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July 11, 2014

ATTN: Ms. Gina McCarthy, Administrator
U.S. Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, NW
Washington, DC 20460
via certified U.S. Mail, return receipt requested

SUBJ: Petition of Freshwater Accountability Project for withdrawal of NPDES enforcement program from State of Ohio Environmental Protection Agency, pursuant to 40 C.F.R. §§ 123.63 and 123.64, and 5 U.S.C. § 555(e)

Dear Administrator McCarthy:

This letter officially notifies the U.S. Environmental protection Agency that the Ohio Environmental Protection Agency is no longer fit to retain primacy to regulate the Clean Air Act in Ohio. The Fresh Water Accountability Project ("FWAP"), a nonprofit grassroots organization and the petitioner in this proceeding, hereby requests that Ohio's primacy be ended by swift and decisive action from your office.

Your predecessors delegated to Ohio's Environmental Protection Agency ("OEPA") the power to run water pollution discharge regulation in the state. Sadly, the OEPA has been stripped of its protective role while the gas industry has erected its own self-regulation façade through powerful lobbying. It's time to unmask this charade and restore USEPA authority over water effluent in Ohio which has been contaminated with radioactive and chemical wastes.

Please consider this letter to comprise the Fresh Water Accountability Project's formal petition for proceedings culminating in the withdrawal of National Pollution Discharge and Elimination System ("NPDES") responsibility from the OEPA as quickly as possible.

Pursuant to 40 C.F.R. § 123.63, the Administrator may withdraw program approval when a State program no longer complies with the requirements of the Clean Water Act, and the State fails to take corrective action. We believe the current state of "regulation" in Ohio violates the Clean Water Act, and we request that an adjudication begin for the withdrawal of the NPDES delegation to the Ohio EPA immediately.

The US EPA regulation provides:

> "(1) Where the State's legal authority no longer meets the requirements of this part, including:
>
> . . . (ii) Action by a State legislature or court striking down or limiting State authorities.

(2) Where the operation of the State program fails to comply with the requirements of this part, including:

(I) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;

(ii) Repeated issuance of permits which do not conform to the requirements of this part; or

(iii) Failure to comply with the public participation requirements of this part.

(3) Where the State's enforcement program fails to comply with the requirements of this part, including:

(I) Failure to act on violations of permits or other program requirements;

. . . (iii) Failure to inspect and monitor activities subject to regulation.

(4) Where the State program fails to comply with the terms of the Memorandum of Agreement required under § 123.24.

(5) Where the State fails to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits."

I. *Background: Breach of the Rules & Memorandum of Agreement By De-Regulation of Ohio Fracking Waste*

In recent years, the Ohio General Assembly has assigned sole responsibility for all environmental permitting for all aspects of the oil and gas industry to a small corner of the Ohio Department of Natural Resources ("ODNR"). In doing so, the former role of the Ohio Environmental Protection Agency has been supplanted and the Ohio Department of Health has been displaced from regulating radioactive drilling wastes resulting from hydraulic fracturing ("fracking") despite the fact that fracking waste is routinely contaminated with radium and other isotopes, and emits radon.

The General Assembly enacted Ohio Revised Code Chapter 1509 in 1965 to regulate all oil and gas drilling and production operations in Ohio. See *Redman v. Ohio Dept. of Industrial Relations*, 75 Ohio St.3d 399, 662 N.E.2d 352 (1996). In 2004, the General Assembly enacted H.B. 278, which expanded
the regulatory scheme and amended O.R.C. § 1509.02 to give the Division of Mineral Resources Management of the Ohio Department of Natural Resources the "sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells."

Subsequently, the General Assembly enacted S.B. 165, effective June 30, 2010, which further expanded ODNR's regulatory authority to include "production operations." The General Assembly again expanded ODNR's authority in H.B. 153, effective September 28, 2011. It amended ODNR's authority to include "well stimulation," "completing," "construction' of site, and "permitting related to those activities." This encompasses all the massive waste disposal issues created by this single industry. 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 to the OEPA in O.R.C. § 1509.02 extends only to the "permitting, location and spacing of oil and gas wells and production operations" in Ohio. Specifically, it includes 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" [§§ 6111.02 to .029 govern identification and protection of wetlands]. extends only to the "permitting, location and spacing of oil and gas wells and production operations" in Ohio. As the highlighted sentence above states, the regulation of oil and gas activities, "including . . . disposal of wastes from those wells," is placed under the "uniform state regulation" of the ODNR.

This state law change stripped away power from the OEPA, the entity with which USEPA had entered into the Memorandum of Agreement by relieving the OEPA of federal law enforcement responsibility over drilling waste disposal. As a result, the ODNR – which is not a party to the CWA delegation from Region V -- has nonetheless been assigned complete responsibility and regulatory discretion over it. The USEPA made a deal with Ohio; they were promised an active environmental regulatory regime by the OEPA but it the arrangement was destroyed by the Ohio legislature when it changed the priority among state agency regulators.

All of this was borne out by the above statement that "the (ODNR gas) chief may enter into cooperative agreements with other state agencies for advice and consultation. The OEPA and Department of Health are kept out of any decisive regulatory role by the statutory language that "such cooperative agreements do not confer on other state agencies any authority to administer or enforce this chapter and rules adopted under it" and that "such cooperative agreements shall not be construed to dilute or diminish the division's sole and exclusive authority as established in this section."

This is the starkest form of "regulatory capture." The agreement with Ohio is broken because the regulated industry owns the regulators with no enforcement by either USEPA or the OEPA.

Thus, ODNR has plenary authority over disposal of oil and gas drilling wastes. Such wastes are disposed of in Ohio, amounting to millions of barrels per year, and consigned to hundreds of injection wells and millions of tons of solidified radioactive material dumped into sanitary landfills as NORM. Several other statutory changes discussed *infra* have facilitated the assignment of exclusive authority over oil and gas industry waste disposal to the ODNR, thus cheapening disposal while simultaneously creating a threat to public health of unimaginable proportions.

The Clean Water Act protects 49 of the 50 states from radioactive waste liquids. Ohio is the one unprotected state. Ohio's omnibus, 2000+ page biannual state budgetary act in 2013 (know as H.B. 59) demonstrates how the governor, his political appointees, and the purchased legislature accomplished this. In this bill, the definitions of TENORM (technologically-enhanced naturally-occurring radioactive material), and NORM (naturally-occurring radioactive material), were dramatically altered to subsume what was formerly TENORM into NORM, by redefining "drill cuttings" as NORM. The new language appears below:

> (W) "Naturally occurring radioactive material" means material that contains any nuclide that is radioactive in its natural physical state. "Naturally occurring radioactive material" does not include source material, byproduct material, or special nuclear material.
> (X) "Technologically enhanced naturally occurring radioactive material" means naturally occurring radioactive material with radio-nuclide concentrations that are increased by or as a result of past or present human activities. "Technologically enhanced naturally occurring radioactive material" *does not include drill cuttings*, natural background radiation,
> byproduct material, or source material.
> (Y) "Drill cuttings" means the soil, rock fragments, and pulverized material that are removed from a borehole and that may include a *de minimi* amount of fluid that results from a drilling process.

O.R.C. § 3748.01 (Emphasis added).

While H.B. left it to the OEPA to implement regulations over the redefined and diminished TENORM, *it left to the exclusive discretion of the oil and gas driller the determination of whether TENORM is even present:*

> (A) With regard to material that results from the construction, operation, or plugging of a horizontal well, all of the following apply:
> > (1) Except as provided in division (A)(2) of this section, *the owner shall determine the concentration of radium-226 and of radium-228 in representative samples of the material if the material is technologically enhanced naturally occurring radioactive material.* The owner shall provide for the collection and analysis of the representative samples of the material. The collection and analysis of the representative samples shall be performed in accordance with requirements approved by the chief of the division of oil and gas resources management.

O.R.C. § 1509.074. (Emphasis added).

The question of who determines whether "the material is technologically enhanced naturally-occurring radioactive material" in the above statute is left to the industry to decide. Only when the

driller, the typical "owner" of the drilling wastes, suspects that they may contain TENORM, does he or she have to then determine the radium concentration. There is no requirement for the routine scrutiny of all drilling wastes for a determination of levels of radioactivity; they are identified as TENORM only according to the conscience of the driller. There is no record kept of this decision or whether the driller has even considered whether the waste contains TENORM. Indeed, even the test results are not required to be divulged.

The authors of the Clean Water Act in the 1960s and 1970s would be appalled if told that only the polluting factory could determine what would be measured from its effluent. USEPA Administrators Ruckelshaus, Muskie and others never imagined USEPA to be relegated to the role of subservient helper after industry had decided to label its own waste as hazardous or not.

Separately, Ohio's landfill statute was altered in the 2013 passage of H.B. 59 by the addition of the following sections. The change allows downblending of TENORM with dry wastes so that it falls below the Federal 5 pCi/l concentration limit under Ohio law. O.R.C. § 3734.02 now states:

> "(P)(2) The owner or operator of a solid waste facility shall not accept for transfer or disposal technologically enhanced naturally occurring radioactive material if that material contains or is contaminated with radium-226, radium-228, or any combination of radium-226 and radium-228 at concentrations equal to or greater than five pico-curies per gram above natural background.
>
> (P)(3) The owner or operator of a solid waste facility may receive and process for purposes other than transfer or disposal technologically enhanced naturally occurring radioactive material that contains or is contaminated with radium-226, radium-228, or any combination of radium-226 and radium-228 at concentrations equal to or greater than five pico-curies per gram above natural background, . . ."

Under this provision, liquid radioactive fracking waste identified as TENORM may be mixed with dirt and other dry material to create a "solid waste" which appears to have a radiation concentration which falls below a threshold allowing it to be handled as NORM. This seemingly innocuous classification allows for these harmful wastes to be landfill-disposed. The trouble is, rainwater or groundwater will inevitably run through the landfill, reconcentrating the radiation above the Federal 5 pCi/l limit. During seepage to the bottom of the landfill, this leachate becomes more likely to leak from the landfill into groundwater or surface water, and/or become an additional radioactive waste disposal problem.

Law-writing at this level of absurdity defies physics, logic, and morality. Liquefied TENORM is momentarily made into NORM only to become TENORM again under this scheme. But it is deregulated at this one stage (when it is "diluted" and not yet re-concentrated in leachate) in order to avoid regulating TENORM as TENORM, which requires management and disposal at a considerably greater cost than the charges at a sanitary landfill. Radium is water-soluble, which makes it quite mobile, and the human body mistakes it as calcium and is deposited in bone tissue. The scientifically established health consequences of liquid disposal of radioactive waste are undeniable even by statehouse lobbyists. A more unethical and immoral plot to bolster industry profits through cheap disposal at enormous future public cost could barely be imagined. Yet it is Ohio's reality.

If anyone were to think that these legislative changes might be mere happenstance instead of a deliberate plan to subsidize a single influential industry at huge public cost, a cursory look at Ohio would prove them wrong. One need only consider how the Ohio General Assembly in H.B. 59 expanded the concept of "beneficial use" to remove any doubt that contaminated drilling wastes - now including drill cuttings - can be "re-used" as landfill capping material even though rejected by landfill operators for being contaminated by refined oil-based substances. This legislation allows the Ohio EPA director, Craig Butler, Governor Kasich's appointee and former right hand man, to make the beneficial use designation (since TENORM is left solely to the driller to identify):

> "O.R.C. § 3734.01. Definitions
>
> . . . (V) "Beneficial use" includes:
>
> . . . (2) With regard to material from a horizontal well that has come in contact with a refined oil-based substance and that is not technologically enhanced naturally occurring radioactive material, *to use the material in any manner authorized as a beneficial use in rules adopted by the director* under section 3734.125 of the Revised Code. [Wording added in 2013 is italicized.]
>
> O.R.C. § 3734.125. The director of environmental protection may adopt rules in accordance with Chapter 119. of the Revised Code establishing requirements governing the beneficial use of material from a horizontal well that has come in contact with a refined oil-based substance *and that is not technologically enhanced naturally occurring radioactive material.* "

To ensure the plot successfully serves the industry's intention to avoid all future liability, in H.B. 59, the Ohio General Assembly directed the Ohio Department of Health not to require maintenance by anyone of records on the receipt, use, storage, transfer and disposal of NORM in Ohio landfills. O.R.C. § 3748.04 states:

> "The director of health, in accordance with Chapter 119 of the Revised Code, shall adopt and may amend or rescind rules doing all of the following:
>
> > . . . (B)(3) Requiring the maintenance of records on the receipt, use, storage, transfer, and disposal of radioactive material, *including technologically enhanced naturally occurring radioactive material*, and on the radiological safety aspects of the use and maintenance of radiation-generating equipment. *The rules adopted under division (B)(3) of this section shall not require maintenance of records regarding naturally occurring radioactive material".*

The US EPA is familiar with "willful blindness" by executives who have been prosecuted for years by EPA's criminal investigators, but here, the lobbyists command a state agency named "Health" to be willfully blind to harmful radiation data, which in 49 other states is deemed significant for the protection of public health.

Stunningly, the Ohio General Assembly in H.B. 59 relieved waste disposal activities in existence before January 1, 2014 from the need to obtain a formal permit from the Ohio EPA. O.R.C. § 1509.227 states:

> "Notwithstanding division (B)(2)(a)4 of section 1509.22 of the Revised Code, on and after

> January 1, 2014, a person that is in operation prior to the date may store, recycle, treat, process, or dispose of in this state brine or other waste substances associated with the exploration, development, well stimulation, production operations, or plugging of oil and gas resources without an order or a permit issued under section 1509.06, 1509.21, or 1509.22 of the Revised Code or rules adopted under any of those sections, provided that the chief of the division of oil and gas resources management has approved the operation and *any required permit or other form of authorization has been issued by the environmental protection agency*." [Wording added in 2013 is italicized.]

The statute is equivocal on whether a non-permit "authorization" may be obtained from the Ohio EPA. Permitting is a public process with certain guarantees of transparency and the opportunity for public comment. "Authorizations" are undefined but suggest a means of *ad hoc* bypassing of formal NPDES permits.

Further, (B)(2)(a) states: "On and after January 1, 2014, no person shall store, recycle, treat, process, or dispose of in this state brine or other waste substances associated with the exploration, development, well stimulation, production operations, or plugging of oil and gas resources without an order or a permit issued under this section or section 1509.06 or 1509.21 of the Revised Code or rules adopted under any of those sections. For purposes of division (B)(2)(a) of this section, a permit or other form of authorization issued by another agency of the state or a political subdivision of the state shall not be considered a permit or order issued by the chief of the division of oil and gas resources management under this chapter."

<u>To summarize the plight of drilling waste disposal in Ohio:</u>

(1) US EPA's Memorandum of Agreement under the Clean Water Act with the Ohio Environmental Protection Agency is non-compliant. Residents are being exposed to unregulated dangers and the Agreement should be withdrawn. The Ohio EPA has been deliberately stripped by the state legislature of all authority to protect the environment due to the industry's lobbying in the state legislature to remove OEPA authority. Regulatory capture by a key class of wealthy polluters has displaced the conditions for Region V's acceptance of the Memorandum of Agreement, so 40 C.F.R. § 123.63 has been triggered.

(2) Ohio's Department of Natural Resources is now the lead agency for the regulation of all aspects of hydraulic fracturing, and the Ohio EPA has been deposed from its legal and statutory responsibilities to enforce the CWA on all oil and gas waste disposal facilities that serve the hydraulic fracking industry.

(3) Radwaste protection is non-existent. The definition of TENORM has been gutted; drill cuttings, which are the predominant type of TENORM-laden fracking waste, have been legislated into NORM using political smoke and mirrors. Legally, the presumption is that fracking waste is NORM unless the Driller says otherwise. The Driller gets to decide whether it has produced NORM or TENORM from the drilling process, and there is no provision for any regulatory review of that determination; governmental regulation, much less, verifiable science, has been excluded. The difference in cost for disposal of NORM vs. TENORM is enormous and is now allowed to be the deciding factor for the drilling industry concerned with how its waste is classified for disposal. NORM wastes contaminated with refined oil-based substances from horizontal drilling now may be disposed of as a "beneficial use" which is defined by the whim of the Ohio EPA Director.

(4) Ohio's leaking old landfills can now become sites of new contamination from radioactive drill

cuttings which, through the magic of legislated re-labeling, are "useful" because of their relatively high clay content for "fill," landfill lining, or capping material. What would have been classified as TENORM before the passage in 2013 of H.B. 59 may not be disposed of on the surface of land with zero landfill protections. The disposition of the newly redefined NORM to include drill cuttings has been made invisible; the General Assembly has ordered that the Ohio Department of Health shall not require portal-to-disposition records for NORM. Liquefied TENORM, such as reused fracking fluid which has acquired concentrations of radiation, may be mixed with dry material to create a "solid waste" to obtain a radiation concentration which falls below a threshold, and thence be disposed of as NORM, with no regard for its later re-concentration at TENORM levels of radiation in leachate, irrespective of the potential for leakage from landfills into the outer environment.

(5) An adjudicated hearing under 40 C.F.R. § 123.63 is justified because the Memorandum of Agreement system which delegated "permitting" authority and "permits" is now nonexistent, owing to the efforts of the gas lobbyists. The Ohio EPA now may substitute undefined *ad hoc* "authorizations" not subject to public comment or procedural regularity for formerly required permits issued governing oil and gas waste treatment, blending and disposal facilities.

II. *ODNR's Administration of Fracking Waste Treatment and Disposal Facilities*

Against the backdrop of gutted CWA powers and massive deregulation in Ohio, a plethora of oil and gas waste disposal and downblending plants and facilities have been licensed by the Ohio Department of Natural Resources with no vetting and almost zero compliance with federal or state air and water quality requirements.

With this Petition, we have provided a disk containing the applications and "Chief's Orders" for 23 different private-sector facilities and projects involving treatment, handling and/or disposal of fracking wastes. "Chief's Orders" are a kind of interlocutory permit to operate which are being issued by the ODNR *before* agency has even promulgated regulations it was ordered to compile by the June 2013 passage of H.B. 59. The temporary authorizations issued for the 23 toxic and radioactive fracking waste facilities include open pit fracking waste storage, water separation and recycling systems, radioactive "downblending" facilities, and unregulated and unmonitored dumps. Authorizations included EnerGreen, a valley-sized fill, waste disposal scheme in Belmont County, which will be a 200-acre landfill involving the piling of a mixture of coal ash and fracking waste up to 100 feet deep on bare land, without liners, monitoring wells, periodic chemical or radiological analysis, in a creek bottom. FWAP has challenged that dump plan before Ohio's Oil and Gas Commission.

Such deregulated "Chief's Order" was also issued to an active radioactive fracking waste processing operation in an old industrial park in Youngstown, a few hundred feet from neighborhoods and the Mahoning River, which will downblend TENORM to disposable, NORM levels of radiation. IWC/Ground Tech holds a December 2013 Ohio Department of Health radiological materials handling license, which besides the handling of radium and other isotopes found in fracking waste, also allows the company to use and maintain inventories of plutonium, enriched uranium, and depleted uranium in central Youngstown. The details of the measurement and testing for radioactivity, and the processing operations at the facility all are shrouded in proprietary secrecy. The potential interplay of Atomic Energy Act-regulated materials with fracking radiation has not been explained to the public. While workers at Ground Tech will be

dosimetrically tracked, soil, water and air discharges to people living in the surrounding neighborhoods, sadly, will not be.

Another Chief's Order was issued for a large waste processing and injection facility next to the Tuscarawas River in Tuscarawas County, which is not obliged to submit to any Ohio EPA regulation. There are many other facilities, most of which involve uses of water, some of which are for washing fracking waste tanks and storage equipment. None of them are being required by ODNR, the statutorily designated lead state agency for drilling waste disposal, to obtain NPDES permits, although at least one may have voluntarily sought an NPDES permit. No records are being required by ODNR of the disposal pathways for the waste.

Yet another Chief's Order was issued to allow the operation of Enviro-Tank, a waste cleaning and handling plant near Belpre, Ohio, which exploded into a raging fire which injured three workers, one of them critically burned, in June 2014.

Remarkably, the boilerplate "Chief's Orders" being issued do not even contain a term requiring the respective applicants to conform their operations to the terms and conditions of operation they outline in their applications for the orders. These "orders" are being secretly issued, with no routine public notification. The public has learned of the existence of these orders only by dint of the relentless pursuit of public records requests. It also appears that the ODNR deliberately delays the provision of requested records on specific issuances of Chief's Orders until the 30-day statutory period in which to file a challenge before the Ohio Oil and Gas Commission has expired. By maintaining records secrecy until an unusually knowledgeable member of the public makes a targeted request, the Chief's Orders remain a closely guarded secret from the communities that will be affected. Even with records released from the targeted request, ODNR still acts to make its decisions unchallengeable despite public outcry.

On June 4, 2014, FWAP sent a written demand letter (copy attached) to the Director of the ODNR, requesting that the practice of issuing secretive Chief's Orders be suspended until regulations have been promulgated as required by statute. The Chief's Orders which have been issued are arguably unlawful because a statute requires regulations to be in place before Chief's Orders may be made.

These waste treatment and disposal facilities are being authorized to accommodate the huge amount of solid, semi-solid and liquid waste that is being generated by fracking, and much of it is coming to Ohio from other states which do not want the waste and which do not make such easy accommodations for cheap and convenient disposal. FWAP has formally notified the county commissioners of the counties in which these hazardous waste facilities are approved to operate, because the ODNR has not even troubled itself to notify local governments so that emergency responders might be aware of the existence of, and prepared for technologically complicated fires, toxic releases or other emergent events this new industry might cause in their communities.

The USEPA Memorandum of Agreement for CWA enforcement with Ohio EPA, Ms. McCarthy, is no longer a valid contract. We urgently request the convening of the 40 C.F.R. § 123.63 adjudication to address this.

Because "regulatory capture" is so extreme in Ohio, and because ODNR has routinized the violation of the Clean Water Act, and the Ohio EPA has abdicated its responsibility over drilling waste processors, we formally request along with the USEPA announcement of a § 123.63 adjudication that it impose a cease-and-desist order upon Ohio for all CWA actions by ODNR until further notice. We submit that the changed legal and regulatory environment in Ohio has destroyed the former

assurances given the USEPA Administrator such that there can be no confidence that Ohio can ensure compliance with federal antipollution laws. See 33 U.S.C. §§ 1318, 1342.

We await your immediate response to this crisis. Thank you.

Sincerely,

Leatra Harper

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cc: Ms. Susan Hedman, USEPA Region V