

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

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In the Matter of the Application of

SIERRA CLUB, PEOPLE FOR A HEALTHY ENVIRONMENT, INC., COALITION TO PROTECT NEW YORK; JEAN WOSINSKI; THERESA and MICHAEL FINNERAN; and VIRGINIA HAUFF,

Petitioners,

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

-against-

THE VILLAGE OF PAINTED POST; PAINTED POST DEVELOPMENT, LLC; SHELL WESTERN EXPLORATION AND PRODUCTION, LP; WELLSBORO AND CORNING RAILROAD, LLC;

Respondents.

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**NOTICE OF MOTION  
REQUESTING LEAVE TO  
FILE MEMORANDUM OF  
LAW AS AMICUS  
CURIAE**

Docket # CA 13-01558

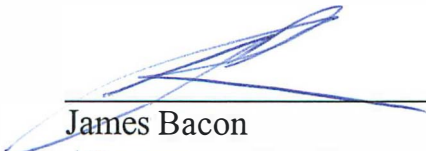
PLEASE TAKE NOTICE that the undersigned will move this Court at the Courthouse located at 50 East Avenue, Rochester, New York 14604 on Monday November 4, 2013 for an order for the following relief:

1. Granting leave to the Croton Watershed Clean Water Coalition, Inc. (“CWCWC”) to file the required number of copies of an amicus curiae memorandum of law in support of Petitioners.
2. And for such other and further relief as to the Court may seem just and equitable.

Please take further notice that, pursuant to Appellate Division Fourth Department Rule 1000.13, this motion is submitted without oral argument, that personal appearance in opposition to this motion is neither required nor permitted, and

any papers in opposition to this motion must be served and filed at the Appellate Division Fourth Department on or before the return date of this motion.

Dated: October 25, 2013



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James Bacon  
Attorney for CWCWC  
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New Paltz, New York 12561

To:

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RAILROAD, LLC;

Respondents.

**AFFIRMATION IN  
SUPPORT OF  
MOTION  
REQUESTING  
LEAVE TO FILE  
MEMORANDUM  
OF LAW AS  
AMICUS CURIAE**

Docket # CA 13-  
01558

JAMES BACON, an attorney duly licensed to practice law in New York State, affirms as follows under penalties of perjury pursuant to the New York Civil Practice Law and Rules:

1. I am counsel for the Croton Watershed Clean Water Coalition, Inc. (“CWCWC”) and make this affirmation in support of the instant motion seeking leave to participate in this appeal, and to file a brief as amicus curiae in support of the Petitioners. The statements made herein are based on my personal knowledge and the public documents.

2. CWCWC is a not-for-profit organization formed in 1997 which comprises more than fifty member groups representing over 120,000 individuals working to protect and improve public water supplies throughout New York State by education and advocacy.<sup>1</sup>

<sup>1</sup> CWCWC’s mission statement states: “[t]he Coalition strives to protect and improve the waters of NYC's Croton Watershed as well as all New York State watersheds. We are an alliance of individuals and groups who believe that safe, clean and affordable drinking water is a basic human right.”

3. The Corning Aquifer is one of eighteen “Primary Water Supply Aquifers” in New York State. It spans a 28-square mile area generally following the river valleys in and around the City of Corning in New York’s Southern Tier. The aquifer partially recharges the Chemung River which ultimately discharges into the Susquehanna River and the Chesapeake Bay. The aquifer serves a population of over 31,000 located in the City of Corning, the Towns of Corning, Campbell and Erwin as well as the Villages of Painted Post, Riverside, Addison and South Corning.

4. The Corning Aquifer is a highly productive system “vulnerable to contamination from the land surface” due to its shallow depth which is just 18 feet below the surface of the Village of Painted Post (“VOPP”). Indeed, the Corning aquifer is the only aquifer designated in New York State as a “Potentially Stressed Area,” by the Susquehanna River Basin Commission (“SRBC”) - “areas in the basin where the utilization of groundwater resources is potentially approaching or has exceeded the sustainable limit of the resources.” The 2002 Chemung River Valley Water Study called for greater regional cooperation and information-sharing in protecting the aquifer as “[n]eighboring communities in the Chemung Valley all draw on the same aquifer for their own consumptive needs and there is no assurance that individual purveyors of water will not place these individual needs above the needs of the valley as a whole.”

5. The VOPP’s authorizing the multi-million gallon taking of groundwater and construction of a rail exporting facility side-stepped environmental review by misinterpreting the State Environmental Quality Review Act (“SEQRA”).

6. In particular, the VOPP designated the drawing of 314 million gallons from the aquifer as a Type II action requiring no environmental review.

7. CWCWC submitted a proposed amicus curiae brief to the lower court identifying that the VOPP wrongly designated its action as a Type II because the transloading facility was located immediately adjacent to the Village-owned Hodgman Park thus lowering SEQRA’s Type I threshold for actions involving water withdrawals from 2,000,000 to 500,000 gallons per day. A Type I action carries with it the presumption that it may have one or more potentially significant environmental impacts thus requiring an in-depth environmental impact statement.

8. The lower court’s decision annulling the VOPP’s actions reflected CWCWC’s argument by stating that “Hodgmen [Hodgman] Park is arguably substantially contiguous to the transloading facility where the water sold by the

Village is loaded onto the trains” (at pg. 30)<sup>2</sup> thus potentially defining the action as a Type I action, but at the very least an Unlisted rather than a Type II action.

9. As the lower court held, the VOPP’s actions involved the sale of “a large volume daily withdrawal of a resource vital to the well being of our state” and thus involves a matter of special concern to water quality advocates, especially because that vital resource is being exported out-of-state.

10. CWCWC’s proposed amicus curiae brief will invite the Court’s attention to law and arguments that might otherwise escape its consideration, particularly those that reflect the positive impact of this decision on other regional users of the Corning Aquifer, and bring to light SEQRA’s important public policy implications that result from municipalities complying with SEQRA before taking action to permanently withdraw millions of gallons of water from a vital aquifer.

11. Finally, this Court has just granted Petitioners until November 21, 2013 to submit its brief. Thus, this motion is made sufficiently in advance of oral argument enabling this Court’s timely review and setting a date for submission of a brief amicus curiae. A second party, the New York State Conference of Mayors and Municipal Officials has also filed a motion for leave to submit an amicus curiae brief dated October 17, 2013.

12. One original and one copy of the motion is enclosed herewith.

**WHEREFORE** your affirgant respectfully requests that this Court render an order granting CWCWC:

- (1) leave to file the required number of copies of a brief amicus curiae, and
- (2) such other and further relief as to the Court may seem just and proper.

Dated: October 25, 2013

Respectfully submitted,

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James Bacon  
Attorney for the Croton  
Watershed Clean Water Coalition

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<sup>2</sup> In a separate decision also dated March 25, 2013, the lower court declined to accept CWCWC’s amicus curiae brief in part due its submission two weeks before oral argument.