

BEFORE THE OIL & GAS COMMISSION

CITY OF WOOSTER,

Appellant,

-vs-

DIVISION OF OIL & GAS RESOURCES
MANAGEMENT,

Appellee.

Appeal No. 901

Review of Chief's Order 2015-70
(EnviroClean Facility)

FINDINGS, CONCLUSIONS AND ORDER OF THE COMMISSION

Appearances: Stephen P. Samuels, Richard R. Benson, Jr., Thaddeus H. Driscoll, Alana R. Shockey, Counsel for Appellant City of Wooster; Brian Ball, Brian Becker, Assistant Attorneys General, Counsel for Appellee Division of Oil & Gas Resources Management.

Date Issued: April 6, 2016

BACKGROUND

This matter comes before the Oil & Gas Commission upon appeal by the City of Wooster [the "City"] from Chief's Order 2015-70. Chief's Order 2015-70 granted EnviroClean Services ["ECS"] temporary authority to operate a facility known as the EnviroClean Facility [the "ECS Facility" or the "Wooster Facility"]. This facility processes waste materials associated with oil & gas exploration and production. The ECS Facility is located in Wooster, Ohio.

On March 25, 2015, the City appealed Chief's Order 2015-70 to the Oil & Gas Commission. ECS did not intervene into this matter, and has not participated in these proceedings.

On December 2 & 3, 2015, this cause came on for hearing before the Oil & Gas Commission. At hearing, the City of Wooster and the Division of Oil & Gas Resources Management [the "Division"] presented evidence and examined witnesses appearing for and against them. No representative of ECS testified at hearing. The parties filed post-hearing briefs, with the last filing received on February 10, 2016.

ISSUE

The primary issue in this appeal is: **Whether the Division Chief acted lawfully and reasonably in issuing Chief's Order 2015-70, which granted temporary authorization to EnviroClean Services to process oil & gas waste at the company's facility in Wooster, Ohio.**

In order to decide this primary issue, the Commission must consider: **(1) whether Chief's Order 2015-70 was issued in compliance with O.R.C. §1509.22, (2) whether the terms of Chief's Order 2015-70 adequately protect public health, safety and the environment, and (3) whether the issuance of Chief's Order 2015-70 was reasonable under the facts of this matter.**

FINDINGS OF FACT

Facility Location:

1. The City of Wooster is located in Wayne County, Ohio. Wooster is the county seat, and has a population of approximately 27,000.

2. EnviroClean Services ["ECS"] operates a facility at 515 Industrial Boulevard, Wooster Ohio. This facility processes exploration and production waste ["E&P waste"], which is a byproduct of the oil & gas industry. The facility site is triangular in shape, encompassing approximately 6 acres. The site is located within Wooster's municipal limits and on property zoned for industrial use.

3. Over the years, various industrial enterprises have operated on this property. The site pre-dates comprehensive zoning in the area.

4. ECS has processed industrial waste on this site since at least 2012. It is unclear exactly when ECS began processing E&P waste associated with oil & gas production. The evidence established that by December 2013 ECS was actively processing oil & gas-related E&P waste at this site.

5. The ECS Facility is situated adjacent to Apple Creek. At the closest point, the facility grounds meet the typical banks of Apple Creek. Apple Creek is a perennial stream that passes the ECS Facility upstream of the more-heavily populated areas of the City. Apple Creek discharges into Killbuck Creek, which flows over the City's aquifer. The City's wellfield is located approximately two miles downstream of the ECS Facility.

6. The property upon which the ECS Facility is located has been designated by the Federal Emergency Management Agency ["FEMA"] as a flood hazard area. The property includes portions of the floodplain and floodway of Apple Creek. A "floodplain" is the area that will be flooded in a major rain event. A "floodway" is the portion of the floodplain that is subject to high velocity flows, and which should remain relatively obstacle-free to allow the safe passage of flood waters.

7. Apple Creek has flooded twice in recent history, once in 1969 and again in 2011. The 1969 flood of Apple Creek reached an elevation of 888 feet mean sea level ["msl"], inundating the entire area of what is now ECS's facility site. Moving water in the floodway of Apple Creek is believed to have reached speeds of approximately 40 mph during the 1969 flood. The 1969 flood resulted in several fatalities.

8. While ECS's facility is zoned for industrial use, the site is immediately adjacent to a residential neighborhood known as the "North Bauer Road Extension." This neighborhood is located to the east of the facility grounds, and is generally situated between the facility grounds and Apple Creek. The neighborhood includes several structures, some of which are occupied residences. Structures in this neighborhood pre-date comprehensive zoning in the area. The North Bauer Road Extension experienced flooding in 1969 and 2011.

Processing Operations:

9. ECS processes E&P waste in a large aluminum building, situated on the north side of the facility grounds. At the closest point, the aluminum building is approximately 150 feet from the typical banks of Apple Creek. The entire facility grounds, including the aluminum building, are located within the floodplain of Apple Creek. The easternmost portion of the aluminum building is located within the floodway of Apple Creek.

10. ECS's aluminum building contains three open-air bays. Each bay contains a sunken concrete pit capable of holding about 7,000 gallons of material. The pits are approximately 3 feet lower than the surrounding ground.

11. Only one of the three open-air concrete pits is used to process E&P waste associated with oil & gas operations. The other two pits are used to process other types of industrial waste, not regulated under O.R.C. Chapter 1509 or subject to Chief's Order 2015-70.

12. E&P waste is delivered to the ECS Facility in trucks, drums, and roll-off containers. E&P waste is dumped into the easternmost 7,000-gallon concrete pit, where it is dried and solidified, by adding hydrated lime or sawdust. Once sufficiently solidified, the E&P waste is shipped to landfills for final disposal.

O.R.C. §1509.22:

13. On September 29, 2013, the Ohio General Assembly revised O.R.C. §1509.22 to improve regulation of E&P waste facilities. O.R.C. §1509.22(B) now requires that E&P waste facilities be permitted by the Chief of the Division of Oil & Gas Resources Management. O.R.C. §1509.22(C) anticipates that the Division will promulgate rules to implement the permitting and regulatory requirements of O.R.C. §1509.22.

14. The permitting of E&P waste facilities under O.R.C. §1509.22 commenced on January 1, 2014. In January 2014, the Chief began issuing temporary authorization orders to new or existing facilities that applied to operate.

15. By January 1, 2014, the Division had not promulgated regulations specific to E&P facilities. At the time of hearing, such regulations still had not been promulgated. The Division could not predict when such regulations might be in place.

16. The Division does not have personnel on staff with expertise in radiation or radiological regulation. Pursuant to a Memorandum of Agreement, the Division currently works with the Ohio Department of Health ["ODH"] to address radioactivity issues at E&P facilities.

Radioactivity Considerations:

17. Radiation from extraterrestrial and terrestrial sources is ubiquitous in our environment. Radioactive particles are naturally present in air, soil and water. Some radiation reaches the Earth from solar and cosmic sources. Certain rock formations naturally contain trace amounts of radioactive material. These rock formations may be located deep within the Earth or may outcrop at the Earth's surface. Radiation levels in such underground or surface rocks vary depending upon the type of rock and geographic location.

18. Currently in Ohio, oil & gas production is associated primarily with shale formations. Shales are known to contain naturally occurring radionuclides.

19. People are routinely exposed to small levels of radiation. "Background radiation" is the level of radioactivity that naturally occurs in a particular area. In Ohio, the "background radiation" level (*i.e.*, the level of radiation to which we are naturally exposed on a daily basis) is estimated to be about 2 pico-Curies per gram ["pCi/g"].

20. Exposure to radioactive materials is unavoidable. Low-level exposure is considered safe. However, exposure to high levels of radioactive materials, or prolonged exposure to radioactive materials, may – potentially – create health and safety issues.

21. Similar to other industries, the drilling and production of oil & gas wells creates wastes and byproducts. Some of these wastes and byproducts created by the oil & gas industry originate in geologic formations, located deep within the Earth's surface. When an oil & gas well is drilled, drilling fluids carry rock chips to the surface. These rock chips, drill cuttings and drilling fluids may contain radioactive isotopes. Thus, exploration and production (E&P) wastes associated with oil & gas wells may contain radionuclides.

22. The radioactive isotopes associated with E&P waste are classified as "NORM" or "TENORM."

23. "NORM" is an acronym for Naturally Occurring Radioactive Materials, which are radioactive materials naturally found in the earth.

24. "TENORM" is an acronym for Technologically Enhanced Naturally Occurring Radioactive Materials. TENORM is NORM material that has been altered by human activity. This alteration generally results in an increased concentration of radiation. For example, the sludge found at the bottom of an oil & gas tank, or the scale found on pipes and equipment, may contain levels of radioactive material that is more concentrated than would naturally occur. Where radionuclides are more concentrated, concerns regarding possible exposure to these materials increases.

Regulatory Actions:

25. In December 2013, ECS filed an application with the Division, requesting authorization to continue to process E&P waste at its Wooster Facility. On January 3, 2014, the Division issued Chief's Order 2014-09 to ECS. Chief's Order 2014-09 [the "First Authorization Order"] granted ECS temporary authorization to process E&P waste at the Wooster Facility.

26. The First Authorization Order (Chief's Order 2014-09) provided little guidance regarding facility operations. Chief's Order 2014-09 basically instructed ECS to "follow the law." The First Authorization Order did not mention, or make specific provisions relative to, the handling of NORM or TENORM materials as part of the E&P waste.

27. On February 3, 2014, the City appealed the First Authorization Order to the Commission (appeal #859).

28. On March 18, 2014, the Ohio Department of Health ["ODH"], in conjunction with the Division, inspected ECS's Wooster Facility. The ODH prepared an audit report, addressing ECS's handling of radioactive materials at the facility. Among other items, ODH found that the facility lacked "adequate protection from the elements" because of its location "in a 100 year flood [plain]."

29. Division Engineer Beth Pratt accompanied ODH during the March 18, 2014 inspection of the Wooster Facility. Ms. Pratt independently made observations and recommendations, including:

The site is located in the 100 yr flood plain. Develop a means to protect the site from flooding and ensure material is not released during a flood event. A dike, higher than 100 yr flood elevation, surrounding the operations where wastes are stored may provide adequate protection.

30. Following the March 18, 2014 inspection, both ODH and Division Engineer Pratt recommended that ECS develop a radiation protection plan for the Wooster Facility.

31. The Division instituted no changes to the First Authorization Order following the March 18, 2014 joint inspection of the facility grounds. ECS continued to operate the facility under the original terms of the First Authorization Order until March 10, 2015.

32. Ultimately, ECS decided to make certain changes to its operations. As a result of these operational changes, on March 9, 2015, ECS filed a second application for temporary authorization. This second application was supplemented on March 10, 2015.

33. On March 10, 2015, the Chief issued Chief's Order 2015-68, which revoked the First Authorization Order (Chief's Order 2014-09).

34. On March 11, 2015, the Chief issued Chief's Order 2015-70 (the Second Authorization Order). Chief's Order 2015-70 replaced the First Authorization Order.

35. As the First Authorization Order, which was under appeal in case #859, had been revoked and replaced, on June 12, 2015, the Commission **dismissed** appeal #859 as moot.

36. The Second Authorization Order, 2015-70, imposed the following conditions upon operations at the Wooster Facility:

IT IS HEREBY ORDERED:

EnviroClean has temporary approval at the EnviroClean Facility to treat and process brine or other waste substances associated with the exploration, development, well stimulation, production operations, or plugging of oil and gas resources, subject to the following conditions:

(1) EnviroClean shall conduct all operations in compliance with R.C. Chapter 1509 and Ohio Adm. Code 1501:9.

* * *¹

(3) EnviroClean shall conduct all operations[s] at the EnviroClean Facility in accordance with the application submitted to the Division for this facility.

¹ Paragraph 2 of the order addressed brine disposal. However, the evidence at hearing established that ECS does not intend to handle, or process, brine at the Wooster Facility.

(4) EnviroClean shall review the EnviroClean Facility to determine if a radiation protection plan is required at the EnviroClean Facility. EnviroClean shall submit the results of the review to the Division of Oil and Gas Resources Management. If the results of the review indicate that a radiation protection plan is required, the additional radiation protection plan will be incorporated into and made a part of this order and EnviroClean shall operate the EnviroClean Facility in accordance with the plan.

(5) EnviroClean shall maintain waste management records for the EnviroClean Facility and shall provide the records to the Division upon request. The records shall include, but not be limited to, manifests of all incoming waste substances, and final disposition of the waste substances.

(6) This Chief's Order shall terminate upon any of the following, whichever occurs first:

a) The Division issues a permit to EnviroClean for the EnviroClean Facility pursuant to rules promulgated under [] R.C. 1509.22(C).

b) The Division denies a permit to EnviroClean for the EnviroClean Facility pursuant to rules promulgated under R.C. 1509.22(C); or

c) Six months after the effective date of rules adopted under R.C. 1509.22(C).

37. Chief's Order 2015-70 (the Second Authorization Order) contained the following additional finding:

(3) ... In its application, EnviroClean supplied the Division with information and details regarding its proposed operations. The drill cuttings, drilling muds, drilling sand, and other waste substances will be solidified primarily by adding sawdust or hydrated lime. EnviroClean will not accept waste substances at the EnviroClean Facility that contain combined concentrations of radium-226 and radium-228 in excess of seven (7) picocuries per gram.

38. ECS is required to conduct all operations at the Wooster Facility consistent with its March 10, 2015 supplemented application. The Division testified that the following limitations and conditions, associated with the March 2015 application, are effectively incorporated into the Second Authorization Order, Chief's Order 2015-70:

The Wooster Facility will not accept waste containing combined concentrations of radium-226 and radium-228 in excess of 7 pCi/g, including background radioactivity.

The facility will not accept brines.

The facility can only "treat and process" E&P waste. The facility will not "store, recycle or dispose of" E&P wastes.

The facility cannot have more than 7,000 gallons of E&P waste on-site at any given time.²

Materials brought onto the site will be accompanied by a non-hazardous waste profile, prepared by the generator of the waste. This form will require radionuclide results for materials identified by the generator as TENORM. (Radionuclide levels for material identified as NORM are not required under ECS's form.)

The non-hazardous waste profile form will be used to confirm that combined radionuclides in TENORM waste do not exceed 7 pCi/g, including natural background radioactivity.

ECS will also screen all materials entering the site with a unit known as a Rad Alert 100.³

39. As of the date of hearing, ECS had not reported to the Division regarding the need for a radiation protection plan at the Wooster Facility.

² Division Engineer Beth Pratt testified that the 7,000 gallon limitation will apply to all E&P materials that are not actively "in transit." This is consistent with the fact that the March 2015 authorization order does not allow E&P waste materials to be stored on the facility grounds.

³ The evidence established that the Rad Alert 100 does not provide radiation levels in terms of pCi/g.

40. As of the date of hearing, the Division has not required, nor has ESC voluntarily undertaken, the construction of any dike or containment features as recommended by Division Engineer Pratt and ODH.

DISCUSSION

In Ohio, oil & gas operations are conducted under the authority of Chapter 1509 of the Ohio Revised Code. The Chief of the Division of Oil & Gas Resources Management possesses permitting, regulatory and enforcement authority over the oil & gas industry.

All industry creates waste, and the oil & gas industry is no exception. Waste generated by the oil & gas industry is commonly referred to as exploration & production waste ["E&P waste"]. Some E&P waste can be recycled and re-used by the industry. E&P waste that is not recycled must be properly disposed of.

Generally, E&P waste is disposed of either: (1) through injection into disposal wells, designed and installed specifically for this purpose, or (2) through burial in an approved landfill. E&P waste may require processing before disposal. For example, "wet" E&P waste will need to be dried, or partially-solidified, prior to its placement in a landfill.

At the Wooster Facility, ECS receives E&P waste from drillers and operators. Some E&P waste enters the facility as a "mud." ECS adds sawdust and/or lime to any semi-fluid "muds," in order to solidify this material. After such processing, the solidified E&P waste is transported from the facility to an approved landfill for burial.

Before September 2013, the treatment and processing of E&P waste did not clearly fall under the regulatory authority of any single state agency. On September 29, 2013, the Ohio Legislature placed E&P waste facilities under the permitting and regulatory jurisdiction of the Chief of the Division of Oil & Gas Resources Management.

O.R.C. §1509.22 (as amended on September 29, 2013) provides *inter alia*:

(A) ... No person shall place or cause to be placed in ground water or in or on the land or discharge or cause to be discharged in surface water brine, crude oil, natural gas, or other fluids associated with the exploration, development, well stimulation, production operations, or plugging of oil and gas resources that **causes or could reasonable be anticipated to cause damage or injury to public health or safety or the environment.**

(B)(2)(a) On and after January 1, 2014, no person shall store, recycle, treat, process, or dispose of in this state brine or other waste substances associated with the exploration, development, well stimulation, production operations, or plugging of oil and gas resources **without an order or a permit issued under this section** ...

(C) The chief **shall adopt rules** regarding storage, recycling, treatment, processing, and disposal of brine and other waste substances. The rules shall establish procedures and requirements in accordance with which a person shall apply for a permit or order for the storage, recycling, treatment, processing, or disposal of brine and other waste substances that are not subject to a permit issued under section 1509.06 of 1509.21 of the Revised Code and in accordance with which the chief may issue such permit or order ...

(Emphasis added.)

EnviroClean's Wooster Facility:

E&P waste is processed at the Wooster Facility in an aluminum building, located on the northern edge of the property. The Wooster Facility is situated adjacent to both Apple Creek and a residential neighborhood.

Relying upon representations in ECS's revised application, Division Engineer Beth Pratt testified that the amount of on-site E&P waste at this facility will never exceed 7,000 gallons. The Division has the responsibility to enforce this quantity restriction, as a condition of the current temporary authorization order.

Location within a Designated Floodplain:

ECS's Wooster Facility is depicted on FEMA maps as being located within the 100-year floodplain of Apple Creek. Moreover, a portion of the facility grounds is located within the "floodway" of Apple Creek.

Government maps and designations aside, there is a realistic significance to the flood risk in this area. In 1969, Apple Creek flooded, resulting in the loss of several lives. The 1969 flood remains a profound memory for many local residents. Another, less devastating, flood occurred in this area in 2011.

Science predicts that Apple Creek will flood again. We cannot know exactly when a future flood might occur. We also cannot know whether ECS will be operating this E&P facility at the time of a future flood. But, given the location of this facility within the designated floodplain and floodway of Apple Creek, the City of Wooster and its citizens have legitimate cause for concern relative to flood risk at this facility.

Regulation of E&P Waste Facilities:

The regulation of E&P waste is not well-developed in Ohio. Prior to September 2013, no single agency regulated this type of waste. (In certain circumstances, E&P waste would fall under the regulatory control of a state agency. For example, E&P waste destined for disposal in an Ohio landfill would be subject to the OEPA restrictions applicable to any solid waste received at an Ohio landfill.)

In September 2013, the Ohio Legislature instituted a permitting requirement for facilities that handle E&P waste. And, beginning on January 1, 2014, E&P waste facilities could not operate without a permit (or order) issued by the Chief of the Division of Oil & Gas Resources Management. *See O.R.C. 1509.22(B)*.

The September 2013 amendment of O.R.C. §1509.22 specifically anticipated that the Division would promulgate rules regarding E&P waste facilities. *See O.R.C. 1509.22(C)*. Currently, no such rules have been promulgated. At hearing, the Division could not predict when such rules might be in place.

In the absence of specific regulations, or a clear permitting program, in January 2014 the Division began issuing "temporary authorization orders" to E&P facilities. Such temporary authorizations were issued in lieu of formal permits. The temporary authorizations allow existing E&P facilities to continue to operate, or new facilities to commence operations.

The temporary authorizations specifically state that once the Division promulgates regulations addressing the permitting of these facilities, the temporary authorizations will expire and companies will be expected to formally apply for a permit under O.R.C. §1509.22 and any amplifying regulations.

The absence of promulgated rules does not relieve the Division of its regulatory responsibilities. Rather, it requires the Division to engage in case-by-case analyses and evaluations of the siting and operational aspects of each proposed facility.

And, while O.R.C. §1509.22 does not provide detailed regulatory, permitting and operational requirements for these facilities, the statute does clearly articulate the goals of the Division's permitting and regulatory function with regards to these facilities:

(A) ... No person shall place or cause to be placed in ground water or in or on the land or discharge or cause to be discharged in surface water brine, crude oil, natural gas, or other fluids associated with the exploration, development, well stimulation, production operations, or plugging of oil and gas resources that **causes or could reasonable be anticipated to cause damage or injury to public health or safety or the environment.**

(Emphasis added.)

ECS has operated the Wooster Facility under two separate temporary authorizations. The first authorization, issued in January 2014, was ultimately replaced by the second authorization in March 2015. A comparison of these two authorizations demonstrates that the Division's regulatory role and oversight function is actively evolving. The 2014 authorization simply instructed ECS to comply with Ohio law, providing no real direction to the company or assurances to the surrounding community. By contrast, the 2015 authorization incorporates conditions specifically limiting the radioactive content of materials brought onto the site and restricting the total amount of E&P waste that may be held on the site at any given time. Thus, the 2015 authorization is significantly more protective of health, safety and environment than was the 2014 authorization.

Radionuclide Considerations Relative to E&P Waste:

The evidence at hearing revealed that E&P waste processed at the Wooster Facility is expected to contain radionuclides. While the term "radioactive" suggests danger, even the City's expert witness, Mr. Haaker, testified that naturally occurring radiation is ubiquitous in our environment, and at low levels does not pose risks to health, safety or the environmental.

At hearing, the Commission received differing opinions regarding "safe levels" of radionuclides. Notably, the radionuclide limits discussed at hearing were "borrowed" from other regulatory programs. For example, the limit of 7 pCi/g, (which will be applied at the Wooster Facility) is "borrowed" from the Ohio Environmental Protection Agency, and was developed to address acceptable radionuclide levels in materials accepted for burial in Ohio landfills.

The Division is still in the process of developing regulations regarding the safe handling of E&P waste, including waste containing radioactive isotopes. Until the Division develops limits for the safe handling of E&P wastes at facilities regulated under O.R.C. §1509.22, it is not unreasonable for the Division to look to other regulatory programs for suggested safe limits.

Following an inspection of the Wooster Facility on March 18, 2014, both the ODH and the Division's field engineer recommended that a radiation protection plan be instituted at the facility.

Chief's Order 2015-70 recognizes that radionuclides will be processed at the Wooster Facility. The Chief's Order recognizes that a radiation protection plan would be an appropriate means of addressing possible risks to employees or to the public:

(4) EnviroClean shall review the EnviroClean Facility to determine if a radiation protection plan is required at the EnviroClean Facility. EnviroClean shall submit the results of the review to the Division of Oil and Gas Resources Management. If the results of the review indicate that a radiation protection plan is required, the additional radiation protection plan will be incorporated into and made a part of this order and EnviroClean shall operate the EnviroClean Facility in accordance with the plan.

Again, the Commission understands that the Division is still in the process of developing regulations necessary to the permitting of E&P facilities and the safe handling E&P materials. However, if radionuclide levels in the E&P waste processed at this facility pose a potential danger to employees or the public, it is essential that the Division make this determination and require protective actions.⁴

⁴ Until a generalized regulatory program is instituted, the Division Chief should consider imposing the safety measures suggested by its own staff (Ms. Pratt) or recommended by ODH. These measures could be imposed until such time as a generalized regulatory program is promulgated pursuant to O.R.C. §1509.22(C).

As the regulatory and permitting authority over E&P processing facilities, the Division and its Chief ultimately have the responsibility to establish safe operational procedures. This should be the highest priority for this agency.⁵

Recommended Protective Actions:

The City has raised the issue of whether E&P waste, including wastes containing radionuclides, might escape from the Wooster Facility during a flood event.

It is unclear whether the levels of radionuclides anticipated to be processed on site would actually create a risk to public health, safety or the environment. But, it is very clear that the Wooster Facility is located within a floodplain. The Commission **FINDS** that in granting ECS temporary authority to operate an E&P facility within a floodplain, without setting forth any containment requirements tied to this site-specific flood risk, the Division Chief did not give full consideration to the risks that this uniquely-sited facility might pose to public health, safety or the environment.

ECS's Wooster Facility is located within a FEMA-designated floodplain. Apple Creek comes within 200 feet of the on-site treatment facility. Occupied residences are situated within 300 feet of this facility. Wooster's municipal well-field is located approximately 2 miles downstream of this facility. All of these items required the Division's most serious consideration in deciding whether to grant ECS a temporary authorization to operate this facility at this location, and in determining whether operational restrictions or conditions should be imposed on this facility.

⁵ Division Engineer Beth Pratt testified that the Division considers the promulgation of rules for E&P waste facilities to be its "topmost priority," and that the Division is actively working towards developing an effective regulatory program. Ms. Pratt testified that such a regulatory program might include rules addressing: (1) facility siting criteria, (2) closure and decommissioning considerations, (3) radiation limits and background radiological sampling, and (4) radiation safety procedures.

The installation of dikes around ECS's Wooster Facility was suggested by both ODH and the Division's field engineer. Diking or containment features could be designed and installed in a manner that would avoid, or significantly lessen, the impacts of future flooding at the Wooster Facility site.

The application of such protective containment measures is consistent with the language of O.R.C. §1509.22:

(C) * * * The storage, recycling, treatment, processing, and disposal of brine and other waste substances and the chief's rules relating to storage, recycling, treatment, processing, and disposal are subject to all of the following standards:

* * *

(5) A dike or pit may be used for spill prevention and control. A dike or pit so used shall be constructed and maintained to prevent the escape of brine and crude oil, and the reservoir within such a dike or pit shall be kept reasonably free of brine, crude oil, and other waste substances.

Installation of dikes around the E&P treatment bay at the ECS Facility would ensure that E&P waste being processed at the facility would remain on facility grounds in the event of a flood. Such diking would significantly reduce public health, safety and environmental concerns in the immediate neighborhood of the facility, as well as in the greater community of Wooster.

The Commission understands that the Division has been given a monumental task to regulate an evolving industry. The Commission also recognizes that the Division is actively attempting to develop a permitting and regulatory program relative to E&P processing facilities. It is unclear when the Division will have a comprehensive permitting and regulatory program for E&P waste in place. But, the citizens of the City of Wooster should not be disadvantaged by the regulatory burden placed upon the Division.

The ECS facility is located in a known, proven and mapped floodplain. The risk of flooding at the ECS site is real and unequivocal.

O.R.C §1509.22 mandates that consideration be given to public health, safety and the environment, in the siting and regulation of E&P waste facilities. This would include a consideration of the flood risk presented at this specific location. Based upon site-specific considerations, the Commission **FINDS** that in granting ECS the temporary authority to operate (as that authority is described in Chief's Order 2015-70), the Division Chief did not give full consideration to the flood risks associated with this facility. Without conditions or restrictions that address the known flood risk, operation of the facility has the potential to cause damage or injury to public health, safety, or to the environment both in the immediate facility area and in the larger community.

The installation of diking and containment features at the ECS Facility would be protective of public health, safety and the environment. While the Division has not yet fully developed its regulatory program for E&P processing facilities, there is no just cause to delay the implementation of a diking or containment program at this particular site.

This matter is **REMANDED** to the Division Chief with instructions to take actions consistent with this decision and to institute an effective containment, or diking, program at the ECS Facility, with the intent of prohibiting the escape of E&P waste from the ECS Facility during flood events.⁶

⁶ The Division and ECS should work together to develop an effective containment / diking program for this site. Diking or containment features should be designed to withstand a 100-year flood event. To achieve this level of protection, berms or dikes should be constructed somewhat higher than the 100-year flood elevation. Diking and containment could be installed in a manner that simply raises the sides of the E&P treatment bay, or could be installed around all - or an appropriate portion of - the facility structures or grounds.

CONCLUSIONS OF LAW

1. O.R.C. §1509.36 provides that any person adversely affected by a Chief's order may appeal to the Oil & Gas Commission. O.R.C. §1509.36 addresses the standard of review applied in Commission appeals, and provides *inter alia*:

If upon completion of the hearing the commission finds that the order appealed from was lawful and reasonable, it shall make a written order affirming the order appealed from; if the commission finds that the order was unreasonable or unlawful, it shall make a written order vacating the order appealed from and making the order that it finds the chief should have made.

Hearings before the Commission are *de novo* in nature, meaning that the Commission takes a "fresh look" at the evidence presented at hearing. The Commission is not restricted to a record developed before the Division Chief. Rather, the Commission may consider any evidence that either supports or refutes the Chief's decision under appeal.⁷

In this appeal, the City shoulders the burden of proving, by a preponderance of the evidence, that Chief Order 2015-70, which temporarily authorized waste processing at the ECS Facility, was unlawful or unreasonable.

2. Standing is a threshold jurisdictional issue. *See New Boston Coke Corp. v. Tyler* (1987), 32 Ohio St.3d 216, 217. It is the burden of the appellant to prove its standing. *See Olmstead Falls v. Jones* (2003), 152 Ohio App.3d 282, 286.

⁷ The Commission is an administrative review board, and operates on the agency level. The Commission's review is not restricted to a record developed before the Chief, and the Commission may freely evaluate factual issues. In fact, O.R.C. §1509.36 allows the Commission to substitute its judgment for that of the Chief (*i.e.* to modify a Chief's order under review) where appropriate. Thus, the scope of the Commission's review is not limited in same manner as an appellate court's would be. Decisions of the Oil & Gas Commission are directly appealable into the Ohio courts (*see* O.R.C. §1509.37). Judicial review of a Commission decision is limited to the record developed before the Commission.

Pursuant to O.R.C. 1509.36 any person who is adversely affected by an order of the Division Chief may appeal to the Commission. A municipality qualifies as a "person" under Revised Code Chapter 1509, and may, therefore, bring an appeal to the Commission. *See O.R.C. 1509.01(T)*.

Standing to bring an action requires that a person have a sufficient stake in the outcome of a justiciable controversy. *See Engineering Technician Association, Inc. v. Ohio Dept. of Transportation* (1991), 72 Ohio App.3d 106, 110; citing *Racing Guild of Ohio, Local 304 v. Ohio State Racing Commission* (1986), 28 Ohio St.3d 317.

In order to establish standing, a party must demonstrate that the challenged action has caused, or will cause, the party an injury in fact. The injury must also be actual and immediate or threatened, and, if threatened, the party must demonstrate a realistic danger arising from the challenged action. *See Olmsted Falls, id., at 286, citing Johnson's Is. Prop. Owners' Assn. v. Schregardus* (1997), 1997 WL 360851 (Ohio App. 10 Dist, no. 96APH10-1330).

Proximity to the contested activity is a factor to consider in determining a party's interest and/or the likelihood of a threatened injury. *See Olmstead Falls, supra at 287.*⁸ In this case the ECS Facility is located within the municipal limits of the City of Wooster, and is upstream of the majority of the City's residences and upstream of the wellfield for the City's water supply. The fact that the ECS Facility is located within a FEMA-designated floodplain demonstrates that risks to the City, its infrastructure and its citizens are realistic concerns.

The City of Wooster has a unique and important responsibility to protect the health, safety and welfare of its citizens. The Commission **FINDS** that the City of Wooster has standing to bring an appeal of Chief's Order 2015-70 to this Commission.

⁸ In the *Olmstead Falls* case, the Tenth District Court of Appeals determined that this municipality lacked standing to challenge an agency approval where the approved activity was over two miles from the city limits. The immediate case is distinguishable from the *Olmstead Falls* case. Here, ECS's facility is located within Wooster's municipal limits and the activities at the Wooster Facility clearly could affect properties, services and persons for which the City of Wooster bears direct responsibility.

3. O.R.C. §1509.22(B)(2)(a) requires that, after January 1, 2014, anyone seeking to "store, recycle, treat, process, or dispose of in this state brine or other waste substances associated with the exploration, development, well stimulation, production operations, or plugging of oil and gas resources" may only do so under the authority of a permit or order allowing such activity.

4. O.R.C. §1509.22(A) prohibits the placement of E&P waste "in or on the land" in a manner that "causes or could reasonably be anticipated to cause damage or injury to public health or safety or the environment."

5. EnviroClean Services applied for, and obtained, Chief's Order 2015-70, which temporarily authorized EnviroClean to process E&P waste at its Wooster Facility. Having reviewed the law and facts in this case, the Commission **FINDS** that the terms and conditions of Chief's Order 2015-70 are not adequately protective of public health, safety or the environment, and, therefore, do not comply with O.R.C. §1509.22. Chief's Order 2015-70 does not require the installation of structures or features specifically designed to prevent the placement of E&P waste "in or on the land" in a way that "causes or could reasonably be anticipated to cause damage or injury to public health or safety or the environment" during a flood event.

6. In light of the site-specific facts of this case, the issuance of a temporary authorization order without terms, conditions or restrictions specifically addressing the location of this facility within a FEMA-designated floodplain and without including features, structures or practices specifically designed to address the flood risk at this facility, was not compliant with O.R.C. §1509.22 and was unreasonable.

ORDER


Based upon the foregoing Findings of Fact and Conclusions of Law, the Commission hereby **VACATES** the Division's issuance of Chief's Order 2015-70 and **REMANDS** this matter to the Division to take actions consistent with the Findings and Conclusions set forth above. A revised and reissued temporary authorization order shall include, at a minimum, the requirement that EnviroClean Services shall install adequate diking or containment features at the Wooster Facility in a manner that will ensure protection of public health, safety and the environment, and in a manner that will specifically address the 100-year floodplain elevations established by FEMA for these facility grounds.

Date Issued:

4/6/2016


MR. JEFFREY J. DANIELS, *Acting Chair* WO


ROBERT C. SMITH WO


GREGORY NEW WO

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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Patrick E. Noser, J. Douglas Drushal, Via Regular Mail

BEFORE THE OIL & GAS COMMISSION

CITY OF WOOSTER, : Appeal No. 901
: :
Appellant, : :
: : Review of Chief's Order 2015-70
-vs- : (Enviro Clean Facility)
: :
DIVISION OF OIL & GAS RESOURCES :
MANAGEMENT, : **INDEX OF EVIDENCE**
: **PRESENTED AT HEARING**
Appellee. :

Before: Dr. Jeffrey J. Daniels, PhD

In Attendance: Robert C. Smith, Gregory New

Appearances: Stephen P. Samuels, Richard R. Benson, Jr., Thaddeus H. Driscoll,
Alana R. Shockey, Counsel for Appellant City of Wooster; Brian Ball,
Brian Becker, Assistant Attorneys General, Counsel for Appellee
Division of Oil & Gas Resources Management.

WITNESS INDEX

Appellant's Witnesses:

A. Joel Montgomery	Direct Examination; Cross Examination
Beth A. Pratt	Cross Examination
Richard F. Haaker	Direct Examination; Cross Examination

Appellee's Witnesses:

Beth A. Pratt	Direct Examination
Scott J. Winters	Direct Examination; Cross Examination

EXHIBIT INDEX

Appellant's Exhibits:

- Appellant's Exhibit 1 Chief's Order 2015-70; Temporary Authorization to Treat and Process Brine and Other Waste Substances Pursuant to R.C. 1509.22; dated March 10, 2015, signed March 11, 2015 (3 pages)
- Appellant's Exhibit 2 EnviroClean Services' Application to Operate a Facility; including application form dated March 9, 2015 and application form dated March 10, 2015 (9 pages)
- Appellant's Exhibit 3 Chief's Order 2014-09; issued January 3, 2014 (3 pages)
- Appellant's Exhibit 4 EnviroClean Services' Application to Operate a Facility, December 2013 (10 pages)
- Appellant's Exhibit 5 Ohio Department of Health, Bureau of Radiation Protection; ODH Audit Report No. ODNR-14-0002; audit date March 18, 2014 (8 pages)
- Appellant's Exhibit 6 Site View Memorandum; March 18, 2014 visit; prepared by Beth Pratt (2 pages)
- Appellant's Exhibit 7 Resume of A. Joel Montgomery (3 pages)
- Appellant's Exhibit 8 Expert Report of A. Joel Montgomery (68 pages)
- Appellant's Exhibit 9 Expanded Version of Map from Montgomery Expert Report (1 oversized sheet)
- Appellant's Exhibit 10 Federal Emergency Management Agency, Flood Map Service Center; Flood Insurance Rate Maps ["FIRM" Maps], Wayne County, Ohio; index and panel where facility is located (2 oversized sheets)

Appellant's Exhibit 11	Federal Emergency Management Agency, Flood Insurance Study; Wayne County, Ohio; revised August 18, 2009 (66 pages)
Appellant's Exhibit 12	Expert Report of Richard F. Haaker; September 21, 2015 (36 pages)
Appellant's Exhibit 13	Resume of Richard F. Haaker (9 pages)
Appellant's Exhibit 14	Risk Calculation from EPA PRG Calculator (3 pages)
Appellant's Exhibit 15	WITHDRAWN / OPEN
Appellant's Exhibit 16	WITHDRAWN / OPEN
Appellant's Exhibit 17	WITHDRAWN / OPEN
Appellant's Exhibit 18	Photographs and information on radiation detection devices (first 4 pages only; last 3 pages WITHDRAWN)
Appellant's Exhibit 19	An Overview of Appeal No. 859; Exhibit "A;" by Scott J. Winters; dated January 29, 2015 (11 pages)
Appellant's Exhibit 20	Committee on Evaluation of EPA Guidelines for Exposure to Naturally Occurring Radioactive Materials, National Research Council; Table 7.2. - lifetime cancer risks corresponding to selected radiation exposures and EPA guidances and regulations for controlling exposures of the public (1 page)
Appellant's Exhibit 21	Aerial Photograph of the portion of the City of Wooster where the EnviroClean Services Facility is located, and including adjacent areas (oversized, dry mounted photograph)

Appellee Division's Exhibits:

Appellee's Exhibit 1	Guidelines for Waste Substance Facilities; requirements of an application for an order for facilities to store, recycle, treat, process, or dispose of brine and other waste substances from production operations; revised December 18, 2013 (3 pages)
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City of Wooster
#901

Appellee's Exhibit 14

Supplement to Scott J. Winters' Report; dated
November 6, 2015 (2 pages)

Appellee's Exhibit 15

Selected Pages of Deposition of Richard F.
Haaker, taken November 2, 2015; including
pages 1-2, 75-82, 86, 93-94, and 103 (14 pages)