BEFORE THE OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

IN THE MATTER OF ALLEGED VIOLATIONS OF THE RULES AND REGULATIONS OF THE COLORADO OIL AND GAS CONSERVATION COMMISSION BY **FIFTH CREEK ENERGY OPERATING COMPANY LLC**, WELD COUNTY, COLORADO	)	CAUSE NO. 1
	)	DOCKET NO. 181200382
	)	TYPE: GENERAL ADMINISTRATIVE (ENFORCEMENT)
	)	ORDER NO. 1-237

REPORT OF THE COMMISSION

The Commission heard this matter on July 31, 2019, at the University of Colorado, School of Public Affairs, 1380 Lawrence Street, Second Floor Terrace Room, Denver, Colorado, upon an Exception filed by HighPoint Operating Corporation (Operator No. 10071) ("HighPoint) to the Hearing Officer's *Order Denying HighPoint's Motion to Dismiss*.

FINDINGS

The Commission finds as follows:

Procedural History

1. The Staff ("Staff") of the Colorado Oil and Gas Conservation Commission ("COGCC" or "Commission") issued a Notice of Alleged Violation ("NOAV") and served Fifth Creek Operating Company, LLC ("Fifth Creek") on March 13, 2018.

2. The NOAV was issued for alleged violations relating to non-compliance of Fifth Creek's alleged violation of the Conditions of Approval ("COA") in the Application for a Permit to Drill ("APD") the Fox Creek 501-340H Well (API. No. 05-123-42583) ("Well"), Commission Rule violations, and one statutory violation.

3. On April 13, 2018, Fifth Creek merged into Bill Barrett Corporation, which was renamed HighPoint Operating Corporation.

4. Fifth Creek is no longer authorized to conduct business effective as of April 13, 2018, and no longer has corporate existence.

5. On October 24, 2018, Highpoint filed its *Motion to Dismiss Under C.R.C.P. 12(b)(5) and §34-60-115, C.R.S.*("Motion to Dismiss"). HighPoint alleged that the NOAV should be dismissed because: 1) there is no valid operator for the well and the Commission has not

determined the responsible party for the NOAV; and 2) the Commission lacks subject matter jurisdiction over the NOAV due to expiration of the statute of limitations.

6. On November 14, 2018, Staff filed *Staff's Response to HighPoint's Motion to Dismiss Under C.R.C.P. 12(b)(5) and §34-60-115, C.R.S.* Staff argued that the action against Fifth Creek can continue pursuant to C.R.C.P. 25(c) because of the merger of Fifth Creek into HighPoint, and because of the applicability of the discovery rule, the statute of limitations had not expired prior to the issuance of the NOAV.

7. On November 20, 2018, HighPoint filed its *Reply in Support of Motion to Dismiss Under C.R.C.P. 12(b)(5) and §34-60-115, C.R.S.* HighPoint asserted a policy argument in support of its Motion to Dismiss, claiming that the purpose of an enforcement action is to deter noncompliance and encourage operators that are out of compliance to quickly and cooperatively bring themselves into compliance and cooperate with the Commission. Therefore, the NOAV should not proceed against HighPoint since Fifth Creek committed the violations. HighPoint further argued that the merger was for "tax purposes" and therefore HighPoint is not responsible for Fifth Creek's obligations. HighPoint also argued that Staff knew or should have known about the violations earlier and the discovery rule was not applicable to this administrative enforcement case.

8. A prehearing conference was held on December 5, 2018. At the prehearing conference, the Hearing Officer heard oral argument on the Motion to Dismiss.

Hearing Officer's Order

9. On March 7, 2019, the Hearing Officer issued his *Order Denying HighPoint's Motion to Dismiss*.

10. The Hearing Officer ruled that pursuant to Commission Rule 519.a., "[t]he Colorado Rules of Civil Procedure apply to Commission proceedings unless they are inconsistent with Commission Rules or the Oil and Gas Conservation Act."

11. The Hearing Officer ruled that the current standard in Colorado for ruling on C.R.C.P. 12(b)(5) motions to dismiss for failure to state a claim upon which relief can be granted is set out in *Warne v. Hall*, 373 P.3d 588 (Colo. 2016). In *Warne*, the Colorado Supreme Court adopted the "plausible claim for relief" standard originally adopted by the United States Supreme Court in the cases of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). *Warne*, at ¶¶ 9 & 24. The tenant that a Hearing Officer must accept as true all of the allegations contained in the Application is inapplicable to legal conclusions and only an Application that alleges facts sufficient to show a plausible claim for relief survives a motion to dismiss. *Id*. at ¶ 9. While notice pleading is still the norm, and allegations can still be made on information and belief, the allegations must be factual. Id. at ¶¶ 21, 22 & 23. Conclusory allegations are not entitled to an assumption that they

are true. Id. at ¶ 27.

12. The Hearing Officer also noted that a motion to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) is disfavored. *Belinda A. Begley & Robert K. Hirsch Revocable Trust v. Ireson*, 399 P.3d 777, 779, ¶7 (Colo. App. 2017); *Rector v. City & County of Denver*, 122 P.3d 1010, 1013 (Colo. App. 2005). "A complaint need not express all facts that support the claim but need only serve notice of the claim asserted." *Adams v. Corrections Corp. of Am.*, 187 P.3d 1190, 1198 (Colo. App. 2008). Accordingly, motions to dismiss are "rarely granted under our notice pleadings." *Id*. In considering whether dismissal is appropriate, all factual allegations in a complaint must be accepted as true and viewed in the light most favorable to the plaintiff. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). In evaluating a C.R.C.P. 12(b)(5) motion, a court "may consider only those matters stated in the complaint." *Lambert v. Ritter Inaugural Committee, Inc.*, 218 P.3d 1115, 1119 (Colo. App. 2009) (citing *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo.1999)).

13. The Hearing Officer ruled that all factual allegations in the NOAV must be accepted by the Hearing Officer as true and viewed in the light most favorable to Staff. *Denver Post Corp., supra.*

14. The hearing officer found that Fifth Creek was the approved operator of record for the Well and location starting August 3, 2016, prior to the occurrence of the acts and omissions giving rise to the alleged violations. On March 13, 2018, the NOAV was served by certified mail, return receipt requested, to Fifth Creek's named Principal Agent, Cody Truitt. The return receipt for the NOAV was signed for on March 14, 2018. The Motion to Dismiss states that the HighPoint merger with Fifth Creek was not effective until April 13, 2018. As such, Staff properly issued the NOAV to Fifth Creek, the operator of the Well and Location, and the enforcement action commenced prior to the merger.

15. Pursuant to the "Certificate of Merger" submitted to the Commission by HighPoint with the Form 10 on April 3, 2018, Fifth Creek and Bill Barrett Corporation ("BBC") were both organized under Delaware law and, in March 2018, merged under §264(c) of the General Corporation Law of Delaware. By and through a State of Delaware Certificate of Amendment of Certification of Incorporation filed with and authenticated by the Delaware Secretary of State's Office on April 2, 2018, BBC changed its name to HighPoint Operating Corporation. Additionally, in the Motion to Dismiss, HighPoint repeatedly referred to the corporate transaction between Fifth Creek and BBC/HighPoint as a "merger." Based on these representations, the Hearing Officer found that this transaction was indeed a "merger" with ultimately HighPoint as the "surviving corporation."

16. Delaware law provides that:

> It is a fundamental principle of corporation law that although a merged corporation ceases to exist, in the absence of a specific provision to the contrary, all property, rights, and privileges of the corporation continue as the property of the surviving entity. In other words, a merger does not allow a predecessor corporation to avoid its pre-merger obligations.

> Rather, the "liabilities and duties of the respective constituent corporations shall thenceforth attach to ... [the] surviving... corporation, and may be enforced against it ... as if ... [the] debts, liabilities and duties had been incurred or contracted by it."

Delaware Ins. Guar. Ass'n v. Christiana Care Health Servs., Inc., 892 A.2d 1073, 1077–78 (Del. 2006) (quoting Delaware General Corporations Law, 8 Del. C. § 259(c)).

17. Like Delaware, the Colorado Corporations and Associations Act, § 7-90-101 *et seq*, C.R.S., requires that when a merger is effective, "[a]ll obligations of the merging entities attach as a matter of law to the surviving entity and may be fully enforced against the surviving entity." § 7-90-204(1)(a), C.R.S. In this context, "obligation" "means any debt, obligation, duty, or liability whether sounding in tort, contract, or otherwise." § 7-90-102(40.5), C.R.S.

18. The Hearing Officer ruled that the merger resulted in all obligations of Fifth Creek passing to the surviving entity, HighPoint, and Staff had alleged sufficient facts in the NOAV to survive the argument in the Motion to Dismiss that there was no viable entity against which the action could proceed.

19. As to the statute of limitation's argument in the Motion to Dismiss, the Hearing Officer ruled that under the discovery rule, the accrual of the statute of limitations is delayed until the date of discovery where a violation was not and could not have been discovered prior to that date. Although the Act's statute of limitations does not state discovery is the accrual date, Colorado state courts have applied the discovery rule even if it is not explicitly stated in the applicable statute. *McDowell v. United States*, 870 P.2d 656, 658 (Colo. App. 1994).

20. On its face, the NOAV was issued on March 13, 2018, and the Form 5s for the Well were filed September 8 and October 13, 2017. The filing of the Form 5s was the only reasonable way for Staff to learn of the violation. This discovery was within one year prior to the issuance of the NOAV.

21. The Commission has previously applied the discovery rule to §34-60-115, C.R.S.:

> In Colorado, statutes of limitations bar various claims initiated after a specified period of time "after the action accrues." To determine when an action accrues, the General Assembly has adopted a form of the 'discovery rule,' which states that an action accrues on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence. *Morrison v. Goff*, 91 P.3d 1050, 1053 (Colo. 2004).

COGCC Order No. 407-1308 (2015).

22. The Order went on to provide that Staff made sufficient factual allegations to comply

with *Warne*, *supra*, and the Motion to Dismiss should be denied.

Exception

23. On March 27, 2019, HighPoint filed its *Designation of Record Pursuant to C.R.S. § 24-4-105(15)(a).*

24. On April 2, 2019, Staff filed *Staff's Amended Response to HighPoint's Designation of Record Pursuant to C.R.S. § 24-4-105(15)(a)*. Staff disputed HighPoint's position on what should be contained in the record.

25. On April 5, 2019, HighPoint filed an *Exception to the Hearing Officer's Order Denying HighPoint's Motion to Dismiss* ("Exception"). HighPoint requested a hearing before the Commission.

26. On April 26, 2019, the Hearing Officer entered his *Order Regarding Designation of Record for Exception to Order Denying HighPoint's Motion to Dismiss*, which set the content of the record.

HEARING

27. At the hearing, both HighPoint and Staff presented oral argument.

28. Highpoint reiterated the arguments set out in its pleadings.

29. In addition, HighPoint argued that there are four main points to its Exception, to wit: 1) the NOAV mainly involved paperwork issues and the main sticking point for the parties is Staff's insistence that HighPoint drill an observation well; 2) HighPoint has no vicarious liability for Fifth Creek's violations; 3) the NOAV was barred by the statute of limitations; and 4) the NOAV serves no deterrent purpose because Fifth Creek no longer exists.

30. HighPoint argued that Fifth Creek's failures that occurred 15 months before the merger probably cannot be cured.

31. HighPoint argued that it had done nothing wrong, therefore it has no vicarious liability for Fifth Creek's violations. Further, even if merger law applies, there is no liability on HighPoint's part because the NOAV was served one month before the merger and was not reduced to judgment.

32. Highpoint also argued that Staff delayed for 15 months before filing the NOAV. If the NOAV had been timely prosecuted, HighPoint would not be involved in this enforcement proceeding.

33. Concerning the statute-of-limitations issue, HighPoint also argued that the discovery

rule was inapplicable to §34-60-115, C.R.S. This enforcement proceeding is more analogous to a criminal proceeding, and the discovery rule has no applicability to statutes of limitation for crimes.

34. HighPoint argued that under Commission Rule 524, a successor operator, such as HighPoint, enjoys a presumption of non-liability if it conducted "due diligence" prior to acquiring Fifth Creek's assets. HighPoint also argued that the statute (§ 34-60-121, C.R.S.) says that each operator is responsible for its own actions, therefore HighPoint cannot be responsible for Fifth Creek's actions.

35. Commissioner Boigon asked why the Exception was not an improper interlocutory appeal. Counsel for HighPoint responded that the Colorado Administrative Procedure Act authorizes such an appeal.

36. Commissioner Boigon then asked if it was HighPoint's position that every Hearing Officer order in the course of a case could be immediately appealed. HighPoint's counsel responded in the affirmative. Commissioner Boigon then stated that such a position struck him as being a real stretch, since if that was true, adjudicatory proceedings would never end.

37. Commissioner Boigon stated that it was black letter law that the surviving corporation was responsible for the predecessor's liabilities. HighPoint's counsel responded that it was only certain liabilities, but he admitted that HighPoint did not do any research on different classes of liabilities.

38. Commissioner Boigon asked what deterrence had to do with a violation of the rule that has occurred. Counsel for HighPoint stated that there was no one to deter and hence no one to prosecute.

39. Commissioner Boigon stated that he did not see how Rule 524 applied to HighPoint in this case. Highpoint's counsel responded that HighPoint did due diligence on Fifth Creek and the alleged misconduct was not apparent to HighPoint.

40. Commissioner Boigon asked if HighPoint had any authority for its position that the discovery rule was not applicable. HighPoint's counsel responded that he had no authority, but the words of the statute were clear on its face.

41. Chairman Gibbs asked who was liable for the violations. Counsel for HighPoijnht responded that Fifth Creek was liable. Counsel for HighPoint also explained HighPoint's program and process for making sure it does not violate Commission rules.

42. Commissioner Overturf stated that there was no reference to Rule 524 in the Motion to Dismiss or the Exception, and argument on that issue was improper. Counsel for HighPoint

responded that Staff should have considered Rule 524.

43. Commissioner Boigon wondered if the monitoring well remedy was justified, but said it looked like to him that HighPoint was raising a number of procedural arguments in an effort to escape liability. Counsel for HighPoint disagreed.

44. Counsel for Staff argued that the Well was drilled and fracked within 100 feet of an offsetting, unprotected well, no Frac Focus report was filed, and the offset well was not plugged. Counsel for Staff also argued that a ruling for Staff will preserve Staff's pursuit of the NOAV. Further HighPoint is the responsible operator and is simply attempting to delay and frustrate a hearing on the merits.

45. Staff further argued that the record before the Commission is what was before the Hearing Officer, and the decision must be made on the same record. The Commission must accept the facts alleged by Staff as true.

46. Counsel for Staff contended that HighPoint represented that the acquisition of Fifth Creek was a merger. Therefore, Fifth Creek's liability transferred to HighPoint. HighPoint wants the benefits of the merger, without the labilities. Under merger law, this can't be.

47. Counsel for Staff argued that Staff pled a plausible claim for relief and the Hearing Officer's order denying the Motion to Dismiss should be upheld.

48. Counsel for Staff argued that as to the statute-of-limitations issue, the discovery rule applies. Fifth Creek was delinquent in filing its forms. The only way for Staff to find out about the violation is for the form to be filed. If the Commission were to adopt HighPoint's argument, it would incentivize operators to not file reports.

49. Counsel for Staff contended that Rule 524(e) was not raised below and is not part of the record. The same can be said of the monitoring well arguments.

50. Staff closed by stating that there is a remedy, to wit: investigation and remediation of any impacts.

51. Staff was asked if the Exception was properly before the Commission. Counsel for Staff said that Staff wants expediency and there is an open question as to what constitutes an initial decision. The Commission has not determined what constitutes a Hearing Officer initial decision.

52. When asked by Commissioner Boigon if Staff and objected to the filing of the Exception, Counsel for Staff conceded that they had not.

53. Commissioner Boigon asked if Staff had waived the argument. Counsel for Staff

responded that the Commission could raise the issue *sua sponte* and then decide the issue.

54. On rebuttal argument, Counsel for HighPoint contended that the Commission's adoption of the discovery rule in a prior case was not related to an enforcement action and therefore the Commission Order adopting the discovery rule is not precedent.

55. Counsel for HighPoint argued that any decision by a Hearing Officer is an initial decision. Further, Staff is aware of all forms filed at the Commission. On its face, the statute bars the NOAV. The Hearing Officer decision should be reversed and the Motion to Dismiss should be granted.

56. Commissioner Haun asked Staff why it took so long to act. Counsel for Staff responded that the Form 7 was filed in March of 2017. It indicated to Staff that there was some activity. Staff then asked for a Form 5A. The Form 5A was filed in September of 2017, and confirmed that the new well was stimulated.

57. The Commission asked Staff if this was a one-time violation or a continuing violation. Counsel for Staff responded that if there is contamination, the violation is continuing. The only way to know is to drill the monitoring well.

58. The Commission asked if there was evidence of contamination. Staff's Counsel responded that Staff has reasonable cause to believe so because the new well was fracked within 100 feet of the existing wellbore.

59. Commissioner Boigon asked if this was a common violation and if the NOAV would have a deterrent effect. Counsel for Staff answered that it was not a common violation and that the NOAV would have a general deterrent effect.

60. Commissioner Hopkins asked if one party had a higher burden to bear. Assistant Attorney General Davenport answered that the process is generally to wait until deliberations, but that the party bringing the motion has the burden.

COMMISSION DELIBERATIONS

61. Commissioner Hopkins asked what standard the Commission should use to decide to dismiss the NOAV or not. Assistant Attorney General Davenport responded that in ruling on a motion to dismiss, there is no factual determination to be made. The Commission must take as true Staff's facts as alleged in the NOAV. If taking Staff's allegations as true, there is no legal claim, the NOAV should be dismissed.

62. Commissioner Haun said there was a serious violation alleged, but questioned whether too much time had passed to do an investigation.

63. Commissioner Messner said that there was a clear violation alleged. HighPoint

assumed the liability and is now the responsible party. HighPoint is the operator. There is no daylight between Fifth Creek and HighPoint. Staff's discovery argument is a good one.

64. Commissioner Boigon stated that the Exception is probably not properly before the Commission. However, Staff never objected. He doesn't believe that the APA provision on exceptions was intended to apply to interlocutory decisions. However, he will take the word of HighPoint's attorney that Commission practice has been to allow interlocutory appeals, and fix the issue in the rules. There is no vicarious liability issue here; it is successor liability. The statute-of-limitations issue is a factual matter and cannot be resolved on a motion to dismiss. There needs to be more legal analysis regarding the applicability of the discovery rule, and the Hearing Officer needs to address the factual issues. There needs to be consideration of the ongoing impacts. The case should go to the Hearing Officer for a hearing on the evidentiary issues and a determination of whether the monitoring well is the proper remedy. Commissioner Boigon stated that he felt like a monitoring well was an extreme remedy. He will vote to deny the Exception.

65. Commissioner Overturf said she seconded Commissioner Boigon's comments. An exception is only for final rulings, such as an order granting a motion to dismiss, not a denial. This is consistent with other agencies that utilize Administrative Law Judges and Hearing Officers. She did not appreciate the argument in the Motion to Dismiss and the Exception. The parties need to stick to the record. The deterrence effect creates a culture of compliance for all operators. There needs to be a factual record before the Hearing Officer regarding incentivizing compliance. She will vote to uphold the Hearing Officer's order.

66. Commissioner Haun agreed, but stated that a monitoring well is absolutely necessary.

67. Commissioner Hopkins stated that a monitoring well is a ground-water well. There would be no undue burden by requiring one to be drilled. Monitoring wells are commonly used. He heard no compelling argument to support HighPoint's position.

68. Commissioner Putnam stated that he agreed with Commissioner's Boigon and Overturf. He does not favor resolving the statute of limitations issue on a motion to dismiss. This is a motion to dismiss, not a factual discovery process. As to the discovery-rule issue, additional legal analysis and evidence are needed.

69. The Commission voted 9-0 to deny the Exception.

COMMISSION CONCLUSIONS

70. HighPoint's Exception should be denied.

71. This case should be returned to the Hearing Officer for an evidentiary hearing.

72. The Hearing Officer should hear evidence on the statute-of-limitations and

discovery-rule issues. These issues should be fully briefed and analyzed based on the evidence.

73. The Hearing Officer should also hear evidence on incentivizing compliance with Commission Rules.

ORDER

IT IS HEREBY ORDERED:

1. HighPoint's Exception to the Hearing Officer's *Order Denying HighPoint's Motion to Dismiss* is DENIED.

2. This case is remanded to the Hearing Officer for an evidentiary hearing consistent with this Order.

IT IS FURTHER ORDERED:

1. The provisions contained in the above order shall become effective immediately.

2. The Commission expressly reserves its right, after notice and hearing, to alter, amend or repeal any and/or all of the above orders.

3. Under the State Administrative Procedure Act, the Commission considers this Order to be final agency action for purposes of judicial review within 35 days after the date this Order is mailed by the Commission.

4. An application for reconsideration by the Commission of this Order is not required prior to the filing for judicial review.

ENTERED this 29th day of August, 2019, as of July 31, 2019

OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO

By _____
Mimi C. Larsen, Secretary