from former industrial operations there) that contamination may be drawn from the Ingersoll-Rand site into the aquifer at issue, but there is no basis for such a claim.

9. In fact, any such claims or alleged concerns are contradicted by the New York State Department of Environmental Conservation's ("NYSDEC") decision to remove former Ingersoll-Rand site from the inactive hazardous waste site list, which included NYSDEC's certification that such site no longer poses concerns from environmental contamination. Moreover, as detailed in the record in this matter, as well as set forth in the Affidavit of Robert Drew, a principal with Hunt Engineers, Architects & Land Surveyors, P.C. ("Hunt"), which firm was involved in the planning, development and construction of the improvements and equipment for the Transloading Facility Site, extensive stormwater controls, and other measures required to be followed at the former Ingersoll-Rand site for any improvements and operations on it were followed during such construction, including those to prevent any impacts to stormwater and surface water. In addition, as documented in Mr. Drew's affidavit, substantial testing taken during construction of the Transloading Facility Site showing no contaminants of concern and further confirms that there are no legitimate issues associated with contamination. Moreover, there is no prohibition placed on the former Ingersoll-Rand site by any agency including NYSDEC or the New York State Department of Health (NYSDOH) from withdrawing water from the Village System from the piping located there.

10. Moreover, required notices were made to applicable agencies including to the NYSDOH and the NYSDEC and permits and approvals required were applied for and received for construction of the Transloading Facility. In addition, periodic testing required to be undertaken by

the Village to identify contamination of water associated with the Village Supply is ongoing, and there is no indication of contamination of it from any source.

11. Based on my review of Village records, including those showing the capacity of the Village System, as well as my experience as Superintendent of the Department of Public Works, the Village Water System currently has more than adequate capacity to provide water to all of the Village Water customers and has a significant excess capacity which will allow the sale of surplus water. Many years ago, the Ingersoll-Rand facility produced among other products, iron products and other products, and there were other businesses in the area that used water as well, and the Village Water System had more than adequate capacity to provide water to those industrial users, as well as more than adequate capacity to provide sufficient water to its other users. Since the closing of Ingersoll-Rand and other industries in the Village, the Village has had substantial excess water supply capacity as users of the Village water have made significantly reduced demands on it.

12. Petitioners claim that water previously purchased from the Village by industries located in Village of Painted Post and otherwise was largely “returned” to the same aquifer from which it was removed, and the use associated with the sale of surplus water to SWEPI will not be so returned, but the Petition provides no basis for this claim. In any event, as detailed below, the Susquehanna River Basin Commission (“SRBC”) is charged with considering the capacities of aquifers in the Susquehanna River Basin in ruling on applications for water withdrawal, including the withdrawal at issue here, and after undertaking consideration of the applications at issue here for the withdrawal of surplus water, the Commission approved it.

13. Previously, applications were submitted to SRBC to authorize the Village’s sale of surplus water to energy companies so that such water could be used in natural gas development. Specifically, application was made to the SRBC for such withdrawals of surplus water and the

Village received permission in January, 2011, to sell such water in the amount of .50 million gallons per day (gpd) to Triana Energy LLC (“Triana”) for natural gas exploration. Subsequently, SRBC gave the Village permission in April, 2011, to sell surplus water in the amount of .5 million gpd to SWEPI, LP, for the same use. Attached as Exhibit “A” hereto and which is also submitted as part of the record are the approvals issued by the SRBC for sale of surplus village water to Triana Energy and to SWEPI (*see* Ex. A). As a sale agreement with Triana Energy was never finalized, the surplus water slated for sale to Triana was transferred by SRBC to SWEPI.

14. Based upon applicable regulations, SRBC reviews such applications for the withdrawal of surplus water for use for natural gas exploration to ensure that there is adequate capacity in the aquifer from which the water is to be withdrawn. Further, SRBC is required to evaluate the impact of the withdrawal of such water under the circumstances throughout the area, including the impacts of such withdrawal throughout the Susquehanna River Basin, which encompasses portions of New York, Pennsylvania and Maryland. As such, through the application process, SRBC evaluated the potential impact of the withdrawal of water from the Village System as part of the SRBC application process.

15. When the Village undertook to review the proposal to sell surplus water to SWEPI, it worked with the Railroad to exhaustively study the impacts of the withdrawal of water slated for such sale. As more fully set forth in the Affidavit of Robert Drew, Hunt undertook a comprehensive study to evaluate whether the sale of surplus water could have any material negative impact on the Village System, including on users of it and it set forth the results of that analysis in a report dated November 11, 2011 (the “November 11, 2011 Hunt Report”). As can be seen from the November 11, 2011 Hunt Report, Hunt concluded after undertaking a comprehensive study that no

negative impacts to the Village Water Supply and the Village System would result from the sale of surplus water as proposed.

16. Further, as more fully set forth in the Affidavit of Robert Drew, while SRBC regulates the withdrawal of water from the aquifer at issue, the day to day operation of the Village System in Painted Post is regulated by NYSDOH. As required, NYSDOH's input was solicited during the permitting process associated with the construction and operation of the Transloading Facility. The Village sought and received approvals from NYSDOH to ensure that withdrawals associated with the sale of water to SWEPI were appropriate and met with all applicable requirements.

B. Funds Generated from the Sale of the Surplus Water will Allow the Village to make Needed Improvements to the Village Water System.

17. As reference in the Affidavit of Mayor Crozier, NYSDOH has requested that the Village make certain upgrades to its water system. Because of loss of tax revenue, including the loss of industry, the Village has been unable to undertake those improvements as it would like. With funds generated from the sale of surplus water to SWEPI, the Village will now be able to undertake those improvements.

18. If the Village was unable to sell such surplus water and generate revenues from same, it is doubtful whether needed repairs and upgrades to the water system can be undertaken in a reasonable manner, including avoiding potentially significant tax increases.

C. The Impact of One More Train a Day in the Village of Painted Post Associated with the Transloading Facility Will Not Adversely Impact Traffic or other Operations, and will Not Cause Excessive Noise or Other Problems.

19. The Petition claims that the operation of the Transloading Facility will result in adverse impacts including preventing residents of Chemung Street from accessing other portions of the Village including preventing them from accessing hospital and health care services.

Preliminarily, it should be pointed out that there are several other routes that can and are used by Village residents to travel eastbound or westbound through the Village, including from Chemung Street that do not require cars or pedestrians to travel over the rail line located on Chemung Street (*see* Ex. B).

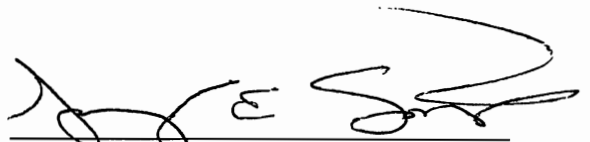
20. For example, if for any reason including motor vehicle traffic or other issues a resident of Chemung Street did not wish to or was not immediately able to travel across Chemung Street, such a person living on the south side of Chemung Street could travel in an easterly direction on Chemung street and take Interstate Route 417 to access other parts of the Village. Similarly, if a resident located on the north side of Chemung Street was unable to travel across it; such a resident could access other areas of the Village by travelling westerly on Chemung Street and access State Route 415 in either a westbound or eastbound direction to travel to other areas in the Village. There is no indication that utilization of other routes would result in significantly increased travel times to those living on Chemung Street seeking to travel to other areas of the Village or the surrounding area.

21. In addition, it is important to note that as a long time citizen of the Village and the area, there is no basis to any claim that operation of the Transloading Facility, which will result in the operation of but one additional train per day to transport and remove cars from the Transloading Facility will cause excess noise or undo air emissions. In sum, as stated, the Village has been the home to industrial operations for many years, and previously was the home for Ingersoll-Rand and is the current home for Dresser-Rand Industries. In the past trains have utilized the rail line located on Chemung Street and have done so for more than 50 years. In fact, throughout the history of the Village several additional rail lines bisected the Village and were utilized by industries and passengers, with an actual rail stop (depot) in the Village.

22. As such, under no circumstances will the operation of the Transloading Facility result in any significant change to the Village, including to the part of the Village where such facility is located. As indicated, the Village, including Chemung Street has been home to industrial facilities for years until the Ingersoll-Rand plant closed, as such, the operation of the Transloading Facility will not change the community in any way whatsoever. Indeed, when the Village was considering the operation of the Transloading Facility we identified rail as a preferred method to load water, as the usual manner in which this is done in the industry is with larger tanker trucks, and we wanted to avoid additional truck traffic which would have been associated with such an operation.

23. Further, as indicated, because of previous losses of tax revenue due to the closing and moving of businesses, the operation of the Transloading Facility will allow the Village not only make needed repairs to the Village Water System, but will also allow the Village to regain revenue which it needs to maintain public facilities and maintain public services.

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.


LARRY E. SMITH

Sworn to before me this
19 day of August 2012.


Notary Public

MUNESH PATEL
Notary Public, State of New York
No. 02PA6109397
Qualified in Ontario County
Commission Expires May 10, 2014

From: Miller, Glenda [<mailto:gmillersrbc.net>]
Sent: Friday, April 15, 2011 2:51 PM
To: Larry Smith
Subject: RE: SRBC approval for Shell

Larry Smith:

Shell is approved to use the Village of Painted Post for the 0.5000 mgd amount.

Regards,
Glenda

Glenda Miller

Supervisor - Approval By Rule Program
Susquehanna River Basin Commission

From: Larry Smith [<mailto:ppdpw@stny.rr.com>]
Sent: Friday, April 15, 2011 2:44 PM
To: Miller, Glenda
Subject: Re: SRBC approval for Shell

Glenda:

Sorry about that.

Larry Smith, Supt of Public Works for the Village of Painted Post.

Glenda Miller

Supervisor - Approval By Rule Program
Susquehanna River Basin Commission

From: Larry Smith [<mailto:ppdpw@stny.rr.com>]

Sent: Friday, April 15, 2011 9:59 AM

To: Miller, Glenda

Subject: SRBC approval for Shell

Glenda:

Just wanted to confirm that Shell has been approved to withdraw up to .50 MGD from the Village of Painted Post Water System. I received an email from them saying they have been approved.

Thank You

Larry Smith, Supt. of Public Works

From: Larry Smith [mailto:ppdpw@stny.rr.com]
Sent: Thursday, February 03, 2011 1:20 PM
To: Ballaron, Paula
Subject: Re: SRBC Approval for the Village of Painted Post

Paula:

Thank you for all your assistance during this permit process.
Larry

----- Original Message -----

From: Ballaron, Paula
To: tjwreed@yahoo.com
Cc: Zampogna, Damian ; ppdpw@stny.rr.com
Sent: Thursday, February 03, 2011 12:42 PM
Subject: SRBC Approval for the Village of Painted Post

Dear Congressman Reed,

The Commission approved the bulk purchase of up to 0.500 million gallons per day by Triana Energy, LLC, from the Village of Painted Post (NYS5001222), as indicated in the attached email. I have copied Larry Smith, Superintendent of Public Works of the Village so he is aware of the approval.

Under the Commission's Approval by Rule regulations, natural gas companies request approval to purchase water from a public water supplier. In the case of the Village of Painted Post where SRBC does not currently regulate the public water supply system, SRBC staff coordinates with NYSDEC in its review of the request to purchase bulk water. In the review, SRBC establishes that:

- There is sufficient excess capacity to support the requested bulk sale;
- There is an agreement in place between the natural gas company and the public water supplier;
- The public water supply system is in compliance with its permits (reporting meets requirements, allocated quantities not exceeded, water loss in the system is within acceptable range, etc.);
- The water for the bulk sale will come from the existing system and not require a modification under state regulations;
- The connection for the bulk sale will be fully metered and quantities monitored; and
- The request is administratively complete and otherwise acceptable.

The approval issued by SRBC does not insure that water will be available for purchase every day; the agreement between the gas company and the public water supplier dictates availability.

If you have additional questions about the approval, please feel free to contact me.

Paula Ballaron, P.G.
Manager, Policy Implementation & Outreach
Susquehanna River Basin Commission

From: Miller, Glenda <gmiller@srbc.net>
Sent: Monday, January 03, 2011 2:04 PM
To: Rachelle King
Cc: Beauduy, Tom; Richenderfer, Jim; suweaver@state.pa.us; johamilton@state.pa.us; rgilius@state.pa.us; mhartle@state.pa.us; cdeluca@state.pa.us; dagustini@state.pa.us; djostenski@state.pa.us; jbutczynski@state.pa.us; jamekline@state.pa.us; mdholt@gw.dec.state.ny.us; pbfreeha@gw.dec.state.ny.us; lacollar@gw.dec.state.ny.us; kfsanfor@gw.dec.state.ny.us; kplynch@gw.dec.state.ny.us
Subject: Triana Energy, LLC - Approved Source Application For The Use of Water Obtained From The Village of Painted Post - PWS #NY5001222

Effective January 3, 2010, and pursuant to 18 CFR Section 806.22(f)(12)(ii), the Susquehanna River Basin Commission (Commission) hereby approves the source application filed by Triana Energy, LLC (hereinafter "project sponsor"), for the use of water obtained from the Village of Painted Post (PWS #NY5001222), located in Painted Post, Steuben County, New York.

As a result of this approval, and pursuant to 18 CFR Section 806.22(f)(11), the project sponsor may utilize this source for natural gas development at any drilling pad site for which it has an effective Approval by Rule issued by the Commission, subject to any approval or authorization required by the Commission's (host) member state to utilize such source.

The project sponsor may obtain water from this source in an amount not to exceed the amount established in the commitment letter submitted as part of its approval. The project sponsor may only increase the committed amount with proper notification to and prior approval from the Commission.

The project sponsor shall record on a daily basis, and report quarterly on a form and in a manner prescribed by the Commission, the quantity of water obtained from this source.

The project sponsor shall demonstrate to the Commission annually, by means of a commitment letter or other documentation acceptable to the Commission, that all sources approved under 18 CFR §806.22(f)12(ii) intend to continue to supply water to the project sponsor. The project sponsor shall notify the Commission, in writing, within two (2) weeks of any termination of source water agreements. The project sponsor may increase the committed amount with proper notification to and approval from Commission staff prior to any consumptive water use.

If you have any questions regarding the approval, please feel free to contact me at extension 227 or Eric Roof at extension 209.

Thank you,
Glenda Miller

Glenda Miller

Supervisor - Approval By Rule Program
Susquehanna River Basin Commission
1721 North Front Street
Harrisburg, PA 17102

717-238-0425 Ext. 227

Fax: 717-909-0468

www.srbc.net



From: Larry Smith [<mailto:ppdpw@stny.rr.com>]

Sent: Wednesday, March 07, 2012 1:14 PM

To: 'Miller, Glenda'

Cc: Richmond, Andrew SEPCO-UAO/Y/E; mpatel@HarrisBeach.com; Wright, Stephen A SEPCO-UAS/E/USON; ryorio@stny.rr.com; 'Rachelle King'

Subject: Village of Painted Post Reallocation of Water

Dear Glenda:

As discussed in our phone conversations this morning, attached for your use is a copy of the letter addressing the reallocation of the .50 MGD approved withdrawal from Triana Energy to the approved withdrawal of .50 MGD to SWEPI LP for a total withdrawal of 1.0 MDG.

Based on our conversation no other additional documents are required for this reallocation.

I am also mailing out a hard copy to you today.

If you have any questions please contact me as soon as possible.

Thank You.

Larry Smith, Supt. Of Public Works



Map of:
[1-99] E Chemung St
Painted Post, NY 14870

Notes

