RECEIVED OCD
2015 AUG -7 P 3:48

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

APPLICATION OF LIGHTNING DOCK GEOTHERMAL HI-01, LLC FOR APPROVAL TO INJECT INTO A GEOTHERMAL AQUIFER THROUGH THREE PROPOSED GEOTHERMAL INJECTION WELLS AT THE SITE OF THE PROPOSED LIGHTNING DOCK GEOTHERMAL POWER PROJECT, HIDALGO COUNTY, NEW MEXICO **CASE NO. 15357**

APPLICATION OF LIGHTNING DOCK GEOTHERMAL HI-01, LLC TO PLACE WELL NO. 63A-7 ON INJECTION-GEOTHERMAL RESOURCES AREA, HIDALGO COUNTY, NEW MEXICO **CASE NO. 15365**

OBJECTIONS

Comes now, Michelle Henrie of Michelle Henrie, LLC and states the following Objections on behalf of Lightning Dock Geothermal HI-01, LLC ("Lightning Dock").

Background

Lightning Dock submitted four G-112 applications to drill injection wells to the Oil Conservation Division ("OCD"). AmeriCulture objected to each: "Owing partially to the potential for endangerment of the regional geothermal resource, underground water supplies, and businesses that rely upon the regional geothermal resource, we believe that [the] applications should be denied."

Three well applications were set for hearing before the Oil Conservation Commission on August 13, 2015. The Commission then added the fourth well application and rescheduled the hearing to September 10, 2015.

Lightning Dock has several objections to the procedure that has taken place. It is unclear to Lightning Dock why its G-112 applications have been set for public hearing. Staff counseled Lightning Dock to raise its objections to the Commission.

Regulatory Context

Development of geothermal resources in New Mexico is governed by the Geothermal Resources Conservation Act, NMSA 1978 §§ 71-5-1 et seq (1975) (the "Act"). The Act is administered by Geothermal Regulations, written in 1983. There have been very few

amendments to the Act and the Geothermal Regulations because there has been relatively little geothermal development in New Mexico. This hearing provides an opportunity for the Commission to interpret the Act and the Geothermal Regulations and to establish precedent. For example, the Geothermal Regulations say very little about hearing procedures. This allows the Commission to develop geothermal hearing procedures that are efficient, such as establishing time limits on presentations and cross examination. There is no reason that a party cannot make its case within reasonable time limits known in advance. In fact this happens regularly in other settings where a developer proposes a project and a neighbor opposes the same.

What Process Applies Under the Geothermal Regulations?

In answer to Lightning Dock's question why its G-112 applications have been set for public hearing, discussions with OCD have focused on two different sections in the Geothermal Regulations. Both sections are set forth in full in Exhibit A.

The G-112 Application Process. The first section addresses the process for filing a Form G-112 application requesting approval to drill a geothermal injection well. The Geothermal Regulations are clear. One may make "[a]pplication for authority to inject fluids into a geothermal reservoir" by following the regulatory procedure at 19.14.93.8(C) NMAC:

> If no objection is received within 20 days from the date of receipt of the application, and the division director is satisfied that all of the above requirements have been complied with, that the proposal is in the interest of conservation and will prevent waste and protect correlative rights, and that the well is cased, cemented, and equipped in such a manner that there will be no danger to any natural resource, including geothermal resources, useable underground water supplies, and surface resources, form G-112 will be approved. In the event the form is not approved because of objection from an affected geothermal lease owner or for other reason, the application will be set for public hearing, if the applicant so requests.

This section does not say that an objection triggers a hearing.

It is important to know that this section is worded differently than language for drilling an oilfield injection waste disposal well in the Oil and Gas Regulations. It also is important to know that the undersigned visited State Records and researched the history of both regulations. The Geothermal Regulations have never said that if an objection is received, the injection well application must go to hearing. The Oil and Gas Regulations have always said that if an objection is received, the injection well application must go to hearing.[1] This distinction makes

[1] See 19.15.26.8(D) NMAC for the applicable Oil and Gas Regulation, originally filed as New Rule 701 on January 8, 1982, which originally (and consistently) stated that "If a written objection to any application for administrative approval of an injection well is filed ... the application shall be set for hearing." When the Geothermal Regulations were written a year later in 1983, the mandatory hearing provision was omitted. A court likely would read this omission as intentional.

sense because geothermal injection wells reinject native geothermal water back into the ground. Oilfield disposal wells inject waste into the ground.

Yet in the 2013 hearing,[2] OCD took the position that it could and should misread the Geothermal Regulations and substitute the oil and gas language instead. This makes no sense. The Geothermal Regulations squarely address the situation. The drafters of the Geothermal Regulations chose to differ from the Oil and Gas Regulations on this point. That choice needs to be honored. It would be arbitrary and capricious to do otherwise.

The Commission's first order, Order R-14021 does not address why the Commission decided to send Lightning Dock's G-112 applications to hearing. The answer cannot be "because AmeriCulture objected." That answer would mean the Commission is following the wrong rules—the Oil and Gas Regulations instead of the Geothermal Regulations. Yet the Commission's second order, Order R-14021-A, refers AmeriCulture's "objections." Objections do not trigger hearings under the Geothermal Regulations.

In geothermal matters, the Commission needs to follow the Geothermal Regulations. Not the Oil and Gas Regulations. Failure to follow the Geothermal Regulations impacts the procedural due process of geothermal developers, sets bad precedent, and sends a chilling message of unpredictability and over-regulation to the geothermal industry.

Lightning Dock submits to the Commission that that the Geothermal Regulations do not require the OCD, the Director or this Commission to send a G-112 application to a public hearing after receiving an objection. Rather, the Director has discretion how to handle an objection. Especially in matters that have already been heard (in this case twice), the Director is well empowered to exercise his discretion to consider and deny an objection without holding a public hearing.

The Process to Apply for a Hearing. The second section in the Geothermal Regulations allows "any operator or producer, or any other person having a property interest" to "institute proceedings for a hearing" by filing an "application." 19.14.112.8 NMAC.

It would be inconsistent for the Commission to take the position that an application to institute proceedings for a hearing is non-discretionary but an application for authority to inject fluids into a geothermal reservoir via form G-112 is discretionary. They are both called "applications" in the Geothermal Regulations. Neither is a "notice." Both applications can be granted or denied at the Director's discretion based on the regulatory criteria. That's the nature of an application. Just because OCD receives an application to hold a hearing does not mean that it must hold a hearing.

In this case, OCD did not even receive an adequate application. Commission Order R-14021 acknowledges that AmeriCulture filed an application for a hearing that does not meet the regulatory criteria. In other words, the statement that there is "potential for endangerment of the

[2]In 2013, the Commission heard Case No. 14948 involving two of Lightning Dock's injection wells that are currently in use at the power plant.

regional geothermal resource, underground water supplies, and businesses that rely upon the regional geothermal resource" is not sufficient reason for the Commission to proceed to a hearing. And yet that is precisely what the Commission did: it set a hearing. This makes no sense.

An inadequate application should have been rejected or dismissed outright. By accepting the inadequate application and allowing it to be supplemented sufficiently to meet the regulatory criteria—as Order R-14021 does—the Commission stepped on a dubious path. Under the Geothermal Regulations, there is one and only one type of application that can be supplemented prior to hearing: a "verbal" request for a hearing under appropriate "conditions" pursuant to 19.14.112.8(C) NMAC:

> When conditions are such as to require verbal application to place a matter for hearing on a given docket, the division will accept such verbal application in order to meet publishing deadlines. However, if written application, filed in accordance with the procedures outlined above, has not been received by the division's Santa Fe office at least ten days before the date of the hearing, the case will be dismissed.

The exception is only for "verbal applications" under "conditions" that require the same. Order R-14021 apparently somehow deems AmeriCulture's non-verbal emailed letter to fit the regulatory criteria for the exception. How is an emailed letter a "verbal" application? What were the "conditions" allowing the exception? The Order is wholly silent on how the exception applies.[3] Logically, it doesn't.

Lightning Dock submits to this Commission that that the Geothermal Regulations do not require it to accept an inadequate application. The Geothermal Regulations do not require the Commission to schedule a hearing where an applicant has stated inadequate grounds for doing so. The Geothermal Regulations do not require the Commission to pretend that a non-verbal application was a "verbal" application meeting the required criteria just so a project opponent can be heard. Failure to follow the Geothermal Regulations impacts the procedural due process of geothermal developers, sets bad precedent, and sends a chilling message of unpredictability and over-regulation to the geothermal industry. Even if AmeriCulture's applications were adequate (and the Commission has already acknowledged otherwise), the Commission is not required to grant the applications and hold a hearing. The Record is silent as to why the Commission granted AmeriCulture's applications and scheduled a hearing.

---

[3] Lightning Dock notes an additional procedural irregularity. The Geothermal Regulations state that "The application shall be in triplicate." 19.14.112.8(A) NMAC. AmeriCulture's application was a letter sent by email to an OCD Staff member. Acting without direction or authority to do so, and without anyone's knowledge, this Staff member printed out the application in triplicate and filed it with the Commission Clerk. This action is entirely inappropriate and prejudicial to Lightning Dock, and should not be sanctioned by the Commission.

Prejudice to Lightning Dock

Delay. Order R-14021-A postpones the hearing one month, from August 13 to September 10, 2015. No reason is given to justify the delay. Lightning Dock repeatedly has told OCD that delay is harmful. The Commission could have consolidated Case No. 15357 and Case No. 15365 and heard both matters on August 13, 2015. There are no minimum notice requirements in the Geothermal Regulations that would have prevented the Commission from hearing both cases on August 13, 2015. Yet Order R-14021-A postponed both cases to September 10, 2015 without any justification whatsoever. Commission Orders should include reasons to support the action taken in the Order. The fact that AmeriCulture requested a delay is not a sufficient reason for delay and sets precedent for abuse of the hearing process.

Inability to Properly Prepare. Order R-14021 acknowledges that AmeriCulture filed an application for a hearing that does not meet the regulatory criteria. Such an application should have been rejected or dismissed. Instead, Order R-14021 treats AmeriCulture's emailed letter as if it were a "verbal application" under the Geothermal Regulations and allows AmeriCulture until ten days before the hearing to supplement its inadequately filed application—i.e., to articulate what Lightning Dock needs to defend against. The effect of the Commission's Orders is to force Lightning Dock into a hearing process in which Lightning Dock does not even know what it has to defend against … because AmeriCulture declined to submit a proper application for hearing in the first place. This is a worst case scenario.

Now that the hearing has been postponed to September 10, 2015, Lightning Dock will not be informed about how to prepare its case until August 27, 2015. The Commission prejudices Lightning Dock by accepting inadequate applications, not requiring AmeriCulture to timely reveal its reasons for asking for a hearing, and now delaying resolution of the situation.[4]

Conclusion

AmeriCulture is taking advantage of procedural uncertainty under the Geothermal Regulations to facilitate its opposition to the Lightning Dock geothermal project. AmeriCulture has already had two hearings, in 2009 and again in 2013. AmeriCulture wasted hours of agency time and countless taxpayer dollars in these prior hearings. Please know that Lightning Dock's geothermal lease with BLM dates back to 1979. Since then, it has been the express desire of the federal government and the express intent of the geothermal leaseholder to generate electricity—and thereby royalties—from this resource. AmeriCulture knew of these intentions when it built a tilapia farm using this same resource. AmeriCulture is a project opponent whose tenacious obstruction spans years, multiple agencies, and countless hours of wasted time.

Lightning Dock encourages the Commission to shut down AmeriCulture's abuse of the system by reaffirming the Director's discretion. The Geothermal Regulations do not require the Director to hold a hearing when a G-112 injection well application draws an objection. The

[4] Lightning Dock notes that Order R-14021 relates to Case No. 15357. Currently there is no requirement that AmeriCulture supplement its identical application for application that relates to Case No. 15365

Director has discretion to deny an objection. The Geothermal Regulations do not require the Director to accept an incomplete application for a hearing. The Geothermal Regulations do not require the Director to pretend that a non-verbal request for a hearing is in fact a "verbal" request meeting certain "conditions." Further, even if AmeriCulture's application for a hearing had been adequate (it was not), it is still an "application." The Geothermal Regulations cannot consistently be read to say that a G-112 injection well "application" is discretionary but an "application" for hearing is mandatory. The Director has discretion to grant or deny any "application" in accordance with the criteria stated in the Geothermal Regulations.[5]

The Commission has good reason to reject or dismiss AmeriCulture's nonconforming applications for hearing. It is not too late for the Commission to take proper action.

If the Commission elects to go forward with the hearing on September 10th, it has the power to limit the time allowed to each party for the sake of judicial efficiency. The Commission should exercise this power and limit the proceeding to one day.

Respectfully Submitted,

MICHELLE HENRIE, LLC

Michelle Henrie
P.O. Box 7035
Albuquerque, NM 87194
Attorney for Lightning Dock Geothermal HI-01, LLC

[5] Lightning Dock has heard arguments that the Act requires a public hearing before any order can be issued and injection wells can only be authorized by order. This is not accurate. The Geothermal Regulations nowhere say that injection wells can only be authorized by order, To the contrary, 19.14.93.8 (C) NMAC clearly delineates that the "form G-112" will be approved or not approved. It is under Oil and Gas Regulations that injection wells must be approved via an order. See 19.15.26.8 NMAC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was e-mailed to the following and faxed to Mr.Lakins as well on August 7, 2015:

Charles N. Lakins
Lakins Law Firm
P.O. Box 91357
Albuquerque, NM 87199
charles@lakinslawfirm.com
Fax: 877-604-8340

Allison Marks
EMNRD
1220 South St. Francis Dr
Santa Fe, NM 87505
AllisonR.Marks@state.nm.us

Bill Brancard
EMNRD
1220 South St. Francis Dr
Santa Fe, NM 87505
bill.brancard@state.nm.us

Michelle Henrie

Exhibit A

19.14.93.8 METHOD OF MAKING APPLICATION

A. Application for authority to inject fluids into a geothermal reservoir or to dispose of geothermal waters into a zone or formation not classified as a geothermal reservoir shall be made in duplicate on division form G-112, application to place well on injection-geothermal resources area, and shall be accompanied by one copy of each of the following:

(1) A plat showing the location of the proposed injection/disposal well and the location of all other wells within a radius of one mile from said well, and indicating the perforated or open-hole interval in each of said wells. The plat shall also indicate the ownership of all geothermal leases within said one-mile radius;

(2) The log of the proposed injection well, if available;

(3) A diagrammatic sketch of the proposed injection well showing casing strings, including diameters and setting depths, quantities used and tops of cement, perforated or open-hole interval, tubing strings, including diameters and setting depths, and the type and location of packers, if any.

B. Copies of the form G-112 (without the above attachments) shall be sent to all other geothermal lease owners, if any there be, within a one-half mile radius of the proposed injection/disposal well.

C. If no objection is received within 20 days from the date of receipt of the application, and the division director is satisfied that all of the above requirements have been complied with, that the proposal is in the interest of conservation and will prevent waste and protect correlative rights, and that the well is cased, cemented, and equipped in such a manner that there will be no danger to any natural resource, including geothermal resources, useable underground water supplies, and surface resources, form G-112 will be approved. In the event the form is not approved because of objection from an affected geothermal lease owner or for other reason, the application will be set for public hearing, if the applicant so requests.

D. The division director may dispense with the 20-day waiting period if waivers of objection are received from all geothermal lease owners within a one-half mile radius of the proposed injection/disposal well.

19.14.112.8 METHOD OF INITIATING A HEARING

A. The division upon its own motion, the attorney general on behalf of the state, and any operator or producer, or any other person having a property interest may institute proceedings for a hearing. If the hearing is sought by the division it shall be on motion of the division and if by any other person it shall be by application. The application shall be in triplicate and shall state:

(1) the name of the applicant;

(2) the name or general description of the common source or sources of supply or the area affected by the order sought;

(3) briefly the general nature of the order, rule or regulation sought; and

(4) any other matter required by a particular rule or rules, or order of the division.

B. The application shall be signed by the person seeking the hearing or by his attorney.

C. When conditions are such as to require verbal application to place a matter for hearing on a given docket, the division will accept such verbal application in order to meet publishing deadlines. However, if written application, filed in accordance with the procedures outlined above, has not been received by the division's Santa Fe office at least ten days before the date of the hearing, the case will be dismissed.