

BEFORE THE OIL & GAS COMMISSION

CITY OF MUNROE FALLS, OHIO,

Appellant,

-vs-

DIVISION OF MINERAL RESOURCES
MANAGEMENT,

Appellee,

and

D & L ENERGY, INC.,

Intervenor.

Appeal No. 793

Review of Chief's Decision
Granting Permit (D&L Energy, Inc.)

ORDER OF COMMISSION GRANTING MOTION TO DISMISS APPEAL

Appearances: Jack Morrison, Jr., Thomas R. Houlihan, Counsel for Appellant City of Munroe Falls, Ohio; Molly Corey, Mark G. Bonaventura, Assistant Attorneys General, Counsel for Appellee Division of Mineral Resources Management; John Keller, Counsel for Intervenor D & L Energy, Inc.

Date Issued: August 7, 2008

BACKGROUND

This matter came before the Oil & Gas Commission upon appeal by the City of Munroe Falls ["Munroe Falls" or "the City"] from the Chief's issuance of oil & gas drilling permit 34-153-2-3024-00-00 to D&L Energy, Inc. ["D&L"]. The proposed well is designated as the Sonoco #1 Well. The property on which the well is proposed to be drilled is located within the City of Munroe Falls, and, while the City does not own any of the surface or mineral rights in the drilling unit, the City does own land adjacent to the proposed site. Munroe Falls has expressed concerns about the impact the Sonoco #1 Well could have upon hydrology in the area and concerns about the potential effects which this well could have upon drinking water supplies for the City. The proposed well would be located in Summit County, Munroe Falls Township, Ohio.

Permit 34-153-2-3024-00-00 was issued to D&L on October 18, 2007. The permit was issued with a number of conditions, due to the fact that the well site would be located within a municipal wellhead protection area and within an urbanized area. Notice of the issuance of this permit was provided to D&L by regular mail. The Division did not independently provide notice of the issuance of this permit to Munroe Falls. Although, by at least December 4, 2007, Munroe Falls was aware of the permit's issuance.

On February 13, 2008, Munroe Falls filed a Notice of Appeal with the Oil & Gas Commission, contesting the issuance of the permit to drill the proposed Sonoco #1 Well. This matter has been assigned case number 793, and is the subject of the instant decision.

On February 20, 2008, Appellant Munroe Falls filed an Application for Stay. On February 29, 2008, a hearing on Appellant's Application for Stay was conducted before the Commission. Prior to the commencement of the hearing, D&L moved to intervene into this action. D&L is the permit holder, and will be the owner and operator of the Sonoco #1 Well. The Commission **granted** D&L intervenor status, finding that D&L qualified as an "interested person" under the Commission's procedural rules.¹ All parties participated in the hearing on the Application for Stay. On March 4, 2008, the Commission **denied** the requested Stay. As of the date of this Order, no drilling has commenced on the proposed well site.

On July 11, 2008, the Division filed a Motion to Dismiss appeal 793, asserting that Appellant Munroe Falls failed to file its appeal in a timely manner. The Division argued that this failure constitutes a jurisdictional defect, requiring dismissal of appeal 793. Through its Motion, the Division also suggested that the Commission lacks subject matter jurisdiction over appeals taken from the issuance of an oil & gas drilling permit

D&L concurred with the Division's Motion, and separately moved to dismiss appeal 793. Appellant Munroe Falls opposed these Motions. Each party has fully briefed the issues presented through the Motions to Dismiss.

¹ OAC §1509-1-14 defines an "interested person" as "any person, partnership, corporation, board or other entity having a pecuniary or proprietary interest directly affected by an appeal." The Commission is authorized to grant an "interested person" permission to appear and participate in an appeal before the Oil & Gas Commission.

BACKGROUND & DISCUSSION

The Motions to Dismiss assert that the Commission lacks jurisdiction to hear and consider appeal number 793. The Oil & Gas Commission is an agency of state government, and as such may only exercise the authority expressly granted to it by the General Assembly. The General Assembly's delegation of authority to the Oil & Gas Commission is found in O.R.C. §1509.35 and §1509.36. O.R.C. §1509.36 requires that an appeal from an order of the Chief of the Division must be filed with the Commission within thirty days after receipt of the Chief's order by registered mail. Since the General Assembly, by statute, has limited the time to file an appeal to thirty days, the Commission has no discretion to extend that time period or to accept an appeal filed more than thirty days after receipt of the Chief's order.

In this matter, the action of the Chief under review is the issuance of a permit. Pursuant to O.R.C. §1509.06, permits are not required to be issued through Chief's orders. O.R.C. §1509.06 also does not specify that permits must be issued by registered or certified mail.

D&L applied for a permit to drill proposed Sonoco #1 Well on or about August 20, 2007. Munroe Falls was not notified in writing of the filing of this application, but was otherwise informed of the pending application, and representatives from the City accompanied the Division on a pre-site inspection of the area at issue on September 10, 2007.

The permit was issued to D&L on October 18, 2007. The permit contains several special conditions, addressing protection of the local aquifer. The approval of the permit was not directly communicated to Munroe Falls. Information provided in pleadings filed with this Commission indicates that by at least December 4, 2007, Munroe Falls was aware of the issuance of the permit. Munroe Falls' appeal of the issuance of permit 34-153-2-3024-00-00 was filed with the Commission on February 13, 2008, 119 days after the issuance of this permit to D&L, and 71 days after Munroe Falls clearly had knowledge of the permit's issuance.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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 claiming to be aggrieved or adversely affected by an order by the chief of the division of mineral resources management may appeal to the oil and gas commission . . . The appeal shall be filed with the commission within thirty days after the date upon which appellant received notice by registered mail of the making of the order complained of. Notice of the filing of such appeal shall be filed with the chief within three days after the appeal is filed with the commission . . .

(Emphasis added.)

Commission Rule O.A.C. §1509-1-04 further provides in part:

All appeals from order of the chief of the division of mineral resources management to the oil and gas commission shall be made by filing written notice to such effect with the oil and gas commission within thirty days after the date upon which the appellant received actual or constructive notice by registered or certified mail of the making of the order complained of. . .

In this matter, Munroe Falls argues that the Chief should have provided notice to the City of his decision to issue the permit for Sonoco Well #1. As notice by registered or certified mail was never provided to Munroe Falls, the Appellant argues that the thirty-day appeal period should not be applied in a manner that would defeat its attempt to appeal.

The Commission can find no statutory requirement that the Chief must notify any entity, other than the permit applicant, of a decision to grant a drilling permit. And while Munroe Falls clearly made its interest in the siting of the Sonoco #1 Well known to the Division by attending the pre-site inspection in September 2007, there is no legal requirement that the Chief must provide notice to Munroe Falls of his ultimate decision to grant the requested permit.

Moreover, Munroe Falls clearly had knowledge of the issuance of the permit as early as December 4, 2007. Yet, Munroe Falls' appeal was not filed until February 13, 2008, 119 days after the issuance of the permit and 71 days after Munroe Falls clearly had knowledge of the permit's issuance.

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. Jurisdiction is not a matter of choice; but rather is an expression of the power and authority of a body to act. If the Commission's jurisdiction has not been properly invoked, the Commission simply is without authority to act.

Regarding the filing of appeals with the Commission, the legislature has clearly set forth certain conditions necessary to invoke the Commission's jurisdiction. The thirty-day appeal period set forth in O.R.C. §1509.36 is not discretionary; but rather is mandatory and jurisdictional.

Where a statute confers the right of appeal, adherence to the conditions imposed thereby is essential to the enjoyment of that right. American Restaurant and Lunch Co. v. Glander, 147 Ohio St. 147 (1946). The filing deadlines for notices of appeal are mandatory and jurisdictional. Indeed, the Oil & Gas Commission has dismissed prior appeals for the appellant's failure to file an appeal within the statutorily mandated 30-day appeal period. See: Quest Energy Corp. v. Biddison, appeal #232 (March 23, 1987); Progressive Oil & Gas, Inc. v. Biddison, appeal #307 (August 22, 1988); Charles & Loretta Mertens v. Mason, appeal #494 (July 16, 1992); Paul Grim v. Mason, appeal #577 (June 26, 1996); Hanley Hardin v. Mason, appeal #566 (June 27, 1996); John & Gladys Spillman, appeal # 604 (May 12, 1997).

The Commission finds that the Chief's service of his approval of D&L's application for permit 34-153-2-3024-00-00 did not violate the provisions of O.R.C. §1509.06. The Commission also finds that the Chief's failure to provide notice of the permit issuance to Munroe Falls, by certified or register mail, or otherwise, did not violate any provision of Chapter 1509. A Notice of Appeal, filed approximately 4 months after the contested action of the Chief, is untimely under O.R.C. §1509.36 and will not invoke this Commission's jurisdiction.

The Division and D&L have also argued that the issuance of a permit is not an "order," and therefore, is not appealable to this Commission. As this appeal must be dismissed for Munroe Falls' untimely attempt to appeal, it is not essential for the Commission to resolve the question of whether the issuance of a permit may be appealed to this body.

In this matter, Munroe Falls attempted to appeal the issuance of a permit to D&L, but did not follow the mandates of O.R.C. §1509.36. The Notice of Appeal was filed 119 days after the permit issuance, 89 days after the statutory appeal period, and at least 71 days after Munroe Falls had knowledge of the permit issuance. In order to invoke the jurisdiction of the Commission, an appellant must file its notice of appeal in a timely manner. By law, the failure of an appellant to file its appeal within the statutorily-mandated time period results in the dismissal of the appeal. Appellant Munroe Falls failed to satisfy this statutory requirement in its attempted appeal. For this reason, the Oil & Gas Commission lacks jurisdiction to hear and decide this appeal.

ORDER

The Oil & Gas Commission has read and considered the Appellee's and Intervenor's Motions to Dismiss, and the responses of Appellant the City of Munroe Falls. The Commission has also reviewed its prior orders and decisions. The Commission finds the arguments of the Appellee and the Intervenor well taken. WHEREFORE, the Commission **GRANTS** the pending Motions on the basis that the appeal was not timely filed, and **DISMISSES** appeal number 793.

RECUSED
M. HOWARD PETRICOFF

JOHN A. GRAY

See attached sheets

JAMES H. CAMERON

TIMOTHY C. McNUTT

City of Munroe Falls
Appeal # 793

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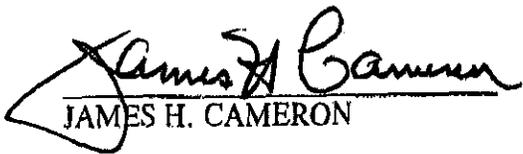
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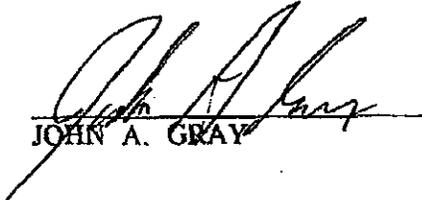
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