State of Michigan
Ingham County Circuit Court

Deanna Hughes, Heather Schiele, and Ban Michigan Fracking,

v

Case No 12-497-CE
Hon William E. Collette
Filed: May 7, 2012

Michigan Department of Environmental Quality

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Plaintiffs' Reply Brief on Summary Disposition

Plaintiffs would emphasize a few points in rebuttal to the department's brief, received as agreed on September 17, 2012.

1. Even under the arbitrary/capricious standard which defendant MDEQ urges, the brief wholly fails to respond to plaintiffs' arguments that:

(a) the language of R 324.102(x) is straightforward and unambiguous, as the

parties agree on page 11 of the Wyant letter, and therefore given the explicit purpose of fracking stated on page 2 of the Wyant letter, resort to claimed legislative context is inappropriate under Michigan case law, [1]

(b) under R 324.103(c)(xi) and the definition of fracking in the uncontested facts, the rules define "injecting" as part of the process of "producing oil or gas",[2]

(c) according to the benchmark for injection wells cited at page 8 of the Wyant letter, every frack well is an injection well because a significant fraction of the injectate stays intentionally in the ground forever, [3] and

(d) the definitions of "injection well" and "hydraulic fracturing" in API's written materials are consistent with plaintiffs'. [4]

2. The department's answer in ¶ 4 admits that plaintiffs' petition was filed on April 27, 2012. The claim that the department's lawyer and staff members all thought the petition was really filed two days later is unsupported by affidavit. Even if there had been a timely affidavit to that effect, there is no showing that such a belief was "excusable." And any argument that the department should be permitted to answer a petition untimely without penalty amounts to an argument that the "shall" language of R

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1 Pages 16-17 of plaintiffs' opening brief.
2 Pages 20-21 of plaintiffs' opening brief.
3 Pages 17-18 of plaintiffs' opening brief.
4 Pages 7, 22-23 of plaintiffs' opening brief.

324.81(2) is an empty promise.

3. There is no basis in the Wyant letter or the record to support the department's assertion at pages 4 and 8 of the brief that frack wells are wells "for the purpose of *initial* recovery of hydrocarbons" (emphasis added).[5]

4. There is no basis in the Wyant letter or the record to support the department's assertion at page 7 of the brief that a secondary recovery project is one in which "production has essentially stalled."

5. At page 9 footnote 1 the brief advises the department intends to file new affidavits of the industry experts who were quoted in plaintiffs' petition to the department. But at page 11, the Wyant letter relied on the experts' quotes as uncontested facts (albeit irrelevant ones). If there were a dispute about the experts' "actual position," affidavits should have been obtained during the 62 days the department studied the petition. Not being in the record, new affidavits today would be contested, not uncontested. Moreover at the court level affidavits would be untimely. Any affidavits were due by yesterday, September 17, the date agreed on by the parties.[6]

6. At pages 14-15 the brief argues that plaintiffs cannot ask the court to rescind the permits of the Encana wells on Sunset Trail because plaintiffs didn't exhaust administrative remedies. In support the department cites a page from *Foote Memorial*

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5 Compare page 8 of plaintiffs' opening brief.
6 See the department's brief at page 2.

Hospital v Department of Public Health, 210 Mich App 516, 521, 534 NW2d 206 (1995).

The statute at issue in *Foote Memorial Hospital* had an explicit exhaustion requirement. The statute in this case, MCL 600.631 (identified first by opposing counsel as the statutory basis for plaintiffs' challenge to the Encana permits [7]), does not. Moreover, plaintiffs *did exhaust*, just as the department asked them to, after the hearing in chambers on May 8. Now plaintiffs have come to the court asking it to overrule the result of that exhaustion. A natural consequence of such a holding would be the rescission of all permits issued to frack applicants since the date this case was filed, because during the period the department was not requiring their applications to follow injection well rules. Particularly is this so as to Encana's wells on Sunset Trail. The "automatic reply" email from Encana on May 29 in exhibit 4 (confirmed by an email from undersigned counsel on June 18) demonstrates Encana's responsible official received a copy of the pleadings. The company elected not to participate in or oppose the relief sought in this case. The lack of a permit is cause for the immediate suspension of operations.[8] If the court agrees with plaintiffs that frack wells come under the rules for injection wells, rescission of those permits is exactly what should happen.

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7 See email thread of counsel, and particularly emails of Dan Bock of May 9 and May 10, 2012 (attached exhibit 11).

8 MCL 324.61506(q), 61519, 61525(1); R 324.201(1), 202(3), and 1014(1).

Respectfully submitted,

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Dated: September 18, 2012

Certificate of Service

Ellis Boal certifies that at approximately 1:00 pm on September 18, 2012, he emailed a copy of the above pleading to opposing counsel at his email address above.

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Ellis Boal

Exhibit 11

Subject: Re: Hughes v DEQ: proposed order
From: Ellis Boal <ellisboal@voyager.net>
Date: 5/10/2012 10:41 AM
To: "Bock, Daniel P. (AG)" <BockD@michigan.gov>

Dan,

Thank you for thinking this through with me.

I note that, unlike MCL 324.1101, MCL 600.631 does not contain a specific standing requirement, meaning that the present plaintiffs could appeal the grant of a permit even for the Encana wells in Kalkaska County.

This makes sense because, unlike the usual case where someone is appealing the application of the rule to one or two specific wells, the issues here affect wells around the state.

And the appeal would be direct to Judge Collette. Wrapping everything up in one decisionmaker will simplify the case for both of us.

Ellis

On 5/10/2012 10:13 AM, Bock, Daniel P. (AG) wrote:

> Ellis,
>
> Ah, I apologize, you're probably correct there. My initial belief was that 324.61503 would apply to any aggrieved party, but I didn't realize it applies only to "owners" and "producers." When I read your email yesterday, I looked at 324.30111 and that appeared to make sense, but I didn't look back and see that it applies to DNR permits. So yes, I agree completely.
>
> One other thing about 61503: it is possible that a specific plaintiff might qualify as an "owner" under the statute. Part 615 defines "owner" at 324.61501(k) as "the person who has the right to drill a well into a pool, to produce from a pool, and to receive and distribute the value of the production from the pool for himself or herself individual or in combination with others." So if a well was to be fracked close enough to your client's property that your client had the right to drill into the same pool of oil or gas (regardless of whether s/he actually intended to), then s/he would probably qualify as an "owner" and could pursue a 61503 appeal within the agency. Otherwise, an RJA 631 appeal would be the way to go.
>
> Sorry again for my initial confusion!
>
> Dan
>
> Daniel P. Bock
> Assistant Attorney General
> Environment, Natural Resources,
> and Agriculture Division
> (517) 373-7540
>
> ---
>
> **From:** Ellis Boal [mailto:ellisboal@voyager.net]
> **Sent:** Wednesday, May 09, 2012 11:08 PM
> **To:** Bock, Daniel P. (AG)
> **Subject:** Re: Hughes v DEQ: proposed order

Dan,

Looking again at MCL 324.1101, it appears to provide only for appeals from decisions of "the department [of natural resources]." In other words not the DEQ. Did the executive order change this? (Why don't you send a copy.) If not, plaintiffs would proceed under MCL 600.631. Sound good?

Ellis

On 5/9/2012 4:10 PM, Bock, Daniel P. (AG) wrote:
Ellis,

I'll look this over and get back to you ASAP. Fyi, I've been in talks with Hal Fitch and we will have an update for you on what measures DEQ will put in place for notification very shortly.

The statute I had in mind is actually a more specific one which allows for appeals of decisions by the Supervisor of Wells. MCL 324.61503(2) provides that "The commission (referring to the Natural Resources Commission, though this authority has since been transferred to the Director of the DEQ by Executive Order) shall act as an appeal board regarding the issuance, denial, suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a permit under this part." Although, now that I look at it again, I see that 324.16503(2) applies to a "producer or owner," and not just any aggrieved party. So I think you are correct – it appears that an appeal to the NRC under 324.1101 might be the way to go. And, of course, there is always judicial review of any final agency action available under section 631 of the Revised Judicature Act.

Dan

Daniel P. Bock
Assistant Attorney General
Environment, Natural Resources,
and Agriculture Division
(517) 373-7540

From: Ellis Boal [mailto:ellisboal@voyager.net]
Sent: Wednesday, May 09, 2012 4:00 PM
To: Bock, Daniel P. (AG)
Subject: Hughes v DEQ: proposed order

Dan,

Attached is the proposed order we discussed. If acceptable, please sign your name and mine (with your initials), and send it to the court for the judge's signature, return, and distribution of true copies, or give me authorization to sign for you and I will do the same.

Please inform your client that until this is resolved plaintiffs expect to FOIA the applications and accompanying documents, and the contact information of the DEQ investigator, but not the ongoing correspondence and notes which may arise during the permitting process.

I found a statute which provides for appeal of grants of permits, MCL 324.1101. Is this the one you had in mind in our colloquy with the judge?

> Thank you for your cooperation.
>
> Ellis