

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

**DELAWARE'S 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**

Delaware Energy LLC (“Delaware”), pursuant to the sua sponte request of the Oil Conservation Commission (“Commission”) at the May 22, 2018, hearing, files this brief to address whether Division Examiners have “jurisdiction” to decide if the issuance of Administrative Order SWD-1680 complied with the procedural requirements of NMAC 19.15.26.8 or whether that authority rests exclusively with the Commission under the statutory “de novo” review process. As demonstrated herein, the Oil and Gas Act authorizes a party adversely affected by Division action to proceed to the Commission “de novo” only in the limited circumstance where a matter has been referred to an examiner for hearing and a decision has been rendered following an examiner hearing. Nothing in the Oil and Gas Act, Division regulations or Administrative Order SWD-1680 authorizes an adversely affected party to proceed directly to the Commission for review of an administrative order. Moreover, it was the Division Director that ultimately determined the proper forum to address the issues raised by Delaware’s application. Delaware properly invoked the only process available to it to address the procedural defects clearly apparent in the issuance of Administrative Order SWD-1680.

INTRODUCTION

Alpha SWD Operating LLC (“Alpha”) has appealed Division Order R-14484-A, which rescinds the injection authority granted by Administrative Order SWD-1680 for a commercial disposal well in the Devonian and Silurian formations. The Division found that Administrative Order SWD-1680 was issued prior to the expiration of the 15-day waiting period required by NMAC 19.15.26.8(C) and was therefore void. *See* Order R-14484-A at p. 3, ¶¶ (11)-(17). This Division Order was initiated by an application to revoke the injection authority filed by Delaware, which has a prior-filed application pending before the Division for a disposal well in the same area and in the same disposal zone. During the Division Examiner proceedings, Delaware established that the record for Administrative Order SWD-1680 indisputably shows Alpha’s application was approved without any prior notice to Delaware, without consideration of Delaware’s prior-filed application for a disposal well, and in violation of the 15-day waiting period required by NMAC 19.15.26.8(C). Order R-14484-A ultimately rescinded the injection authority solely on the basis that the Division failed to wait the mandatory 15-day period required by NMAC 19.15.26.8.C(2).

During the May 22nd Commission hearing on Alpha’s de novo appeal, the Commission sua sponte inquired whether Division Examiners have “jurisdiction” to determine if Administrative Order SWD-1680 complied with the procedural requirements of NMAC 19.15.26.8 or whether that authority rests exclusively with the Commission under the statutory “de novo” review process. An examination of the Oil and Gas Act, Division regulations and Administrative Order SWD-1680 demonstrate that Delaware properly invoked the only process available to it to address the procedural defects clearly apparent in the issuance of this administrative order.

A. Parties Adversely Affected By Division Action Can Invoke “De Novo” Relief Only After A Matter Was Referred To An Examiner For Hearing.

Section 70-2-13 of the Oil and Gas Act authorizes Division Examiners to conduct hearings.

The last sentence of this Section 70-2-13 authorizes a party adversely affected by a Division decision to proceed “de novo” to the Commission only under limited circumstances:

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. (emphasis added)

Division regulations confirm that the statutory right to a “de novo” review by the Commission is limited to circumstances where an order has been rendered following an Examiner hearing:

19.15.4.23 HEARING BEFORE COMMISSION AND STAYS OF DIVISION ORDERS:

A. De novo applications. When the division enters an order pursuant to a hearing that a division examiner held, a party of record whom the order adversely affects has the right to have the matter heard de novo before the commission, provided that within 30 days from the date the division issues the order the party files a written application for de novo hearing with the commission clerk. If a party files an application for a de novo hearing, the commission chairman shall set the matter or proceeding for hearing before the commission. (emphasis added)

Alpha’s Administrative Application for injection authority was not referred to an Examiner for hearing. Rather it was approved administratively without an examiner hearing under the provisions of NMAC 19.15.26.8. Accordingly, the issuance of “Administrative Order SWD-1680” did not trigger the right of an adversely affected party to proceed “de novo” to the Commission. Rather, the only relief available to Delaware was to file an application for an adjudicatory hearing with the Division, the agency that retained jurisdiction under the last paragraph of Administrative 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.

Nothing in Administrative Order SWD-1680, Division regulations, or the Oil and Gas Act afford a party adversely affected by this administrative order to file a “de novo” proceeding with the Commission. Rather, the only apparent remedy for Delaware to address the procedural irregularities surrounding the issuance of this administrative order was to file an adjudicatory hearing under Section 70-2-13 and NMAC 19.15.4.8 (Initiating an Adjudicatory Hearing).

B. The Division Director, Not The Applicant, Determines The Proper Forum To Address the Issues Raised In Any Application For Hearing.

NMAC 19.15.4.8.B requires all applications for an adjudicatory hearing to be filed with the division clerk. Thereafter the Division Director publishes notice of the adjudicatory hearing and in that notice identifies not only the time and place for the hearing, but “whether the case is set for hearing before the commission or a division examiner.” NMAC 19.14.4.9.A(2). After Delaware filed its application to revoke the injection authority granted by Administrative Order SWD-1680, the Division Director at that time determined that the matter should initially proceed before a Division Examiner and not go directly to the Commission. *See* NMAC 19.15.4.20 (authorizing the Director to bring a matter directly before the Commission). Delaware did not determine, nor can it determine, which forum should initially address the issues raised by Delaware’s Application: That authority rests exclusively with the Division Director. *Id.*

CONCLUSION AND REQUEST FOR RELIEF

The process for Commission review of any action taken by the Division is governed by statute and regulation, not by legal doctrines applicable to district court review. Undersigned counsel is not aware of any prior Division/Commission ruling suggesting a party adversely affected by an administrative order must file a “de novo” application for review with the Commission. Indeed, the administrative order itself states that “jurisdiction” is retained by the

Division. A review of the Oil and Gas Act and the Division regulations reflect that Delaware properly invoked the only process available to it to address the procedural defects clearly apparent in the issuance of this administrative order. Thereafter, the Division Director determined that a Division Examiner should address the issues raised by Delaware's Application.

The administrative record comprising the exhibits attached to Delaware's Supplement To Motion For Judgment clearly and indisputably establish that Administrative Order SWD-1680 was issued prematurely and in violation of the 15-day waiting period required by NMAC 19.15.26.C(2). Accordingly, Administrative Order SWD-1680 is void and must be rescinded. The Commission should further order that the Division or the Commission schedule a hearing to address the competing disposal applications filed by Delaware and Alpha, both of which involve the same geographic area and the same disposal zone.

Respectfully Submitted,

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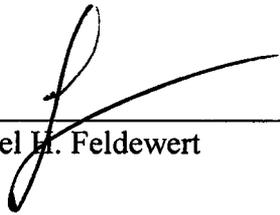
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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2018, I served a copy of the foregoing document to the following counsel of record via Electronic Mail to:

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