

**STATE OF OHIO
BEFORE THE OIL AND GAS COMMISSION**

Frack Free Mahoning, an unincorporated)
association, on behalf of its members)
525 Glacierview Drive)
Youngstown, Ohio 44509,)

Appellant,)

Appeal No. _____)

-vs-)

Richard K. Simmers, Chief)
Division of Oil and Gas)
Resources Management)
Ohio Department of Natural Resources)
2045 Morse Road - Bldg. F-2)
Columbus, OH 43229-6693,)

Appellee.)

NOTICE OF APPEAL

Notice is hereby given that the Appellant in this action, Frack Free Mahoning, an unincorporated association not-for-profit (hereinafter referred to as “FFM”), on behalf of its adversely affected and aggrieved members, including but not limited to Valeria Goncalves of Funston Street in Youngstown, Ohio 44510, Hattie Wilkins of Fairmont Avenue in Youngstown, Ohio 44510, and Cheryl Mshar of Donald Avenue in Youngstown, Ohio 44509, hereby appeals to the Oil and Gas Commission of the State of Ohio (hereinafter “Commission”) from the issuance of Chief’s Order No. 2014-52 (“Chief’s Order) approved by Appellee Richard J. Simmers, Chief of the Division of Oil and Gas Resources Management (“Chief”) of the Ohio Department of Natural

Resources (“ODNR”) dated March 6, 2014. The Order appealed from permits Industrial Waste Control/Ground Tech., Inc., (“Ground Tech”) to operate a facility located at 240 Sinter Court, Youngstown, Ohio 44510 known as the “Ground Tech Facility” (“facility”), at which there will be radiological waste characterization, tank cleaning and decontamination, waste solidification, brine storage, and preparation of drilling wastes for disposal. The radiological waste characterization and handling at the Ground Tech Facility will be performed by Austin Master Services, LLC, which holds License for Radioactive Material No. 03219 510000 from the Ohio Department of Health. See “Application to Operate a Facility,” Exhibit A annexed hereto, incorporated fully herein by reference as though rewritten.

A copy of the Chief’s Order from which appeal is taken is annexed hereto as “Exhibit B” and is incorporated fully herein by reference as though rewritten.

The named individual members of FFM all own or rent residential real estate, reside and/or conduct business and recreate in proximity to the IWC/Ground Tech facility. A map depicting the proximity of the named individuals’ residences to the Ground Tech facility is attached as “Exhibit C” hereto, and is incorporated fully herein by reference as though rewritten. If the facility is allowed to be built and to function as stated in the Application, FFM’s members anticipate there will be pollution of the air they breathe and the water they drink and use for household purposes. The individual members of FFM believe that they can, and will, be physically harmed by even routine pollutants and radiation being released from the Ground Tech facility into air and water, with consequent physical effects on their families and themselves, and upon the physical environment of central Youngstown, if the facility is allowed to proceed with operations.

FFM has organizational standing to pursue this appeal which derives from the standing of the individually-named FFM members.

STATEMENT OF FACTS FROM WHICH THIS APPEAL ARISES

IWC/Ground Tech filed an application with the Chief dated February 7, 2014, requesting authorization from ODNR pursuant to O.R.C. § 1509.22 to operate a facility for the storage, treatment and processing of brine, drilling mud, drill cuttings, and for the cleaning of tank bottoms. The facility is to be located at 240 Sinter Court, Youngstown, Ohio 44510. The ODNR Chief signed the Chief's Order on March 5, 2014 and issued it on March 6, 2014, granting the application without any substantial restrictions.

On February 11, 2014, a legal researcher for Appellant named Teresa Mills made, via electronic mail, a formal written request under § 149.43 of the Ohio Revised Code for the names and locations of all facilities that have applied for and/or received temporary authorization through a Chief's Order to store, recycle, treat, process or dispose of brine or other waste substances in Ohio. Ultimately a total of six (6) such facilities, including the IWC/Ground Tech facility, were disclosed by ODNR. On March 3, 2014, Ms. Kelly Rice of ODNR responded to Mills that the information would be compiled onto a compact disk due to the size of some of the applications. On March 10, 2014, Mills emailed Rice that she had not received the disk. On March 11, 2014, Rice emailed Mills that the disk had been mailed out the previous day. On March 28, 2014, Mills emailed Rice that she had received the disk but that it did not include any of the Chief's Orders for any application. On March 5, 2014, Mills emailed Rice, asking for confirmation that Rice was going to provide the Chief's Orders. On March 9, 2014, Rice emailed Mills to say that she had put the disk in the mail. Mills received the disk containing the

six Chief's orders, including the IWC/Ground Tech order, on March 10, 2014.

The 30-day period prescribed by O.R.C. § 1509.36 to initiate an appeal expired days before a copy of the March 6 Chief's Order for IWC/Ground Tech was provided to Teresa Mills on April 10, 2014 in response to Mills' public records request of February 11, 2014. However, the public's 30-day opportunity to initiate an appeal began on April 10, 2014 because of ODNR's misleading representations and acts in delaying the public availability of Exhibits A and B.

Under principles of equitable tolling, this Appeal should be deemed to be timely initiated.

Upon information and belief, there is no provision in Ohio law that obligates the Chief or ODNR to disclose the receipt of any application or issuance of any order under O.R.C. § 1509.22 by a means calculated to reserve to any member of the Ohio public the right of appeal to the Ohio Oil & Gas Commission during the first 30 days after a permit is issued to the applicant. The entire permitting process may occur in secret if the Chief and ODNR wish for it to be. The Chief and ODNR are accorded unfettered discretion to decide whether, or if, they will provide information about an application or ODNR to the public, except when a request is made under Ohio's Public Records Act, O.R.C. § 149.43. But the Public Records Act does not require the Chief and ODNR to provide requested information within a specific time frame. For the public to learn of the pendency of applications for permits, or the granting of permits to operate, fracking waste disposal facilities, a constant stream of precise and targeted Public Records Act requests must perpetually be launched by citizens in order to learn what secret approvals their government is granting for processes and projects involving inherently-dangerous materials and substances.

PURPOSE AND FUNCTIONS OF THE IWC/GROUND TECH FACILITY

The facility will be used to perform radiological waste characterization using *in situ*

counting equipment; waste treatment/stabilization and down-blending; pressure washing; tank cleaning and decontamination, and containerized waste storage.

Ground Tech will perform fracking waste stabilization in a bermed unit, mixing it with a nonhazardous material and mechanically agitating it to mix it together. Waste will be shipped from the plant by trucks carrying open-topped rolloff containers. A range of tank containers used in the oil and gas industry will be washed with high-pressure spray devices, and the liquified waste runoff, which is expected to be radioactive, will be vacuumed up. “Temporary onsite storage of containerized waste” will accumulate outside the plant on a gravel lot.

The Ohio Department of Health License for Radioactive Material which is part of the application authorizes Austin Master Services, LLC, to receive, acquire, possess and transfer an array of radioactive materials at the 240 Sinter Court site, including Plutonium, Uranium-233, enriched Uranium-235, depleted Uranium, and “radioactive materials with atomic numbers 1 to 103,” as well as Radium-226 and Radium-228, which are present in fracking wastes. Some of these radioactive elements are used in the manufacturing or assembly of nuclear weapons of mass destruction, and there is no explanation of whether and why these materials will be present at the Ground Tech plant, nor what chemicals will be used to control or stabilize them, nor what processes and quantities of non-fracking radioactive material will be involved in activities at the plant.

The physical properties and qualities of the waste products which will be handled at the facility; their chemical composition and unknown isotopic stability; the unknown presence or absence of other chemicals and contaminants in the received wastes; the unknown presence or absence of other radiological treatment and storage processes on the premises at 240 Sinter

Court, which may pose additional concerns for facility operations; and the inherently toxic and health-threatening dangers of the chemical and radiological constituents of fracking waste, as sporadically revealed in IWC/Ground Tech's application, suggest that dangerous processes may be undertaken at the plant and dangerous products and byproducts will be trucked through the central city of Youngstown for processing and disposal.

The IWC/Ground Tech application predicts that the facility will store, treat or process up to 50,000 tons of fracking wastes annually, but does not identify the quantities which will be drilling wastes, muds or other material and what other materials will be combined as and for treatment. Further, there is no disclosure of the activities contemplated involving other, non-fracking radioactive wastes mentioned on the Austin Master Services ODH permit.

The IWC/Ground Tech application contains no disclosure or discussion of whether there are facility features or structures which will release, or contain, emissions of dangerous substances to air or water at the 240 Sinter Court, Youngstown site. Even if the facility is confined only to processing fracking waste, there are likely to be emissions of significant quantities of volatile organic chemicals (VOCs) and polyaromatic hydrocarbons (PAHs) which are injurious to human health, unknown chemicals used in oil and gas field operations, radon gas, and other radioactive or toxic substances that will adversely affect persons in the vicinity of the facility and which are not delineated in the application and are not restricted in any manner by the terms of the Chief's Order.

Following processing, radioactive materials will be transported in bulk from the facility site to unknown locations for disposition as dictated by Ground Tech customers. There is no requirement in the Chief's Order to identify and record the locations where these materials will

be disposed of, no requirements concerning worker safety procedures. There are no requirements or standards in the Chief's Order for monitoring or oversight of the radioactive and toxic materials to determine or restrict environmental contamination and harm to human health of the public and of workers associated with the processing or end-use disposition of the end products at Ground Tech.

While the Chief's order asserts that the facility "shall conduct all operations in compliance with R.C. Chapter 1509 and Ohio Adm. Code Chapter 1501:9," there are no requirements governing facilities such as IWC/Ground Tech's to be found in those sources of law. Those sources also provide no criterion governing the Chief's approval of the order appealed by this Notice. Further, while the IWC/Ground Tech application (Exhibit A) is the only officially-styled record describing the facility, the Chief's Order (Exhibit B) does not require binding legal compliance by IWC/Ground Tech with even the few specifics mentioned in it, such as the applicant's own statements that the facility will provide dosimetry for its workers, accept only oil and gas drilling-related radioactive TENORM waste, and that the applicant or its employees or contractors will actually perform a hierarchy of tests to determine the most accurate data on the types and levels of radioactivity present in wastes at the facility.

GROUND FOR APPEAL

The Chief's issuance of the order authorizing the operations of the IWC/Ground Tech facility was unreasonable and unlawful for a number of reasons, including, but not limited to, the following grounds for appeal. Appellant reserves the right to amend or supplement the grounds for appeal as further information becomes available to it.

1. The Chief unlawfully and unreasonably approved the order by failing to incorporate

any enforceable restrictions for the protection of the public health and the environment, in violation of the requirements of Ohio law which prohibit administrative agencies from acting in an arbitrary and capricious manner.

2. The Chief unlawfully and unreasonably approved the order by utilizing general, but unknown and unspecified, standards for approval that amounted to “rules” as defined in Chapter 119 of the Ohio Revised Code but which were neither publicized nor adopted pursuant to the required procedural and substantive safeguards for rules promulgation under Ohio law.

3. The Chief unlawfully and unreasonably approved the order without any minimum direction, criteria or standards from the Ohio General Assembly, and thereby unlawfully exercised legislative power in violation of the constitutional doctrine of separation of powers.

4. The Chief acted unlawfully and unreasonably in approving the order by creating a scheme to circumvent the statutorily-created program for the regulation of waste materials created in Chapters 3734 of the Ohio Revised Code and administered by the Ohio Environmental Protection Agency, and Chapter 3748 and administered by the Ohio Department of Health.

5. The Chief unlawfully and unreasonably approved the order by failing to incorporate into it enforceable requirements for the operation of the facility or which would restrict the potential for the final products and byproducts of the facility’s treatment process to contaminate the environment or endanger human health, including any requirement that would make any of IWC/Ground Tech’s representations, as stated in Exhibit A, enforceable.

6. The Chief unlawfully and unreasonably approved the order as a “temporary approval” by failing to specify a date when the open authority of the order would terminate in the event that the Chief does not adopt any regulations governing such waste management facilities.

7. The Chief unlawfully and unreasonably approved the Chief's Order absent any regulatory criteria. It refers on its face to being temporary in nature, pending promulgation and effectiveness of rules pursuant to O.R.C. § 1509.22(C). As a result, the Chief could not reasonably and lawfully find that a proper basis exists for the conclusion that the treatment facility would not result in an adverse effect on public health or safety by means of contamination of groundwater quality protected by O.R.C. Chapter 1509 and the federal Safe Drinking Water Act.

8. The Chief unlawfully and unreasonably approved the Chief's Order absent any regulatory criteria. It refers on its face to being temporary in nature, pending promulgation and effectiveness of rules pursuant to O.R.C. § 1509.22(C). As a result, the Chief could not reasonably and lawfully find that a proper basis exists for the conclusion that the treatment facility would not result in an adverse effect on public health or safety by means of contamination of air quality in violation of Ohio and federal law, in the vicinity of the disposal facility.

9. The Chief unlawfully and unreasonably approved the Chief's Order by creating *ad hoc* regulatory criteria without promulgated and effective rules pursuant to O.R.C. § 1509.22(C). As a result, the Chief could not reasonably and lawfully find that a proper basis exists for the conclusion that the treatment facility would not result in an adverse effect on public health or safety by means of contamination to groundwater quality and air quality protected by O.R.C. Chapter 1509, the federal Safe Drinking Water Act, and Ohio and federal laws governing air quality in the region of the disposal facility.

10. The Chief unlawfully and unreasonably approved the Chief's Order by failing to require the establishment of enforceable treatment and containment standards to maintain water quality, substantially in the form of a National Pollutant Discharge Elimination System (NPDES)

permit under the federal Clean Water Act. Consequently, the Chief could not reasonably and lawfully find that a proper basis exists for the conclusion that the treatment facility would not result in an adverse effect on public health and safety by means of contamination to groundwater quality protected by O.R.C. Chapter 1509.

11. The proposed facility will dispose of waste materials which are classified or classifiable as “solid waste” or “hazardous waste” under O.R.C. Chapter 3734, and/or which include naturally-occurring radioactive material (NORM) or technologically-enhanced naturally-occurring radioactive material (TENORM). The facility represents an attempt to subvert the requirements of state and federal waste disposal and landfill laws and regulations, including but not limited to O.R.C. Chapter 3734 and its definitions of waste, hazardous waste, and state and federal law definitions of TENORM.

12. By approving the Chief’s Order without applying any regulatory criteria for TENORM (because ODNR has not implemented any formal rules for the same), ODNR has suborned IWC/Ground Tech and Austin Master Services to violate the terms of the ODH License for Radioactive Material Permit No. 03219 510000. Ohio Administrative Code § 3701:1-43-07 states:

(A) Persons who receive, possess, use, process, transfer, distribute, or dispose of TENORM are exempt from the requirements of this chapter with respect to any combination of radium-226 and radium-228 if the materials contain, or are contaminated at, concentrations less than one hundred eighty-five becquerel per kilogram (five picocuries per gram) excluding natural background. The progeny of the exempt TENORM radium-226 and radium-228 are also exempt. Manufacture of consumer or retail products at concentrations greater than one hundred eighty-five becquerel per kilogram (five picocuries per gram) is regulated pursuant to paragraph (C) of rule 3701:1-43-10 and rule 3701:1-43-11 of the Administrative Code.

The IWC/Ground Tech application states, in contrast to the ODH regulation, that the company

will consider itself free to dispose of fracking waste in regular landfills if it registers 6.99 pCi/g, or lower concentrations, of Ra-226 and Ra-228.

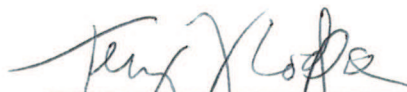
13. By § 1509.02, ODNR has jurisdiction limited to regulating “all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells *within this state*, including site construction and restoration, permitting related to those activities, and the disposal of wastes from those wells.” The application does not disclose how much out-of-state waste will be accepted at the facility, nor what regulations for its characterization, treatment and disposal will govern. By blanket approval of all wastes accepted at the IWC/Ground Tech facility, ODNR has exceeded the limits of its authority.

REQUESTED REMEDY

Based upon the foregoing alleged violations of regulations and law, Appellants pray the Oil and Gas Commission find that the Chief’s Order No. 2014-52 is unlawful and unreasonable and should be vacated, and that this matter be remanded to the ODNR Chief for further action as required by and in compliance with law, together with such other and further relief as may be deemed proper in the premises.

Dated: April 22, 2014

Respectfully submitted,



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