

**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-A**

**ALPHA SWD OPERATING, LLC's  
PRE-HEARING BRIEF**

In accordance with the Oil Conservation Commission's ("Commission's") directive during the May 22, 2018 hearing in this case, *de novo* applicant Alpha SWD Operating, LLC ("Alpha SWD") submits its Pre-Hearing Brief.

**INTRODUCTION**

During the May 22, 2018 hearing, the Commission scoped the following issues to be addressed at its July 20, 2018 hearing:

1. Whether the Oil Conservation Division ("Division") had jurisdiction to consider Delaware Energy LLC's ("Delaware's") application requesting the revocation of Administrative Order No. SWD-1680 ("SWD-1680") when Delaware had failed to file a *de novo* appeal of the order under the Oil and Gas Act;
2. "[I]f the Commission then does not have jurisdiction in this matter," whether the Division applied the 15-day deadline in 19.15.26.8(C) NMAC; and
3. If the Commission does have jurisdiction, and rules that there was a violation of 19.15.26.8(C) NMAC, what is the proper remedy for the violation.

*Transcript of 5.22.18 Commission hearing ("5.22.18 Tr.") at 33-34.*

As demonstrated below, as a matter of law the Division lacked jurisdiction to issue Order No. R-14484-A because (i) neither the Oil and Gas Act nor the Commission's adjudication rules establish a process whereby a party can forego the *de novo* appeal process and request the Division to review its own administrative order, and (ii) Delaware lacked standing to challenge SWD-1680. With regard to the question whether the Division violated 19.15.26.8(C) in issuing SWD-1680, it is undisputed that the Division's records reveal that the Division issued the order prematurely, and that Order No. R-1448-A is premised solely on the Division's mistake. However, the Division's presumably inadvertent mistake does not necessarily – and should not – lead to the conclusion that Alpha SWD's injection authority should be revoked. Rather, the Commission should consider the unique circumstances presented, as well as the potential ramifications of its ruling, and conclude that Alpha SWD's injection authority should be reinstated.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

A recap of the chronology of this matter is necessary to provide context to the Commission for its consideration of the three issues it has scoped. The first pertinent date is October 24, 2016, when Delaware filed an application for injection authority for its Ruiz SWD #1 well. *See Exhibit ("Ex. ") B to Alpha SWD's Response In Opposition to Delaware's Motion for Judgment Based on the Division Record ("Alpha SWD Response") at 2.* The Division assigned application number pMAM1630053276 to Delaware's application. *Id.* The Division's records reveal that, as of April 19, 2017, the Division had cancelled application number pMAM1630053276. *Id.*

On June 12, 2017, Alpha SWD filed an administrative application for authorization to inject produced water into its SWD Well No. 1. *See Ex. 1 to Delaware's Supplement to Motion for Judgment Based on the Division Record ("Delaware Supplement").* That same day, the Division requested additional information regarding notice and the proposed injection interval.

*Ex. 2 to Delaware Supplement.* Alpha SWD's consultant submitted the requested information to the Division on June 19. *Ex. 3 to Delaware Supplement.* The Division issued SWD-1680 nine days later. *See SWD-1680.*

The Division's October 20, 2017 online listing of Administrative Applications Records Not Approved indicates that on July 3, 2017, Delaware made another submittal for the Ruiz SWD #1 well, which was assigned application number pKSC1718735697 by the Division. *See Ex. C to Alpha SWD Response at 2.* That listing again reveals that Delaware application number pMAM1630053276 had been cancelled. *Id at 3.* Because of the close proximity of Delaware's proposed Ruiz SWD #1 well to its permitted SWD No. 1 well, Alpha SWD protested application number pKSC1718735697. *Id at 2.*

Delaware did not apply for a *de novo* review of SWD-1680 by the Commission. Instead, ten weeks after the Division issued SWD-1680, Delaware submitted an application requesting the Division to revoke SWD-1680. Delaware's application asserts that, because Delaware's October 2016 submission for the Ruiz SWD #1 well was pending when Alpha SWD filed its application, Alpha SWD and the Division should have notified Delaware of Alpha SWD's application. *Ex. A to Alpha SWD Response at 1 - 4.* The application does not assert that Delaware was entitled to receive notice as an affected person within a half-mile radius of Alpha SWD's well. *See id.*

The Division issued Order No. R-14484-A on February 13, 2018. The order does not address the disputed issues of whether (i) Delaware had an application pending when Alpha SWD submitted its application, and (ii) Delaware was entitled to receive notice of Alpha SWD's application. *See Order No. R-14484-A.* Instead, the order focuses solely on the timing of the Division's issuance of SWD-1680 and rescinds SWD-1680 based on the Division's own violation of 19.15.26.8(C)(1) NMAC. *Id at 3.* The order states that is "is without prejudice to the right of

[Alpha SWD] to file an application to obtain proper injection authority for the proposed well *as a new application, accompanied by a new Form C-108.*” *Id.* at 4 (emphasis added).

I. The Division Lacked Jurisdiction to Consider Delaware’s Application.

During the May 22, 2018 hearing, both the Commission Chair and Commission Counsel questioned why Delaware had not filed a *de novo* appeal. *5.22.18 Tr. at 13, 23-24.* Commission Counsel further questioned whether the Division had jurisdiction to review its own order, and whether a *de novo* appeal constituted Delaware’s exclusive remedy. *Id. at 23-24.* And viewing the jurisdictional issue from a broader perspective, Commission Counsel voiced his concern about the Commission setting a precedent that could open the door to collateral attacks on historical Division orders via the Division’s hearing process. *Id. at 25, 29.*

The concern about Delaware foregoing the *de novo* appeal process under the Oil and Gas Act is entirely appropriate. Despite having actual notice of the issuance of SWD-1680 within the thirty-day time period in which to file a *de novo* appeal, Delaware chose not to file an appeal to the Commission and instead asked the Division to revoke SWD-1680. *See 5.22.18 Tr. at 26-27.* There is no legal basis for the path chosen by Delaware and, therefore, the Commission should conclude that the Division lacked jurisdiction to consider Delaware’s application. And as Alpha SWD has previously informed the Commission, there is an alternative basis for the Commission to conclude that the Division lacked jurisdiction: Delaware lacked standing to seek the revocation of Alpha SWD’s injection authority.

A. There Is No Statutory or Regulatory Basis for the Division to Review Its Own Administrative Orders.

The Commission and the Division are both creatures of statute, and as such are expressly defined, limited and empowered by the law creating them. *Sims v. Mechem*, 72 N.M. 186, 189 (1963). Thus, the Division’s jurisdiction and authority are conferred, defined and limited by the

Oil and Gas Act and the Commission's rules promulgated pursuant to the statute. Specific to this case, neither the statute nor the Commission's rules confer jurisdiction to the Division to review its own administrative orders.

The Oil and Gas Act creates a singular process for review of Division orders. The statute provides that when any matter is referred to a Division examiner and a decision is rendered, any party of record adversely affected "shall have the right to have the matter heard before" the Commission. NMSA §70-2-13. The Commission's adjudication rules mirror the statutory provision in affording an adversely affected party the right to have the matter heard *de novo* by the Commission. 19.15.4.23(A) NMAC. These provisions establish the only procedural path for seeking review of a Division order.

Alpha SWD acknowledges that these statutory and regulatory provisions speak in terms of a matter referred to a Division examiner. *See* NMSA 70-2-13. Yet an administrative order issued after notice and an opportunity to protest is the functional equivalent of a hearing order. More importantly, there is no provision in the Oil and Gas Act or the Commission's adjudication rules that authorizes the Division to rule on a challenge to an administrative order that it issued. The Division has no jurisdiction or authority that is not expressly granted by the Oil and Gas Act. *Sims*, 72 N.M. at 189. Delaware has cited no statutory or regulatory provision – and Alpha SWD is not aware of any – that authorizes (i) a party challenging an administrative order to forego the statutorily mandated *de novo* appeal process and request the Division to revoke its own administrative order, or (ii) the Division to hear such a request.

Neither does the retention of jurisdiction provision in SWD-1680 authorize or even contemplate the path taken by Delaware. That provision addresses future review by the Division if and only if Alpha SWD, the permitted operator, were to cause waste, violate correlative rights,

fail to protect fresh or protectable water, or fail to comply with the requirements in the order. *SWD-1680 at 3*. Delaware's application for revocation of Alpha SWD's injection authority asserts violations of Delaware's due process rights, and does not assert – and would have no basis to assert since Alpha SWD has not drilled its well - any of the matters specified in the retention of jurisdiction provision in SWD-1680. *See Ex. A to Alpha SWD Response*.

B. Even if the Division Had Jurisdiction to Hear Delaware's Application, Delaware Lacked Standing to File Its Application.

In its response to Delaware's motion requesting the entry of judgment based on Division records, Alpha SWD alerted the Commission to Delaware's lack of standing to challenge SWD-1680. *See Alpha SWD Response*. The Commission's adjudication rules expressly require a party seeking relief from the Division to have the requisite standing. 19.15.4.8(A) NMAC. As a matter of New Mexico law, standing is a jurisdictional prerequisite when a cause of action is created by a statute. *See, e.g., Deutsche Bank Nat. Tr. Co. v. Johnston*, 2016-NMSC-013, ¶11, 369 P. 3d 1046; *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶9, 144 N.M. 471. When the issue of standing is considered to be jurisdictional, it "may not be waived and may be raised at any stage of the proceedings, even sua sponte by the appellate court." *Gunaji v. Macias*, 2001-NMSC-028, ¶20, 130 N.M.734.

The Division's records reveal that, when Alpha SWD filed its administrative application on June 12, 2017, the application filed by Delaware on October 24, 2016 had been cancelled. *See Ex. B to Alpha SWD Response at 2*. Thus, the Division's records indicate that Delaware did not have an application for injection authority pending when Alpha SWD filed its application. It is the existence of a pending application that is the sole basis for Delaware's assertion in its application that Alpha SWD and the Division *should have* notified Delaware of Alpha SWD's application. *Ex. A to Alpha SWD Response*. Delaware's application does not assert that it was an

affected person with an interest within a half-mile radius of Alpha SWD's proposed injection well, which might have conferred standing to Delaware to challenge SWD-1680. *See id.*

In enumerating the Commission's scoping of the issues to be addressed at the July 20, 2018 hearing, Commission Counsel noted that the issue of whether the Division had jurisdiction to consider Delaware's application is a legal rather than an evidentiary issue. *See 5.22.18 Tr. at 36-37.* With regard to the issue of Delaware's standing to challenge SWD-1680, a jurisdictional defect in its application filed with the Division, Alpha SWD is asking the Division to make a legal determination based on Division records previously submitted in this case.

## II. The Legal Effect of the Division's Violation of 19.15.26.8(C) NMAC

### A. A Presumably Unintentional Mistake By the Division Should Not Require the Revocation of SWD-1680.

Alpha SWD concedes, as it must, that the Division issued SWD-1680 less than fifteen days after Alpha SWD's consultant submitted the additional information requested by Division. The Division's records make that clear. What is not clear, and will have to be determined by the Commission, is the legal effect of the Division's premature issuance of SWD-1680.

Undeniably, the Commission has a paramount interest in the Division properly applying and enforcing the Commission's rules. But it would require exalting form over substance to conclude that SWD-1680 must be revoked simply because the Division made a presumably unintentional mistake by issuing SWD-1680 six days early, particularly when there were no protests to the application either during or after the 15-day waiting period had run and there were no technical deficiencies in the application noted by the Division. The intent of 19.15.26.8(C) is to afford affected persons entitled to notice of an administrative application a reasonable amount of time to object to an application, and the record is devoid of an objection to Alpha SWD's application.

If the Commission were to determine that its injection authority must be revoked because of an inadvertent Division mistake, then Alpha SWD would be penalized through no fault of its own. Alpha SWD properly complied with the Division's requirements for obtaining injection authority, and in the process incurred expenses for a consultant to evaluate the injection interval and prepare the application. Additionally, Alpha SWD expended time and additional expenses in seeking contracts for the surface acreage for its well and for the disposal of produced water. Finally, Alpha SWD has incurred attorney's fees to defend against Delaware's attack on its injection authority.

**B. Revocation of Alpha SWD's Injection Authority Based on the Division's Mistake Could Open the Door to Attacks on Historical Division Orders.**

As noted above, Commission Counsel voiced a concern during the May 22, 2018 hearing "about the precedent the Commission may be setting here, that basically any one of the tens of thousands of well orders that have been issued in the last 83 years are now up for grabs because somebody can go back in the record and find a technical problem with how the [order] was issued". 5.22.18 Tr. at 25. Not only would a ruling by the Commission that Alpha SWD's injection authority is void because of a "technical" flaw be an incorrect and inequitable result in this case, it would open the door to challenges to historical Division orders.

For example, Alpha SWD has unearthed a 2016 administrative order, No. SWD-1625, that authorizes Delaware to inject produced water into its Pardue 31 Com. No. 1 SWD well. Alpha SWD has attached to its Pre-Hearing Statements pertinent documents from the Division's file for SWD-1625. Those records reveal that Delaware submitted its application on April 4, 2016, and supplemented the application with proofs of certified mail notice and an affidavit of publication on April 20, 2016. *See Alpha SWD Exs. 2 and 3.* The Division then issued SWD-1625 on May 3, 2016, thirteen days after Delaware's application was complete. *See Alpha SWD Ex. 3.*



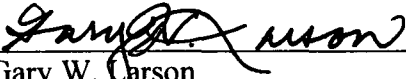
SWD-1625 involves a sequence of events that is strikingly similar to those presented in this case. However, Alpha SWD is in no way attacking the validity of the order, and does not have standing to do so. To be consistent with its position in this case, Alpha SWD believes the fact that SWD-1625 appears to have been issued prematurely is not a sufficient basis to revoke Delaware's injection authority. Alpha SWD is bringing SWD-1625 to the Commission's attention for the sole purpose of illustrating the potential consequences of a ruling that a violation of 19.15.26.8(C) NMAC must result in the voiding of an administrative order granting injection authority.

III. The Appropriate Remedy for the Division's Violation of the 15-Day Rule Is a Nunc Pro Tunc Order Reinstating Alpha SWD's Injection Authority.

If the Commission finds that the Division made a mistake in issuing SWD-1680, Alpha SWD submits that the Commission should not rule that the mistake must result in the revocation of Alpha SWD's previously granted injection authority. Because such a ruling could result in unintended consequences, the Commission should conclude that challenges to Division administrative orders should be decided on a case-by-case basis depending on the circumstances presented. Specific to this case, Alpha SWD further submits that the Commission should determine, under the circumstances presented, where Alpha SWD would be unnecessarily penalized for a mistake by the Division, and there is no question of a violation of correlative rights or potential damage to the injection interval, that the Division's mistake is not an appropriate basis to revoke SWD-1680. Accordingly, Alpha SWD submits that the appropriate remedy is the Commission's issuance of a nunc pro tunc order reinstating Alpha SWD's injection authority effective as of July 5, 2017.

Respectfully submitted,

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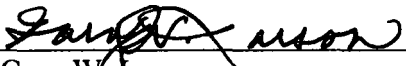
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of July, 2018 I served a true and correct copy of the foregoing *Alpha SWD Operating LLC's Pre-Hearing Brief* via email to:

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