Commercial/Industrial Floodplain Development Permit

Doddridge County, WV Floodplain Management

This permit has been issued to **MarkWest Liberty Midstream & Resources, LLC**, and is for the approved commercial and/or industrial development project associated with this permit that impacts the FEMA-designated floodplain and/or floodway of Doddridge County, WV, pursuant to the rules and regulations established by all applicable Federal, State and local laws and ordinances, including the Doddridge County Floodplain Ordinance. This permit must be posted at the site of work as to be clearly visible, and must remain posted during entirety of development.

Permit: #14-123 ~ MarkWest Liberty Midstream & Resources, LLC ~ Master Plan Extension & Modification

Date Approved: 04/10/2015 **Expires: 04/10/2016**

Issued to: MarkWest via CEC, Inc.

POC: Andrew Gullone
412-429-2324

Company Address: 333 Baldwin Road
Pittsburgh, PA 15205

Project Address: Grant District
Lat/Long: 39.276129N/80.686377W

Purpose of development: Master plan permit # 14-123 extension & modification project. Removal of detention ponds, placement of three underground storage facilities, and administration building construction.

Issued by: Edwin L. "Bo" Wriston, Doddridge County FPM (*or designee*)

_____ **Date: 04/10/2015**

For additional information regarding this permit, please contact Doddridge County Floodplain Manager at 304.873.2631, or via email at doddridgecountyfpm@gmail.com
118 East Court Street; West Union, WV 26456

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July 15, 2015

Via Hand Delivery
Doddridge County Commission

RE: Appeal of Floodplain Permit #14-123

Dear Sir or Madam,

Please be advised that I have been retained by the Doddridge County Watershed Association (the "DCWA") in regards to their appeal of the above-referenced floodplain permit (the "Mark West Permit"). As the DCWA made clear in its Notice of Appeal, and as this letter will reiterate, numerous rules and requirements mandated by the Doddridge County Floodplain Ordinance (the "Ordinance") were not followed when the Mark West Permit was issued (i.e., rules and requirements that are directly related to public health, safety, and welfare as well as rules and requirements that are directly related to the protection of Constitutional Due Process Rights of residents of Doddridge County). While there were numerous rules and requirements that were not followed, this letter will identify the more important rules and requirements that were not followed. This letter will also explain why the Doddridge County Commission aka the Doddridge County Floodplain Appeals Board ("DCC") must revoke the Mark West Permit (and also explain why the Mark West Permit is automatically void and should simply be declared as such). Additionally, this letter will explain why Mark West's allegations regarding the DCWA lacking "standing" to appeal the Mark West Permit are incorrect (i.e., the allegations contained in the complaint Mark West filed in its recently dismissed lawsuit against the DCC).

By way of background, I represented the Huff Family in the lawsuit that EQT Production Co. filed against the DCC in regards to the revocation of a certain floodplain permit that had been previously issued to EQT which would have allowed EQT to construct a natural gas well-site in a floodplain situated at the Huff Farm. As you are aware, the Doddridge County Circuit Court ultimately declined to issue an order mandating that the DCC return said permit to EQT. The Court refused to order the return of EQT's permit because the Ordinance was constitutionally defective. Specifically, said ordinance failed to provide adequate Due Process (i.e., notice and an opportunity to be heard) to persons living near the sites of planned floodplain

developments/construction. The Huffs and the Fosters were deprived of Due Process because they did not receive notice of EQT's permit application, did not receive notice of the Floodplain Administrator's issuance of said floodplain permit, and were not afforded an opportunity to object to the application for and issuance of said floodplain permit.

Following the Court's ruling, the DCC amended the Doddridge County Floodplain Ordinance so as to ensure that the Due Process rights of residents living near planned floodplain developments were protected (the Ordinance was also amended so that it was better equipped to deal with the development and construction of large scale natural gas facilities in floodplains and floodways). As you are all well aware, the amendment process was a long and drawn out process that involved numerous revisions as well as numerous comments provided by several interested persons (and several of those comments were provided by myself and my mother-in-law/client, Joye Huff). After a number of months a new Ordinance was enacted by the DCC. This is the Ordinance that governs the Mark West Permit.

As the persons tasked with enacting the present Ordinance, the DCC surely knows that the Ordinance contains specific rules and requirements that was must be followed prior to the issuance of a floodplain permit. The DCC also knows that failure to follow these rules and requirements can have serious repercussions. The most severe and obvious repercussion is inadvertently putting the public health, safety, and welfare by not following the rules and requirements of the Ordinance (e.g., allowing construction in prohibited areas and/or allowing impermissible alterations of the floodway. Another repercussion from the issuance of floodplain permits in violation of the Ordinance is the possibility of significant sanctions from FEMA. One such sanction is suspension from the National Flood Insurance Program, and said suspension would result in Doddridge County and residents of Doddridge County no longer having access to either flood insurance or the federal disaster relief funds typically provided to flood prone areas (i.e., Special Flood Hazard Areas)(note, attached hereto as Exhibit "A" is a news article describing the plight of a small Pennsylvania town that failed to enforce the requirements of its own floodplain ordinance). Obviously, said sanction would have a devastating impact on the residents of Doddridge if it were ever implemented. Moreover, failure to follow the rules and requirements of the Ordinance (especially the ones related to Due Process) may subject Doddridge County to a lawsuit (and as was seen by the EQT v. the DCC/Huff/Foster case, lawsuits can be extremely costly as well as time consuming).

I mention the above for the following purposes: (a) to explain that I do know what I am talking about when it comes to the Ordinance (I spent a year and a half litigating a lawsuit that was solely about the Ordinance, and I then spent several months thereafter participating in the amendment process), (b) to assure the DCC that the DCWA is 100% correct when it states that the Ordinance was not followed when the Mark West Permit was issued, and (c) to make clear that that it is vitally important that the Ordinance's rules and requirements are followed because otherwise the County's residents could be harmed, the County's residents could lose their ability to obtain flood insurance and flood related federal disaster funds, and the County itself could face, yet another, costly lawsuit.

Several rules and requirements were not followed when the above-referenced floodplain permit was issued, but a handful are of particular importance due to public health, safety, and

welfare issues and due to Constitutional Due Process issues. In the interest of not confusing the issue, this letter will focus solely on these violations of the Ordinance (and not the numerous other violations that are not quite as severe).

Before I begin, I would like to say that I have noticed a pattern of the Ordinance's more important rules and requirements being treated as discretionary as opposed to mandatory. There is a reason why these rules and requirements are mandatory...they directly relate to protect people, their property, and their rights (and helps the County and its residents avoid lawsuits). As such, I respectfully request that the DCC and the Floodplain Administrator give consideration to making sure that when a provision in the Ordinance says "shall" that said provision be enforced.

A. Floodway Issues

There are several issues related to the Mark West permit's lack of compliance with the Ordinance's Floodway requirements. These issues are especially troublesome because the Floodway is the most dangerous portion of the floodplain in terms putting the public health, welfare, and safety at risk (i.e., putting people and their homes at risk of increased flooding and/or increased velocity of floodwaters).

The Ordinance describes the Floodway as "present[ing] increased risk to human life and property due to their relatively faster and deeper flowing waters", and the Ordinance mandates that the Floodway "shall be preserved to the greatest extent possible" (see Section 4.1(B), pg. 16 of the Ordinance). FEMA identifies the Floodway as "the stream channel that must remain open to permit passage of" the floodwaters "and anything in" the Floodway "is in the greatest danger during flooding". Basically, Floodways are to be left alone because they are a hazard (see FEMA info regarding "Floodway Analysis" attached hereto as Exhibit B). Additionally, interfering with and/or altering the Floodway can increase flooding. Floodways are used to accommodate flooding (i.e., by allowing the floodwaters to move forward), and if they are blocked by fill or by structures then the floodwaters can accumulate and the point of the blockage and the areas behind causing the height of the floodwaters to increase. Note, I realize that the Floodway sounds like a complicated thing, but it is really rather simple. The Floodway is the dry ground on either side of the normal water level of a creek, river, fork, stream, etc. (attached as Exhibit C is a sketch of a generic Floodway from a different floodplain ordinance).

Note, given the obvious importance of the Floodways and the danger caused by Floodways, it shouldn't come as a surprise that the Ordinance has several rules and requirements as to Floodways. Almost all of which are mandatory and not discretionary.

1. Mark West was required to delineate the Floodway and failed to do so.

Pursuant to the Ordinance, Mark West was required to delineate (i.e., identify) the Floodway in the site plans it submitted with its floodplain permit application (see Ordinance Section 5.4 (D), pg 24) (see attached NFIP map that was part of the Mark West Permit Application that identified the project site as being in an Approximated Area attached hereto as Exhibit "D"). Despite being required to delineate the Floodway(s), Mark West did not do so.

Pursuant to the Ordinance, whenever construction is planned in an Approximated

Floodplain that will be two acres or larger, the applicant must have a licensed engineer delineate (i.e., identify) the Floodway. Here, the development at issue in the Mark West Permit easily exceeds two acres. The site location map shows attached to the Mark West Permit application shows the area of disturbance to be enormous (see attached as Exhibit "E", said site location map), and a very conservative estimate of the area of disturbance is well over 2,000,000 square feet (i.e., at the very least 45 acres). Note, the requirement to delineate the Floodway is mandatory. It is not at the Floodplain Administrator's discretion. As such, Mark West's failure to delineate the floodway means that the Mark West Permit does not comply with the Ordinance. Additionally, the fact that the Floodplain Administrator issued the Mark West Permit without requiring the Floodway to be delineated means the Floodplain Administrator issued the Mark West Permit in violation of the Ordinance.

2. Fill in the Floodway.

Mark West intends to place large amounts of fill in the area identified in the site location map referenced above (i.e., "at various locations on the site")(see attached as exhibit "F" pg. 1 of Mark West's Jan. 2014 hydraulic study re the site). Since Mark West failed to delineate the Floodway as required by the Ordinance, there is no document that states that fill would be placed into the Floodway(s). But if Mark West had delineated the Floodway(s) as required by the Ordinance then it is almost certain that said delineation would show that fill would be (and already had been) placed in the Floodway(s). I say this because the Mark West project filled in two streams and/or tributaries of Buckeye Creek. By filling in the streams and/or tributaries Mark West literally put fill in the Floodways by filling the Floodways along with portions of the streams and/or tributaries. Further, Mark West built bridges over Buckeye Creek and is siting various new developments related to the site directly next to Buckeye Creek (e.g., a truck unloading area comprised of fill directly adjacent to Buckeye Creek). Given the proximity of these structures (and the fill related to them) to Buckeye Creek, it is almost certain fill has gone into the Floodway of Buckeye Creek.

The Ordinance has two main requirements as to the place of fill into a Floodway. One, fill cannot be placed in a floodway unless it has first been demonstrated that the fill will not cause ANY increase in the base flood elevation (i.e., no increase in flooding at all)(see Ordinance Section 6.1 (E), pg. 29). Two, no development shall be permitted in the Floodway where reasonable alternatives exist elsewhere, and Mark West had to demonstrate that there were no other "reasonable alternatives" before it could be issued the floodplain permit (see Ordinance Section 4.1(B)). If Mark West had delineated the Floodway(s) as required by the Ordinance, then it is almost certain that the results would have shown that Mark West was placing (and has already placed) fill in the floodplain without FIRST demonstrating that said fill would not cause ANY increase in the base flood elevation (i.e., the level of the floodwaters). Additionally, Mark West would have been required to demonstrate no other "reasonable alternatives" were available for its project site before the Floodplain Admin could have issued the Mark West Floodplain Permit. More importantly, it defies logic that if there has been filled placed in the Floodplain (especially to the extent that entire streams have been "filled"), that has not been even a slight rise in the Base Flood Elevation (in violation of 6.1(E)).

B. No Contractor Contracts Presented to Floodplain Administrator and None Saved in File.

Pursuant to the Ordinance, Mark West had to present copies of any and all contracts it entered into with any contractors in regards to the work to be done pursuant to the Mark West Floodplain Permit (see Ordinance Section 5.2 (H), pg. 20). Failure to do so within 14 days of the contracts being signed AUTOMATICALLY VOIDS the floodplain permit. Void means no appeal necessary. Void means the no hearing necessary. Void means the floodplain permit ceases to exist.

We know that Mark West hired at least one contractor to do work on the project (see the permit application --- Anderson Excavating). But there are no contractor contracts in the Mark West Permit File as required by the Ordinance (see attached as exhibit "G" Affidavit of Tammy Beamer). As such, the Mark West Floodplain Permit is void (i.e., automatically ceases to exist as if never applied for and issued...non-existent).

The reason why the Ordinance requires proof of the contractor contracts is related to public health, welfare, and safety. Specifically, the purpose of the requirement is to ensure that only licensed professionals are building large scale projects in floodplains. The point is, by ensuring only professionals are allowed to build in the floodplain, you are also presumably ensuring that the quality of work done will be of a professional level, and you will avoid a situation where someone unqualified is building something in a floodplain that is incapable of resisting floodwaters and, in the event of a flood, will break apart, explode, etc. I bring this hope so as to show that this is actually an extremely important provision, and there is a reason why persons who fail to comply with it have their floodplain permits voided.

C. Improper Notice Given to the Community in Violation of Constitutional Due Process Protections and in violation of the Floodplain Ordinance.

Note, the above issue is especially troublesome given the expense and heartache incurred by the parties to the EQT v. Doddridge/Huff/Foster as a result of the EQT floodplain permit that was issued in violation of the Due Process rights of the Huffs and the Fosters. That case ended because the original Ordinance was deemed unconstitutional for failing to provide adequate notice and opportunity to be heard for people like the Huffs and Fosters (i.e., persons who are having to deal with 3rd parties building potentially destructive floodplain projects on or near their property). If the Huffs and Fosters had been giving notice of the application for the EQT floodplain permit and an opportunity to object, then they might have been able to nip the matter in the bud and save everyone the expense and stress of a year and a half of litigation. Additionally, the whole point of amending the Ordinance was to rectify the issues with a lack of Due Process related to floodplain permits.

But all the changes in the world to the Ordinance don't do any good if rules and requirements are added to the Ordinance to provide for Due Process, but are NOT properly enforced.

Failure to Place Permit Info on the DCC Agenda.

The Ordinance requires that the specific information related to a floodplain permit (both

the application for and issuance of a permit) be placed on the DCC Agenda ahead of the DCC meeting at which the announcements will be made as to the floodplain permits (i.e., name of applicant and location of planned project). Last I checked the only info placed on the DCC Agendas related to Floodplain Permits was a generic statement that Floodplain Permits will be heard as Agenda Item No. X. No specific information is provided despite the requirments of the Ordinance and the requirements of Due Process.

Moreover, by failing to place the specific information regarding each floodplain permit on the Agenda, the entire legal advertisement notice process is essentially defeated (especially, when the ads don't run until after the deadline to object or appeal has expired, and I have seen those situations). The problem is, the legal advertisement does not state which date the announcement was made about the floodplain permit (regardless of whether the announcement is to say it was applied for or to say it was issued or denied). So, how is an interested party, like the DCWA, supposed to know when a permit is applied for or granted or denied if there isn't specific information provided on the Agenda? Are they supposed to attend every single DCC Hearing and just in case maybe an announcement will be made about a floodplain permit that matters to them?

In the case of the DCWA, notice regarding the application for the Mark West Permit was not placed on the DCC's Agenda (i.e., all a DCWA member would have seen was the generic statement that Floodplain Permits will be discussed). Further, the legal advertisement for the Mark West Permit Application states that the date that the permit was applied for was February 5, 2014. It also says anyone who wants to comment or object has until 20 days after the permit application was announced at the DCC meeting. Additionally, it says that the deadline to comment or object is February 25, 2014. Obviously, there is something seriously wrong with those dates.

One, in order for this to work, as mandated by the Ordinance, Mark West would have had to have applied for the Floodplain Permit on February 5, 2014, the clerk would have had to put it on the Agenda on February 5, 2014, and the DCC would had to have had a meeting on February 5, 2014 whereat the application was announced. Otherwise, it would be impossible for there to be 20 days for the comment and/or object period post-announcement (i.e., the deadline was February 25, 2014). Putting aside the sheer impossibility of, on the same day, an application being processed, an agenda being printed the same day, and a DCC meeting being held right after to announce the application, there is the obvious and huge problem in that the 5th of February was a Wednesday (and the DCC meets on Tuesday). As such, there could not have been an announcement on the February 5, 2014, and accordingly, the DCWA (and every other interested parties' Due Process rights were violated, and the rules and requirements contained in the Ordinance were violated). Additionally, the newspaper ad did not even run until February 11, 2014 (see attached as Exhibit H copies of all relevant legal ad documents). As such, not only were the DCWA members deprived of proper notice, they were also deprived of their rightful 20 day period to comment and/or object (given there was apparently no announcement at the DCC Meeting until, at the very least, almost a week after the Permit was applied for, at best they had 15 days of notice.

As such, not only was the Ordinance not followed as to the notice requirements, my clients also have a potential Due Process claim that they could bring against the DCC in order to

have the Mark West Floodplain Permit revoked.

The DCWA's Standing to Appeal

In the complaint Mark West filed against Doddridge County after the Stop Work Order was issued following the DCWA's appeal (a Stop Work Order that the Ordinance does not allow to be lifted until after the Appeal is decided...but I digress), Mark West alleged that the DCWA lacked the standing to appeal the Mark West Permit.

Mark West's argument is incorrect. The DCWA has standing to challenge the Mark West Permit. One, the DCWA is a legitimate organization dedicated to protecting the watersheds and water sources of Doddridge County. It was founded years ago in response to a leak and/or dump of chemicals into Buckeye Creek (i.e., the same creek that Mark West is building next to). The DCWA holds regular meetings and government officials regularly come to these meetings to give informational sessions, hold seminars, and discuss watershed related topics (obviously said government officials consider and treat the DCWA as the legitimate organization that it is). Objecting to and appealing a proposed floodplain project for the purposes of protecting the source of drinking water for West Union (i.e., the home of the DCWA and its members) and also protecting the very creek that pollution of which gave rise too the DCWA, is pretty much the definition of germane to the DCWA's purpose. Moreover, there are DCWA members who live very close to the site of the Mark West project, and who may be harmed by the project, and whose interests will be protected by the DCWA's appeal. In short, the DCWA has standing in its own right and also on behalf of its members.

Conclusion

Given the foregoing and given the grievous violation of the Ordinance (i.e., as to the rules and requirements protecting Public Health, Safety, and Welfare and as to the rules and requirements in regards to the violation of the DCWA member's Due Process Rights), the only correct choice is to revoke the Mark West Floodplain Permit and have Mark West resubmit another floodplain permit application that, unlike the one at issue here, actually conforms to the requirements of the Ordinance. The other alternative is to declare the Mark West Floodplain Permit void for failure to provide the Floodplain Administrator with copies of the contractor contracts (which would accomplish the same result). Otherwise, Doddridge County has issued a floodplain permit in violation of its own Ordinance, and as such, opens itself up to FEMA sanctions as well as the possibility of Court action.

Best regards,
/s/

David T. Richardson, Esq.