IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

BLUE EAGLE, LLC. et. al.,	PETITIONER,
and	
WEST VIRGINIA SURFACE OWNER'S RIGHTS ORGANIZATION,	INTERVENOR/PETIIONER,
VS.	Civil Action No. 08-CAP-171 Judge Murensky
WEST VIRGINIA OIL AND GAS CONSERVATION COMMISSION, CHESAPEAKE APPALACHIA, LLC, EASTERN AMERICAN ENERGY CORPORATION, and PETROEGDE RESOURCES (WV), LLC.,	RESPONDENTS.

ORDER

Pending before the Court is the Petitioners' appeal from four Orders issued by the West Virginia Oil and Gas Conservation Commissions (sometimes referred to as the Commission). Petitioners initially filed a Writ of Prohibition directly with the Supreme Court objecting to certain Orders by the Commission regulating the drilling of "deep" wells for oil and gas. Petitioners claimed that the Commission did not have jurisdiction to issue orders to the proposed wells because the wells were "shallow wells" regulated by the Shallow Well Gas Review Board, not the Commission. In *State ex. Rel. Blue Eagle Land, LLC v. West Virginia Oil and Gas Conservation Commission*, 222 W.Va. 342, 664 S.E.2d 683 (2008), the Supreme Court granted a Writ of Prohibition, as moulded, and dismissed the case from the Supreme Court's docket with leave for the petitioner's to file an appeal of the Commission's Orders to the Circuit Court within thirty (30) days.

On June 26, 2008, petitioners filed a timely appeal from the Commissioner's Orders in the Circuit Court of McDowell County. By Order entered June 2, 2009, this Court granted the West Virginia Surface Owner's Rights Organization's (WVSORO) motion to intervene. The Court has reviewed the oral arguments and briefs submitted by all parties. At the request of the parties the Court delayed its ruling in order to provide the West Virginia Legislature with an opportunity to amend the applicable law relating to the subject of this case, if it so chose. The Legislature chose not to make any amendments relating to the applicable law, so the Court is of the opinion that the Legislature is satisfied with the law in this matter and that no changes are needed.

A second issue to be determined by this Court relates to spacing between the wells and the granting of special field rules.

STANDARD OF REVIEW

W. Va. Code § 22C-9-11(a) states that:

> Any party adversely affected by an order of the commission shall be entitled to judicial review thereof. All of the pertinent provisions of section four, article five, chapter twenty-nine-a of this code, shall apply to and govern such judicial review with like effect as if the provisions of said section four were set forth in this section.

W.Va. Code § 29A-5-4(g), provides the appropriate standard of review, which is as follows:

> The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:
>
> (1) In violation of constitutional or statutory provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedures; or

(4) Affected by other error of law; or

(5) Clearly or wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

On appeals of agency action questions of law are subject to a de novo standard of review. *Martin v. Randolph County Bd. Of Edu.*, 465 S.E.2d 399 (W.Va. 1995); C&H Taxi Co. v. Richardson, 461 S.E.2d 442 (W.Va. 1995). Evidentiary findings of fact may be reversed only where clearly wrong or not supported by substantial evidence. *Rayle Coal Co. v. Chief, Div. of Water Resources,* 401 S.E.2d 682 (W.Va. 1990); *Stewart v. West Virginia Bd. of Examiners for Registered Professional Nurses,* 475 S.E.2d 478 (W.Va. 1996).

STATUTORY PROVISIONS

W. Va. Code § 22C-9-2(a)(11) defines shallow well as follows:

"Shallow well" means any well drilled and completed in a formation above the top of the uppermost member of the "Onondaga Group": Provided that in drilling a shallow well the operator may penetrate into the "Onondaga Group" to a reasonable depth, not in excess of twenty feet, in order to allow for logging and completion operations, but in no event may the "Onondaga Group" formation be otherwise produced, perforated, or stimulated in any manner;

W. Va. Code § 22C-9-2(a)(12) defines deep well as follows:

"Deep Well" means any well, other than a shallow well, drilled and completed in a formation at or below the top of the uppermost member of the "Onondaga Group."

W. Va. Code § 22C-9-2(b) is as follows:

Unless the context clearly indicates otherwise, the use of the word "and"and the word "or" shall be interchangeable, as, for example, "oil and gas" shall mean oil or gas or both.

THE COMMISSION HAS JURISDICTION OVER WELLS DRILLED MORE THAN TWENTY FEET INTO THE ONONDAGA GROUP

Petitioners complain that the Commission does not have jurisdiction over the wells that are the subject of this proceeding. In order to find for the petitioners this Court would have to ignore the plain language of the pertinent statutes and find that wells drilled more than 20 feet into the Onondaga fall within the definition of a shallow well.

Statutory construction starts with a basic rule: "Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. Pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E. 2d 384 (1970). "Generally the words of a statue are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use." Syl. Pt. 4, *State v. General Daniel Morgan Post No. 548, V. F. W.*, 144 W. Va. 137, 107 S.E. 2d 353 (1959).

The definitions of a shallow well and a deep well are consistent with two statutes that regulate drilling into two different types of geographical formations. The Legislature acknowledges that "shallow sands or strata" differ in "geological and other characteristics" from "deeper Formations" and that the Onondaga is considered a deeper formation. *See* W. Va. Code § 22C-9-1, *et. seq.*, and W. V. Code § 22C-8-1, *et seq*. The Commission was created to regulate drilling in the deeper formations, whether for production or exploration. *Id.* The Shallow Gas Review Board was similarly created to regulate drilling formations, whether for production or exploration. *Id.* Separate regulatory agencies regulate the two formations that differ in geological and other characteristics.

The definition of a shallow well in both statutes specifically provides that a shallow well cannot be drilled more than twenty feet into the Onondaga. *See* W. Va. Code § 22C-8-2(21). *See also* W. Va. Code § 22C-9-2(a)(12). If a well is drilled more than twenty feet into the

Onondaga then it is something "other than a shallow well." *See* W. Va. Code § 22C-9-2(a)(12). The definition of a deep well specifically contemplates wells that are something other than a shallow well because it specifically makes reference to "any well, other than a shallow well." *Id.* A well drilled more than twenty feet into the Onondaga is a well other than a shallow well, as contemplated in the deep well definition.

The definition of a deep well also contemplates that a well will be drilled into the Onondaga and then completed either at or below the top of the Onondaga. *Id.* There is no question that the Marcellus wells will be drilled more than twenty feet below the top of the Onondaga. The Marcellus is at the top of the Onondaga. Thus, the Marcellus wells are drilled into the Onondaga and the wells are completed in the strata at the top of the Onondaga. But for the Marcellus being on top of the Onondaga, any drilling into the Onondaga would not be necessary. The Legislature contemplated such a case because it gave a specific twenty foot limitation to the shallow well definition and included anything beyond the twenty foot limitation in the deep well definition.

Petitioners argue that a well must be completed in the Onondaga to meet the definition of a deep well. The plain reading of the deep well definition contemplates wells that are completed both at the top of the Onondaga and below the top of the Onondaga. The only difference between the definition of a shallow well and a deep well is how far the well is being drilled. Further evidence that the Legislature contemplated drilling into the Onondaga or completion of a well at the top of the Onondaga is found in the specific provision that provides for the interchange of the word "and" and the word "or." *See* W. Va. Code § 22C-9-2(b). Not only is the Legislature presumed to know the laws that it passes, but also specific statutory provisions trump general provisions. "The general rule of statutory construction requires that a specific

statute be given precedence over a general statue relating to the same subject matter where the two cannot be reconciled." Syl. Pt. 1, *UMWA by Trumka v. Kingdom*, 174 W. Va. 330, 325 S. E. 2d 120 (1984).

The Legislature contemplated that a well drilled more than twenty feet into the Onondaga is no longer a shallow well but is a deep well, whether it is completed at the top of the Onondaga or below the top of the Onondaga. The interchange of the word "and" and "or" does not change the definition of a deep well. Again, a clear reading of the deep well definition contemplates that completion will not be in the Onondaga. Rather, it can occur at the top. Jurisdiction lies with the Commission when a well is drilled more than twenty feet into the Onondaga and is completed at the top of the Onondaga.

This clear reading of the definition is consistent with regulation of drilling in the Onondaga. If the deep well definition requires both drilling and completing in the Onondaga, then there would be no limitation in how far a well is drilled into the Onondaga so long as it is not completed. Such a reading will allow any drilling into the Onondaga under the guise of being a shallow well. Unlimited drilling in the Onondaga without regulatory authority defeats the purpose of the deep well statute. Just as the purpose of the Shallow Gas Review Board is to regulate drilling in shallow formations, the Commission has been granted express authority to regulate drilling in deep formations.

"Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statues, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law

expressly or by implication." Syllabus point 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E. 2d 111 (1973)

The Shallow Gas Review Board does not have authority to regulate wells drilled more than twenty feet into the Onondaga, regardless of where completed- drilling into the Onondaga is drilling into a different formation. The Shallow Gas Review Board has no authority to regulate wells drilled more than twenty feet into the Onondaga if the well is completed at the top of the Onondaga or below the top of the Onondaga. The Shallow Gas Review Board does not have discretion to apply the definition of a shallow well to some wells and not others. The dividing line is clear and can be applied uniformly: more than twenty feet in the Onondaga. The Marcellus wells do not fall within the definition of a shallow well but do fall within the definition of a deep well. "A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." Syllabus Point 5, *State v. Snyder*, W. Va. 659, 63 S.E. 385 (1908). As such, the Marcellus wells fall within the jurisdiction of the Commission.

Subjecting the Petitioners to the jurisdiction of the Commission neither offends their constitutional rights, nor prevents them from engaging in the administrative process. Petitioners assert their due process rights are violated because they are not given the opportunity to challenge an application for special field rules. (*See* Petition p. 27) This statement is not correct. All coal owners or interest holders and property owners and tenants in common or other co-

owners of interest are provided with notice (and certification thereof) when a well permit application is filed with the Office of Oil & Gas. *See* W. Va. Code § 22-6-9; W. Va. 22-6-12 and 13; and CSR 6.1.b. Further, all applications for special field rules are published in local newspapers as legal advertisements. *See* W. Va. Code § 22C-9-5. The Petitioners have notice when the wells are drilled and when an application is made for special field rules. Petitioners have a clear right to be heard before the Commission with all testimony and evidence made a part of the record.

SPACING

The Commission Orders in these cases contain the same language under Conclusions of Law as follows

> 4. That Operational Rule § 39-1-4.2 requires that all deep wells drilled shall be not less than 3,000 feet from a permitted deep well location or from a deep well drilling to or capable of producing hydrocarbons from the objective pool of the deep well and no deep well shall be less than 400 feet from a lease or unit boundary. Operational Rule § 39-1-4.3 allows for an exception to Operational Rule § 39-1-4.2 or for the establishment of special field rules.

In its Orders the Commission provides for special field rules totaling hundreds of thousands of acres changing the minimum distance from 3,000 feet to a minimum distance of 1,000 feet from each well and 100 feet from a lease line or unit boundary line. The evidence appears that Chesapeake had been using 1500-foot spacing for their 1700 planned locations, and requested 1,000 feet in order to give them a cushion. However, the Commission does not explain nor justify the reason for the exceptions given.

It is a paramount principle of jurisprudence that a court speaks only through its orders. *Legg v. Felton,* 219 W.Va. 478, 637 S.E. 2d (2006); *See State v. White,* 188 W.Va. 534, 536 n. 2, 425 S.E.2d 210, 212 n. 2 (1992). This same principle applies to the Commission.

It is apparent that these are blanket special field rules. It is also apparent that the exception (1,000/100 foot minimum) has become the rule (3,000/400 foot minimum) instead of the exception. In effect the Commission has improperly changed the rule.

Therefore, it is the **ORDER** of this Court that these cases be remanded to the Commission for the purpose of taking testimony relating to the issue of spacing. In the event that the Commission determines that special field rules are established, the Commission shall provide findings of facts and conclusions of law explaining/justifying the need for the special field rules.

For the reasons set forth in this Order, it is hereby **ORDERED** that the Commission has jurisdiction over well drilled more than twenty feet into the Onondaga Group. It is further **ORDERED** that this matter be remanded to the Commission for further proceeding consistent with this **ORDER.**

The Clerk of this Court is directed to remove this case from the trial docket of this Court. The Clerk is further directed to send attested copies of this Order to the following at their addresses:

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Enter this the 27th day of September, 2010

Rudolph J. Murensky II
JUDGE

A TRUE COPY TESTE
FRANCINE SPENCER CLERK
BY