BEFORE THE OIL AND GAS COMMISSION
STATE OF OHIO

ATHENS COUNTY FRACKING ACTION NETWORK Appellant, vs. RICHARD J. SIMMERS, Chief, Division Of Oil and Gas Resources Management and K & H PARTNERS, LLC Appellees.	:	Case No. 855

APPELLANT ACFAN'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS

INTRODUCTION

This is an appeal of a permit for a new brine injection well proposed for Athens County and approved by the Chief on December 9, 2013.

The Chief has moved to dismiss this appeal by raising only a single, narrow claim: that even though the Chief acknowledges that this appeal is for a brine injection well permit, this appeal should nevertheless be dismissed on the basis of a statute applicable to oil and gas well permits issued under R.C. 1509.06. Indeed, the only statute cited by the Chief to support his core argument on jurisdiction is a single sentence in R.C. 1509.06(F). Injection well disposal permits, however, are issued pursuant to R.C. 1509.22(D). That statute provides that injection well

permits are distinct from permits issued under R.C. 1509.06, thus rendering R.C. 1509.06(F) irrelevant to this appeal. The Chief's Motion makes no effort to establish a relevant legal connection between injection well disposal permits and R.C. 1509.06 and must be overruled because no such relationship exists.

The Ohio Supreme Court's recent opinion in *Chesapeake Exploration, LLC v. Oil & Gas Comm.,* 135 Ohio St.3d 204, 2013-Ohio-224, that prevents appeals of oil and gas permits under R.C. 1509.06, provides the long standing rule of law that governs this appeal as well. That rule is that permit appeal rights can be restricted only pursuant to explicit statutory authority clearly intended by the General Assembly to restrict the right of appeal, see ¶15, 17. While this explicit statutory authority exists for oil and gas wells due to R.C. 1509.06(F), there is no analogous statute for injection well permits. Read in its entirety, the *Chesapeake Exploration* opinion directly contradicts the Chief's position. In fact, the *Chesapeake* opinion explicitly cites waste injection permits issued per R.C. 1509.22 as one of several orders in R.C. Chapter 1509 where the right of appeal remains, see ¶17.

Finally the Chief's Motion also ignores a recent amendment to R.C. 1509.03(B) that confirms the narrow scope that the General Assembly intended for R.C. 1509.06(F) and that only the oil and gas well permits specified in R.C. 1509.06(A) are no longer subject to appeal.

The root of the Motion to Dismiss is that the Chief is asking this Commission to immunize his actions on injection well permits under R.C. 1509.22(D) from review by terminating the appeal rights of untold thousands of Ohioans without regard to the seriousness of the legal and technical errors that those permits may contain. To reach this extreme result in the absence of unambiguous legislative authority is unlawful and would result in a gross overreach of unaccountable government authority over private rights. The Franklin County Court of

Appeals held in *Clermont Nat. Bank v. Edwards*, 273 N.E.2d 783, 27 Ohio App.2d 91, at 105, (Ohio App. 10 Dist. 1970) that, "There is no presumption against judicial review and in favor of administrative absolutism * * * unless that purpose is fairly discernible in the statutory scheme." Such statutorily unsupported administrative absolutism on injection disposal well permits is precisely what the Motion to Dismiss seeks.

ARGUMENT

The Chief's motion to dismiss should be overruled for the following reasons:

1. the brine injection well permit under appeal was issued pursuant to R.C. 1509.22(D) and is not an oil and gas well pursuant to R.C. 1509.06. The two permitting programs are completely separate and thus, R.C. 1509.06(F) – the sole statute relied upon by the Chief – is irrelevant to this appeal of an injection well permit.
2. although the Chief's Motion relies almost exclusively on the Ohio Supreme Court's opinion in *Chesapeake Exploration, LLC v. Oil & Gas Comm.,* 135 Ohio St.3d 204, 2013-Ohio-224, he ignores completely the critical language in ¶14 of the opinion that only the oil and gas production well permits specified in R.C. 1509.06 are held not to be appealable orders and in ¶17 that explicitly provides that injection well permits issued pursuant to R.C. 1509.22, like the permit in this case, remain subject to R.C. 1509.03(B) and are therefore appealable.
3. that subsequent to its adoption of the language in RC 1509.06(F) relied upon by the Chief, the General Assembly amended R.C. 1509.03(B)(1) to clarify that only oil and gas well permits issued pursuant to R.C. 1509.06 have been exempted from Ohio's

Administrative Procedures Act, R.C. Chapter 119, requiring that permits are adjudication orders requiring an appeal hearing to be valid.

1. An Injection Well Permit Issued Pursuant to R.C. 1509.22 Is Completely Separate From A Permit Issued Pursuant to R.C. 1509.06, Rendering R.C. 1509.06(F) Irrelevant.

The first fundamental flaw underlying the Chief's Motion to Dismiss is its failure to differentiate between waste disposal injection wells and oil and gas wells permitted by the Chief. It is beyond question that the two types of wells are treated in a completely separate manner under federal law and that Ohio law has been carefully drafted to preserve that distinction. Because the two types of wells are permitted under separate systems, the inability to appeal an oil and gas well permit due to R.C. 1509.06(F), that was confirmed in *Chesapeake Exploration, supra.*, does not affect the ability to appeal an injection well permit issued pursuant to R.C. 1509.22(D).

The beginning point for this analysis is that oil and gas production wells are exempt from regulation under federal law and are governed solely by state law. In contrast, injection well disposal for wastes created during oil and gas production is regulated as Class II wells under the federal "Underground Injection Control" or "UIC" program established in Part C of the federal Safe Drinking Water Act ("SDWA," 42 U.S.C. 300(f), P.L. 93-523 as amended by P.L. 95-190 and 96-502). The Chief could not issue Class II injection well permits absent the delegated authority that he received in 1984 pursuant to a Memorandum of Agreement ("MOA") with U.S. EPA authorized by Section 1425 of the SDWA. The Chief's permitting of Class II injection wells are subject to extensive requirements in federal UIC regulations and the MOA. This more stringent system for handling wastes that have no commercial value makes sense because

production well operators have an economic incentive not to lose their valuable product that injection well operators do not.

To permit injection wells consistently with the SDWA, the General Assembly enacted R.C. 1509.22(D) establishing a permitting system for Class II injection wells. To satisfy the underlying federal law, R.C. 1509.22(D) expressly refers to the SDWA, see e.g., R.C. 1509.22(D)(1)(e) authorizing the Chief to adopt rules in furtherance of the goals of the SDWA and R.C. 1509.22(D)(5) that all the Division's actions are to be construed to comply with the minimum requirements of the SDWA.

When enacting R.C. 1509.22(D), the General Assembly preserved the distinction between the two types of wells by expressly making injection well permits separate from those for production wells permitted pursuant to R.C. 1509.06. 1509.22(D) provides in pertinent part:

> (D) (1) No person, without first having obtained a permit from the chief, shall inject brine or other waste substances resulting from, obtained from, or produced in connection with oil or gas drilling, exploration, or production into an underground formation unless a rule of the chief expressly authorizes the injection without a permit. The permit shall be in addition to any permit required by section 1509.05 of the Revised Code. . . (emphasis added)

As described in Ohio Adm. Code 1501:9-3-06(A), the permit authorized by R.C. 1509.22(D) is a single permit that authorizes both the drilling and the use of the injection well for brine waste disposal. The rule provides that this combined permit is to be applied for through a single application addressing both drilling and use, see Ohio Adm. Code 1501:9-3-06(A) and (F). The permit under appeal (attached to the Notice of Appeal) is consistent with this description; it states that Appellee K&H "is hereby granted permission to: Salt Water Injection Well New Well, that the "purpose of well" is "Water injection - Disposal," and that it is effective for two years until December, 2015.

The underlined, second sentence in 1509.22(D) above, that this injection well permit is "in addition to" and therefore, separate from, any permit issued under R.C. 1509.05 is critical. R.C. 1509.05 requires that the following wells must receive state permits:

> "No person shall drill a new well, drill an existing well any deeper, reopen a well, convert a well to any use other than its original purpose, or plug back a well to a source of supply different from the existing pool, without having a permit to do so issued by the chief. . ."

These categories of permits in R.C. 1509.05 are identical to the permit categories covered in R.C. 1509.06:

> "a permit to drill a new well, drill an existing well deeper, reopen a well, convert a well to any use other than its original purpose, or plug back a well to a different source of supply, including associated production operations," R.C. 1509.06(A).

The coverage of the two statutes is identical because R.C. 1509.06 addresses how the Chief handles the applications for the permits required by R.C. 1509.05.

Accordingly, since R.C. 1509.22(D) is expressly made separate from R.C. 1509.05 which, in turn, controls the scope of R.C. 1509.06, permits under R.C. 1509.22(D) are also legally separate from R.C. 1509.06, the only statute cited by the Chief in his jurisdictional argument.

Two other provisions of R.C. Chapter 1509 further support this conclusion that injection wells are permitted independently of R.C. 1509.06. First, disposal wells have an exclusive grant of rule-making authority in R.C. 1509.22(D)(1) that is separate the Chief's rule-making authority for oil and gas production wells in R.C. 1509.03. Injection well rules have been adopted in a completely separate chapter of the Administrative Code, Ohio Adm. Code Chapter 1501:9-3, titled "Saltwater Operation," while the rules governing production wells are contained in Ohio Adm. Code Chapter 1501:9-1, titled "Oil Well Drilling." The two programs for injection and production wells can function wholly independently of one another based on their own separate

authority. Overlap between the programs is therefore unnecessary as a statutory matter and would be incidental.

Second, although the Chief only cites the second sentence of R.C. 1509.06(F) in his Motion, it is significant that the first sentence in that paragraph establishes the criteria governing the Chief's approval of permits under 1509.06.[1] These criteria, however, are completely different from the approval criteria for injection well permits which are set forth in 1509.22(D)(3).[2] Not only are separate permit approval criteria another obvious indication of two separate permit systems, but the fact that the first sentence of R.C. 1509.06(F) cannot possibly apply to injection well permits is a clear indication that the second sentence does not either.

The Chief makes no effort in his Motion to connect injection well permits to R.C. 1509.06 or explain why he ignores the explicit language of R.C. 1509.22(D) providing for the separate permitting of injection disposal wells. By citing only R.C. 1509.06(F) to support his jurisdictional argument, the Chief is therefore relying upon statutory law that is irrelevant to injection well permits issued pursuant to R.C. 1509.22(D). There is no statute in the injection

[1] The full language of R.C. 1509.06(F) is:
(F) The chief shall issue an order denying a permit if the chief finds that there is a substantial risk that the operation will result in violations of this chapter or rules adopted under it that will present an imminent danger to public health or safety or damage to the environment, provided that where the chief finds that terms or conditions to the permit can reasonably be expected to prevent such violations, the chief shall issue the permit subject to those terms or conditions, including, if applicable, terms and conditions regarding subjects identified in rules adopted under section 1509.03 of the Revised Code. The issuance of a permit shall not be considered an order of the chief. The chief shall post notice of each permit that has been approved under this section on the division's web site not later than two business days after the application for a permit has been approved. (emphasis added to the only language cited in the Chief's Motion).

[2] R.C. § 1509.22(D)(3): "To implement the goals of the Safe Drinking Water Act, the chief shall not issue a permit for the injection of brine or other waste substances resulting from, obtained from, or produced in connection with oil or gas drilling, exploration, or production unless the chief concludes that the applicant has demonstrated that the injection will not result in the presence of any contaminant in ground water that supplies or can reasonably be expected to supply any public water system, such that the presence of the contaminant may result in the system's not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons."

well disposal program that terminates appeal rights in R.C. 1509.22(D) comparable to what R.C. 1509.06(F) does in the separate program for oil and gas production wells.

This fact requires that the Chief's Motion be overruled because of the primary holding made by the Ohio Supreme Court in *Chesapeake Exploration*, at ¶15, that R.C. 1509.36 governing appeals to this Commission "generally confirms appellate jurisdiction on the Ohio and Gas Commission over appeals from orders of the Chief of the Division of Oil and Gas Resources Management by persons adversely affected" unless an explicit statute "manifestly divests" the Commission of appellate jurisdiction. In other words, the controlling rule of law governing the Motion to Dismiss is that the removal of an existing right to appeal can only be accomplished in Ohio through a specific and explicit statute clearly repealing that right. See also *Rosen v. Celebrezze,* 117 Ohio St.3d 241, 2008-Ohio-853, 883 N.E.2d 420, ¶46, cited with approval in *Chesapeake Exploration* at ¶15:

> "the mere fact that the Ohio Court has basic statutory jurisdiction to determine custody matters in legal-separation and divorce cases * * * does not preclude *a more specific statute * * * from patently and unambiguously divesting the court of such jurisdiction."* (emphasis added).

This rule arises in part from the rules of statutory construction governing a repealing statute, see *General Motors Corp. v. McAvoy,* (1980) 407 N.E.2d 527, 63 Ohio St.2d 232, an early administrative law case upholding appeal rights from Ohio EPA permitting decisions:

> We first note that under established rules of statutory construction, that the repeal of rights granted by one statute does not occur, unless the intent to supercede the operation of that statute is clear from enactment of another provision, or there is no reasonable way to read the statutes in a conciliatory fashion. *Lucas County Commrs. v. Toledo (*1971), 28 Ohio St.2d 214, 217, 277 N.E.2d 193; *State v. Frost (*1979), 57 Ohio St.2d 121, 387 N.E.2d 235; R.C. 1.51. (at p. 235)

Prior to the enactment in 2010 of the sentence in R.C. 1509.06(F) that the Chief relies upon, all permit decisions by the Chief were appealable orders pursuant to R.C. 1509.03(B)(1),

Chesapeake Exploration, ¶15, see below. With no statute in R.C. Chapter 1509 "manifestly" or "patently and unambiguous" divesting the Commission of it prior jurisdiction over appeals of injection well disposal permits issued pursuant to R.C. 1509.22(D), the Commission's general appeals authority in R.C. 1509.36 over the Chief's permitting orders authorizes this appeal, *Chesapeake Exploration* at ¶15. Further, in the absence of such an explicit repealing statute, the general rule to be applied in ruling on the Chief's Motion is that "statutes providing for appeals should be given a liberal interpretation in favor of appeal," *Chesapeake Exploration,* at ¶ 18, thus any ambiguity is to be resolved in favor of maintaining the Appellants' right of appeal. Accordingly, the Chief's Motion should be overruled.

2. The Ohio Supreme Court's Opinion in *Chesapeake Exploration* Supports Overruling the Chief's Motion.

In a highly selective fashion, the Chief's Motion cites only a small portion of the Supreme Court's opinion in *Chesapeake Exploration, supra.,* to support his Motion while ignoring two very important qualifications within the opinion.

The first limitation is in ¶14 that the ruling is limited to only those wells enumerated in R.C. 1509.06(A):

> "For oil and gas wells, however, a permit to drill a new well, drill an existing well deeper, reopen a well, convert a well to any use other than its original purpose, or plug back a well to a different source of supply including associated production operations [i.e., the well actions specified in 1509.06(A)], is not considered an order of the chief of the division. R.C. 1509.06(F)"

As discussed above, these are the same type of well permits which the General Assembly has expressly declared in R.C. 1509.22(D)(1) are "in addition to" and separate from injection well permits. Throughout its opinion, the Court was very careful in limiting its holding to only

those permits specifically covered in R.C. 1509.06(A). Due to this limitation, the Supreme Court's holding cannot be extended to limit injection well permit appeals.

Second, and most telling, the Ohio Supreme Court specifically excludes brine injection wells in ¶17 of its *Chesapeake Exploration* opinion from the limitation on appeals that it applied to oil and gas wells. Paragraph 17 addresses R.C. 1509.03(B),[3] a statute that generally confers appeal rights over permits issued by the Chief by providing that "any order issuing a permit" is an "adjudication order" and must comply with Ohio's Administrative Procedures Act, R.C. Chapter 119. The importance of this provision is that, for an "adjudication order" to be valid, there must be an opportunity provided for a hearing, see R.C. 119.06, 119.01(D). The Court held that 1509.03(B) is now inapplicable to the permits specified in R.C. 1509.06 due to the adoption of .06(F), thus extinguishing the right to appeal them.

However, the Court concludes Paragraph 17 by holding that this ruling "does not render R.C. 1509.03(B) superfluous" because there are at least three other orders issued by the Chief under R.C. Chapter 1509 to which the statute, and its inherent right of appeal, still applies. One of the three orders singled out by the Supreme Court as remaining appealable under R.C. 1509.03(B) are the issuance of injection well permits pursuant to R.C. 1509.22:

> "Construing these provisions in this manner does not render R.C. 1509.03(B) superfluous, because it would still apply to certain permits issued by the chief. See R.C. 1509.21 (permit issued by chief to conduct secondary or additional mining operations), 1509.22 (permit issued by chief to inject brine or other waste substances into an underground formation), and 1509.27 (permit issued by the chief for a mandatory pooling order)." (¶17, emphasis added)

[3] The full text of R.C. 1509.03(B) is: (B) (1) Any order issuing, denying, or modifying a permit or notices required to be made by the chief pursuant to this chapter shall be made in compliance with Chapter 119. of the Revised Code, except that personal service may be used in lieu of service by mail. Every order issuing, denying, or modifying a permit under this chapter and described as such shall be considered an adjudication order for purposes of Chapter 119. of the Revised Code. Division (B)(1) of this section does not apply to a permit issued under section 1509.06 of the Revised Code.

Accordingly, the *Chesapeake Exploration* opinion stands for the exact opposite proposition for which it is cited by the Chief by expressly holding that injection well permits issued pursuant to R.C. 1509.22 remain appealable to this Commission despite R.C. 1509.06(F).

The Supreme Court's finding in ¶17 that injection well permits remain subject to R.C. 1509.03(B) also prevents any confusion over whether there is any legal distinction between permits and orders in light of the Commission's authority to hear only appeals of "orders" in R.C. 1509.36. R.C. 1509.03(B) expressly provides that all permits are issued as orders and are therefore subject to the Commission's jurisdiction. The Court ruled in ¶15 that it took the "plain language" of R.C. 1509.06(F) for the Chief's issuance of a permit for oil and gas wells to "not constitute an order of the Chief [which] cannot be appealed to the commission." So except only for the permits to which R.C. 1509.06(F) specifically applies, any other permit, including injection well permits, would be issued as an order pursuant to R.C. 1509.03(B)[4] and be appealable to the Commission.

[4] During the parties' Conference Call setting the briefing schedule on this Motion, the Chief's counsel stated that there would be an order issued on this injection well following its testing. This deserves brief comment to prevent confusion. The statement appears related to Ohio Adm. Code 1501:9-3-06(D) that an injection well operator shall "refrain" from using the injection well "until the chief has evaluated the results of any test performed." While a welcome component of Ohio's Class II UIC regulatory program, this evaluation does not constitute, and should not be confused with, the Class II injection well permit required by R.C. 1509.22(D) that is under appeal in this proceeding.

First, this process is not labelled as a "permit" in the Chief's rules but as a mere "evaluation" and an equally vague "withholding of authority." See Ohio Adm. Code 1501:9-3-06(D). No statute elevates this evaluation procedure to the status of a permit. If this 'evaluation' was intended to be a permitting process, far more specific language would have been used to express that specific an intent. This is especially true if the Chief would ever seek to transform the Class II permitting system into some type of bifurcated process which would require comprehensive alterations to the language throughout Ohio Adm. Code 1501:9-3-06 to accomplish.

Second, the requirement for testing is only a single element of the injection well permit described in Ohio Adm. Code 1501:9-3-06; there is not even a remote correspondence between this one component and the comprehensive permit governing injection well permits formally defined in R.C. 1509.22(D) and the underlying SDWA. Third, unlike a permit, no procedural or substantive standards are provided for this evaluation in any statute or rule. Appellants' appeal rights attach to the permit legally required to be issued by the Chief by R.C. 1509.22(D), all of Ohio Adm. Code 1501:9-3-06, and the SDWA. This is the permit attached to the Notice of Appeal.

In the absence of a statute declaring that injection well permit approvals are not orders of the Chief, a full reading of *Chesapeake Exploration* establishes that this appeal involves an appealable adjudication order and the Chief's Motion to Dismiss should be overruled.

3. The Amendment to R.C. 1509.03(B) in S.B. 315 Clarifies that R.C. 1509.06(F) Only Affects Permits Issued Under R.C. 1509.06 and Not Injection Well Permits.

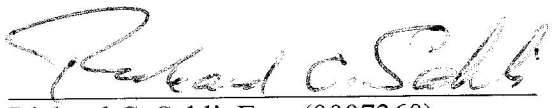
R.C. 1509.03(B) provides an additional reason that injection well permits remain appealable. The language in R.C. 1509.06(F) relied upon by the Chief ("The issuance of a permit shall not be considered an order of the chief.") was adopted in Senate Bill 165, effective on June 30, 2010. Over two years later, the General Assembly amended R.C. 1509.03(B) in Senate Bill 315 by adding the final sentence to the statute that, "Division (B)(1) of this section does not apply to a permit issued under section 1509.06 of the Revised Code."

Both statutes address the same subject of appeal rights in Chapter 1509 with the subsequent provision in 1509.03(B), as the one most recently adopted, being an effective limitation on the earlier provision in 1509.06(F), see R.C. 1.52, *Chesapeake Exploration, supra.,* at ¶18. The earlier provision in .06(F) is very broad and, merely on its face and out of context, could be interpreted that any permit issuance is not an appealable order. It is in this completely unrestricted sense that the Chief now seeks to use .06(F) in his Motion to Dismiss. The second amendment to .03(B)(1), however, clarifies that the only permits that are not appealable "adjudication orders" are those issued under R.C. 1509.06. As a result, any ambiguity on whether the Chief may assert that R.C. 1509.06(F) covers a permit other than those specified in R.C. 1509.06(A), such as an injection well permit, is removed by this subsequent amendment.

CONCLUSION

For the foregoing reasons, the Appellant and its members respectfully request that the Commission overrule the Chief's Motion to Dismiss and provide them with a hearing on the grounds stated in the Notice of Appeal. The Ohio Supreme Court stated in *Union Camp Corp. v. Whitman* (1978), 54 Ohio St.2d 159, at 162, 375 N.E. 2d 417, at 419, that "The right to a hearing is a basic right, and, where it is withheld, that right is clearly and substantially affected." Appellants urge the Commission to uphold their basic rights here because their right to an appeal can only be taken from them by an unmistakably clear statutory directive where any doubt or ambiguity is resolved in favor of their right of appeal. Because 1) the General Assembly has not enacted an explicit repeal of the right to appeal an injection well permit and 2) the Ohio Supreme Court has clearly found in *Chesapeake Exploration,* at ¶17, that the repeal of appeal rights over oil and gas wells in R.C. 1509.06 does not affect appeals of injection well permits issued pursuant to R.C. 1509.22, the Chief has not shown he is legally entitled to the "administrative absolutism" that he seeks and the Motion to Dismiss should be overruled.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief in Opposition to the Appellees' Motion to Dismiss was served upon counsel for the Appellee Chief and Appellee K&H Partners, LLC, by electronic mail to the addresses stated below on this 18th day of February, 2014.

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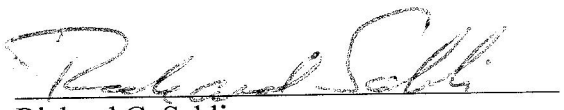

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