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July 28, 2014

United States Army Corps of Engineers
ATTN: CELRH-RD-N
Public Notice No. LRH-2013-848-OHR
502 Eighth Street
Huntington, West Virginia 25701-2070
Via email to Teresa Spagna, teresa.d.spagna@usace.army.mil

RE: Comments of Ohio, West Virginia, and Illinois organizations and persons on Sect. 10
Permit Application #LRH-2013-848-OHR (GreenHunter Meigs County Docking
Facility)

Dear Ms. Spagna:

On behalf of the undersigned organizations and persons, I hereby tender comments in opposition to the issuance of a permit under Section 10 of the Rivers and Harbors Act of 1899 to GreenHunter Water, LLC for the construction and operation of a barge unloading and pipeline facility in Meigs County, Ohio, to deliver “bulk liquids” generated by hydraulic fracturing (“fracking”) operations to upland facilities.

Kindly send me immediate confirmation that you have received this.

I. Background Details

The Public Notice provides these details: The proposed facility would consist of a barge dock with a center platform and two-pipe pile dolphins to accommodate two tank barges (either 195 feet x 35 feet or 300 feet x 54 feet) simultaneously. Construction of the barge dock would involve the installation of five 24 inch pilings driven to an elevation of 522 feet and extend to an elevation of 595 feet above mean sea level, and a platform measuring 20 feet long by 10 feet wide. Piping valves, pipe and a tankerman’s shelter would be installed on the dock. A crane capable of handling hoses connecting the dock pipe valves to the barge piping valves would be installed on top of tankerman’s shelter. A 100 foot walkway/pipeway would be constructed and would extend from the dock to top of the river bank. Two tripod mooring dolphins, each consisting of 24 inch wall pipe pile and two supporting 14 inch wall batter piles, would be installed upstream and downstream of the barge dock for mooring of the tank barges. The purpose of the project is to unload bulk liquids (~2.5 million bbl per year, or 105,000,000 gal.) from the tank barges via a pipeline, mounted on the side of the walkway, to above ground storage tanks. The maximum riverward extension of the facility would be 165 feet from the shoreline at a

normal pool elevation of 560.0 feet above msl. The overall facility would occupy approximately 600 linear feet of the shoreline.

II. Request for a Public Hearing

We request a public hearing on the matter, owing to the significant interest in this project by residents of southern Ohio and northern West Virginia. If approved, GreenHunter would be adding infrastructure to a large-scale river barge fracking waste shipping scheme, the polluting effects of which will both pose an immediate threat to the Ohio River and its tributaries in the form of toxic and radioactive fracking waste spills. In addition, the cumulative environmental problems from the additional millions of barrels of fracking waste being introduced to the region around Meigs County will greatly exacerbate the potential environmental downside of drilling waste disposal, in the form of groundwater pollution and exhaustion of available solid waste disposal facilities. The affected public within the Ohio River valley region should be allowed to personally deliver facts and analysis to the Corps via a public hearing.

III. Request for 90-day Extension of Time to Comment

We request a 90-day extension of time for the submission of public comments, from July 28, 2014 until October 28, 2014, for several reasons. There are serious issues with the sufficiency of the June 27, 2014 Public Notice in this matter, which are expressed below. This is a complex issue which has been inadequately described in the Public Notice, and the misleading wording in the Notice has not sufficiently informed potential commenters. The Notice was issued during midsummer, a time when members of the public might be unavailable on vacation and unavailable to participate in this proceeding.

IV. Comments and Objections to Granting a Permit for the GreenHunter Development

We object to the issuance of a permit for the GreenHunter development on these grounds:

A) The Public Notice is defective. There are several inadequacies in the Public Notice which are more than merely technical or academic, as explained below. Based on any of these defects, the Public Notice must be corrected, re-issued, and an extended comment period afforded the public.

1. *The Public Notice does not honestly characterize in the simplest terms what materials GreenHunter proposes to deliver, other than referring to them as “bulk liquids.”* We suspect the obvious: that the facility will accept bargeloads of oil and gas drilling wastes (~105,000,000 gallons per year, according to the Notice), which are expected to be industrial chemical-laden wastes which will also contain moderate to problematic levels of radioactivity, which will be disposed in nearby injection wells on both sides of the Ohio River or as solid waste in area landfills. The misleading language chosen for the public notice is very troublesome because it insufficiently discloses the nature of the development and in the opinion of these commenters, will deter public participation because people will not be able to decipher the

meaning of “bulk liquids.” Corps regulations at 33 C.F.R. § 325.3(f) says that “The notice must, therefore, include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment.” Use of “bulk liquids” instead of “oil and gas drilling wastes” or “wastes from hydraulic fracturing (fracking) extraction of gas and oil from shale” or similar descriptive terminology falls well short of the guideline. Section 325.3(f)(5) echoes this point, requiring “A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments. . . .”

2. *There is no mention in the Public Notice of any compliance with the National Environmental Policy Act (NEPA).* Corps regulations at 33 C.F.R. § 325.3(f)(9) requires, “If appropriate, a statement that the activity is a categorical exclusion for purposes of NEPA. . . .” The Notice contains no mention of a categorical exclusion, an Environmental Assessment, a Finding of No Significant Impact, nor an Environmental Impact Statement. Without being informed of the important NEPA determination which the Corps has preliminarily made, the public cannot knowledgeably comment about a legally-mandated consideration of the project. The public will not understand that comments may discuss and advocate for a more comprehensive NEPA analysis, and will consequently be denied the opportunity to communicate with other members of the public about this project.

3. *The listing of other required government authorizations is not complete.* Corps regulations at 33 C.F.R. § 325.3(f)(8) require the Notice to contain a “list of other government authorizations obtained or requested by the applicant, including required certifications relative to water quality, coastal zone management, or marine sanctuaries. . . .” A federal Clean Water Act NPDES permit appears likely to be required for this project, as well as a federal Clean Air Act permit but neither are mentioned. Failure to apprise the public via the Notice that GreenHunter may not be operating the facility in compliance with environmental laws is of critical significance to the public’s opportunity to give meaningful comments and to communicate with other members of the public about this project.

4. *The Ohio EPA may decline to issue a § 401 Water Quality Certification for an unlawful reason.* The Public Notice indicates that the Ohio Environmental Protection Agency must be contacted by GreenHunter to determine whether a water quality certification is required. If the OEPA does not respond within the 30-day time limit, the certification is deemed waived.

The Ohio Environmental Protection Agency was delegated Clean Water Act enforcement responsibility by the U.S. EPA decades ago. However, Ohio law has recently been drastically altered to exclude the Ohio EPA from exerting any regulatory authority over an oil and gas drilling waste treatment or disposal facility without a formal invitation from the Ohio Department of Natural Resources for OEPA to step in as a regulator.¹ If the Ohio EPA does not

¹Ohio Revised Code § 1509.22 states, in part:

“The regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation, and this chapter and rules adopted under it constitute a comprehensive plan

respond to the notice, neither the Corps nor the public will know if the nonresponse is because the Ohio EPA is responding to the suspect Ohio statutory change and simply declining to answer, in which case an important state government regulatory responsibility is being abrogated, or whether the agency has made a considered determination based on the federal Clean Water Act standards.

5. *The project is likely not located at the address listed in the Public Notice.* Google mapping the 53549 Great Bend Road, Portland, Ohio address given in the Public Notice as GreenHunter's business address is situated at a greenfield location well north of the Ohio River. Corps regulations at 33 C.F.R. § 325.3(f)(4) require the Public Notice to reveal "the location of the proposed activity." If the true location is not revealed, preferably by latitude and longitude coordinates, the public cannot reliably and meaningfully understand the location, scope, nature of and environmental or other effects of the proposal, nor to communicate with other members of the public.

6. *The public should be informed of the Corps' decision to allow submission of comments via electronic mail.* Evidently in response to several communications from the public, Teresa Spagna, overseer of the public participation in the permitting process, sent an email to a member of the public on July 16, 2014, stating that she will be accepting emailed public comments for the Corps' record. But the Public Notice as written advises people that they must submit comments via regular hard-copy mailing. This amounts to a deterrent to people unused to submitting formal comments, who must send them in advance of the deadline by some days, and to have proof of submission, send paper letter comments via a return receipt requested method. The Corps' mid-course change in acceptability of electronically-transmitted comments must be added to the Public Notice, and the comment period extended.

B) An Environmental Impact Statement (EIS) is required. With roughly 105,000,000 gallons annually of fracking waste to be offloaded, handled and stored at, and ultimately transported away from, the Meigs County facility, that facility, alone, should be the object of an EIS to assess expected and unexpected air and water quality effects. The potential effects include spills and wastewater generated by the facility's normal operations, also air pollution emissions, routine and nonroutine; water contamination, routine and nonroutine, air and sound effects of having vastly-increased truck traffic on area highways to transport the wastes for land disposal; and potential spill effects, routine and nonroutine, from trucking vast amounts of

with respect to all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state, including site construction and restoration, permitting related to those activities, and the disposal of wastes from those wells. *In order to assist the division in the furtherance of its sole and exclusive authority as established in this section, the chief may enter into cooperative agreements with other state agencies for advice and consultation, including visitations at the surface location of a well on behalf of the division. Such cooperative agreements do not confer on other state agencies any authority to administer or enforce this chapter and rules adopted under it. In addition, such cooperative agreements shall not be construed to dilute or diminish the division's sole and exclusive authority as established in this section.*"(Emphasis added).

wastes on public roads. The accident potential from barge transport must be examined and analyzed; routine, but toxic, emissions must be accounted for. Additionally, the GreenHunter waste disposal stream is much more complex than this, and the Meigs County facility must be cumulatively analyzed in light of the larger disposal stream within an EIS.

1. *The project is a 'major Federal action' and the Corps permit turns the private action into a Federal action.* A “major Federal action significantly affecting the quality of the human environment,” 42 U.S.C. § 4332(2)(c), requires an EIS. An EIS is required if “substantial questions are raised” about effects on environmental quality. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149-50 (9th Cir. 1998). The proposed Meigs County development is water-dependent and the non-federal development will not go forward absent the Section 10 RHA permit, hence the project must be deemed federalized for purposes of NEPA. *Save the Bay v. U.S. Army Corps of Engineers*, 610 F.2d 322 (5th Cir. 1980); *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 400-01 (9th Cir. 1989). “Substantial questions” are raised about the Meigs development, even as a stand-alone facility, given the enormous quantity of wastes which are bound for landfill and injection well disposal in the southern counties of Ohio and possibly Kentucky and West Virginia. Even more substantial questions arise when considering the Meigs facility against the larger GreenHunter business plan.

The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action.” 33 C.F.R. pt. 325, App. B, § 7(b)(2). Moreover:

For those activities that require a DA permit for a major portion of a shoreside facility, the scope of analysis should extend to upland portions of the facility. For example, a shipping terminal normally requires dredging, wharves, bulkheads, berthing areas and disposal of dredged material in order to function. Permits for such activities are normally considered sufficient Federal control and responsibility to warrant extending the scope of analysis to include the upland portions of the facility.

Id., § 7(b)(2)(C).

The Corps should take into account, in terms of scoping the project under NEPA, that the Meigs County facility is part of a much larger GreenHunter network of drilling waste disposal activities. The company sends specially-equipped trucks into the fracking patches of West Virginia and Pennsylvania to collect, filter, recycle, and dispose of drilling wastes. The plan is for the trucks to deliver wastes to a GreenHunter facility in Wheeling, West Virginia, located near the Ohio River. There appears to be a problem which may make it impossible for barge loading at Wheeling, but indisputably, GreenHunter intends for there to be river barge loading and transport of millions of barrels of fracking wastes for dispatch downriver to GreenHunter’s New Matamoras and Meigs County facilities and ultimately for waste disposal via injection well or landfill. GreenHunter is a Texas-based firm and is further believed to be contemplating delivery to the Ohio terminals of fracking waste from southern and southwestern states. The environmental effects of transporting dozens of barges of drilling wastes along hundreds of miles of inland

waterways, with hundreds of millions of gallons of toxic and radioactive cargo and the attendant risks, obligates investigation within an EIS.

2. *Greenhouse Gas (GHG) emission implications are significant but undetermined and should be addressed under NEPA.* The scope of environmental effects from the GreenHunter overall business plan is even broader. The global warming implications of allowing the creation of a high-volume, risky waste disposal network which effectively subsidizes fracking waste disposal by endangering common waterways, and which thus induces hydraulic fracturing expansion as an energy source, must be analyzed within an EIS. Assessment of a project's effects on greenhouse gas ("GHG") emissions is encompassed within the NEPA inquiry. As a federal district court in Colorado recently explained:

One of the foreseeable effects of the Lease Modification approval is the likely release of methane gas from the expanded mining operations. As explained above, an EIS must disclose and evaluate all of the effects of a proposed action — direct, indirect, and cumulative. NEPA further defines impacts or effects to include 'ecological[,] . . . economic, [and] social' impacts of a proposed action. 40 C.F.R. § 1508.8(b). The agencies do not argue that they could ignore these effects. In fact, they acknowledged that there might be impacts from GHGs in the form of methane emitted from mine operations and from carbon dioxide resulting from combustion of the coal produced.

High Country Conservation Advocates v. United States Forest Service, Case No. 13-cv-01723-RBJ (D.C. Colo. June 27, 2014) (slip op. at 17). The *High Country* court also suggested that federal agencies use as a measurement tool the protocol document "Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866," Interagency Working Group on Social Cost of Carbon (Feb. 2010).²

3. *The State of Ohio has abdicated regulation of air and water pollution emitted from drilling waste treatment, storage and disposal facilities.* The State of Ohio has statutorily abdicated its responsibility for implementing the federal Clean Water and Clean Air Acts to enforce federal regulation of the environmental effects of the Meigs County development. This makes a NEPA document singularly important.

In recent years, the Ohio General Assembly has assigned sole responsibility for environmental permitting for all aspects of the oil and gas industry to the Ohio Department of Natural Resources ("ODNR"). In doing so, the former role of the Ohio Environmental Protection Agency has been usurped, despite the fact that fracking waste is routinely contaminated with dangerous industrial chemicals, radium and other isotopes, and emits radon.

The Ohio General Assembly enacted Ohio Revised Code Chapter 1509 in 1965 to regulate all oil and gas drilling and production operations in Ohio. Legislative amendments commencing in in 2004, 2010, 2011 and 2013 have expanded the Ohio Department of Natural Resources' regulatory jurisdiction to cover every aspect, from cradle to grave, of fracking

²Available at www.epa.gov/oms/climate/regulations/scc-tsd.pdf

activity. O.R.C. § 1509.02 in its current form reads as follows:

There is hereby created in the department of natural resources the division of oil and gas resources management, which shall be administered by the chief of the division of oil and gas resources management. The division has sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state, excepting only those activities regulated under federal laws for which oversight has been delegated to the environmental protection agency and activities regulated under sections 6111.02 to 6111.029 of the Revised Code. The regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation, and this chapter and rules adopted under it constitute a comprehensive plan with respect to all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state, including site construction and restoration, permitting related to those activities, and the disposal of wastes from those wells. *In order to assist the division in the furtherance of its sole and exclusive authority as established in this section, the chief may enter into cooperative agreements with other state agencies for advice and consultation, including visitations at the surface location of a well on behalf of the division. Such cooperative agreements do not confer on other state agencies any authority to administer or enforce this chapter and rules adopted under it. In addition, such cooperative agreements shall not be construed to dilute or diminish the division's sole and exclusive authority as established in this section.* Nothing in this section affects the authority granted to the director of transportation and local authorities in section 723.01 or 4513.34 of the Revised Code, provided that the authority granted under those sections shall not be exercised in a manner that discriminates against, unfairly impedes, or obstructs oil and gas activities and operations regulated under this chapter.” (Emphasis added).

The reservation of authority to the Ohio Environmental Protection Agency in O.R.C. § 1509.02 extends only to the “permitting, location and spacing of oil and gas wells and production operations” in Ohio. But the regulation of “. . . disposal of wastes from those wells,” is placed under the “uniform state regulation” of the ODNR. Consequently, despite U.S. Environmental Protection Agency delegation to the Ohio EPA of federal Clean Water and Air Act enforcement responsibility over drilling waste disposal, Ohio’s legislature has superseded those delegations. Presently, “the (ODNR gas) chief may enter into cooperative agreements with other state agencies for advice and consultation” and “such cooperative agreements do not confer on other state agencies any authority to administer or enforce this chapter and rules adopted under it.”

The GreenHunter terminal facility along the Ohio River at New Matamoras, Washington County, Ohio has been in operation for about a year. It has not been required to obtain an NPDES permit,³ nor any Clean Air Act permit, nor has there been any consideration of the facility’s direct or indirect effects and whether they increase greenhouse gases. The aging 50-year-old tank

³Verification of this is available by proceeding to the Ohio EPA website http://wwwapp.epa.ohio.gov/dsw/permits/permit_list.php and inserting “Washington” in the blank.

storage facility at New Matamoras receives thousands of gallons of fracking waste fluids which are presently 100% truck-delivered⁴ for disposal in class II injection wells or solidification for landfill disposal. Despite the age of the tanks and onsite pipelines, including from the wharf on the Ohio River, neither ODNR nor the Ohio EPA have required NPDES compliance for wastewater disposal, spillage cleanup or other actions which would generate contaminated water.

The Corps may limit the scope of NEPA analysis to exclude environmental effects on upland areas only if there is a state agency which takes responsibility for determining the social and environmental impacts associated with a development. *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 196⁵ (4th Cir. 2009). Ohio's abdication of federal regulatory responsibility for air and water compliance as to drilling waste facilities means that there is no state agency which will be determining the social and environmental impacts associated with the Meigs County terminal. This must be taken into account as the Corps decides whether there has been NEPA compliance.

C) Application of the Corps' Public Interest Review factors suggests serious detriments. There will be detrimental effects from the project on habitat use, air quality, water quality, endangered species and massive spill potential. Those effects would continue at least as long as the project-related infrastructure is in place. This development would be permanent and would pose recurring threats from these detrimental effects for decades. The development would change a rural stretch of small communities from a recreational area to an industrial area. There are considerable cumulative effects from the anticipated operation of the Meigs County terminal. It will foster a large increase in both injection well and landfill disposal of fracking waste within a radius of several counties. There will be greatly-increased truck traffic. There will be a heightened potential for routine as well as non-routine spills of fracking waste into the Ohio River and its tributaries. There will be significant air emissions of the constituent chemistry of the waste, including volatile organic chemicals (VOCs) and polyaromatic hydrocarbons (PAHs). There will be greater potential for toxic industrial fires. Fracking waste is radioactive and contains troublesome quantities of water-soluble radium.

D) It is not presently lawful to ship oil and gas drilling wastes by barge on inland waterways such as the Ohio River. The U.S. Coast Guard is considering, but has not added such materials to the permissible list of cargoes. There is likely to be litigation in the event that fracking wastes are added to that list. GreenHunter's application is premature and could improperly pressure or bias the Coast Guard's determination. The lack of any NEPA reference in the Corps' public notice may properly be interpreted to mean that the Corps has no intention of complying with that critical federal statute.

⁴If barge approval is granted by the Coast Guard for oil and gas drilling wastes, this facility will also be a waterborne destination.

⁵"While SMCRA's provisions should not be construed as 'superseding, amending, modifying, or repealing' the requirements of NEPA or the CWA, 30 U.S.C. § 1292(a) (2000), neither should NEPA be construed to require the Corps to essentially federalize an environmental review process that has already been delegated to federally approved state programs." *Id.*

We realize that the Corps has no command and control over the Coast Guard; however, since the Corps is considering GreenHunter's permit without disclosing the nature of the material to be delivered to the Meigs County docking facility, and (so far) without undertaking the preparation of an EA or EIS, the public rightfully might question the Corps' objectivity and wonder whether an unduly fast Section 10 approval might be in the works to compel the Coast Guard's regulatory decision in favor of barge shipments of drilling wastes on inland waterways.

Thank you very much.

For the environment,

/s/ Terry J. Lodge

Terry J. Lodge

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