

January 31, 2020

Colonel Patrick V. Kinsman
Norfolk District Commander
U.S. Army Corps of Engineers
803 Front Street
Norfolk, VA 23510

BY EMAIL

Re: Proposed Cumberland County Mega-Landfill

Dear Colonel Kinsman:

The Southern Environmental Law Center and Preservation Virginia are writing to express our concerns with the proposed Green Ridge Recycling and Disposal Facility in Cumberland County, Virginia. The development and operations of this proposed mega-landfill would have serious impacts, harming the 1,200-acre site of this facility as well as the surrounding community. In addition to the numerous residents and natural resources that would be adversely affected, the proposed landfill would be directly adjacent to the Pine Grove School—a historic African American school that was recently added to the Virginia Landmarks Register and has been recommended by the state for inclusion in the National Register of Historic Places.¹

The sensitive location and potentially severe impacts of this proposal raise significant questions about whether granting a permit for this project would be in the public interest, and whether less-damaging alternatives may be available. Although we understand that no Clean Water Act permit application has been filed at this time, we urge the Norfolk District of the U.S. Army Corps of Engineers to ensure a comprehensive and thorough review of this proposal, its adverse effects, and potential alternatives in connection with any permit application received for this project. As discussed further below, review of this proposal must also include careful analysis of impacts on significant historic and cultural resources under Section 106 of the National Historic Preservation Act, as well as comprehensive review under the National Environmental Policy Act.

I. Clean Water Act Section 404 Permit Review

The Corps' Clean Water Act permitting regulations require comprehensive analysis of whether issuing a permit would be in the "public interest" based on a careful weighing of the proposal's benefits against its costs and reasonably foreseeable impacts.² Among the factors that must be weighed in this analysis are the potential impacts (direct, indirect, and cumulative) on historic properties, wetlands and water quality, floodplains and flood hazards, fish and wildlife

¹ Virginia Department of Historic Resources, 024-5082 Historic Pine Grove School, <http://www.dhr.virginia.gov/historic-registers/024-5082/> (last visited January 27, 2020).

² See 33 C.F.R. § 320.4(a)(1).

habitat, economics, and the general public welfare.³ This review must also consider the extent of public and private need for the proposal, as well as the practicability of reasonable alternative locations for the project.⁴ Federal courts have stated that the public interest must be given “significant consideration” in the review of a Section 404 permit.⁵

In addition, under guidelines developed by the U.S. Environmental Protection Agency to implement Section 404(b)(1) of the Clean Water Act (which the Corps’ regulations provide must be applied in its review of discharge permits⁶), “no discharge of dredged or fill materials shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.”⁷ In short, the Corps may only grant a Section 404 permit for the “least environmentally damaging practicable alternative” for a proposed project.

The Corps’ review of a permit application submitted for the Green Ridge proposal must include careful analysis of the public interest and of possible alternatives, particularly given the potentially severe impacts of the project on the landfill site and the surrounding community. This mega-landfill would occupy a 1,200-acre site encompassing large portions of Muddy Creek and its tributaries, along with substantial wetlands. The applicant has estimated that 3,000 to 5,000 tons of waste would be handled by this facility each day, requiring up to 500 daily tractor-trailer trips along the area’s roads.⁸ The facility is planned to operate 24 hours per day every Tuesday through Friday (plus 18 hours on Mondays and 10 hours on Saturdays) and service waste from a 500-mile radius.⁹ The extent of these operations raise serious questions related to potential air quality, traffic, and noise-related effects on area residents, as well as the need to locate the landfill at this particular location given the facility’s expansive proposed service territory.

Recent design changes to eliminate a previously-proposed “eastern fill area” would apparently reduce the overall size of landfill areas on the site to roughly 240 acres, with the same total amount of waste now being proposed to be handled within a more concentrated “western fill area.”¹⁰ While it is possible that this change significantly reduces—or even eliminates—wetlands impacts from the project, the proposed western fill area and related roads are still estimated to impact over 5,000 linear feet of streams and over 5,000 linear feet of additional

³ See *id.* The Corps’ regulations further provide that the appropriate weight and level of analysis to be given to each factor will be determined by its “importance and relevance to the particular proposal.” *Id.* at (a)(3).

⁴ *Id.* at (a)(2).

⁵ *Ohio Valley Envtl. Coal. v. Aracoma*, 556 F.3d 177, 191 (4th Cir. 2009).

⁶ See 33 C.F.R. § 323.6(a); 33 C.F.R. § 320.4(a).

⁷ 40 C.F.R. § 230.10(a); see also *B&B P’ship v. U.S.*, 133 F.3d 913 (4th Cir. 1997); *Precon Devel. Corp. v. U.S. Army Corps Eng’rs*, 658 F. Supp. 2d 752, 767 (E.D. Va. 2009).

⁸ See Nick Ligouri, “Local traffic impact statement for proposed Green Ridge landfill, Cumberland County, VA” (July 3, 2019), available at <http://www.cumberlandcounty.virginia.gov/sites/default/files/2019-07/183002%20CUMBERLAND%20LANDFILL%20TRAFFIC%20STATEMENT%2003Jul2019.pdf>.

⁹ See Green Ridge Recycling and Disposal Facility, <http://greenridgeva.com/project-description.html> (last visited January 27, 2020).

¹⁰ Sarah Vogel song, *Waste company slashes size of controversial Cumberland landfill*, VIRGINIA MERCURY, Dec. 16, 2019, <http://www.virginiamercury.com/2019/12/16/county-waste-slashes-size-of-controversial-cumberland-landfill/>.

ephemeral channel,¹¹ and would still place 37 homes within a half-mile of the landfill use.¹² The proposed shift to intensify use of the western fill area also heightens concerns about potential impacts to historic and archeological resources on this part of the landfill site, as well as the historic Pine Grove Rosenwald School located directly adjacent to the site's western boundary.

The Pine Grove School was founded in 1917 with support from the Rosenwald Fund and based on the model developed by Booker T. Washington to help establish affordable schools for African American children throughout the South in the Jim Crow era. The school remained in operation from 1917 to 1964, during which time it also served as a vital civic and social center for the local Black community. It is now owned by the Agee Miller Mayo Dungy Family Association (an association of former students and family members), and continues to serve as a community gathering place. In December 2019, Virginia's Department of Historic Resources listed the Pine Grove School on the Virginia Landmarks Register and recommended its inclusion in the National Register of Historic Places.¹³ The close proximity of proposed fill areas to this irreplaceable historic and cultural resource warrants the Corps' closest consideration, and must be a central part of any public interest review completed for this project.

II. Section 106 of the National Historic Preservation Act

The Clean Water Act permitting process will also require compliance with Section 106 of the National Historic Preservation Act (NHPA),¹⁴ as outlined in the Corps' "Procedures for the Protection of Historic Properties."¹⁵ Given the sensitive historic and archeological resources (including potential historic cemeteries) that have been identified both within and adjacent to the landfill site, the Corps must ensure a comprehensive review of the potential direct and indirect effects of this mega-landfill proposal on these resources and seek to avoid or minimize any adverse effects to the greatest extent possible.¹⁶ It is also essential that this review includes close coordination and ample input opportunities for the Virginia Department of Historic Resources, interested stakeholders and organizations, and the public.¹⁷

The Corps' procedures direct the Norfolk District to "take into account the effects, if any, of proposed undertakings on historic properties both within and beyond the waters of the U.S."¹⁸ These procedures further provide that the relevant "permit area" for the Corps' analysis encompasses "those areas comprising the waters of the United States that will be directly affected by the proposed work or structures and uplands directly affected as a result of

¹¹ See Draper Aden Associates, "New Schematic Design," Green Ridge Recycling and Disposal Facility (presented to Cumberland County Board of Supervisors-elect in December 2019).

¹² Vogel song, *supra* note 9.

¹³ Virginia Department of Historic Resources, 024-5082 Historic Pine Grove School, <http://www.dhr.virginia.gov/historic-registers/024-5082/> (last visited January 27, 2020).

¹⁴ See 54 U.S.C. § 306108.

¹⁵ 33 C.F.R. Part 325, App. C.

¹⁶ See *id.* at §2(f) (noting that the Corps' historic resource review procedures are "intended to provide for the maximum consideration of historic properties within the time and jurisdictional constraints of the Corps regulatory program").

¹⁷ See *id.* (also noting that "[w]ithin the time constraints of applicable laws, executive orders, and regulations, the Corps will provide the maximum coordination and comment opportunities to interested parties").

¹⁸ *Id.* at § 2(a).

authorizing the work or structures.”¹⁹ Waters of the U.S. are well spread throughout the proposed Green Ridge landfill site, and seem likely to substantially affect the location and arrangement of proposed landfill areas—both in relation to the site’s aquatic resources and in upland areas. Thus, it will likely be necessary for the Corps’ permit area to extend beyond the areas of the site in which direct effects on waters of the U.S. will occur, and to ensure careful analysis of any resources that may be identified within this broader area.

In addition, the Corps’ procedures provide that the review of historic resources “will consider the effects of undertakings on any known historic properties that may occur outside the permit area.”²⁰ This part of the analysis will be particularly pertinent to the Pine Grove School located directly adjacent to the site’s western boundary. While it is unclear if the landfill proposal (and related re-routing of local roads) will physically encroach upon the historic site, it is almost certain to have substantial adverse effects on the Pine Grove School given the close proximity of its enormous proposed western fill area. This includes visual, noise, and traffic impacts that will significantly alter the historic rural setting that contributed to the school’s qualification for the Virginia Landmarks Register and the state’s recommendation that it be included in the National Register of Historic Places.²¹ The proposed landfill’s potential effects on this important historic and cultural resource must be fully evaluated, and any options to avoid or minimize any adverse effects thoroughly explored, as part of the Corps’ Section 106 review of any application submitted for this project.

III. National Environmental Policy Act Review

The Corps also will have to meet the requirements of the National Environmental Policy Act (NEPA) in its review of a Clean Water Act § 404 permit submitted for the Green Ridge landfill proposal.²² We strongly urge the Corps to ensure that this NEPA process comprehensively reviews the adverse effects of this proposal on the landfill site and the surrounding community, as well as any reasonable alternatives. Given the significant extent and uncertainty of potential impacts of this proposal, the preparation of an environmental impact statement (EIS) will likely be necessary.

Similar to the review under Section 106 of the NHPA, the Corps’ NEPA procedures provide that the appropriate scope of NEPA review may extend beyond the boundaries of affected waters of the U.S., such as cases in which “there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the

¹⁹ *Id.* at §1(g)(1).

²⁰ *Id.* at §5(f).

²¹ *See, e.g.*, National Register of Historic Places Registration Form, Pine Grove Elementary School at 7-7, *available at* http://www.dhr.virginia.gov/wp-content/uploads/2019/11/024-5082_Pine_Grove_School_2019_NRHP_draft_FINAL.pdf (“In its totality, the Pine Grove School possesses integrity of feeling as a rural schoolhouse associated with African American education in rural Cumberland County. The integrity of feeling is expressed by the property’s continued interrelationship with its rural setting and integrity of design, workmanship, and materials.”)

²² *See* 33 C.F.R. § 325.2(a)(4) (stating in regards to Department of the Army permits: “The district engineer will follow Appendix B of 33 CFR part 230 for environmental procedures and documentation required by the National Environmental Policy Act of 1969. A decision on a permit application will require either an environmental assessment or an environmental impact statement unless it is included within a categorical exclusion.”).

regulated activity.”²³ As noted above, the waters of the U.S. are spread throughout the proposed Green Ridge site and seem likely to materially affect the location and arrangement of proposed landfill areas in both aquatic and upland areas, indicating that the scope of NEPA review may need to extend beyond the limits of the waters of the U.S. proposed to be impacted. NEPA also requires the consideration of both direct and indirect effects of a proposal,²⁴ which in this case will necessitate review of potential effects on the historic Pine Grove School adjacent the proposed western fill area and other resources that may be affected in this area.

NEPA provides that an EIS must be prepared for any major federal action “significantly affecting the quality of the human environment,”²⁵ and the Green Ridge proposal appears to implicate several of the “significance” factors identified in the Council on Environmental Quality’s (CEQ) NEPA regulations as pertinent to this determination.²⁶ CEQ provides that “significance” involves consideration of both “context” and “intensity,” with “intensity” based on a list of several factors, including²⁷:

- (2) The degree to which the proposed action affects public health or safety;
- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources...;
- (4) The degree to which the effects on the human environment are likely to be highly controversial;
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks; and
- (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historic resources.

Each of these factors is clearly relevant to the proposed Green Ridge mega-landfill, which is likely to have severe and uncertain impacts on this rural community and important historic and cultural resources in this area. It is also important to note that the project area has historically been home to substantial minority and low-income populations, indicating the need to carefully review potential environmental justice implications of this permit application.

We therefore strongly urge the Corps to require preparation of an EIS for this proposal to ensure adequate review and analysis of the adverse effects and available alternatives to this project. As in the case of the Section 404 and Section 106 reviews discussed above, we also urge the Corps to provide ample opportunities for public input and involvement in this NEPA process.

²³ 33 C.F.R. Part 325 App. B (“NEPA Implementation Procedures for the Regulatory Program”) at § 7(b).

²⁴ 40 C.F.R. § 1508.8 (providing the term “effects” as used in NEPA regulations includes “indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable”).

²⁵ 42 U.S.C. 4332(C).

²⁶ 40 C.F.R. §1508.27.

²⁷ *Id.* at §1508.27(b).

Thank you for your consideration, and we look forward to participating in these reviews in relation to any permit application submitted for this project.

Sincerely,



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