

**BEFORE THE
OIL & GAS COMMISSION**

FRACK FREE MAHONING,	:	
	:	Appeal No. 864
Appellant,	:	
	:	Review of Chief's Order 2014-52
-vs-	:	(IWC/Ground Tech., Inc. Facility)
	:	
DIVISION OF OIL & GAS RESOURCES	:	<u>ORDER OF THE</u>
MANAGEMENT,	:	<u>COMMISSION GRANTING</u>
	:	<u>APPELLEE'S MOTION TO</u>
Appellee.	:	<u>DISMISS FOR LACK OF</u>
	:	<u>STANDING</u>

Appearances: Terry J. Lodge, Counsel for Appellant FFM; Gerald E. Dailey, Jennifer Barrett, Assistant Attorneys General, Counsel for Appellee Division of Oil & Gas Resources Management.

On April 23, 2014, Appellant Frack Free Mahoning ["FFM"] filed with the Oil & Gas Commission, a Notice of Appeal from Chief's Order 2014-52. Chief's Order 2014-52 grants Industrial Waste Control/Ground Tech., Inc. ["IWC"] temporary authorization to operate a facility in Youngstown, Ohio, known as the Ground Tech. Facility [or the "facility"]. This facility, which is currently operational, proposes to perform radiological waste characterization, tank cleaning and decontamination, waste solidification, brine storage and preparation of disposal operations.¹

On June 16, 2014, by leave of the Commission, Appellant FFM filed an *Amended Notice of Appeal*, correcting certain dates contained in its original Notice of Appeal.

¹ The Commission has provided notice of this proceeding to Industrial Waste Control/Ground Tech., Inc. However, this entity has not participated in this appeal in any manner.

On June 19, 2014, the Division filed a *Motion to Dismiss* this matter, arguing that the Commission lacks jurisdiction to hear this cause as: (1) the appeal was untimely filed,² and/or (2) the Appellant failed to establish associational standing in this matter. On July 22, 2014, FFM responded to the Division's Motion. Attached to FFM's response were affidavits of three members of FFM. On August 5, 2014, the Division replied.

BACKGROUND³

The Division of Oil & Gas Resources Management is the regulatory authority for the oil & gas industry in Ohio. Pursuant to O.R.C. §1509.22(B)(2)(a):

(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 or section 1509.06 or 1509.21 of the Revised Code⁴ or rules adopted under any of those section.⁵

...

² The timeliness issue raises a jurisdictional question regarding the application of O.R.C. §1509.36's 30-day appeal period to a citizens group wishing to appeal a Chief's Order directed to a regulated entity. The parties' filings recognize that R.C. Chapter 1509 does not obligate the Division to serve copies of orders upon interested persons, who are not the identified-recipient of a Chief's Order. See *City of Munroe Falls v. Division and D & L Energy, Inc.*, case no. 793 (Oil & Gas Commission, August 7, 2008) (dismissed by the Franklin County Court of Common Pleas, case no. 08CVF-08-11965, November 7, 2008). In the immediate matter, FFM obtained a copy of Chief's Order 2014-52 through a public records request, filed under O.R.C. §149.43. FFM asserts that it did not receive its copy of Chief's Order 2014-52 until after the 30-day appeal period had run (although FFM made record requests before, and during, the 30-day appeal period). The Division contends that it responded to FFM's public records request within a reasonable time. As the Commission will decide this matter on the threshold issue of standing, the Commission does not intend to address this timeliness issue.

³ No evidentiary hearing has been conducted in this appeal. All factual information comes from the filings of the parties, *i.e.*, FFM's Amended Notice of Appeal and the parties' filings with regards to the Division's Motion to Dismiss, including the affidavits annexed to FFM's response to the Division's Motion to Dismiss.

⁴ O.R.C. §1509.06 addresses applications for permits to drill, reopen, convert, or plug back a well. O.R.C. §1509.21 addresses permits for secondary or additional recovery operations.

⁵ It is the Commission's understanding that rules have not yet been promulgated by the Division, relative to the permitting or operation of the facilities addressed under O.R.C. §1509.22.

Thus, beginning in January 2014, the Division became the permitting authority for certain disposal facilities associated with the oil & gas industry, over which facilities the Division had not previously possessed such authority.

Chief's Order 2014-52 (the order under appeal) was issued by the Division Chief on March 6, 2014. That order (which was attached to FFM's Notice of Appeal) states in its entirety:

Pursuant to Ohio Revised Code Section 1509.22, the Chief of the Division of Oil and Gas Resources Management ("Chief" or "Division") issues the following Order:

BACKGROUND:

(1) Industrial Waste Control/Ground Tech., Inc. ("IWC/Ground Tech.") proposes to operate the IWC/Ground Tech. Facility located at 240 Sinter Court, Youngstown, Ohio ("IWC/Ground Tech. Facility"). The IWC/Ground Tech. Facility will perform radiological waste characterization, tank cleaning and decontamination, waste solidification, brine storage, and preparation for disposal operations. The radiological waste characterization and handling at the IWC/Ground Tech. Facility will be performed by Austin Master Services, LLC, who has been issued License for Radioactive Material No. 03219 510000 by the Ohio Department of Health.

(2) Division (B)(2)(a) of R.C. 1509.22 states, in pertinent part, that "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 or section 1509.06 or 1509.21 of the Revised Code or rules adopted under any of those sections."

(3) On February 7, 2014, the Division received an application from IWC/Ground Tech. requesting to operate the IWC/Ground Tech. Facility. In its application, IWC/Ground Tech. supplied the Division with information and details regarding its operations.

ORDER:

IT IS HEREBY ORDERED:

IWC/Ground Tech. has temporary approval to operate the IWC/Ground Tech. Facility in the State of Ohio,⁶ subject to the following conditions:

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

(2) Brine shall not be disposed of in a manner not specified in R.C. 1509.22(C)(1)(a) through R.C. 1509.22(C)(1)(c). Disposal pursuant to R.C. 1509.22(C)(1)(d) requires separate written approval by the Chief.

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

(a) The Division issues a permit to IWC/Ground Tech. for the IWC/Ground Tech. Facility pursuant to rules promulgated under [] R.C. 1509.22(C);

(b) The Division denies a permit to IWC/Ground Tech. for the IWC/Ground Tech. 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).

⁶ Information from IWC is attached to FFM's Notice of Appeal, including permit application documents. In a document identified as "Attachment 3 Detailed Description," IWC describes operations at the facility as follows:

IWC/GROUNDTech and our business associates Austin Master Services will be performing the following tasks at our Sinter Ct. facility:

- Radiological waste characterization using in-situ counting equipment (ISOCs).*
- Waste treatment/stabilization and down-blending (down blending to occur only after 03219 license amendment).*
- Pressure washing, tank cleaning and decontamination*
- Containerized waste storage.*

This document concludes with the statement:

Expected Waste Volumes

Approximately 50,000 tons of material per year is passed through our facility with the majority of work activities focused on our tank cleaning operations. It is expected that our new business lines (analytical and waste conditioning) will likely double that amount.

DISCUSSION

O.R.C. §1509.36 sets forth the method by which an appeal is perfected to the Oil & Gas Commission. That section of law provides *inter alia*:

Any person adversely affected by an order by the chief of the division of oil and gas resources management may appeal to the oil and gas commission for an order vacating or modifying the order.

FFM filed this appeal, asserting that its membership is adversely affected by Chief's Order 2014-52. FFM's appeal sets forth two general areas of concern: (1) a concern that the operation of this facility may be injurious to the health and safety of its members, or may result in environmental harm, and (2) a concern that Chief's Order 2014-52 was issued in the absence of promulgated regulations addressing the permitting and operation of the facility. In regards to this second item, FFM suggests that, in granting IWC a permit in the absence of regulatory criteria, the Chief has unlawfully exercised legislative powers.

Standing is a threshold jurisdictional issue that must be resolved before an appellant may proceed with an appeal. *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

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 alleged injury must be definite, not abstract or speculative. *See Olmsted Falls, id., at 286*. 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).

⁷ As regards this burden, it should also be noted that when, as in this case, a party's asserted injury arises from the government's alleged unlawful regulation (or lack of regulation) of someone else, more may be necessary to establish standing:

Thus when [a party] is not, himself, the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily "substantially more difficult" to establish.

See Lujan v. Defenders of Wildlife (1992), 504 U.S. 555, 561-562.

FFM is the appellant in this matter, and is described as an unincorporated not-for-profit association whose membership includes persons who own or rent real estate, reside and/or conduct business and recreate in proximity to the Ground Tech. Facility. FFM's Notice of Appeal goes on to assert that its members anticipate pollution to air and water resources if the Ground Tech. Facility is allowed to operate. FFM specifically contests the operation of this facility in the absence of promulgated regulations.

Where an organization or association seeks to establish its standing to appeal, the association's standing is derived from the standing of its members. Thus, at least one member of FFM must be able to demonstrate sufficient interest or injury to confer standing in his or her own right. *See In re 730 Chickens (1991), 75 Ohio App.3d 475, 484-485.*

In evaluating the standing of an association, Ohio courts apply a three-pronged test. *See Ohio Contractors Association v. Bicking (1994), 71 Ohio St.3d 318.* Under this three pronged analysis, an association has standing on behalf of its members if:

- (1) its members [or at least one member] would otherwise have standing to sue in their own right;
- (2) the interests that the association seeks to protect are germane to its purpose; and
- (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

See Ohio Contractors Association, id. at 320.

The issue of standing is a question of law, but cannot be easily determined in a factual vacuum. FFM's Amended Notice of Appeal articulates in detail the association's concerns relative to IWC's operation of the Ground Tech. Facility. FFM attached to its **Memorandum Contra the Motion to Dismiss**, affidavits of three FFM members, in order to more fully set forth its assertion that individual members of FFM might suffer actual, or threatened, injury under the contested Chief's order.

Given that there has been no evidentiary opportunity for the development of facts relative to the specific interests of, or potential injuries to, FFM's membership, the Commission believes that it is appropriate to consider the affidavits of FFM members Cheryl Mshar, Valaria Goncalves and Hattie Wilkins. These affidavits have been evaluated in the light most favorable to the members, for the purpose of determining whether these members have a sufficient stake in the outcome of an appeal of Chief's Order 2014-52.

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.

Proximity to the contested activity may be a factor in determining a party's interest and/or the likelihood of a threatened injury. *See Olmstead Falls, supra at 287*. In this matter, the sworn affidavits of Ms. Mshar, Ms. Goncalves and Ms. Wilkins establish that these persons all reside within one mile of the Ground Tech. Facility.

However, proximity is only one factor that may impact the likelihood, or concrete nature, of a threatened injury. Looking beyond the issue of proximity, and focusing more specifically upon any real and concrete injury alleged, experienced or threatened to these known members of FFM, the Appellant has not adequately demonstrated that any real and current injury - or threat thereof - actually exists, which is fairly traceable to the Chief's order under appeal. Indeed, the concerns of the identified members of FFM do not appear to differ from concerns that would be held by the public at large. *See Fresh Water Accountability Project vs. Division and Energreen 360 Holding Co. LLC, case no. 858 (Oil & Gas Commission, November 6, 2014)*.

At the point of demonstrating standing, an appellant is not asked, nor expected, to prove the merits of its case. However, in order to establish its standing to appeal an action, the appellant must demonstrate an alleged interest, or claimed injury, that is distinct from those of a member of the general public. *See Fresh Water Accountability Project vs. Division and Energreen 360 Holding Co. LLC, id.* A generalized grievance of a citizen does not convert to an individual right to bring action against a governmental agency, unless the appellant has or may suffer a distinct harm not common to the public at large. *See Lujan v. Defenders of Wildlife, supra at 573-579*.

Notably, Ohio courts have recognized that:

...a general interest as a citizen, without a distinct injury, does not satisfy the requirements of standing. The personal distaste for a particular situation or perceived lack of faith in any agency's administration of its role, without more, does not satisfy the legal concepts of "adversely affected" or "aggrieved" for purposes of standing.

See Yost v. Jones (2002), 2002-Ohio-119 (Ohio App. 4 Dist, no. 01CA667), citing *Lujan v. Defenders of Wildlife, supra*. In the immediate appeal, FFM did not distinguish how its interests, or those of its members, differ from those of the general public.

The Ohio Legislature has not set forth a clear path for interested citizens to contest, or provide input into, the permitting and regulatory processes addressing disposal facilities operated under O.R.C. §1509.22.

Moreover, the Division - the regulatory agency charged with the permitting and oversight of such facilities - has promulgated no regulations seeking public input into these permitting or regulatory processes. The Oil & Gas Commission is a creature of statute. *See O.R.C. §1509.35*. As such, the Commission may exercise only that jurisdiction, which is specifically conferred upon it by the General Assembly. This Commission is not authorized to read into the law, provisions or processes that do not currently exist.

It is clear that the members of FFM have significant and genuine concerns regarding the Ground Tech. Facility. However, such concerns are not sufficient to confer upon them the standing to appeal Chief's Order 2014-52. And, as FFM derives its standing from that of its members, this association, likewise, lacks standing in this matter.

ORDER

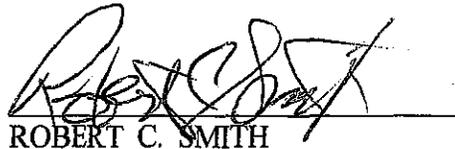
Based upon the foregoing, the Commission **FINDS** that Appellant Frack Free Mahoning has not demonstrated sufficient interest or injury to establish the standing of this association. The Commission hereby **GRANTS** the Division's Motion and **DISMISSES** the instant appeal for the Appellant Frack Free Mahoning's lack of standing.

Date Issued: 8/12/2015


BRANDON DAVIS, Chairman


ROBERT S. FROST, Vice 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.

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