

**Joint Legislative Hearing on Water Quality Issues- Statement by David Engel**

My name is David Engel. I am an attorney with Nolan & Heller, LLP. I have practiced law for over 40 years. My practice has concentrated primarily in the fields of environmental law and toxic exposure. I have worked on major water contamination cases throughout New York State and in several other states. Prior to going into private practice in 1988, I held various positions with the New York State Department of Environmental Conservation (“DEC”).

At Nolan & Heller, my colleagues and I have been involved in the Hoosick Falls PFOA matter since December 2014. At that time we began to receive calls from local residents who were concerned about the early reports of PFOA in the public water supply. The residents expressed concerns with respect to the claims then being made that the PFOA levels in the Village water supply of 450 PPT did not present a threat to public health. At that time, the Village was advising its residents that it was safe to continue to consume the Village water without fear or concern as to possible health effects. On its website, the Village reported that it based its advice upon guidance or advice provided by the New York State Department of Health (DOH).

Following our telephone discussions with Hoosick residents, we undertook a search for information pertaining to PFOA. I also contacted Dr. Robert Michaels and sought his involvement and guidance. Dr. Michaels is a highly regarded Environmental Toxicologist. He testified before the Senate hearing held last week in Hoosick Falls.

Based upon our initial review of the data and the abundant information available online including the papers and conclusions published by the so-called “C-8” Science Panel and the EPA Guidance pertaining to short term exposure to PFOA in drinking water, it was apparent that there was a serious problem in Hoosick Falls.

In January 2015, we met with Michael Hickey and Dr. Marcus Martinez. They explained to us the efforts they had made and were continuing to make to convince the Mayor and his colleagues on the Hoosick Village Board to take action to find a solution to the water problem.

During our discussions with Mr. Hickey, we learned that his father John Hickey had worked in the Saint-Gobain plant. We further learned that he had apparently been exposed to PFOA-containing materials and that he had contracted kidney cancer and died from that disease in 2013.

Working primarily with Dr. Martinez, we created Healthy Hoosick Water (“HHW”) as a not-for-profit entity whose purpose was to seek redress for the still-unresolved PFOA contamination problem in Hoosick. Throughout 2015, Michael Hickey and Dr. Martinez attempted to persuade Mayor Borge that he and the Village Board should meet with us to discuss in depth the entire PFOA problem in Hoosick. By September (2015), we had assembled a team that included Dr. Michaels as well as highly qualified environmental engineers and geologists from Sterling Environmental.

Notwithstanding the efforts of Mr. Hickey and Dr. Martinez, Mayor Borge and the Board refused to meet with us. The message that was conveyed back to us was that the Mayor had assured Saint-Gobain that the Village would not get confrontational with the Company and specifically, it would not “lawyer up”.

Given the attitude of the Village leadership and the guidance that DOH had reportedly been giving to the Village, we then looked for alternative approaches. Accordingly, we then did the following:

On September 16, 2015, I had a discussion with EPA Region 2 Administrator Judith Enck, in which I raised the subject of the PFOA problem in Hoosick. Thereafter, I began to email documents to Ms. Enck as to the nature and extent of the problem.

In October 2015, I had further discussions with Ms. Enck regarding Hoosick. We arranged and held further lengthy conference calls involving EPA Region 2 staff and Dr. Martinez and Mr. Hickey. On November 25<sup>th</sup>, EPA Region 2 issued a letter to the Village advising against the use of the Village’s water supply for drinking and cooking purposes.

While we were engaged with EPA, at the same time we worked on bringing a possible lawsuit against Saint-Gobain for the purpose of compelling the Company to address the water problem. At that time, we were cautiously optimistic that the Company might be willing to engage in discussions and act in a responsible manner to finally address the problem. In the course of preparing a possible legal action, our research revealed that Saint-Gobain had filed a “TSCA 8e” notification letter with EPA in Washington on December 30, 2014. In that letter, Saint-Gobain stated the following:

On behalf of Saint-Gobain Performance Plastics Corporation (SGPP), we are submitting this notice to provide information to the U.S. Environmental Protection Agency (EPA) concerning data regarding the presence of perfluorooctanoic acid (PFOA) that was detected in recent tests of the public drinking water supplies of the Village of Hoosick Falls, New York (the Village), SGPP processes fluoropolymers at a facility within the Village that were made with PFOA, but it is not and never has been a manufacturer, processor, distributor or user of PFOA *per se* anywhere in the United States. Since 2003 SGPP has participated in industry’s voluntary PFOA phase-out effort by purchasing raw materials with decreasing levels of PFOA as an ingredient.

On December 12, 2014, SGPP became aware of PFOA measurements conducted by the Village in three wells used to supply drinking water to the community. The wells are located near one of our facilities in the Village. On December 15, 2014, SGPP learned of the results of the tests, and obtained a copy of the report.

As we later found out, Saint-Gobain’s claims as to its use of PFOA in Hoosick were untrue. Based upon statements provided by Saint-Gobain personnel, we can reasonably conclude that Saint-Gobain continued to use formulations containing PFOA at least through 2014. Saint-Gobain’s disclaimer that it did not use “PFOA *per se*” is disingenuous. The fact is that PFOA was part of a mix, even if it was not used as a stand-alone ingredient.

On October 19, 2015, we sent a letter to Saint-Gobain advising the Company as follows:

The purpose of this letter is to advise you that we are prepared to provide formal notice to SGPP and Saint-Gobain Corporation of HHW’s intent to sue under RCRA §7002(a)(1)(B) (42 USC §6972(a)(1)(B)). The basis for HHW’s suit is as follows: (1) the Hoosick Falls water system is contaminated and remedial action is required; (2) SGPP’s practices have resulted in the spread of PFOA contamination throughout Hoosick Falls; (3) the cost of responding to the contamination should not fall on the residents of Hoosick Falls; and (4) SGPP and Saint-Gobain Corporation are the appropriate parties who should bear the costs associated with

addressing the PFOA contamination in Hoosick Falls. We are enclosing a copy of the "Notice" letter that we are prepared to formally serve upon SGPP and Saint-Gobain Corporation as well as the United States Environmental Protection Agency and the New York State Department of Environmental Conservation.

Prior to sending that letter to Saint-Gobain, I finally had direct discussions via telephone with Mayor Borge on Sunday, October 18<sup>th</sup>. At that time, I informed Mayor Borge of what we intended to do and I invited the Mayor to have the Village join in our effort. He responded that he did not want to get confrontational with Saint-Gobain and that he wanted to avoid the involvement of lawyers in the process.

Within one week of sending our letter to Saint-Gobain, we were engaged in discussions with the Company. On November 4<sup>th</sup>, we met with Saint-Gobain's representatives including its retained counsel Chris Gibson from Archer & Greiner, and Saint-Gobain's Vice President for Environmental Health and Safety, Lauren Alterman. At that time, Saint-Gobain indicated that it would pay for the installation of a temporary water treatment system in Hoosick to be succeeded by a "permanent" system for removing the PFOA contamination. However, Saint-Gobain refused our demand that it provide bottled water pending the provision of a permanent treatment system. The following week on November 10<sup>th</sup>, at a Village Board meeting, Saint-Gobain announced that it would cover the cost of a bottled water program. Also at the November 10<sup>th</sup> meeting, Saint-Gobain released the results of groundwater sampling from its plant site. The samples show PFOA concentrations as high as 18,000 PPT.

Based upon those interactions with Saint-Gobain in October and early November, we were somewhat optimistic that further progress could be made on an expedited basis so long as everyone acted in good faith.

As noted EPA issued its advisory against the use of Village water on November 25<sup>th</sup>.

To be clear, by December 1, 2015, the Company had committed to both water treatment and a bottled water program. The details of the water treatment remained to be worked out. At that time, we anticipated that the Village would enter into a formal agreement with Saint-Gobain and our hope was that Healthy Hoosick Water could also join as a party to that Agreement. We believed that Healthy Hoosick Water's involvement was vital because (1) Healthy Hoosick Water had been the public advocate for

holding Saint-Gobain responsible, (2) Dr. Martinez was the face and voice of Healthy Hoosick Water and he had credibility with Hoosick residents that the Mayor and the Board did not appear to enjoy and (3) Healthy Hoosick Water was adamant that the treatment system be designed, constructed and operated to the strictest standards possible. Further, we had other concerns that we believed should be addressed as part of any agreement with Saint-Gobain including the need to track down and resolve all sources of PFOA exposure in the community.

On December 2<sup>nd</sup>, the Village held a so-called public meeting at the Immaculate Conception Church for the purpose of providing information to the public. The event was not an actual public meeting. It was set up in the format of a science fair. The Village apparently invited Saint-Gobain and DOH to participate. Saint-Gobain had a table; DOH had a table, the Village had a table. Healthy Hoosick Water was not asked to participate. Instead, Dr. Martinez, and other Healthy Hoosick Water members set up their own table. At that event, DOH provided a "Fact Sheet" stating that it did not anticipate public health effects from normal use of the water. On the other side of the room Dr. Martinez and Dr. Michaels were providing the EPA Advisory letter and other material including articles written by the C-8 Science Panel members; all of which emphasized the threat posed by PFOA exposure.

By that time in December 2015, DOH was still suggesting that the Hoosick water posed no threat. The DOH fact sheet specifically stated that questions and inquiries could be posed by either telephone or email to Dr. Lloyd Wilson. Accordingly, on behalf of Healthy Hoosick Water, I emailed Dr. Wilson and requested all documents, data and reports that supported the conclusion in the Fact Sheet as to the "no health effects" conclusion.

Instead of receiving a response, we received an email stating that our request would have to be reformulated as a formal FOIL request and that Dr. Wilson could not communicate with us directly because I was a lawyer representing a client.

Without recounting the entire history of our FOIL request, please be aware that to date we have received only partial responses. The response relating to the "no health effects" conclusion consists only of copies of documents from sources other than DOH. None of the documents specifically address

conditions in Hoosick Falls. There is no document in the DOH collection that sets forth any analysis of the possible health effects in light of the specific data pertaining to Hoosick.

Several of the articles cited by DOH were authored by the members of the C-8 panel. One of the articles states as follows:

In humans, the primary associations that have been observed have included ulcerative colitis (an autoimmune disease), thyroid disease, high cholesterol, kidney cancer, testicular cancer, prostate cancer and non-malignant kidney disease. Pregnancy-induced hypertension has also been associated with PFOA.

That statement was based upon several peer-reviewed articles for which citations were provided. Nonetheless, DOH concluded that no health effects were expected.

In January 2016, the State finally decided to act by declaring PFOA a hazardous substance and by proposing that the Saint-Gobain and former Honeywell properties be listed as Superfund sites.

In January, DEC and DOH assumed the lead role in dealing with Saint-Gobain. In turn, the Company stopped discussing much less negotiating anything with Healthy Hoosick Water. Further, even the Village appeared to be cut out of those discussions.

In time, the State's efforts resulted in Consent Orders, one of which finalized the commitment Saint-Gobain had made months earlier to provide water treatment. That said, Healthy Hoosick Water remains concerned that the DEC Consent Order lacks any specific reference to performance standards for the treatment systems.

We had advocated for the position that the treated water should be "non-detect" for PFOA with a detection limit of under 2 PPT. Based upon the experience with the use of treatment systems in the Ohio Valley communities, that level of treatment should be readily achievable. In our view, the strictest standards are a necessity in Hoosick because fundamentally the remedial efforts must be aimed at reducing the levels of PFOA in the exposed population and that can best occur if no further exposure takes place. We had several frustrating discussion with DOH on this issue and we were informed that the operational standard would not be set at non-detect and that the reference point would be a so-called reporting limit of 20 PPT.

With all that said, here are some possible lessons from the Hoosick experience:

- (1) Based upon the Hoosick experience, it appears that DOH was more concerned with avoiding alarm than providing information to the public. Dr. Zucker has pointed out that exposure does not automatically equate to a health effect. But fully informing people as to the potential problems associated with exposure is the best way to allow for early detection and response to a health effect.
- (2) Steps should be taken to assure that DOH personnel keep up with the current literature. In the early stages of awareness as to the Hoosick problem, DOH evidently fell back on generic guidance values and failed to consider the information that was available in the established scientific literature.
- (3) EPA can be called to task for failing to establish strict nationwide standards for PFOA based upon the latest available science. However, it should be kept in mind that at all times in which DOH considered the Hoosick circumstance, the PFOA levels were above the EPA value for short term exposure to PFOA. There never should have been any confusion about that.
- (4) The process by which DEC negotiated Consent Orders with Saint-Gobain should have been open to all stake-holders. As noted, Healthy Hoosick Water had and continues to have concerns about the performance standards for the treatment systems. We also have had a host of other concerns relating to pathways of exposure, including Saint-Gobain's practice of allowing used containers in which PFOA materials had been delivered to the plant to be taken out by workers for reuse as storage and even beverage bins.
- (5) New York does not need to wait on EPA to take the lead and set standards when it comes to environmental matters. New York can invoke its own authority to adopt standards that reflect the latest science. Both New Jersey and Vermont have been ahead of New York in responding to PFOA and other PFCs.
- (6) Finally, the Hoosick situation points out the need of reforming the law in New York with respect to Medical Monitoring. At present, New York has not recognized Medical Monitoring either as a cause of action or as a remedy. The legislature should act so that the residents of Hoosick and other exposed to hazardous chemicals can obtain this important form of relief.