

**STATE OF NEW MEXICO
DEPARTMENT OF ENERGY, MINERALS AND NATURAL RESOURCES
OIL CONSERVATION COMMISSION**

**APPLICATION OF DELAWARE ENERGY LLC TO REVOKE THE INJECTION
AUTHORITY GRANTED UNDER SWD-1680 FOR THE ALPHA SWD NO. 1
WELL OPERATED BY ALPHA SWD OPERATING LLC, EDDY COUNTY, NEW
MEXICO.**

**Case No. 15855 (*de novo*)
Order No. R-14484-B**

ORDER OF THE COMMISSION

THIS MATTER comes before the New Mexico Oil Conservation Commission (“Commission”) on the application of Alpha SWD Operating, LLC (“Alpha SWD”) for *de novo* review. The Commission, having conducted a hearing on July 20, 2018 in Santa Fe, New Mexico, and having considered the record in this case, enters the following findings, conclusions and order.

THE COMMISSION FINDS THAT:

1. This is a *de novo* review by the Commission of an Order (R-14484-A) entered by the Oil Conservation Division (“Division”) which rescinded a previous Order (SWD-1680) of the Division. The issue, which was raised *sua sponte* by the Commission, is whether the Division had the authority under the Oil and Gas Act (“Act”) to hear an appeal from its own decision and to reverse a prior Division order.
2. Due public notice has been given, and the Commission has jurisdiction over this case under the Act. NMSA 1978 §70-2-13 (1981).
3. This case involves two Division orders. The following will review the issuance of each order.
4. First Division Order. On June 12, 2017, Alpha SWD filed an administrative application for authorization to inject produced water into its Alpha SWD Well No. 1 (API No. 30-015-44237) to be located 1,457 feet from the South line and 2,093 from the East line in Unit J of Section 10, Township 24 South, Range 28 East, NMPM, in Eddy County. There were no objections to Alpha SWD’s application.
5. That same day, the Oil Conservation Division (“Division”) notified Alpha SWD by e-mail that its application was deficient and that Alpha SWD needed to submit to the Division: (i) additional information regarding notifications; and (ii) an affirmed statement regarding hydrologic connectivity. Alpha SWD submitted the additional information to the Division on June 19, 2017.

6. An applicant for administrative approval is required to publish notice of the application in a newspaper of general circulation in the county where the proposed well is located, 19.15.26.8(C)(1) NMAC. The notice must inform interested parties that they shall file objections or requests for hearing within 15 days. *Id.* The notice was published in the Carlsbad Current-Argus on June 6, 2017. No objections or requests for hearing were filed within the 15 day period.

7. The Division is prohibited from approving an application until 15 days after a complete application is filed, and if an objection is received before the end of that 15-day period, a hearing must be held. 19.15.26.8(C)(2) and (D) NMAC.

8. On June 28, 2017, the Division issued Administrative Order SWD-1680 authorizing Alpha SWD to inject produced water into its Alpha SWD Well No. 1. This date is after the end of the 15-day public notice period, 19.15.26.8(C)(1) NMAC, but before the end of the 15-day period following the submittal of a complete application. 19.15.26.8(C)(2) NMAC.

9. Delaware had actual notice of the issuance of Order SWD-1680 within the thirty-day period for filing an application for *de novo* review of the Order, but did not file an application with the Commission.

10. Second Division Order. On September 12, 2017, seventy-six days after SWD-1680 was issued, Delaware filed with the Division an application requesting the revocation of the injection authority granted to Alpha SWD under Order SWD-1680. Delaware's application asserted that: (i) because Delaware had a competing administrative application for authorization to inject produced water into its nearby Ruiz SWD #1 well that was pending when Alpha SWD filed its application, Alpha SWD should have notified Delaware of its application, and the Division should have required Alpha SWD to notify Delaware or done so itself; and (ii) the Division violated 19.15.26.8(C)(2) NMAC by issuing Administrative Order SWD-1680 less than fifteen days after Alpha SWD's administrative application was complete. The application further asserted that Delaware's due process rights had been violated based on the lack of notification.

11. On October 11, 2017, the Division issued Order No. R-14484 granting Delaware's request for an emergency stay and suspending Order SWD-1680 until the hearing on Delaware's application to revoke the order.

12. On November 7, 2017, the Division conducted an evidentiary hearing on Delaware's application.

13. On February 13, 2018, the Division issued Order No. R-14484-A rescinding Order SWD-1680. The Division's sole basis for rescinding SWD-1680 was the Division's failure to comply with the fifteen-day waiting period in 19.15.26.8(C)(2) NMAC. Order No. R-14484-A does not address any of the other issues raised in Delaware's application.

14. Commission Proceeding. On March 14, 2018, Alpha SWD timely filed its Application for Hearing *De Novo* with the Commission pursuant to NMSA 1978, §70-2-13.

15. On April 10, 2018, Delaware filed a Motion for Judgment Based on the Division Record (“Motion for Judgement”) requesting the Commission forego a hearing and make a legal determination that Order R-14484-A should be confirmed based on the Division’s violation of 19.15.26.8(C)(2) NMAC.

16. At a meeting on April 12, 2018, the Commission considered the Motion for Judgment and determined that since this was a *de novo* proceeding, the Commission had no evidence on which to rule on the Motion. The Commission allowed Delaware to supplement its motion with evidentiary support and allowed Alpha a response to the Motion. The hearing was continued to May 22, 2018.

17. On April 16, 2018, Delaware filed its Supplement to Motion for Judgment Based on the Division Record, which included Division records regarding Alpha SWD’s administrative application.

18. On May 4, 2018, Alpha SWD filed its Response In Opposition to Delaware’s Motion for Judgment Based on the Division Record. Alpha SWD opposed Delaware’s motion on the grounds that: (i) Alpha SWD was entitled to an evidentiary hearing on all of the issues raised by Delaware in its Division application to revoke Alpha SWD’s injection authority; (ii) the Commission has a statutory mandate to independently consider all of the issues raised in Delaware’s application; and (iii) Delaware lacked standing to challenge Administrative Order SWD-1680 because the Division had cancelled the application Delaware claimed was pending at the time that Alpha SWD submitted its administrative application. Alpha SWD included with its response Division records indicating that Delaware’s previously-filed application had been cancelled before Alpha SWD submitted its application.

19. On May 22, 2018, the Commission conducted a hearing on Delaware’s motion. The Commission denied the motion, and set a hearing for July 20, 2018 that would be limited to three issues: (i) whether the Division had jurisdiction to consider Delaware’s application to revoke Alpha SWD’s injection authority when Delaware had failed to file a *de novo* appeal of Order SWD-1680 pursuant to the Oil and Gas Act; (ii) if the Commission does not have jurisdiction in this matter, the case would be limited to the single issue on which the Division decided the case below, which is the question of the fifteen-day deadline and whether it was applied; and (iii) if the Commission does have jurisdiction, and rules that there was a violation of 19.15.26.8(C)(2) NMAC, what would be a proper remedy for the violation. The Commission limited the parties’ evidentiary presentation to the second issue and permitted counsel to submit pre-hearing briefs.

20. On July 13, 2018, Alpha SWD filed its Pre-Hearing Brief, which asserted that: (1) neither the Oil and Gas Act nor the Commission’s rules confer jurisdiction to the Division to review its own administrative orders; (2) Delaware lacked standing to challenge

Order SWD-1680; and (3) the Commission should not conclude that a violation of 19.15.26.8 (C) NMAC must result in the revocation of an administrative authorization to inject because (a) it would not be commensurate with the nature of the Division's violation, and (b) would lead to the unintended consequence of opening historical Division orders to challenges. To demonstrate the potential for unintended consequences, Alpha SWD submitted 2016 Division records regarding Order SWD-1625 authorizing Delaware to inject produced water, which was issued thirteen days after Division had deemed Delaware's administrative application to be complete.

21. Also on July 13, 2018, Delaware filed its Brief on the Jurisdiction of *Division Examiners to Determine Whether Issuance of Administrative Order SWD-1680 Complied With the Requirements for Administrative Approval of Injection Applications Filed Under NMAC 19.15.26.8.* (Emphasis in original). Delaware's brief asserted that: (i) *de novo* review by the Commission is limited to circumstances where a Division order has been entered after an examiner hearing; (ii) because Alpha SWD's application had been approved administratively, the only process available to Delaware was filing an application with the Division requesting the revocation of Alpha SWD's injection authority; and (iii) it is the Division Director who ultimately determines whether a matter should be heard by a Division examiner or by the Commission.

22. On July 20, 2018, the Commission conducted a hearing on the three issues that it had scoped at its previous hearing. Counsel for Alpha SWD and Delaware presented legal arguments regarding each of the issues. At the conclusion of the hearing, the Commission determined that the Division had no jurisdiction over Delaware's application to revoke Alpha SWD's injection authority.

23. Analysis. Did the Division have authority to hear an appeal of its first decision and then reverse that decision? The Commission finds no authority in the Act for the Division to hear appeals of its own orders and to overturn its orders. The Act specifically provides for a *de novo* appeal of a Division decision to the Commission:

When any matter or proceeding is referred to an examiner and a decision is rendered thereon, any party of record adversely affected shall have the right to have the matter heard *de novo* before the commission upon application filed with the division within thirty days from the time any such decision is rendered.

NMSA 1978 §70-2-13 (1981)

24. Similarly, while the Act provides the Commission with the power to rehear its cases, NMSA 1978 §70-2-25, the Act provides no such rehearing authority to the Division. "[T]he power of any administrative agency to reconsider its final decision exists only where the statutory provisions creating the agency indicate a legislative intent to permit the agency to carry into effect such power." *Armijo v. Save 'N Gain*, 1989 NMCA 14, 771 P.2d 989, 994.

70-2-25. Rehearings; appeals.

A. Within twenty days after entry of an order or decision of the commission, a party of record adversely affected may file with the commission an application for rehearing in respect of any matter determined by the order or decision, setting forth the respect in which the order or decision is believed to be erroneous. The commission shall grant or refuse the application in whole or in part within ten days after the application is filed, and failure to act on the application within that period shall be deemed a refusal and final disposition of that application. In the event the rehearing is granted, the commission may enter a new order or decision after rehearing as may be required under the circumstances.

B. A party of record to the rehearing proceeding dissatisfied with the disposition of the application for rehearing may appeal to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

25. Delaware argued that the remedy in Section 70-2-13 does not apply to the first Division Order because no hearing was held. Delaware construes the statutory phrase "referred to a examiner" as requiring a hearing before a decision may be appealed to the Commission. For the review of a proposed injection well, the Division followed a process of public notice with an opportunity for hearing. 19.15.26.8(C) NMAC. Since the Division injection well program is authorized by the U.S. Environmental Protection Agency under the federal Safe Drinking Water Act, the Division process for notice and opportunity for hearing mirrors the EPA rules. 40 CFR 145.11 (Requirements for permitting); 40 CFR 124.10 (Public notice). The Commission finds that a final decision of the Division which is issued either after a hearing or after a public notice and opportunity for hearing is subject to review by the Commission under Section 70-2-13.

26. Delaware also argued that the Division retained jurisdiction to reconsider its decision under a provision in Order SWD-1680:

Jurisdiction is retained by the Division for the entry of such further orders as may be necessary for the prevention of waste and/or protection of correlative rights or upon failure of the operator to conduct operations (1) to protect fresh or protectable waters or (2) consistent with the requirements in this order, whereupon the Division may, after notice and hearing, terminate the disposal authority granted herein.

This provision does not grant unlimited jurisdiction to the Division to revisit and reverse the Order. Instead, it alerts the operator that the Division can take enforcement action against this permit if the operator is causing waste, impacting correlative rights or impairing fresh water or the operator is violating the Order.

27. Delaware also argued that since its application was filed with the Division, the Division Director could have determined that the case be set before the Commission. However, Delaware's application was filed 76 days after SWD-1680 was issued well beyond the 30-day deadline to invoke the Commission's jurisdiction to hear a *de novo* appeal under Section 70-2-13.

28. Even if Delaware is correct that the remedy of an administrative appeal to the Commission is not available in this case because of a lack of a hearing below, there is still no support in the Act for an appeal to the Division. Instead, a party would need to appeal the final Division order to district court. Rule 1-075 NMRA (“an aggrieved party may seek review of a final decision or order of an agency” by filing a petition for writ of certiorari).

29. The Commission concludes that the administrative appeal to the Commission provided in Section 70-2-13 is an exclusive remedy that Delaware failed to exhaust. *Gzaskow v. Public Employees Retirement Bd.*, 2017-NMCA-064 ¶25. The exclusivity of the Commission appeal process is further supported by the fact that the Act only provides for judicial review of Commission decisions. NMSA 1978, §70-2-25. The appeal to the Commission must be filed within 30 days after Division decision is rendered and can be appealed to the courts. This process meets the *Gzaskow* test of being “plain, adequate and complete”. *Id.* (quoting *Chavez v. City of Albuquerque*, 1998-NMCA-004, ¶ 14). Allowing an aggrieved party to circumvent this process by later filing an application with the Division would create great uncertainty and place every permit decision at risk of being challenged in the future. (See Alpha SWD’s Pre-Hearing Statement which contains evidence of a Delaware injection permit from 2016 that was also issued before the 15-day deadline).

THE COMMISSION CONCLUDES THAT:

1. Delaware failed to timely appeal SWD-1680 to the Commission pursuant to NMSA 1978, §70-2-13. Therefore, the Commission lacks jurisdiction to consider an appeal of SWD-1680.

2. The Commission has jurisdiction to review Order No. R-14484-A. Alpha SWD filed a timely de novo appeal of Order No. R-14484-A pursuant to NMSA 1978, §70-2-13.

3. Delaware improperly appealed SWD-1680 to the Division. The Oil and Gas Act does not authorize the Division to consider appeals or rehearings of final administrative orders issued by the Division and to reverse a prior Division order.

4. The Division lacked jurisdiction to issue Order No. R-14484-A reversing Administrative Order SWD-1680.

IT IS THEREFORE ORDERED THAT:

1. Order No. R-14484-A is hereby reversed and vacated.

2. Administrative Order SWD-1680 is reinstated.

DONE at Santa Fe, New Mexico on the 20th day of August, 2018.

**STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION**



SEAL

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HEATHER RILEY, Chair

A handwritten signature in cursive script, appearing to read "Robert Balch", written over a horizontal line.

ROBERT BALCH, Member

A handwritten signature in cursive script, appearing to read "Ed Martin", written over a horizontal line.

ED MARTIN, Member