

BEFORE THE OIL & GAS COMMISSION

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| FRESH WATER ACCOUNTABILITY PROJECT, | : | |
| | : | Appeal No. 858 |
| Appellant, | : | |
| -vs- | : | Review of Chief's Order 2014-08 (EnerGreen 360 Facility) |
| | : | |
| DIVISION OF OIL & GAS RESOURCES MANAGEMENT, | : | |
| | : | |
| Appellee, | : | <u>ORDER OF THE</u> |
| | : | <u>COMMISSION GRANTING</u> |
| and | : | <u>APPELLEE'S MOTION TO</u> |
| | : | <u>DISMISS FOR LACK OF</u> |
| ENERGREEN 360 HOLDING CO. LLC, | : | <u>STANDING</u> |
| | : | |
| Intervenor. | : | |

Appearances: Terry J. Lodge, Counsel for Appellant FWAP; Daniel Martin, Jennifer Barrett, Elizabeth Ewing, Assistant Attorneys General, Counsel for Appellee Division of Oil & Gas Resources Management; Joseph M. Reidy, Counsel for Intervenor EnerGreen 360 Holding Co. LLC.

On February 3, 2014, Appellant Fresh Water Accountability Project ["FWAP"], and individual FWAP members John M. Morgan, Leatra Harper and Steven Jansto, filed with the Oil & Gas Commission, a Notice of Appeal from Chief's Order 2014-08. Chief's Order 2014-08 grants EnerGreen 360 Holding Company LLC ["EnerGreen 360"] temporary authorization to operate a facility known as the EnerGreen 360 Facility [the "facility"]. This facility, when operational, proposes to process certain oil & gas field wastes. EnerGreen 360 has been **granted** intervenor status in this appeal.

On February 12, 2014, by leave of the Commission, FWAP filed an Amended Notice of Appeal. Among other amendments, the Amended Notice of Appeal removed John M. Morgan, Leatra Harper and Steven Jansto as individual appellants in this matter.

Both the original and the amended notices of appeal assert that " ... members of FWAP all own real estate, reside and/or conduct business and recreate in proximity to the EnerGreen treatment facility" The Amended Notice of Appeal goes on to assert that the members of FWAP " ... anticipate damage to air and water quality if the facility is allowed to proceed with operations."

On March 3, 2014, the Division filed a *Motion to Dismiss* this matter, asserting that FWAP has failed to establish associational standing in this appeal, and arguing that the Commission, therefore, lacks jurisdiction to hear this cause. Intervenor EnerGreen 360 filed a memorandum in support of the Division's Motion to Dismiss. FWAP made filings in opposition to the Division's motion and in opposition to EnerGreen 360's filing in support of the Division's motion. Attached to FWAP's response in opposition to the Division's Motion to Dismiss were affidavits of FWAP members Leatra Harper and John M. Morgan.

BACKGROUND¹

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 Code² or rules adopted under any of those section. ...

¹ No evidentiary hearing has been conducted in this appeal. All factual information comes from the filings of the parties, *i.e.*, FWAP's Amended Notice of Appeal and the parties' filings with regards to the Division's Motion to Dismiss, including the affidavits annexed to FWAP's response to the Division's Motion to Dismiss.

² 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.

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

Chief's Order 2014-08 (the order under appeal) was issued by the Division Chief on January 3, 2014. That order (which was attached to FWAP'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) EnerGreen LLC ("EnerGreen") operates a treatment facility located at the East Ohio Regional Industrial Park, Warren Township, Belmont County, Ohio ("EnerGreen 360 Facility").³ EnerGreen receives drill cuttings, processes the drill cuttings, and reuses the drill cuttings at the facility. Any drill cuttings that cannot be reused will be disposed of at a landfill.

(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 December 27, 2013, the Division received an application from EnerGreen requesting to operate the EnerGreen 360 Facility. In its application, EnerGreen supplied the Division with information and details regarding its operations.

ORDER:

IT IS HEREBY ORDERED:

EnerGreen has temporary approval to operate the EnerGreen 360 Facility in the State of Ohio, subject to the following **conditions**:

³ While the language of the order suggests that the EnerGreen 360 Facility was operational at the time of the issuance of Chief's Order 2014-08, in fact, the facility was not operational. EnerGreen 360 anticipated that the facility would begin operations in the Fall of 2014. The current operating status of the facility is unknown to the Commission.

- (1) EnerGreen 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 EnerGreen for the EnerGreen 360 Facility pursuant to rules promulgated under [] R.C. 1509.22(C);
 - (b) The Division denies a permit to EnerGreen for the EnerGreen 360 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).

(Emphasis in original.)

The filings of the parties contained certain additional facts, which appear to be undisputed: (1) the EnerGreen 360 Facility will be located approximately 1-2 miles north of Barnesville, Ohio, and (2) when operational, the facility will process up to 2,500 tons of material per day.

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.

FWAP filed this appeal, asserting that its membership is adversely affected by Chief's Order 2014-08. FWAP's Amended Notice of Appeal sets forth two general areas of concern: (1) a concern that the facility, when operational, 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 2014-08 was issued in the absence of promulgated regulations, addressing the permitting and operation of this facility.

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 Olmsted Falls v. Jones* (2003), 152 Ohio App.3d 282, 286.⁴

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).

FWAP is the appellant in this matter, and is described in its Amended Notice of Appeal as a non-for-profit organization whose membership includes persons who "own real estate, reside and/or conduct business and recreate in proximity to the EnerGreen treatment facility."

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 FWAP 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.

⁴ 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.

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.

In this matter, the critical consideration is whether any individual member of FWAP possesses sufficient standing to appeal Chief's Order 2014-08 in his or her own right.

The issue of standing is a question of law, but cannot be easily determined in a factual vacuum. FWAP's Amended Notice of Appeal articulates in detail the association's concerns relative to the proposed operation of the EnerGreen 360 Facility. But, the Amended Notice of Appeal provides little information to aid the Commission's evaluation of whether, or how, any individual member of FWAP would suffer actual, or threatened, injury under the contested Chief's order.

However, affidavits of two members of FWAP were appended to FWAP's response to the Division's Motion to Dismiss. Given that there has been no evidentiary opportunity for the development of facts relative to the specific interests of, or potential injuries to, FWAP's membership, the Commission believes that it is appropriate to consider the affidavits of FWAP members Leatra Harper and John M. Morgan in its examination of the personal stake which these members may have in the outcome of an appeal of Chief's Order 2014-08.

Through the affidavits, the Commission has learned the following as regards Ms.

Leatra Harper:

1. With her husband, Steven Jansto, Ms. Harper owns a home in Senecaville, Ohio, near Senecaville Lake. Ms. Harper considers this home her "legal residence and settlement."
2. Ms. Harper minimizes time at her Senecaville home out of health concerns, which concerns are related to oil & gas drilling in the area of her home. For this reason, Ms. Harper stays overnight at her Senecaville home only "a night here or there," and generally resides in Grand Rapids with her husband or in Tiffin with her daughter.
3. Ms. Harper's Senecaville home is located approximately 18-20 straight-line miles from the planned EnerGreen 360 Facility.
4. In 2013, Ms. Harper traveled to Barnesville⁵ at least 3 times to run errands and shop.
5. Ms. Harper expects to travel to Barnesville approximately 3-5 times per year into the future.
6. Ms. Harper has undertaken efforts to educate herself regarding various issues relating to oil & gas drilling and the disposal of oil & gas wastes.

With regards to Mr. John M. Morgan, the Commission has learned the following:

1. Mr. Morgan lives in Beallsville, Ohio. His home is located approximately 13 straight-line miles from the planned EnerGreen 360 Facility.
2. Mr. Morgan travels to Barnesville⁵ at least 2 times per month on business, for shopping or to attend events.
3. Mr. Morgan has undertaken efforts to educate himself regarding various issues relating to oil & gas drilling and the disposal of oil & gas wastes.

⁵ The EnerGreen 360 Facility is located approximately 1-2 miles outside of Barnesville, Ohio.

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. Harper and Mr. Morgan establish that both persons reside at a significant distance from the proposed EnerGreen 360 Facility, and neither of these persons spends significant time in the city of Barnesville or in the immediate vicinity of the proposed facility. Mr. Morgan's home is located approximately 13 miles from the facility. While Ms. Harper's home is located approximately 18-20 miles from the facility, and she candidly admits that she spends very little time at her Senecaville home (this appears to have been the case even before the issuance of Chief's Order 2014-08). Based upon this information, it is difficult to discern how the interests, or potential for injury, of Ms. Harper and Mr. Morgan are any different than those of the general public.

Here, the proximity of members of FWAP to the proposed EnerGreen 360 Facility does not strengthen Appellant's claim of standing. However, proximity is only one factor that may impact the likelihood, or concrete nature, of a threatened injury.

Yet, even 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 FWAP, 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.

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. 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*.

It is clear that Ms. Harper and Mr. Morgan have significant and genuine concerns regarding the planned EnerGreen 360 Facility. However, such concerns are not sufficient to confer upon them the standing to appeal Chief's Order 2014-08. And, as FWAP 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 FWAP 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 Fresh Water Accountability Project's lack of standing.

Date Issued: November 6, 2014


ROBERT S. FROST, Chairman


J. BRANDON DAVIS, Vice Chairman


JEFFREY J. DANIELS, Secretary

FWAP
Appeal # 858

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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