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June 1, 2012

Judges, Conservancy Court
Muskingum Watershed Conservancy District
Tuscarawas County Courthouse
101 E. High Ave.
New Philadelphia, OH 44663
Via fax to Judge Edward O'Farrell (330-602-8811)
and MWCD (330-364-4161)

RE: Public objections to MWCD plans to sell water to hydraulic fracking industry

To the Honorable Judges of the Conservancy Court:

I write as counsel for Mr. and Mrs. Steven Jansto (Ms. Leatra Harper) who are property owners at 16555 Heron Rd., Senecaville, OH 43780 and the grassroots citizen organization, Southeast Ohio Alliance to Save Our Water, which is comprised of many of the Janstos' fellow property owners within the Muskingum Watershed Conservancy District. On behalf of the Janstos and SOASOW, we respectfully demand that the Court decline to approve the gross sales of millions of gallons of water to oil and gas drilling firms to enable hydraulic fracturing of eastern Ohio shale layers for natural gas. We hereby inform you of many public concerns which have been ignored, trivialized or down-played by the MWCD staff and appointed board.

We view any formal policy votes and decisions taken by the Conservancy Court on June 2, 2012 as administrative licensing proceedings and related rulings under O.R.C. Chapter 119 which are being made on behalf of hydraulic fracturing gas ("fracking") drilling firms. These private companies will be beneficiaries of advantageous water takings licenses from the Court's votes and decisions.

Respectfully, the administrative record does not support any decisions which the Court may make to grant these large-volume water licenses, because there has been a complete lack of public notice and opportunity for public objection. Moreover, there have been no administrative rules or standards promulgated to establish the parameters of such sales. There have been no analyses undertaken to ensure that the remaining District, public and private property resources within the District will be protected. There are unexamined "takings" issues. No environmental or species studies have been performed which consider the scope and implications of long-term, massive water withdrawals, which will be permanent removals of millions of gallons of water from

the human environment.

"Permanent" removal means that when the MWCD water assets are removed containing well waste contamination in the form of bromine, radioactive materials and other poisonous materials, it cannot safely be returned to groundwater or surface water, a principle well-recognized by public water works operators and federal and state water quality officials. Thus, the asset is literally forever removed from the District and will eventually be pumped under high pressure into later-sealed underground injection wells after removal from the gas well. The asset is lost to the District (not to mention humanity for the rest of time), so the alienation of the asset is permanent, not a transitory part of the water evaporation and rainwater recharge cycle.

For these reasons, my clients as property owners who are subject to the District's assessments, and as citizens protected by federal and state laws, demand that all licenses for sales of water, and actual sales of water, be withheld by the District (and by this Court) until there is full legal compliance with the many obligations that attend so momentous a policy determination.

A. O.R.C. §6101.24 Deficiencies

If passed, the requested water removal licenses would violate §6101.24 in several respects.

1. The Commodified Water Does Not Result From District Improvements

There is no evidence that the water which would be sold results from improvements "made by the district" which have made possible "a greater, better, or more convenient use of, or benefit from, the waters of the district for any purpose." Consequently, "the right of such greater, better, or more convenient use of, or benefit from, such waters" has ***not*** become "the property of the district" to be "leased, sold, or assigned by the district in return for reasonable compensation." The volume of pooled water behind District dams is being trapped currently and the content remains subject to the same federal manuals and regulatory operating procedures as it did in the mid-1930's. The commodity remains essentially unchanged, except for increased draws over the past 80 years as a result of industrial, agricultural and residential development. There is no additional or surplus water commodity which can be identified for sale.

2. No Consultation With Assessed District Water Users

There is no evidence of compliance with the §6101.24 requirement of consultation with those in the District who are assessed for MWCD's operations, quoted below:

> "If a district has as one of its purposes the provision of water supply, the persons and public corporations assessed for the cost of building or acquiring properties, works, and improvements for such purpose shall have priority in the purchase of the

waters made available thereby, and *no sale, lease, or assignment shall be made under this section which will deprive any such person or public corporation without his or its consent, of the right to purchase and use a share of such water supply proportionate to the assessments imposed upon him or it for water supply purposes."*

No notice or consent has been given or requested.

3. No Administrative Standards For Mass Water Sales Exist

The MWCD board has not promulgated standards for mass water sales. Section 6101.24 states that "The board may make regulations for the determination and greater, better, or more convenient use of, or benefit from, the waters of the district and for the sale of water made available by the works and improvements built or acquired by the district for the purpose of water supply...." Without regulations governing manner of withdrawals, volumes per withdrawal, measurement and recording of withdrawals and coordination/prioritization of withdrawals, for example, there are no parameters which pertain to the licenses, except those which might be made on an *ad hoc* basis. Again, the record does not support issuance of the licenses.

4. Statutory Rate-Setting Procedure Has Been Ignored

The MWCD board is enjoined by §6101.24 to establish "reasonable" rates and make a formal report to this Court, which must then extend to the public the opportunity to know the rates, to object and thereafter to have a hearing if requested. This has not been done:

> "Upon the determination of any rate, *the board shall make a report of its determination to the court. The court shall thereupon cause notice by summons or publication to be given to the parties interested, stating that such a determination of rate has been made, that a hearing before the court will be had thereon on a certain day, and that objection may be made at such time to such determination of rates. A hearing may be had before the court and objections may be made in the same manner as in case of the appraisal of benefits.* Upon the final determination of the matter by the court, the determination of such rates of compensation are conclusive and binding for the term and under the conditions specified in the lease or other agreement."

The Conservancy District's managers have not convened a public meeting of the required board of appraisers and such board, if it exists, has evidently conducted no comparisons with water rates being charged to shale fracturing firms in Pennsvlvania, West Virginia, Michigan, North Dakota or other states with active fracturing drillers. There is no basis for determination of the rates proposed in the contracts which are being presented to the Court. This is arbitrary in the extreme, and when rules are adopted they should describe whether or not public bidding statutes may apply to the future purchases of these public assets.

B. Regulatory Takings Possibilities

There further might be a "takings" problem under state law associated with a sweeping water sales policy, given the lengthy (10- to 20-year) period of anticipated fracking activity and the projected numbers of wells to be developed in eastern Ohio (25,000+). The U.S. Army Corps of Engineers projects that lake levels might be permanently lowered by up to 8 feet in the affected lakes. Assessed property owners, including recreational facilities and shoreline business operators, have not been notified of the "taking" and consequent reduction of dollar value of their lakefront properties. This is a matter for which the statutory notice provision was intentionally adopted.

The governmental policy choice of semi-permanent and unpredictable reductions and fluctuations in lake levels from water withdrawals comprises a regulatory taking inasmuch as it explicitly elevates one use (water supply) over others such as the substantial recreation industry in the region. The resulting changes in economic value to property interests within the District boundaries could be considerable and appear not to have been considered at all by the MWCD or the staff in their narrow prioritization of water for the fracking industry to the detriment of other uses and interests in the watershed.

C. Possible Federal Law Violations

1. Federal Water Supply Act

The proposed water sales, in the aggregate, would be historically unprecedented in Ohio. Up to 12,000,000 gallons of water per day will be permitted to be withdrawn from at least ten (10) of the District's fourteen (14) lakes, with sales initially to be made from the three to six easternmost of the lakes. The total water sales may exceed ten billion (10,000,000,000) gallons per year.[1] As previously noted, the Corps of Engineers has projected lake level reductions by as much as 8 feet in the affected lakes.

The water withdrawn from MWCD lakes is slated to be injected into active fracture gas wells to facilite gas production, and some is expected to be left permanently *in situ* in shale deposits 1,000 or more feet beneath the Earth's surface. Fracking water which emerges as highly contaminated liquids from active wells will be injected into separate Class II underground injection wells. Criminal prosecutions have followed the disposal of fracking water directly into some bodies of surface water, so we must assume the fracking waste water will not be returned to the lakes and streams within the MWCD.

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[1] MWCD proposes withdrawals from at least 6 lakes, and possibly as many as 10, @ as much as 12,000,000 gallons/day.

One (1) lake X 200 days/year (conservatively) X 12,000,000 gpd = 2,400,000,000 gallons per year, from just 1 lake.

So 6 lakes X 2,400,000,000 = 14,400,000,000 gallons per year total. In light of the gross totals, 10,000,000,000 gallons per year of water withdrawals is a prudent conclusion about the aggregate possibility.

We believe that the federal Water Supply Act will be violated by the proposed sales policy, absent a specific act of the United States Congress. Section 301 of the Water Supply Act requires that:

> "Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage [for water supply] which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes shall be made only upon the approval of Congress . . . ."

43 U.S.C. §390b(d). Please consider the multi-billion gallon removal by the licensees for its cumulative effect during dry or wet seasons. Obviously, there would be major operational changes caused by massive water withdrawals from these reservoirs, which would seriously affect the purposes for which the dams were constructed, *i.e.*, not just flood control, but to maintain water supplies and to support downstream activities within the Muskingum basin, but also within the downstream navigable waters of the United States, in the Ohio and Mississippi River basins. These are "major operational changes," as the licensees will either be installing fixed-location improvements in the form of permanent pipelines, or will be using temporary pumps and hoses to withdraw water from the MWCD lake on a daily basis.

2. §216 of the River and Harbor and Flood Control Act of 1970

Section 216 (33 U.S.C. §2309a) authorizes the Corps to undertake an analysis of any water resources project to determine if the quality of the environment can be improved. It further empowers the Corps to then make changes to enhance and restore the environment from the harm that was caused by the project purpose if such enhancements are feasible and are deemed to be consistent with the authorized project purposes.

We expect the MWCD staff will claim, based on memos just revealed to the public this week, that lower level federal employees at the Huntington Corps offices have not yet found a need for a §216 study. When the appropriate level of federal officials understand the magnitude of a 10,000,000,000 gallon removal from a federally-financed dam project, we expect reversal of that tentative finding. At this time the Conservancy Court cannot rely on the tentative finding and should expect that there will be a §216 study performed.

MWCD and the Corps have a common interest in seeing that federal legal obligations are properly discharged. Without that analysis, MWCD's record of the administrative decision(s) cannot justify the new withdrawal policy. MWCD has a duty to coordinate with the Army Corps of Engineers on the content of the §216 analysis to ensure maximum possible disclosure for what must be a transparent, public decision: whether or not a volume water sales policy is established. It would be arbitrary and reversible error for the Conservancy Court to ignore the §216 obligations.

3. NEPA, Endangered Species Act, Lacey Act

Implicit within the undertaking of a §216 analysis are the requirements of compliance with other Federal statutes. These include the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4332 *et seq.*; the Endangered Species Act of 1973, 16 U.S.C. §§1531-1544, 87 Stat. 884; and the Lacey Act,18 U.S.C. §§42-43, 16 U.S.C. §§3371-3378. MWCD's responsibilities and liabilities vary under these statutes, but there is a duty on MWCD as a special unit of government to see that the appropriate consultations, studies and investigations are initiated and addressed. That has clearly not occurred.

D. Unconsidered Implications for Bondholder Rights

The Court's approval of the water sales policy threatens to compromise and devalue bondholders' rights specified in representations made in the underwriting package. There is an unidentified and likely substantial risk that the infrastructure and physical improvements achieved via MWCD's bond expenditures in recent years will be devalued as a direct consequence of water supply depletions from many of the lakes in the District. Security for the bonds may be jeopardized and the District's present as well as prospective bond rating will suffer as a result. The Conservancy Court must put a halt to any action that is or may be contrary to bondholders' rights.

E. Conclusion: Reject Mass Water Sales

The underlying determinations on whether and how to proceed with a massive, unprecedented water sales policy from District lakes has been conducted in semi-secrecy, and several key disclosures that MWCD owes to the public have not been made. We believe that there is a conscious design which connects the disturbing void of meaningful administrative regulations, agency inaction in the face of obvious federal legal requirements, and the decided impulse to keep secret until the last minute the very agenda and proposed resolutions for the June 2 meeting. With no public scrutiny, the District government purports to institute a long-term policy for drastic redirection of the District's prized asset without any serious on-the-record discussion, and only one or more unexplained, hasty votes. This is not the way that quality decisions in the public interest can be made and it will not be tolerated by my clients. They request, in the most urgent terms, that the Conservancy Court perform its statutory duties and deny the proposal for removal of water from District lakes.

Respectfully yours,

/s/ Terry J. Lodge
Terry Jonathan Lodge