STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

DEANNA HUGHES, HEATHER SCHIELE,
AND BAN MICHIGAN FRACKING,

Plaintiffs,

v

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Defendant.

No. 12-497-CE

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MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION AND IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

The Plaintiffs filed their Motion for Summary Disposition on September 5, 2012, with a hearing date set for October 3, 2012. However, counsel for the Plaintiffs requested an earlier hearing date on the grounds that it is

concerned that one of the companies that received a permit from the Michigan Department of Environmental Quality (MDEQ) to drill a frack well might begin drilling before the October 3, 2012 hearing date.

Given the relatively complex nature of this matter, counsel for the MDEQ suggested that the Plaintiffs seek a temporary restraining order against that oil company to prevent it from drilling before the Court could issue a decision in this matter. Counsel for the Plaintiffs declined, and filed a request to accelerate consideration of its Motion for Summary Disposition instead. The hearing on that request was set for September 19, 2012.

In an effort to accommodate the Plaintiffs' request for accelerated consideration, the MDEQ agreed to simply hold the hearing on Plaintiffs' Motion for Summary Disposition on September 19, 2012, provided that the MDEQ could submit its Brief in Response and a Cross Motion for Summary Disposition by September 17, 2012. This was agreed upon by counsel and discussed over the telephone with the Court's clerk on or about September 14, 2012.

The MDEQ now submits this Brief to support its position that the Plaintiffs' Motion for Summary Disposition (and, in fact, its entire lawsuit) is premised on a misunderstanding of terms of art used in the administrative rules that govern drilling permit applications. The Plaintiffs argue that the rules governing "injection" wells should apply to any application for a well that would involve hydraulic fracturing (fracking). This argument is misguided because an injection well is – and always has been – a term that refers to a well that is used for

secondary, or ultimate, recovery of hydrocarbons or storage of waste. It does not apply to frack wells, which are new wells for the purpose of initial hydrocarbon recovery. Therefore, for the reasons set forth below, the Plaintiffs' Motion for Summary Disposition should be denied, and the MDEQ's Cross-motion for Summary Disposition should be granted.

STATEMENT OF FACTS

On April 27, 2012, the Plaintiffs emailed a petition to the MDEQ for a declaratory ruling on the issue of whether the rules governing injection wells should be applied to frack wells. A hard copy of the petition was filed with the MDEQ on April 29, 2012. This petition was submitted pursuant to MCL 24.263. The administrative rules that govern declaratory rulings provide that the MDEQ shall, within 60 days, either issue a declaratory ruling or inform the petitioner that it has declined to issue one. Mich Admin Code R 324.81.

On May 7, 2012, the Plaintiffs filed a Verified Complaint for a Temporary Restraining Order to Produce a List of Certain Pending Frack Well Permit Applications, Suspend Granting Them, and Show Cause Why the Order Should Not be Continued Until Disposition of a Petition for Declaratory Ruling. The thrust of the Plaintiffs' argument was, as it is now, that the MDEQ should be applying the rules that govern injection wells to applications for natural gas wells that call for fracking.

Shortly thereafter, on or about May 9, 2012, a hearing was held on the record in the Court's chambers between the Court and counsel for the Parties. At that

meeting, the Court ordered that the MDEQ produce a list of pending applications that call for fracking, but denied the rest of the relief requested by the Plaintiffs. The Court retained jurisdiction over the matter so that it could conduct further proceedings should the need arise. The MDEQ promptly generated a list of all applications for frack wells on its website and provided that information to Plaintiffs' counsel.

On May 30, 2012, the Plaintiffs filed their first Supplemental Complaint, adding counts pertaining to two specific wells for which an oil company (Encana Oil & Gas) had received permits to drill and employ fracking. By stipulation of the Parties, the deadline for the MDEQ to Answer was extended pending further administrative developments.

The MDEQ issued its Declaratory Ruling on June 28, 2012. (Exhibit A). The Declaratory Ruling set forth the reasons why a frack well is not an injection well – the primary reason being that an injection well is a well that is used for either secondary, or "ultimate," recovery of hydrocarbons or for storage of waste, whereas wells that use fracking are wells for the purpose of initial recovery of hydrocarbons, and therefore are regulated by the rules that pertain to oil and gas wells. (Exhibit A). As noted in the Plaintiffs' Motion and Brief for Summary Disposition, the Declaratory Ruling was issued 62 days after the initial request for a declaratory ruling was submitted via email (though exactly 60 days from the date that the Plaintiff submitted its hard copy).

The Plaintiffs then filed their Motion for Summary Disposition on September 5, 2012, which purports to appeal the MDEQ's decision not to issue a declaratory ruling, to seek revocation of permits for the two specific proposed frack wells mentioned in the Plaintiffs' Supplemental Complaint, and to seek revocation of any other permits for frack wells issued since this case was filed. For the reasons set forth below, the Plaintiffs' Motion for Summary Disposition should be denied because it is premised on an erroneous interpretation of the administrative rules that govern permits for oil and gas wells, because it seeks relief which is unavailable in this forum, and because it does not comply with the law governing appeals from administrative agency decisions.

ARGUMENT

I. Wells that use hydraulic fracturing are natural gas wells, and are therefore regulated under the provisions of the statute and administrative rules that govern oil and gas wells, not injection wells.

The primary issue in this case, as addressed in the MDEQ's Declaratory Ruling, is whether wells that employ hydraulic fracturing should be regulated as injection wells instead of oil and gas wells.

Simply put, a frack well is not an injection well. A frack well is a gas well, the purpose of which is to conduct the initial production of natural gas from a shale formation. This is governed by the portions of the statute and rules that refer to oil and gas wells.

As set forth in the MDEQ Position Paper on Hydraulic Fracturing, hydraulic fracturing is a one-time procedure that is part of the completion of some types of oil or natural gas wells. (Exhibit B).

The term "injection well," on the other hand, describes two types of wells. One is a well from which oil or gas has already been produced, and the producer injects water or some other substance to kickstart a secondary round of production (described in the statute and rules as a "secondary recovery project"). The second type of injection well is a well into which brine or other waste generated by the hydrocarbon production process is injected for storage.

Injection wells are defined in the Part 615 administrative rules as "a well used to dispose of, into underground strata, waste fluids produced incidental to oil and gas operations or a well used to inject water, gas, air, brine, or other fluids for the purpose of increasing the ultimate recovery of hydrocarbons from a reservoir or for the storage of hydrocarbons." Mich Admin Code R 324.102(x).

Drilling permit applications of any type are regulated by Part 615, Supervisor of Wells, of the Michigan Natural Resources and Environmental Protection Act, MCL 324.61501 *et seq*, and the attendant administrative rules. Both the statute and the administrative rules draw a clear distinction between oil and gas wells, which are regulated by one administrative rule, and injection wells, which are regulated by a different set of rules.

The statute provides that the Supervisor of Wells for the State of Michigan is specifically empowered to regulate "wells drilled for oil and gas *or* for secondary

recovery projects, *or* wells for the disposal of salt water, brine, or other oil field wastes . . . ." MCL 324.61506(c).

Part 615 does not define "secondary recovery projects," but the administrative rules provide that "'Secondary recovery' means the introduction or utilization of fluid or energy into or within a pool for the purpose of increasing the ultimate recovery of hydrocarbons from the pool." Mich Admin Code R 324.103(j).

Part 615 further provides that the Supervisor of Wells has authority "To regulate the secondary recovery methods of oil and gas, including pulling or creating a vacuum and the introduction of gas, air, water, and other substances into the producing formation." MCL 324.61506(i).

In other words, a secondary recovery project is one in which the oil or gas well has been drilled and has produced oil or gas, but production has essentially stalled, and so the producer can use a vacuum or inject gas, air, water, or other substances to jump start a secondary recovery of oil or gas from the well.

Similarly, the statute and the rules both refer to injection wells for the purpose of waste storage. Part 615 provides that the Supervisor has authority "To promulgate rules or issue orders for the classification of wells as oil or gas wells; *or* wells drilled, or to be drilled, for secondary recovery projects, *or* for the disposal of salt water, brine, or other oil or gas field wastes . . . ." MCL 324.61506(o).

In the administrative rules enacted pursuant to Part 615, there is a clear distinction between oil and gas wells and the various types of injection wells. For example, the rules provide that:

> Until a person has complied with the requirements of subrule (2) of this rule, a person shall not begin the drilling or operation of any well for any of the following:
>
> (a) Oil or gas, or both.
> (b) Injection for secondary recovery.
> (c) Injection for the disposal of brine, oil or gas field waste, or other fluids incidental to the drilling, producing, or treating of wells for oil or gas, or both, or the storage of natural hydrocarbons or liquefied petroleum gas derived from oil or gas.
> (d) Injection or withdrawal for the storage of natural dry gas or oil well gas.
> (e) Injection or withdrawal for the storage of liquid hydrocarbons or liquefied petroleum gas.
>
> Mich Admin Code R 324.201(1).

In short, it is clear that both the statute and administrative rules draw a distinction between oil and gas wells and injection wells. As set forth in the MDEQ's Declaratory Ruling, a well may be an "oil and gas" well, or it may be an "injection" well, but it cannot be both.

Under the Plaintiffs' interpretation of "injection well," an oil or gas that is completed using hydraulic fracturing would be just that – both an oil and gas well *and* an injection well – which makes no sense in the context of the plain language of Part 615 and the attendant administrative rules.

While it is true that fracking does involve injecting fluid into the ground, the purpose of that injection is for the initial recovery of natural gas in a gas well, which is plainly regulated by the provisions of the statute and rules that govern oil and gas wells. Fracking fluid is not injected for any of the purposes set forth in the provisions of the statute and rules that govern injection wells (secondary recovery or

various kinds of storage). Therefore, the Plaintiffs' attempt to conflate gas wells that employ hydraulic fracturing with injection wells is misguided, and should not be followed by this Court.[1]

II. The Declaratory Ruling issued by the MDEQ is valid and, even if it weren't, the relief sought by the Plaintiffs would not be available in this proceeding because it does not comply with the law governing challenges to administrative agency decisions

The Plaintiffs have styled their Motion for Summary Disposition as an appeal of the MDEQ's "refusal to issue a declaratory order" under MCL 24.263. (Plaintiffs' Motion and Brief for Summary Disposition, at 1). This statement is somewhat disingenuous, as the MDEQ did, in fact, issue a Declaratory Ruling, as requested by the Plaintiffs. (Exhibit A). However, because that Declaratory Ruling was issued two days after the deadline set by the administrative rules, the Plaintiffs have

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[1] It bears mentioning that the Plaintiffs reliance on out of court statement by representatives of the oil and gas industry that the purpose of a frack well is ultimate recovery of hydrocarbons is completely disingenuous. First, it is inadmissible hearsay – there is no affidavit from the person making the statement, only an affidavit from Plaintiffs' counsel claiming that these so-called "witnesses" said these things to him. Second, as set forth in the MDEQ's Declaratory Ruling, Plaintiffs' counsel obviously posed these questions to these "witnesses" out of context, and did not advise them that he was referring to the specific language of administrative rules governing injection wells when he used the word "ultimate." Particularly telling is the statement on page 23 of the Plaintiff's Motion and Brief for Summary Disposition in which Plaintiffs' counsel states "[u]nderstanding the 'point' is not critical to a witness giving a direct candid answer." This is ludicrous. These men were not witnesses, and use of their out of court, out of context statements – presumably without their knowledge – is completely improper. The MDEQ is in the process of obtaining affidavits from both of the Plaintiffs' so-called "witnesses" to provide the Court with their actual position on whether frack wells are injection wells, and will provide those to the Court in a supplemental brief. They have not been obtained yet due to the extremely short turnaround time on the MDEQ's Motion and Brief (because of the MDEQ agreeing to accelerate hearing on the Plaintiffs' Motion for Summary Disposition).

argued that it has no legal effect and is merely a statement of the MDEQ Director's personal opinion. For the reasons set forth below, this argument is baseless.

A. The fact that the MDEQ mistakenly issued its Declaratory Ruling two days late does not constitute a "refusal to issue a declaratory order" as argued by the Plaintiffs.

The administrative rule that governs declaratory rulings by the agency provides that:

> Within 60 days of receipt of the request, the department shall take 1 of the following actions:
>
> (a) Deny the request and state the reasons for the denial.
>
> (b) Grant the request and issue the declaratory ruling.
>
> (c) Advise the person requesting the ruling that further clarification of the facts must be provided, or that the department requires additional time to conduct a review, including, but not limited to, an on-site investigation.
>
> Mich Admin Code R 324.81(2).

Admittedly, the MDEQ issued its Declaratory Ruling 62 days after the request for a declaratory ruling was originally emailed in by the Plaintiffs. Two things bear mentioning here. First, the Declaratory Ruling was issued precisely 60 days from the date the Plaintiff submitted a hard copy of its request for declaratory ruling. Second, neither the statute nor the rules provide any penalty for the agency being a mere two days late.

In their Motion and Brief for Summary Disposition, the Plaintiffs argue that, because the Declaratory Ruling was two days late, it has no legal effect. However, this is contrary to basic principles of Michigan law. The Michigan Court Rules

provide that courts may permit parties to serve and file pleadings or motions or do other acts after the expiration of deadlines if missing the deadline was the result of excusable neglect. MCR 2.108(E). Granted, this was not an action in a Michigan court, but rather an action before an administrative agency where the Director of the MDEQ served as the decision making tribunal. Still, it is clear that where, as here, a party fails to comply with a deadline as the result of excusable neglect, that failure is not automatically fatal to that party's action, as asserted by the Plaintiffs.

More substantively, as noted above, the Plaintiffs purport to appeal the MDEQ's "refusal to issue a declaratory order." The MDEQ did not refuse to issue a declaratory order. Under the administrative rules, in order to "refuse to issue a declaratory order," the MDEQ must "deny the request and state the reasons for the denial." Mich Admin Code R 324.81(2)(a). Here, the MDEQ did not do that. Rather, it issued a Declaratory Ruling on the Plaintiffs' request. (Exhibit A).

The MDEQ attempted to comply with the 60 day deadline in good faith, but missed that deadline by two days for two reasons. First, the MDEQ takes is responsibilities under the Administrative Procedures Act and the administrative rules very seriously, and the Declaratory Ruling was vetted through several MDEQ staff members and the MDEQ's counsel before it was issued, which took time. Additionally, the MDEQ staff operated under the mistaken belief that the 60 day deadline began from the date the Plaintiffs submitted the hard copy of their request. The Declaratory Ruling was issued 60 days from that date.

In short, admittedly, the MDEQ's Declaratory Ruling was two days late. However, there is no authority to support the position that this renders the Declaratory Ruling void or of no legal effect. Further, the MDEQ also never denied the Plaintiffs' request for a declaratory ruling within 60 days, nor did it provide reasons for that denial. Therefore, there was no "refusal to issue a declaratory order" for the Plaintiffs to appeal. The Plaintiffs cannot have it both ways – either the MDEQ's Declaratory Ruling was valid and can be appealed by the Plaintiffs, or there was no action taken by the MDEQ whatsoever, which means there is nothing to appeal. But being two days behind schedule on a complex Declaratory Ruling such as this does not constitute a "refusal to issue a declaratory order" as argued by the Plaintiffs. If it did, then there would be no agency decision to be appealed here, and the Plaintiffs would have failed to exhaust administrative remedies. However, there was an agency decision issued, albeit two days behind schedule.

B. Standard of Review on Appeal.

The MDEQ's Declaratory Ruling constitutes a final agency decision which did not result from a contested case hearing, and is therefore appealable to this Court pursuant to section 631 of the Revised Judicature Act. MCL 600.631.

In an appeal under RJA § 631, the agency's decision "must be affirmed unless it is in violation of a statute, in excess of statutory authority or jurisdiction of the agency, made upon unlawful procedure resulting in material prejudice to a party, is arbitrary or capricious." *Michigan Waste Systems v Dep't of Natural Resources*, 147 Mich App 729, 736; 383 NW2d 112 (1985); *Southwestern Oakland County*

Incinerator Authority v Dep't of Natural Resources, 176 Mich App 434, 438; 440 NW2d 649 (1989). An agency's action is arbitrary if it is "fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance." *Dykstra v Dep't of Natural Resources*, 198 Mich App 482, 491; 499 NW2d 367 (1993). "Capricious" means apt to change suddenly, freakish or whimsical. *Dykstra*, 198 Mich at 491.

Applying the "authorized by law" standard of judicial review in *Turner v. Washtenaw County Rd. Comm.*, the Supreme Court has explained that it is:

> [h]ighly deferential, and precludes judicial intervention unless the disputed decision lacks any reasoned basis or evidentiary support.
>
> The fact that a different decision might also be reasonably justified on these facts is immaterial. Absent a totally unreasonable exercise of governmental power, the circuit court had no basis in this context for substituting its judgment for that of the commission.
>
> *Turner v Washtenaw County Rd Comm*, 437 Mich 35, 36; 467 NW2d 4 (1991).

Therefore, unless the Court finds that the MDEQ's basis for its Declaratory Ruling is a violation of law, that Declaratory Ruling must be affirmed. The basis for that Declaratory Ruling was set forth in Argument section I of this Brief, and the Declaratory Ruling itself is attached as Exhibit A, and therefore the MDEQ's interpretation of the law will not be repeated in this section.

Because the MDEQ's Declaratory Ruling represents an accurate interpretation of the law governing oil and gas wells as opposed to injection wells,

and because wells that are completed using hydraulic fracturing are clearly gas wells, not injection wells, the Court should not only deny the Plaintiffs' Motion for Summary Disposition, but also grant summary disposition of this matter in favor of the MDEQ.

III. The Plaintiffs seek relief which is unavailable in this Court.

In addition to an appeal of the MDEQ's supposed refusal to issue a declaratory ruling, the Plaintiffs have also requested that this Court revoke several permits that have been issued by the MDEQ. (Plaintiffs' Motion and Brief for Summary Disposition, at 26). Simply put, such relief is beyond this Court's authority to grant under Michigan law.

There is a very clearly established body of law governing challenges to permits issued by administrative agencies. The decision to issue a permit is an agency decision that is subject to judicial review only after other administrative remedies have been exhausted. Const 1963 art 6, § 28; MCL 24.301; MCL 300.631; *W.A. Foote Memorial Hospital v. Department of Public Health*, 210 Mich App 516, 521; 534 NW2d 206 (1995).

A party that seeks to challenge the MDEQ's decision to issue any permit under Part 615 has the right to challenge that decision administratively. MCL 324.1101; MCL 324.61503(2). Once that challenge has been made, and the MDEQ has issued a final agency decision, that decision can then be appealed to the circuit courts. MCL 324.61517; MCL 600.631.

Here, there was no challenge to the issuance of these specific permits, yet now the Plaintiffs seek to attack those permits collaterally through this proceeding. This is improper procedure. More importantly, because there was no administrative challenge to the issuance of those permits, there was no opportunity for the MDEQ to arrive at a final agency decision. If there is no final agency decision, the Circuit Court lacks subject matter jurisdiction over the dispute. Const 1963 art 6, § 28; MCL 24.301; MCL 300.631; *W.A. Foote Memorial Hospital v. Department of Public Health*, 210 Mich App 516, 521; 534 NW2d 206 (1995). And, when a Circuit Court lacks subject matter jurisdiction, any action it takes on a case, other than outright dismissal, is void as a matter of law. *Bowie v. Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992).

CONCLUSION AND RELIEF REQUESTED

For all of the reasons set forth above, the Plaintiffs' Motion for Summary Disposition should be denied and summary disposition should instead be granted in favor of the MDEQ.

Respectfully submitted,

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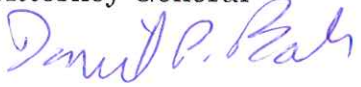

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