

FILED
COURT OF COMMON PLEAS
MAR 30 2012
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

**IN THE COURT OF COMMON PLEAS
- GENERAL DIVISION -
TRUMBULL COUNTY, OHIO**

CASE NUMBER: 2011 CV 02454

**PATRIOT WATER TREATMENT LLC
PLAINTIFF**

VS.

JUDGE ANDREW D LOGAN

**OHIO ENVIRONMENTAL
PROTECTION AGENCY
DEFENDANT**

JUDGMENT ENTRY

This cause came to be heard on the Motion to Dismiss filed by the Defendant, Ohio Environmental Protection Agency. The Court has reviewed the motion, oppositional responses, replies, memoranda, pleadings, affidavits, exhibits and the relevant applicable law.

On March 12, 2012, OEPA filed a motion to dismiss the complaint and accompanying requests for injunctive relief filed by Patriot Water Treatment, LLC and the City of Warren, Ohio. OEPA requests a dismissal for lack of subject matter jurisdiction pursuant to Civ.R. 12(B)(1).

This case now concerns the issuance of a renewal permit by OEPA to Warren prohibiting Warren from "*** accepting brine wastewater from oil or gas drilling, exploration or production." Under the original permit, Warren accepted brine wastewater, otherwise known as "Light Water," from Patriot. The renewal permit prohibits this exchange. According to the renewal permit, "Disposal of brine wastewater from oil and gas drilling, exploration or production through a wastewater treatment plant and discharge to waters of the state is not an authorized method of disposal under R.C. 1509.22(C)(1) unless and until it is approved by the Chief of the Division of Oil and Gas Resources Management for testing or implementing a new technology or method of

disposal." Patriot and Warren claim ODNR approved their specific method of disposal pursuant to the statute. OEPA and ODNR maintain no such approval was applied for, nor was it granted.

Patriot and Warren filed a first amended complaint which seeks declaratory relief regarding the issuance of the original OEPA permit to Warren and the modified renewal of the same. Specifically, Patriot and Warren seek a declaration from this Court that the method employed by Patriot for the disposal of low-salinity brine water is an acceptable method pursuant to R.C. 1509.22(C)(1). Hand-in-hand with this request, Patriot and Warren seek a declaratory judgment from this Court stating the three methods of brine water disposal listed in R.C. 1509.22(C)(1) are not the exclusive means of disposal. The Plaintiffs also seek a declaration from this Court that ODNR approved the "Patriot method" of disposal in accordance with R.C. 1509.22(C)(1).

R.C. 1509.22(C) states: "The chief of the division of oil and gas resources management shall adopt rules and issue orders regarding storage and disposal of brine and other waste substances; however, the storage and disposal of brine and other waste substances and the chief's rules relating to storage and disposal are subject to all of the following standards: (1) Brine from any well *** shall be disposed of only by injection into an underground formation, including annular disposal if approved by rule of the chief, *** by surface application *** or by other methods approved by the chief for testing or implementing a new technology or method of disposal."

The Court finds the interpretation of the statute is not in controversy. The statute, R.C. 1509.22(C), is clear on its face. According to the statute, there are two pre-approved methods of brine disposal; injection into an underground formation and

surface application. In addition, there may be other acceptable methods, subject to the approval from the chief of oil and gas resource management (ONDR herein).

The true controversy in this instance is whether ODNR approved the "Patriot method." Patriot and Warren assert ODNR approved this process. OEPA maintains there was never any such approval.

R.C. 3745.04 governs appeals before the environmental review appeals commission. Pursuant to R.C. 3745.04, ERAC "**** has exclusive original jurisdiction over any matter that may, under this section, be brought before it. However, the director has and retains jurisdiction to modify, amend, revise, renew, or revoke any permit, rule, order, or other action that has been appealed to the commission." The same section further states permit modifications and renewals are appealable to ERAC.¹

On March 22, 2012, Patriot and Warren filed separate objections with ERAC appealing the renewal permit issued to Warren prohibiting the city from accepting brine wastewater for discharge by Patriot. In this appeal, Patriot cites the following assignments of error to be resolved by ERAC: "(1) The Director failed to follow Ohio law with respect to pre-issuance requirements; (2) The Director engaged in an unreasonable and unlawful public process that mislead the public; (3) The Director's issuance of Section II.BB of the NPDES Renewal Permit exceeds the Director's authority; (4) The Director's issuance of Section II.BB of the NPDES Renewal Permit is unreasonable and unlawful."

Patriot and Warren also petitioned ERAC for a stay on the effective date of the renewal permit. ERAC denied this request for a stay following oral argument to ERAC on

¹ OEPA actually attempted to appeal its own issuance of the original permit to ERAC. OEPA claims the original permit issuance was in violation of R.C. 1509.22 because the "Patriot method" was not approved by ODNR prior to the issuance of the permit. However, on March 20, 2012, ERAC decided OEPA did not have standing to appeal its own permit. Alternatively, ERAC suggested OEPA could unilaterally revoke the permit at issue pursuant to R.C. 6111.03. ERAC Case No. 156477 consolidated with No. 786501.

March 27, 2012. However, ERAC also set a de novo hearing for April 24, 2012. The issue of the ODBR approval as it pertains to Warren's NODES Renewal Permit will be litigated at the April 24th ERAC hearing.

The assignments of error presented to ERAC are indistinguishable from those presented in the declaratory action before this Court. Although couched in terms of the interpretation of R.C. 1509.22, the crux of the requests made by Patriot and Warren before this Court concern the validity of the renewal permit issued by OEPA prohibiting the "Patriot method" of brine wastewater disposal. There is no true controversy in the statutory interpretation of R.C. 1509.22. Rather, the controversy exists in the manner and method surrounding the issuance of the renewal permit. This controversy is required to be resolved by ERAC; the only forum with exclusive jurisdiction.

These assignments of error relative to the renewal permit are now set for review before ERAC on April 24, 2012. Although the Court acknowledges the April 1, 2012 deadline as the effective date of the renewal permit, it is not amenable to usurping the exclusive jurisdiction of ERAC set forth in R.C. 3745.04. To do so could result in contradictory decisions in different forums on the same issues of law. This is not acceptable.

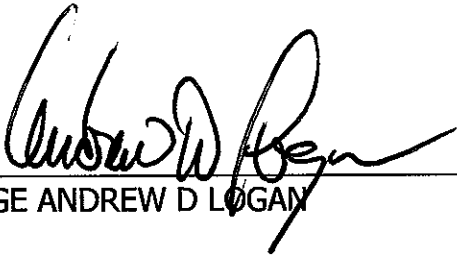
R.C. 3745.04 identifies ERAC as the exclusive forum to appeal OEPA permits. Patriot and Warren have exercised their rights to petition ERAC for relief, even to the point of a request for an expedited stay. Although ERAC chose not to grant that stay, it is the only jurisdiction to respond to such a request prior to the appellate level.

The Court finds the motion to dismiss for lack of subject matter jurisdiction is well taken. ERAC is the appropriate and exclusive jurisdiction for this dispute.

The complaint of Patriot and Warren is hereby dismissed without prejudice for lack of subject matter jurisdiction.

IT IS SO ORDERED.

This is a final appealable order and there is no just cause for delay.



JUDGE ANDREW D LOGAN

Date: March 30 2012

Copies to:

JANEAN R WEBER SUMMER J KOLADIN PLANTZ CHRISTINE L RIDEOUT
MOLLY COREY MEGAN DELISI
SARAH L HERBERT MARTIN F. WHITE APRIL R BOTT