

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

IN THE MATTER OF THE HEARING CALLED
BY THE OIL CONSERVATION COMMISSION FOR
THE PURPOSE OF CONSIDERING:

CASE NOS: 15855

APPLICATION OF DELAWARE ENERGY LLC
TO REVOKE THE INJECTION AUTHORITY GRANTED
UNDER SWD1680 FOR THE ALPHA SWD NO 1 WELL
OPERATED BY ALPHA SWD OPERATING LLC,
EDDY COUNTY, NEW MEXICO.

REPORTER'S TRANSCRIPT OF VIRTUAL PROCEEDINGS
COMMISSIONER HEARING
Agenda Item 4
May 13, 2021
Santa Fe, New Mexico

BEFORE: ADRIENNE SANDOVAL, CHAIRWOMAN
GREG BLOOM, COMMISSIONER
CHRIS MOANDER, ESQ.

This matter came on for hearing before the New Mexico Oil Conservation Commission on Thursday, May 13, 2021, via Webex Virtual Platform, hosted by New Mexico Energy, Minerals, and Natural Resources Department.

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APPEARANCES

FOR DELAWARE ENERGY LLC:
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INDEX

Case Called	
Motions	03
Reporter Certificate	20

1 CHAIRWOMAN SANDOVAL: Mr. Rankin, are you there?

2 MR. RANKIN: I am here. I appreciate the
3 Commission's accommodating my vaccination schedule this
4 morning.

5 CHAIRWOMAN SANDOVAL: We just fixed all the
6 schedules this morning.

7 MR. RANKIN: Thank you.

8 CHAIRWOMAN SANDOVAL: Ms. Hardy, are you there?

9 MS. HARDY: I am here. Can you hear me.

10 CHAIRWOMAN SANDOVAL: Yes.

11 MS. HARDY: Okay, thank you.

12 CHAIRWOMAN SANDOVAL: All right. Great.

13 We will move on to Case Number 15855, a motion
14 hearing for the application of Delaware Energy LLC, to
15 revoke the injection authority granted under SWD1680 for the
16 Alpha SWD Number 1 operated by Alpha SWD LLC.

17 I think in this situation, you know, I will let
18 both of you provide sort of a brief update to the
19 Commission, and then we will move forward from there.
20 Please keep in mind that we have read the order and the
21 information, and so we are already familiar with that.

22 Mr. Rankin, would you proceed?

23 MR. RANKIN: I'm happy to go first, Madam Chair,
24 however I -- I defer to Ms. Hardy since it was her motion,
25 but I'm happy to give my input on how things should stand.

1 I think Ms. Hardy should go first.

2 CHAIRWOMAN SANDOVAL: Agreed. Sorry about that.
3 Ms. Hardy, would you please start off?

4 MS. HARDY: Sure. Thank you, Madam Chair. So at
5 this point I think where we are is that the district court
6 issued it's order, and on the issue of whether the Division
7 had jurisdiction under the Oil & Gas Act to determine that
8 administrative injection permit was issued in violation of
9 the Division's regulations. And because the permit had been
10 issued prior to the 15 day expiration period after it was
11 submitted.

12 So that's the issue that the district court
13 addressed in the appeal. And the district court decided
14 that the Division did have jurisdiction over the Delaware
15 application to revoke the permit. And Page 8, Paragraph 3
16 of the district court's order states that the Division got
17 it right. Application for a permit was granted without a
18 hearing. Delaware had no choice but to file an application
19 to revoke Alpha's permit. The Division had held the
20 hearing, and after it reviewed the evidence revoked the
21 permit. There has been no dispute that the permit was
22 issued prematurely.

23 After Alpha's hearing -- I think they mean
24 permit -- was revoked and (unclear) de novo review before
25 the Commission, that is where the error of procedure

1 occurred.

2 That is what the district court decided, so now I
3 think we are back before the Commission for a de novo
4 hearing or one to be set on Delaware's application to revoke
5 Alpha's permit because that hearing was never held.

6 The Commission had decided the case based on a
7 lack of jurisdiction to the Division. The Commission had
8 also asked the parties to brief issues related to standing
9 of Delaware to apply to revoke Alpha's permit, and that
10 issue was fully briefed by the parties in November of 2018.

11 So it's been quite a while but I think that's an
12 issue that has not been addressed by the district court or
13 the Commission, and so I think at this point Alpha would ask
14 that the Commission consider the motions that were filed
15 regarding dismissal of Delaware's application based on
16 Delaware's lack of standing.

17 And I can address the standing issue argument
18 unless you would like for me to hold off on doing that and
19 hear from Mr. Rankin.

20 CHAIRWOMAN SANDOVAL: Let's hold off on that for
21 a moment and let Mr. Rankin.

22 MS. HARDY: Thank you.

23 MR. RANKIN: Good morning, Madam Chair,
24 Commissioners, Adam Rankin appearing from the law firm of
25 Holland & Hart on behalf of Delaware Energy LLC. I agree

1 with what Ms. Hardy read from the district court's order,
2 that the Division got it right. I think that is correct.

3 And then but I think I -- I disagree about
4 where -- what needs to happen next, I don't believe that the
5 Commission needs to revisit Delaware's application to revoke
6 Injection Order 1680 at this point.

7 I believe that, that with the rescission of the
8 existing order, I think that we can go back and decide, you
9 know, what the next step would be, and I think it would be,
10 as Ms. Hardy was relating, you know, to the point where the
11 procedures started to go awry, which is essentially where
12 the Division left off, which is at the revocation of that
13 injection authority.

14 The question then is, where do we go from there.
15 And what we have said before and what we think the correct
16 next step would be would be to remand the competing
17 applications before the Division for a hearing, for a
18 hearing on each of the individual, you know, injection
19 authority applications, you know, before the Division. I
20 think that would be the proper next step assuming that the
21 Commission, you know, finds that Delaware has standing to
22 make its arguments on the authority to, to inject.

23 So I'm happy to address that motion. I do
24 believe it's, you know, district court, while it was not
25 directly before the district court, indicates very clearly

1 where it would come out if that issue were to be appealed
2 again. I do believe there is standing, but I'm happy to go
3 into that argument.

4 But procedurally I think the proper course would
5 be for the Commission to remand the issues both to the
6 Division for the Division to hear the competing applications
7 on injection. I think the Division is probably more fairly
8 equipped to hear competing applications along those lines.

9 And then at that point, you know, if there's a
10 dispute over the Division's resolution of that, then the
11 parties can appeal that to the Commission. I will say that,
12 you know, if it's helpful to the Commission, I do believe
13 the Commission has the authority to hear the competing
14 applications directly under 19.15.4.20 Subpart B, the
15 director may direct that the Commission can hear a matter
16 directly without having to go before the Division.

17 So, however, I think that, you know, within the
18 nature of these cases the Division is probably better
19 equipped to hear such matters in the first instance,
20 especially these cases in which neither one has been heard
21 and there's perhaps still factual matters that would be
22 better suited for a presentation at the Division level.

23 MR. MOANDER: Madam Chair, I've got a question
24 that I want to put out there for the parties, if that's
25 okay.

1 CHAIRWOMAN SANDOVAL: Sure.

2 MR. MOANDER: One of the issues that I'm
3 struggling with here, and I know the Commission is aware of
4 this issue, is the difference between dismissing the de
5 novo -- dismissing a de novo application and then remand.
6 Because my understanding of the procedural posture at the
7 Division level is that the Division doesn't actually in and
8 of itself have anything left to do. It's the -- it's the
9 parties that need to do something at the Division level if
10 were to end up back there.

11 In other words, the case was effectively
12 completed to, but not all the way through the reg -- I call
13 it the regulations and what was in the order. So if we were
14 to remand it, doesn't that require at least one of the
15 parties or both to take action, which is not usually how
16 remands operate?

17 MS. HARDY: I agree, Mr. Moander. I think --
18 well, the issue I see is that Delaware had filed its
19 application to revoke Alpha's permit, which was granted, and
20 then Alpha had this application for a de novo hearing that's
21 never been decided. So to me it seems if the cases were
22 remanded back to the Division, it would require at the least
23 dismissal of Delaware's application to remove the permit if
24 we are going to go back and have an actual hearing on the
25 actual injection permit.

1 And then procedurally, I think those permits will
2 then basically, I mean Delaware is suspended or canceled
3 depending on how you look at it, I think there is dispute
4 about that, so how we go back and have a hearing on the
5 injection permits would be, I think, a procedural -- so I
6 guess I'm not sure exactly how that would work.

7 MR. MOANDER: Mr. Rankin?

8 MR. RANKIN: Yes, so I think because the district
9 court has, has voided Order 1444 B and E, I believe, in my
10 view, the original Commission order -- and I should had
11 reviewed this, I'm sorry I hadn't, but I believe it was
12 upholding the Division, original Division decision which was
13 to rescind the -- Alpha's injection authority.

14 So I think where, where this ought to go is it
15 ought to go back to where it should have been as the
16 district court has laid out. In fact, I think the district
17 court provides a road map for the Commission to follow here
18 on Page 3 of their order.

19 And what it says here is that, prior to
20 considering Alpha's competing C-108 application, the
21 Division should have required Alpha to provide notice to
22 Delaware Energy or notify Delaware Energy itself about this
23 pending application. That's what should have happened and
24 it didn't.

25 So first sentence. Second sentence, the Division

1 should not have approved Administrative Order SWD 1680
2 without first affording Delaware Energy to protest Alpha's
3 C-108 application. So I think where we are, I think the
4 district court is giving direction to the Commission to
5 restart at this point so that, so that Delaware can properly
6 protest Alpha's pending -- what should be now a pending
7 C-108 application. Having permitted Delaware to make that
8 protest, then the parties can then proceed to the Division
9 level to have a competing hearing -- have competing hearings
10 on their proposed injection.

11 I believe that the district court has laid out a
12 framework and pathway here for the parties and the
13 Commission to resolve these competing applications, and
14 that's what is provided in that paragraph on Page 3.

15 So I think, to Mr. Moander's question, what, with
16 a remand, I think that if there is a motion that should be
17 filed by, by Delaware to affect this, you know, this result,
18 I think I'm happy to file it, but I think it's within the
19 authority of the Commission to -- in an effort to resolve
20 this dispute -- to remand the matter to the Division level
21 pursuant to the direction given by the district court for
22 there to be -- for Delaware to be provided the opportunity
23 to protest Alpha's application and then for the Division to
24 hear what then would be two pending SWD applications.

25 MR. MOANDER: Okay, that makes -- I mean, what I

1 have been hung up on is when something gets remanded, there
2 is some level of instruction to that administrative body or
3 court, saying, "Here is what you have to do as a court or
4 adjudicatory body next, or here are your next steps," and
5 that isn't quite how this order is written.

6 And so because this, a remand in this case sort
7 of leaves the case sitting on the Division's desk until and
8 unless a party takes some sort of action, and that's what
9 I'm trying to clarify here for purposes -- because I looked
10 at this and there is a big distinction between a dismissal
11 and a remand.

12 And in this instance, because there is a
13 necessity of a party taking action, if this is we will say
14 remanded, in quotes, to the Division, it just seems like an
15 old outcome in a way to me, and I wanted to hear how the
16 parties viewed that because I have never had -- I have not
17 had court orders that didn't give lockstep marching orders
18 on what needs to get done next. So that's what I wanted to
19 clarify.

20 MR. RANKIN: Thank you, Mr. Moander. I think, in
21 my view, the directions we have been given are in that
22 paragraph on Page 3, was essentially start at the point
23 where, where the Division should not have approved Alpha's
24 application and should have permitted Delaware the
25 opportunity to protest. I think we should go back to that

1 point and allow Delaware to protest, and then we would have
2 competing applications for injection at the Division. I
3 think that's direction from the district court.

4 MR. MOANDER: Thank you, Mr. Rankin.

5 CHAIRWOMAN SANDOVAL: Commissioner Bloom, do you
6 have any questions for the parties?

7 COMMISSIONER BLOOM: Madam Chair, not at this
8 time.

9 CHAIRWOMAN SANDOVAL: I don't either. So,
10 Mr. Moander, I mean, in this situation, maybe you can help
11 in terms of the terminology whether it's a remand or a
12 dismissal, but it doesn't appear that the Commission has the
13 jurisdiction to hear the de novo application.

14 MR. MOANDER: Madam Chair, I think that is right,
15 and one of the issues in here is that but for Alpha's
16 application, Delaware did not file one in this case, and so
17 my suggestion is, is that if the Commission didn't have
18 jurisdiction to hear Alpha, or Alpha's application, then I
19 think that it really does impact the remainder of the case
20 because everything stems from that application.

21 And so if the Commission doesn't have
22 jurisdiction then -- you know, this is where I'm a little
23 stuck on this -- from what I am seeing and hearing from the
24 parties and my own research, it seems proper to dismiss
25 this, this matter and remand it to the Division for further

1 proceedings consistent with the order.

2 Because otherwise we are going to end up with a
3 bifurcated case where things will not operate properly
4 again, and I think the court was clear, the error happened
5 once the Commission took or assumed jurisdiction, and the
6 remedy here is to rewind things back to that point and get
7 everything done correctly at the Division level.

8 So a dismissal of the applications of both
9 parties with a remand to the Division is consistent with the
10 court's order.

11 COMMISSIONER BLOOM: Madam Chair, Mr. Moander, it
12 works for me -- I would welcome any input from the attorneys
13 here as well -- work me to move to dismiss this matter and
14 remand it to the Division for further proceedings pursuant
15 to the court's order.

16 MR. MOANDER: I think that's proper.

17 CHAIRWOMAN SANDOVAL: I would second that motion.

18 MR. MOANDER: Well, do you guys want or does the
19 Commission wish to hear from the parties any further on
20 this?

21 COMMISSIONER BLOOM: (Poor audio.)

22 MR. RANKIN: I think that's the right course. I
23 think the only thing that might be helpful in the order
24 issuing from the Commission would be some clarification on
25 maybe timing. In other words, my assumption would be upon

1 the dismissal and remand, I think the clock on Delaware's
2 time to protest I think should be set. And I don't know the
3 dates, I'm sorry, I should check that, but I think there
4 were a few days left when the initial administrative order
5 approving Alpha's injection authority was granted.

6 So I think what I would propose is in any
7 Commission order, that the clock would be set for, you know,
8 a date certain when, when the Division resumes authority
9 over these cases and that Delaware be afforded the
10 opportunity to make its protest just so it's clear, and
11 then, then the Division can proceed according to, you know,
12 a request to have the cases heard at the Division level.

13 COMMISSIONER BLOOM: We could say, Mr. Rankin,
14 remand this to the Division for further proceedings pursuant
15 to the court's order so that Delaware Energy can make its
16 protest by X date at the Division.

17 MR. RANKIN: Yes. I'm sorry I don't have that
18 information in front of me, I would have to double check the
19 time frame in there. I believe it was on the order of four
20 days or so. See if I could figure it out real quick.

21 MR. MOANDER: That is something I wasn't
22 preparing for either, now that you mention it, Mr. Rankin.

23 MS. HARDY: I think it's six -- well, I believe
24 it would be, if you are looking at the date that Alpha
25 submitted its final information was June 19 of 2017, and the

1 Division issued the permit on June (unclear.)

2 MR. RANKIN: Okay. That would be --

3 MR. MOANDER: This is why lawyers go to law
4 school; right.

5 MS. HARDY: That's right.

6 MR. MOANDER: I know that joke has been beaten to
7 death, but it's not wrong.

8 CHAIRWOMAN SANDOVAL: Would that be six days?

9 MS. HARDY: I believe that would be right.

10 MR. MOANDER: I think that's right.

11 CHAIRWOMAN SANDOVAL: I'm getting six days.

12 COMMISSIONER BLOOM: That would be six days from
13 now?

14 MR. MOANDER: So conventionally when time is
15 calculated for filings and pleadings, tomorrow is day one.
16 So today is sort of a freebie in that sense. So the
17 clock -- tomorrow is day one. So if that's the case, then
18 that would put, and we are under -- we are under ten days
19 for this weekends are not -- where is my civil procedure on
20 that one? I forgot like which way that rule works. You
21 don't get weekends if it's under ten days.

22 MS. HARDY: So this would be governed by the
23 notice and objection rule, right? So I don't know.

24 MR. MOANDER: You're right.

25 MS. HARDY: So I don't know if it specifies

1 calendar days or business days.

2 MR. MOANDER: Well, let's find out.

3 MR. RANKIN: We will make shower our protest is
4 submitted tomorrow.

5 MS. HARDY: That's the safe thing to do.

6 MR. MOANDER: Here is what I'll do, because I
7 know everyone is busy, I'm not going to take up your time, I
8 will confirm all of this stuff and be in touch with you guys
9 this afternoon about the, you know, I will reference where
10 I'm finding all the deadlines are coming from, and I will
11 make sure that that's properly taken care of. If there a
12 problem, we will be able to work that out, I think, between
13 me and the parties, unless someone thinks that's not going
14 to happen. Does that sound amenable?

15 MS. HARDY: That sounds reasonable to me.

16 MR. RANKIN: Thank you.

17 MS. HARDY: I did have one request and that would
18 be, to avoid further confusion, I think it would be helpful
19 if the order remanding to the Division clarified that
20 Delaware's application to revoke Alpha's permit is also
21 dismissed.

22 MR. MOANDER: Yes, so that would be I think the
23 intention of the Commission, and the Commissioners are more
24 than welcome to correct me, is to wipe the slate clean at
25 this level and get it back to where things were working

1 properly and just for the sake of cleanliness and structure.

2 MR. RANKIN: May I make one point there, I guess.
3 I just want to be clear though that the intent is to -- is
4 that Alpha's authority to inject will have been revoked
5 because in order to get it back to where the district court
6 intended, there would be no authority to inject on the part
7 of, of Alpha.

8 And I guess if I understand Ms. Hardy correctly,
9 she is suggesting that the Division's order may stand and go
10 back and have a hearing at the Division level on the two
11 competing applications to inject.

12 MR. MOANDER: That will be -- and that's what I
13 was getting at about party action because in effect what I
14 see this doing or the Commission resulting in is that
15 everything stands as it was just prior to any Commission --
16 filings by the parties to the Commission, and that's where
17 it stands at that point in time. I realize it's suboptimal
18 and it can be a little harsh in that sense, but that's the
19 only way to clear out the taint here, I think.

20 COMMISSIONER BLOOM: Ms. Hardy, if you would
21 repeat that then, you are suggesting that we simultaneously
22 dismiss Delaware's motion to dismiss -- I'm sorry I got lost
23 on that one.

24 MS. HARDY: Sorry. No, so the case -- the whole
25 case began when Delaware filed an application to revoke

1 Alpha's permit, which the Division granted. And then Alpha
2 filed for a de novo hearing with the Commission. So if the
3 Commission is dismissing Alpha's de novo hearing
4 application, we are going back to the Division to have a
5 hearing on the competing injection permit, then I would
6 think that Delaware's application would also have to be
7 dismissed.

8 They can protest according to the Commission's
9 ruling the injection permit, but if we are back at square
10 one, then we are back at square one and I think that --

11 COMMISSIONER BLOOM: So we would dismiss
12 Delaware's application to revoke Alpha's permit to inject.

13 MS. HARDY: Right, which is why Delaware would
14 protest, right, the permit. Right? Because if the permit
15 is already revoked then there is no hearing on revoking the
16 permit.

17 MR. MOANDER: Right.

18 COMMISSIONER BLOOM: That gets us back to what
19 Mr. Moander was suggesting that we get this back to the
20 Division and can begin anew.

21 CHAIRWOMAN SANDOVAL: I think that's a good
22 point. Do we have a motion

23 COMMISSIONER BLOOM: I think I got it. Mr.
24 Moander, just jump in if I blow this, or anyone. Madam
25 Chair I move to dismiss this matter and remand it to the

1 Division for further proceeding pursuant to the court's
2 order so that Delaware Energy can make its protest by --
3 let me get the date.

4 CHAIRWOMAN SANDOVAL: Six days.

5 COMMISSIONER BLOOM: Make its protest within six
6 days at the Division and dismiss Delaware Energy's
7 application to revoke Alpha's permit to inject.

8 CHAIRWOMAN SANDOVAL: I second that.
9 Mr. Moander, would you do a roll call vote please?

10 MR. MOANDER: Yes. Commissioner Bloom?

11 COMMISSIONER BLOOM: Approved.

12 MR. MOANDER: Madam Chair?

13 CHAIRWOMAN SANDOVAL: Approved.

14 MR. MOANDER: The motion passes unanimously.

15 (Motion passes unanimously.)

16 MR. MOANDER: As to the parties, I will be
17 working on this quickly. This will be a project for today
18 so we can get this done.

19 CHAIRWOMAN SANDOVAL: Thank you.

20 (Hearing concluded.)

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1 STATE OF NEW MEXICO
2 COUNTY OF BERNALILLO

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REPORTER'S CERTIFICATE

I, IRENE DELGADO, New Mexico Certified Court Reporter, CCR 253, do hereby certify that I reported the foregoing virtual proceedings in stenographic shorthand and that the foregoing pages are a true and correct transcript of those proceedings to the best of my ability.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case and that I have no interest in the final disposition of this case.

I FURTHER CERTIFY that the Virtual Proceeding was of poor to reasonable quality.

Dated this 13 day of May 2021.

/s/ Irene Delgado

Irene Delgado, NMCCR 253
License Expires: 12-31-21