

BEFORE THE OIL & GAS COMMISSION

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|--|---|-----------------------------------|
| ATHENS COUNTY FRACKING ACTION NETWORK, | : | Appeal No. 902 |
| | : | |
| Appellant, | : | |
| | : | |
| -vs- | : | Review of Chief's Issuance of |
| | : | Injection Well Permit SWIW #11 |
| DIVISION OF OIL & GAS RESOURCES MANAGEMENT, | : | (K & H Partners, LLC) |
| | : | |
| Appellee, | : | <u>ORDER OF THE</u> |
| | : | <u>COMMISSION GRANTING</u> |
| and | : | <u>MOTION TO DISMISS</u> |
| | : | <u>APPEAL</u> |
| K & H PARTNERS, LLC, | : | |
| | : | |
| Intervenor. | : | |

Appearances: Richard C. Sahli, Counsel for Appellant ACFAN; Jennifer Barrett, Brett Kravitz, Assistant Attorneys General, Counsel for Appellee Division of Oil & Gas Resources Management; Robert L. Bays, Counsel for Intervenor K & H Partners, LLC.

BACKGROUND

This matter comes before the Oil & Gas Commission upon appeal by Appellant Athens County Fracking Action Network ["ACFAN"] from a decision of the Chief of the Division of Oil & Gas Resources Management ["the Division"] granting a well permit to K & H Partners, LLC ["K & H Partners"]. The well permit at issue authorizes K & H Partners to drill a well in Troy Township, Athens County, Ohio. After being drilled, this well is proposed to be utilized for the injection of oilfield waste materials into an underground geologic formation. The well is known as the SWIW #11, or the K & H 3 Well.

ACFAN filed its notice of appeal on April 14, 2015. Attached to ACFAN's notice of appeal was a copy of the permit under review. This permit was issued to K & H Partners on March 18, 2015, and is set to expire on March 17, 2017.

ACFAN is identified in its notice of appeal as an unincorporated association, including members who reside and frequent areas in close proximity to the injection well site.¹

On April 24, 2015, K & H Partners filed a request to intervene into this action. No objections to this request were heard, and on May 27, 2015, the Commission **granted** K & H Partners intervenor status in this appeal.

On April 27, 2015, the Division filed a ***Motion to Dismiss*** this appeal, asserting that the Commission lacks jurisdiction in this matter. The Division argued that Commission is not statutorily-authorized to hear appeals from the Division Chief's issuances of oil & gas drilling permits. In support of its position, the Division cites to O.R.C. §1509.06(F)(6) and to the decision of the Ohio Supreme Court in a prohibition action designated as *Chesapeake Exploration, LLC v. Oil & Gas Commission et al.*, 135 Ohio St.3d 204, 2013-Ohio-224.

On May 18, 2015, K & H Partners separately filed a ***Motion to Dismiss*** this appeal. Through this filing, K & H Partners articulated its support of the Division's April 27, 2015 Motion to Dismiss.

On May 27, 2015, ACFAN filed a ***Response Brief Opposing [the Division's] Motion to Dismiss***. Through this filing, ACFAN argued that the permit under appeal is an injection well permit, issued under the authority of O.R.C. §1509.22(D), and that the Commission's review of the issuance of this permit is not precluded under the operation of O.R.C. §1509.06(F)(6) or under the holdings of the *Chesapeake Exploration* case.

¹ ACFAN's standing has not been challenged by either the Division or K & H Partners. As the Commission has not been asked to address ACFAN's standing, the immediate ruling does not reach this issue. Rather, the instant ruling focuses upon the Commission's subject matter jurisdiction over the permit under appeal. Due to the Commission's ultimate finding that its jurisdiction is not invoked in this matter, it is not necessary for the Commission to consider, or determine, ACFAN's standing to appeal, and the Commission makes no specific finding relative to ACFAN's standing.

On June 3, 2015, K&H Partners filed a *Reply to [ACFAN's] Response Brief*, and on June 8, 2015, the Division filed a *Reply in Support of [the Division's] Motion to Dismiss*.

DISCUSSION

The Commission's Jurisdiction Over Permitting Decisions

The Oil & Gas Commission is created, and exists, by virtue of O.R.C. §1509.35, to provide an administrative forum for the review of orders issued by the Chief of the Division of Oil & Gas Resources Management. As a creature of statute, the jurisdiction and authorities of the Commission are both defined, and limited, by statute. *Delaney v. Testa*, 128 Ohio St.3d 248, 2011-Ohio-550, 943 N.E.2d 546. Pursuant to O.R.C. §1509.36, the Commission provides a *de novo* adjudicatory hearing where an appellant claims to be adversely affected by an order of the Division Chief.

The Division of Oil & Gas Resources Management is the regulatory authority for Ohio's oil & gas industry. The Division possesses inspection, enforcement and permitting authorities relative to this industry.

Revised Code Chapter 1509. provides for various types of permits associated with the oil & gas industry, with the Division identified as the permitting authority for these various permits. Permits relevant to the immediate appeal are: (1) a drilling permit, required under O.R.C. §1509.05, and issued in accordance with O.R.C. §1509.06, and (2) an injection, or disposal, permit required and issued pursuant to O.R.C. §1509.22.

Historically, the Commission's jurisdiction extended to appeals from all Chief's decisions regarding permitting. However, beginning in 2010, legislation was enacted, limiting the Commission's jurisdiction over certain permitting decisions.

The following legislation impacts the Commission's jurisdiction over permitting decisions:

1. **O.R.C. §1509.05 and O.R.C. §1509.06.** O.R.C. §1509.05 sets forth the requirement that well drilling activities must be permitted. O.R.C. §1509.06 describes the application and approval process for drilling permits, as well as for "associated production operations."

Division (F) of O.R.C. §1509.06 provides in part:

The chief shall issue an order denying a permit if the chief finds that there is a substantial risk that the operation will result in violations of this chapter or rules adopted under it that will present an imminent danger to public health or safety or damage to the environment, provided that where the chief finds that terms or condition to the permit can reasonably be expected to prevent such violation, the chief shall issue the permit subject to those terms or conditions, including, if applicable, terms and conditions regarding subjects identified in rules adopted under section 1509.03 of the Revised Code.

In 2010, O.R.C. §1509.06(F) was **amended** to include the following additional language:

The issuance of a permit shall not be considered an order of the chief.

2. **O.R.C. §1509.03.** O.R.C. §1509.03(B)(1) provides that the Chief's permitting decisions are issued as adjudication orders. O.R.C. §1509.03(B)(1) states in part:

Any order issuing, denying, or modifying a permit or notices required to be made by the chief pursuant to this chapter shall be made in compliance with Chapter 119. of the Revised Code, except that personal service may be used in lieu of service by mail. Every order issuing, denying, or modifying a permit under this chapter and described as such shall be considered an adjudication order for purposes of Chapter 119. of the Revised Code.

...

In 2011, O.R.C. §1509.03(B)(1) was **amended** to include the following additional language:

Division (B)(1) of this section does not apply to a permit issued under section 1509.06 of the Revised Code.

So while, historically, the Commission exercised jurisdiction over all permitting decisions,² the above-quoted amendments to O.R.C. §1509.06(F) and O.R.C. §1509.03(B)(1), effectively divested the Commission of jurisdiction to hear appeals from Chief's decisions regarding drilling permits issued under O.R.C. §1509.06. In 2013, this restriction of jurisdiction was confirmed by the Ohio Supreme Court in Chesapeake Exploration, LLC v. Oil & Gas Commission et al., *supra*.

In the Chesapeake case, the Ohio Supreme court granted a *writ* of prohibition, precluding the Commission from exercising jurisdiction over an appeal taken by a landowner (Summitcrest, Inc.) from the Chief's issuance of a drilling permit for an oil & gas production well sought by Chesapeake Exploration LLC.

In the Chesapeake case, the Court noted that "statutes providing for appeals should be given a liberal interpretation in favor of appeal." Chesapeake Exploration, LLC v. Oil & Gas Commission et al., *supra*, at ¶19. However, the Court also noted that:

When the General Assembly grants an administrative agency power to hear appeals, the statutory language determines the parameters of the agency's jurisdiction. Cuyahoga Cty. Bd. of Cty. Commrs. v. Daroczy, 10th Dist. No. 08AP-123, 2008-Ohio-5564, ¶17.

Chesapeake Exploration, LLC v. Oil & Gas Commission et al., *supra*, at ¶13.

² See for example: Lawrence & Shalyne Fox vs. Division & Everflow Eastern, # 822 (September 29, 2010); City of Munroe Falls vs. Division & D&L Energy, # 793 (August 7, 2008).

The Court in Chesapeake specifically found that the language of O.R.C. §1509.06(F) (as amended in 2010) divested the Commission of jurisdiction over decisions relating to "permits to drill a new well, drill an existing well deeper, reopen a well, convert a well to any use other than its original purpose, or plug back a well to a different source of supply, including associated production operations." Chesapeake Exploration, LLC v. Oil & Gas Commission et al., *supra*, at ¶14. Thus, the Commission cannot exercise appellate jurisdiction over permitting decisions relating to drilling permits issued under O.R.C. §1509.06.

However, the Court in Chesapeake also specifically held that this restriction of the Commission's jurisdiction is limited to permits issued under O.R.C. §1509.06. Indeed, the Ohio Supreme Court noted that the Commission retains jurisdiction over certain other permitting decisions. In this regard, the Court commented that other permitting decisions still fall under the Commission's jurisdiction, noting specifically that permits issued by the Chief under O.R.C. §1509.22 (for the injection of brine or other waste substances into an underground formation) are not subject to the limiting language of O.R.C. §1509.06(F), and would, therefore, be reviewable by the Commission. Chesapeake Exploration, LLC v. Oil & Gas Commission et al., *supra*, at ¶17.

Significantly, the issue of the Commission's jurisdiction over the issuance of drilling permits, and specifically drilling permits issued for future injection operations, has been raised and decided by this Commission in a previous appeal. On June 12, 2014, this Commission issued a decision in the matter of Athens County Fracking Action Network v. Division and K & H Partners, LLC, #855. This previous case involved the same parties as appear in the immediate matter. Moreover, the previous case involved a similar permit, addressing a similar well, and proposed to be sited in the same vicinity as the well at issue in the immediate matter.

In the previous ACFAN appeal, the Commission found that the permit under review was a drilling permit, over which this Commission lacks jurisdiction.

As in the prior ACFAN case, the permit attached to the notice of appeal in the immediate case is in the nature of a drilling permit issued under O.R.C. §1509.06, and is not an injection permit issued under O.R.C. §1509.22.

The Commission's decision in the prior ACFAN matter, case #855, was appealed by ACFAN to the Court of Common Pleas for Franklin County on July 10, 2014. That appeal remains pending before the court (case # 14 CV 7132).

It is the Commission's desire to respect the limitations placed upon its jurisdiction as articulated by the legislature through statute, but also to respect appellate rights ensured by statute. Thus, the Commission will not exercise jurisdiction inappropriately, but also does not intend to preclude appeals of decisions anticipated to be administratively reviewable.

The Ohio Supreme Court has held that the Commission lacks jurisdiction over permitting decisions that address drilling permits issued under O.R.C. §1509.06, and the Commission will not exercise jurisdiction over such decisions.

The Nature of the Permit Under Appeal

Permits to drill wells are required under O.R.C. §1509.05. The application and approval process for such drilling permits are described in O.R.C. §1509.06. Permitting decisions regarding the drilling of wells (and rendered under O.R.C. §1509.06) are the types of permitting decisions over which this Commission specifically **lacks** jurisdiction. Chesapeake Exploration, LLC v. Oil & Gas Commission et al., supra.

However, Revised Code Chapter 1509. provides for other types of permits, separate and distinct from drilling permits issued under O.R.C. §1509.06. O.R.C. §1509.22 describes permits associated with the underground storage and disposal of brine and other oilfield wastes. Wells addressed under O.R.C. §1509.22 are characterized as "injection wells," and are separately permitted.

O.R.C. §1509.22(D)(1) provides:

No person, without first having obtained a permit from the chief, shall inject brine or other waste substances resulting from, obtained from, or produced in connection with oil or gas drilling, exploration, or production into an underground formation unless a rule of the chief expressly authorizes the injection without a permit. **The permit shall be in addition to any permit required by section 1509.05 of the Revised Code,** and the permit application shall be accompanied by a permit fee of one thousand dollars. The chief shall adopt rules in accordance with Chapter 119. of the Revised Code regarding the injection into wells of brine and other waste substances resulting from, obtained from, or produced in connection with oil or gas drilling, exploration, or production. ...

(Emphasis added.)

Oil & gas production wells, and oil & gas injection wells, are administered under two distinct permitting programs. Oil & gas injections wells are regulated as Class II wells under the federal "Underground Injection Control" program, and are subject to additional, and more stringent, state operational requirements as compared to oil & gas production wells. Indeed, separate state regulations have been promulgated for these distinct regulatory programs.³

³ Production wells are subject to regulations found at O.A.C. Chapter 1501:9-1; while injection wells are subject to regulations found at O.A.C. Chapter 1501:9-3.

The permit under review was attached to ACFAN's notice of appeal, and is also attached to this order (*see Attachment A*). Unfortunately, this document does not specifically identify itself as either a drilling permit or as an injection permit. Nor does the document indicate whether its issuance is accomplished pursuant to O.R.C. §1509.06 or pursuant to O.R.C. §1509.22. To establish whether the Commission possesses jurisdiction over the permit under appeal, the Commission must determine whether this permit is: (1) a drilling permit issued pursuant to O.R.C. §1509.06 (over which the Commission **may not** exercise jurisdiction), or (2) an injection permit issued pursuant to O.R.C. §1509.22 (over which the Commission **may** exercise jurisdiction).

The Division administers all permitting programs under Revised Code Chapter 1509., and has great familiarity with how various permits are issued. The Division maintains that the permit under appeal is a **drilling permit**, issued under O.R.C. §1509.06, and that a **separate injection permit**, pursuant to O.R.C. §1509.22, is yet to be issued. This position is supported by the language of O.R.C. §1509.22(D)(1), which provides that the injection well permit issued under O.R.C. §1509.22 shall be "... **in addition** to any permit required by section 1509.05 of the Revised Code."

A review of the permit under appeal reveals that this document contains information specific to the drilling and construction of a well. For example, the permit, and its conditions, address items such as the type of drilling tools to be utilized, construction details for the surface facilities, the casing program to be employed, and certain pressure testing criteria.

Indeed, only one item of the permit under appeal specifically addresses future injection into this well. Under the "constructional conditions" for this well, item 11 states:

11. K & H Partners, LLC shall notify the Division in writing prior to the initiation of injection operations and injection operations shall not commence until the Division provides K & H Partners, LLC with written approval that authorizes injection. Operational conditions to the permit shall be issued with the written approval.

(See Attachment A, 4th page.) This language suggests that a separate authorization will be required in order to commence injection activities, and that injections cannot be made under the permit that is the subject of this appeal.

Moreover, under O.R.C. §1509.22 and O.A.C. §1501:9-3, an injection permit should contain information specific to the injection process. Such information is not reflected in the permit under appeal.

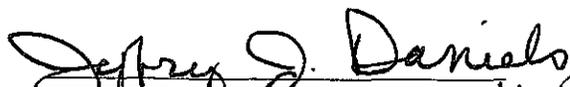
The Commission **FINDS** that the permit under appeal is not an injection permit issued under O.R.C. §1509.22. The Commission **FINDS** that the permit under appeal is a drilling permit, issued under the requirements of O.R.C. §1509.05, and in accordance with O.R.C. §1509.06. As this appeal is taken from a drilling permit issued under O.R.C. §1509.06, this Commission lacks jurisdiction over this permit pursuant to the provisions of O.R.C. §1509.06(F)(6). *Chesapeake Exploration, LLC v. Oil & Gas Commission et al., supra.*

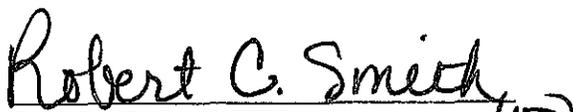
ORDER

Wherefore, based upon the foregoing discussion, Appellee's Motion to Dismiss is **GRANTED**, and this appeal is hereby **DISMISSED**.

Date Issued: November 2, 2015


J. BRANDON DAVIS, Chairman 


JEFFREY J. DANIELS, Secretary 


ROBERT C. SMITH 

INSTRUCTIONS FOR APPEAL

This decision may be appealed to the Court of Common Pleas for Franklin County, within thirty days of your receipt of this decision, in accordance with Ohio Revised Code §1509.37.

DISTRIBUTION:

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ATTACHMENT A

PERMIT UNDER REVIEW

**as attached to
Appellant's Notice
of Appeal**

STATE OF OHIO
DEPARTMENT OF NATURAL
RESOURCES

Division of Oil and Gas
Resources Management
WELL PERMIT

API WELL NUMBER

34-009-2-3824-00-00

OWNER NAME ADDRESS

K & H PARTNERS LLC
2130 HARRIS HIGHWAY
WASHINGTON WV 26181

DATE ISSUED

3/18/2015

PERMIT EXPIRES

3/17/2017

TELEPHONE NUMBER

(304) 863-8867

IS HEREBY GRANTED PERMISSION TO: Salt Water Injection Well New Well

AND ABANDON WELL IF UNPRODUCTIVE

PURPOSE OF WELL: Water Injection - Disposal

COMPLETION DATE IF PERMIT TO PLUG:

DESIGNATION AND LOCATION:

LEASE NAME R & H (SWIW #11)
WELL NUMBER 3
COUNTY ATHENS
CIVIL TOWNSHIP TROY

SURFACE NAD27

X: 2212918

Y: 460713

LAT: 39.2350821866218

LONG: 81.7483127391423

TARGET NAD27

TRACT OR ALLOTMENT

SURFACE FOOTAGE LOCATION

TARGET FOOTAGE LOCATION

TYPE OF TOOLS: Air Rotary

PROPOSED TOTAL DEPTH

4200 FEET

GROUND LEVEL ELEVATION

797 FEET

GEOLOGICAL FORMATION(S):

OHIO SHALE/MARCELLUS SHALE

SPECIAL PERMIT CONDITIONS: Permit is subject to the attached terms and/or conditions
Salt Water Injection Well (Class II) Construction Conditions

CASING PROGRAM (CASING MUST BE CENTRALIZED AND IS SUBJECT TO APPROVAL OF THE OIL AND GAS INSPECTOR):

- 13-3/8" CONDUCTOR APPROX. 100' CEMENTED TO SURFACE
- 9-5/8" SURFACE CASING MINIMUM OF 300' CEMENTED TO SURFACE
- 7" CASING 1750' CEMENTED TO A MINIMUM OF 300' ABOVE INJECTION ZONE
- 2-3/8" TUBING @ 2040' SET ON A PACKER @ 10' ABOVE INJECTION ZONE

This permit is NOT TRANSFERABLE. This permit or an exact copy thereof, must be displayed in a conspicuous and easily accessible place at the well site before permitted activity commences and remain until the well is completed. Ample notification to inspector is necessary.

OIL AND GAS WELL INSPECTOR:

JON SCOTT (740) 624-4863
DAN GOINS - Supervisor (614) 264-6724
DISTRICT # (740) 288-6411

FIRE AND EMERGENCY NUMBERS

FIRE () - 911
MEDICAL SERVICE () - 911

INSPECTOR NOTIFICATION:

The oil and gas inspector must be notified at least 24 hours prior to:

- 1. Commencement of site construction
- 2. Pit excavation and closure
- 3. Commencement of drilling, reopening, converting or plugback operations
- 4. Installation and cementing of all casing strings
- 5. BOP testing
- 6. Well stimulation
- 7. Plugging operations
- 8. Well pad construction

The oil and gas inspector must be notified immediately upon:

- 1. Discovery of defective well construction
- 2. Detection of any natural gas or H2S gas during drilling in urban areas
- 3. Discovery of defective well construction during well stimulation
- 4. Determination that a well is a lost hole
- 5. Determination that a well is a dry hole

Richard J. Simmers

CHIEF, Division of Oil and Gas Resources
Management

STATE OF OHIO
DEPARTMENT OF NATURAL
RESOURCES

Division of Oil and Gas
Resources Management
WELL PERMIT

API WELL NUMBER

34-009-2-3824-00-00

JEFF HARPER
PO BOX 7366
PARKERSBURG, WV 26102

**PERMIT CONDITIONS – CLASS II SALTWATER INJECTION
WELL – DRILL NEW WELL**

**RE: Permit #2-3824, SWIW #11, K & H Partners No. 3, Troy
Township, Athens County, Ohio**

Constructional conditions:

1. The 7" casing must be enclosed with Class A cement from the total depth to approximately 1750 feet (minimum of 300 feet above the top of the injection zone).
2. Bow-string or rigid centralizers must be used to provide sufficient casing stand off and foster effective circulation of cement to isolate critical zones including aquifers, flow zones, voids, lost circulation zones, and hydrocarbon-bearing zones.
3. K & H Partners, LLC shall run at minimum, a gamma ray, compensated density-neutron, and resistivity geophysical log. A copy of this geophysical log must be submitted to the UIC Section within 48 hours after the geophysical logging has been accomplished.
4. Injection tubing must be set on a packer at approximately 2040 feet. A ¼", female, threaded fitting with a stop valve must be installed on the tubing and accessible at the surface.
5. The annular space between the injection tubing and the 7" production casing must be filled with a fluid (e.g., freshwater with a corrosion inhibitor additive), pressure tested to at least 475 psi, and monitored for at least 15 minutes with no more than a five percent decline in pressure. Additionally, the injection line must also be tested to 475 psi for 15 minutes with no more than a five percent decline.
6. The UIC Section and the Mineral Resources Inspector must be notified at a minimum of 48 hours in advance of the time of cementing, placing and removing of casing, installation of the tubing and packer, testing of the casing, construction of the surface facilities, pressure testing of the injection line, and initial injection so that a representative of the Division can be present to witness the operations. The Division must also be notified in advance of any subsequent removal of the injection tubing or resetting the packer. A pressure test will also be required.
7. Surface facilities as proposed in the application are satisfactory and must be constructed under the supervision of a representative of the Division. A concrete pad with drain must be constructed so as to contain any spillage of saltwater during unloading from the trucks. Any proposed changes in the

surface facilities must be submitted in writing and must have prior approval of the UIC Section.

8. If an unloading pad is to be constructed, the underground concrete vault associated with the catch basin on the unloading pad shall be of one-piece construction and if the concrete vault has a detached lid, the lid must be exposed above the ground level. Additionally, the inside walls of the concrete vault shall be sealed with a salt-corrosion type material such as an asphalt-based coating to prevent deterioration of the vault from the brine water.
9. A Well Construction Record (Form 8) must be submitted within 30 days after completion describing how the well was completed for injection operations. This report should include the amount and grade of tubing, type and depth of packer, treatment of the injection formation, testing of the system integrity, method used to monitor pressure in the annulus and injection tubing, and method used to monitor volumes of injected fluid.
10. A Murphy Switch or other cut-off switch device must be in-line with the injection pump and set at the maximum allowable surface injection pressure of 475 psi, so that the pump will automatically shut-down upon exceeding the maximum allowable surface injection pressure.
11. K & H Partners, LLC shall notify the Division in writing prior to the initiation of injection operations and injection operations shall not commence until the Division provides K & H Partners, LLC with written approval that authorizes injection. Operational conditions to the permit shall be issued with the written approval.
12. K & H Partners, LLC shall monitor for seismicity in at least three locations approved by the Division in the area of the proposed wellsite for a minimum of 60 days prior to beginning injection operations. The monitoring will be required to continue in accordance with the written approval that authorizes injection.
13. Prior to initiation of injection operations, two Oriskany wells (P #3575 and P #3572) within the Area of Review (AOR) shall be properly plugged and abandoned in accordance with Division standards. In addition to the regularly required plug intervals, K & H Partners, LLC shall plug over and at least 100 feet above the proposed injection interval.