Subject: BMF comment on DEQ injection primacy
From: Ellis Boal <ellisboal@voyager.net>
Date: 12/23/2014 9:40 AM
To: "Wygant, Adam (DEQ)" <WygantA@michigan.gov>
CC: Hal Fitch <fitchh@michigan.gov>, "Lawrence, Deana (DEQ)" <LawrenceD6@michigan.gov>, luanne Kozma <luannekozma@gmail.com>

Adam,

I write with comments on behalf of Ban Michigan Fracking concerning the DEQ's draft application for primacy for the class II UIC program. This substitutes for oral comments I made on the record on December 9, 2014.

DEQ did not hold the promised "public hearing" on December 9

I first learned of the December 9 gathering from this notice in the November MOGN (emphasis added):

> PUBLIC MEETING ON DEQ APPLICATION FOR PRIMACY OF THE UNDERGROUND INJECTION CONTROL PROGRAM FOR CLASS II WELLS.
>
> The Department of Environmental Quality's (DEQ) Office of Oil, Gas, and Minerals (OOGM) will hold a public meeting on Tuesday, December 9, 2014, from 3:00 to 6:00 p.m., at Lansing Community College, West Campus, 5708 Cornerstone Drive, Lansing, Michigan 48917. The DEQ's OOGM intends to submit an application to the U.S. Environmental Protection Agency to assume primacy for the regulation of Class II injection wells pursuant to Section 1425 of the Safe Drinking Water Act. Class II wells inject fluids associated with oil and natural gas production. The wells are used either to dispose of salt water that is brought to the surface in the process of producing oil and gas, or to inject salt water or other fluids to enhance oil and gas production. There are about 1,300 Class II wells in Michigan. The purpose of the meeting is to provide information and to accept public comments on the proposed application.
>
> For more information please go to our web page http://www.michigan.gov/deqoilgasminerals; or you can contact Ms. Deana Lawrence at 517-284-6823; P.O. Box 30256, Lansing, Michigan 48909-7756, LawrenceD6@michigan.gov .

The same notice was on the DEQ calendar for December 1, at *http://www.michigan.gov/documents/deq/deq-oea-envcalendar-120114_475072_7.pdf* .

But for some weeks prior to December 9, the cited DEQ OOGM website for "more information" carried a different notice (copy attached). It said nothing about public commenting, had a 2-page briefing report linked, and said a copy of the draft application would be posted by November 26. Because this page was the notice with "more information," its omission of public commenting deprecates the MOGN/calendar notices that public comments would be accepted at the meeting. It said:

> "Public Meeting on DEQ Application for Primacy of the Underground Injection Control Program for Class II Wells.
>
> The Department of Environmental Quality's (DEQ) Office of Oil, Gas, and Minerals (OOGM) will hold a public meeting on Tuesday, December 9, 2014, from 3:00 to 6:00 p.m., at Lansing Community College, West Campus, 5708 Cornerstone Drive, Lansing, Michigan 48917. The DEQ's OOGM intends to submit an application to the U.S. Environmental Protection Agency to assume primacy for the regulation of Class II injection wells pursuant to Section 1425 of the Safe Drinking Water Act.
>
> For more information please see our brief:
>
> BRIEFING REPORT STATE OF MICHIGAN APPLICATION FOR CLASS II UNDERGROUND INJECTION CONTROL PRIMACY [linked to 2-page document].
>
> Additional information, including the draft application will be posted by November 26, 2014."

http://www.michigan.gov/deqoilgasminerals

Actually, the draft application was not posted until December 5, 9 days after the promised date and just 4 days before the meeting. On that day this line was added at the end of the notice:

> "DRAFT UIC APPLICATION [linked to 328-page document]."

Section C(XIV) on page 33 of the 328-page draft promised this (emphasis added):

> "At least one (1) public hearing will be conducted by the OOGM prior to the completion of Michigan's primacy application. The hearing will provide

> all interested persons with an opportunity to comment on the proposed program. Input on the program will not be limited to oral presentations at each hearing. Written comments will be accepted and reviewed in the same manner as those received orally."

This gave no notice of the date the public hearing would be.

On December 5 the day the draft application was published, I wrote questions, to which you responded on December 8, attached.

So it was a surprise that, at the start of the December 9 meeting, backed by top DEQ OOGM officials Hal Fitch and Rick Henderson, you said the public hearing was then and there; it was not just a public meeting. The attached notice about submitting "written comments" was circulated. It said comments could be submitted for only 14 days, to December 23. A formal record was made and comments solicited, just as at the public hearings last July 15-16 to consider proposed new administrative rules for part 615 after which a transcript was prepared.

Because the public was not notified or prepared for on-the-record comments on December 9, only two in the audience gave them on the spur of the moment, myself being one.

It was a bait-and-switch. Public meetings and public hearings are different. Hearings are formal and one-way. Meetings are informal and two-way. Comment periods are typically 30 days not 14. Comment deadlines are noticed to the public, not just to people who show up for an informal meeting. The January 2014 DEQ "Public Involvement Handbook" explains the difference (in the context of permitting) at page 6, attached (emphasis added):

> "Often these public notices provide a time period (usually a 30 day public comment period) for interested persons to send comments to the DEQ on a permit before it is issued or denied. Public meetings and public hearings are sometimes held in association with the public comment period. In a public meeting, the DEQ can discuss a proposed action with the public, including answering questions. In a public hearing, the DEQ receives comment from the public on a proposed action, but does not informally discuss the proposal as in a public meeting."

See also page 10 of the handbook, "Attending Community Meetings." Typically

formal public hearings are noticed well in advance, unlike here where there was no notice at all.

Federal law is similar. EPA's Ground Water Program Guidance # 19 ("GWPG-19") (downloadable from *http://www.epa.gov/safewater/uic/pdfs/guidance/guide_uic_guidance-19_primacy_app.pdf* , attached) provides for notices, public hearings, and commenting on permit applications at the state level if EPA does grant primacy to a state. Taking GWPG-19 as a model for public hearings on primacy applications, it was violated here in a couple of ways:

- ¶ 5.6(e)(2)(B) provides a hearing "should be scheduled no sooner than 15 days after the notice" and ¶ 5.6(e)(1)(C)(I) provides that the public notice should "provide an adequate description of the proposed action." There was no description of the program, much less an adequate one, till 4 days before the meeting.

- ¶ 5.6(e)(1)(C)(iv) says the public notice should provide for 15 days of commenting. The website notice with "more information" made no mention of commenting at all. Moreover, the 14-day commenting deadline given out on December 9 did not go out to the public.

Accordingly the December 9 meeting was not the public hearing promised by Section C(XIV) of the draft. Regardless of the advice of GWPG-19 ¶ 4.1 that DEQ need not hold a public hearing on the primacy application, DEQ may elect to do so, and having promised one, must now follow through.

Moreover:

- GWPG-19 ¶ 3.2 provides that the governor formally "request approval" of the primacy application. According to the draft application he has not.

- GWPG-19 ¶ 3.4 provides that the attorney general provide a statement of "legal authority to carry out the program." According to the draft application, he has not, particularly not as to the definitions of "protected aquifer" and "injection well" discussed below.

Please provide a transcript of the proceedings on December 9.

Public hearing needed to "expand" non-existent definition of "protected aquifers"

As explained at point 5 of my email of December 5 and again in my comments on the record, the DEQ briefing report and draft application both state that DEQ will be "expanding its definition of protected aquifers." This is untruthful because the administrative rules have no current definition of "protected aquifer." There is nothing to "expand."

In response on December 8 you referred me to the rules' current definition of "fresh water" at R 324.102(r).

Setting aside that the definition says nothing about "aquifers" or protecting them, DEQ knows that in order to change or expand that definition it has to go through procedures under the APA similar to the ones which were initiated last summer. As described at pages 10-11 and 139 of the combined transcripts of the hearings of July 15-16, there must first be a public draft of the new rules, a timely announcement of a public hearing, DEQ evaluation of comments after the hearing, possible preparation of a final draft in light of the comments, and submission of the final draft for approval by the office of regulatory reform, the legislative service bureau, and the joint committee on administrative rules of the legislature. Only then can a rule be formally created or expanded.

The amendments which were on the table on July 15-16 showed no changes to R 324.102(r) except as to numbering and style. Accordingly DEQ has nothing under consideration today about expanding the definition of protected aquifers as claimed in the briefing report and draft application.

"When is a Well That Receives Injections Not an Injection Well?"

GWPG-19 states the federal definition of a class II injection well at ¶ 2.1. It includes this category:

> "the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production."

Michigan's definition is different. In *Hughes v DEQ*, 2014 WL 547648 (Mich App, 2/11/14), attached, the court of appeals considered this phrase in Michigan's definition

of "injection well" at R 324.102(x):

> "... 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...."

As we discussed in point 8 of our email correspondence of December 5 and 8 and again at the gathering on December 9, the appellants in *Hughes* were attempting to establish that any frack well is an injection well, as Michigan defines that term, because frack wells inject lots of fluids.

Rejecting both parties' interpretations, the court interpreted the Michigan definition literally to mean that to be an injection well, a well must be used for the purpose of recovering hydrocarbons from a reservoir "before and after the injection of fluid."

As you know, under MCL 324.61501(l) a "reservoir" is not the same as a "pool." The attached definition of "reservoir" was before the court at page 117 of the record, a record which was the "actual state of uncontested facts" required for consideration under MCL 24.263 and R 324.81(1) and which provided jurisdiction for the case. The uncontested reservoir definition is:

> "subsurface hydrocarbon bearing formation."

The horizontal frack well at issue in *Hughes* was Sherman 1-8, but the record did not identify the reservoir (or formation) into which Sherman 1-8 would have drilled. Appellants lost on the uncontested facts of that case.

But in any future case an appellant would be free to do what the *Hughes* appellants did not: identify a frack well's target reservoir (or formation), and note that it has existing production. For example the Utica and Collingwood and Antrim formations are all reservoirs. Wells have been producing from them for years as you know. Therefore any future well that injects frack or other fluids into those reservoirs (or formations) will be considered injection wells under state law, according to the court, because they will increase ongoing existing production from the reservoir (or formation).

Dan Bock, DEQ counsel on the case, wrote an article with the above title analyzing the case for the spring number of the Michigan Environmental Law Journal. *http://www.michbar.org/environmental/pdfs/spring2014.pdf* . On July 24 I wrote him about it by the attached email, making many of the same points as in our email exchange of December 5 and 8, and at the gathering on December 9, and in this

comment. He did not write back any disagreement.

The sum of it is that Michigan has a different definition of "injection well" than EPA has, and will have to apply it to any well which uses injection and thereby increases existing production from a reservoir (or formation).

You responded in our correspondence of December 5 and 8, "we disagree with your interpretations" of the *Hughes* opinion. But DEQ has not stated what its different interpretation is. As part of its application, DEQ and the attorney general must state it, including its response if any to the above points.

"Excellent environmental protection and regulation for class II injection"

The briefing report asserts DEQ is well equipped for primacy among other reasons because it understands "climactic" issues and has a record of "excellent environmental protection and regulation for class II injection."

At the record hearing I cited a number of facts undercutting that claim, but at the same time admitted that because of the short 4-day notice of the 328-page draft application I hadn't had time to verify all my facts.

One of the facts was that the DEQ used to maintain a list of remediation sites known alternatively as the "part 201" list or the "SAP list." The list was discontinued in the 1990s, making it difficult for citizens to assess DEQ's claim of excellent stewardship, though talk has been heard that it may be reinstated some time in the future.

On the record I asked for correction, whether from panelists or the audience, of any of my facts which were mistaken. None came.

The record was closed. I objected to closure but now withdraw the objection.

During the public meeting which followed, which had Q&A, I asked again for correction of any mistaken facts. This time Hal did object to several. Privately after the Q&A meeting ended you also objected to one.

For purposes of this comment, let us grant that Hal and you were right and I was

wrong on all the points contradicted during and after the Q&A meeting. Still, several were left untouched:

- No one controverted that the DEQ claim that it plans to expand definitions of "protected aquifer" or "fresh water" is untruthful.
- No one controverted that DEQ allowed Newstar Energy to drill under the Great Lakes even while it had 23 serious law violations, and there was a contaminated site which went unremediated for 35 years. (Those facts are in 2001 reports of the Lake Michigan Federation at *http://www.greatlakes.org /Document.Doc?id=213* and *http://www.greatlakes.org/Document.Doc?id=214* .)
- As to discontinuance of the remediation site list and its possible reinstatement, during the Q&A meeting it was stated that DEQ does expect to reinstate the list as part of a database, but not till some time next summer. This will be long after DEQ expects to submit the primacy application. In the meantime remediation site lists are available by email for individual regions of the state, but I don't recall it being stated that notice of that is public information either on the DEQ website or elsewhere.
- You did dispute my interpretation of *Hughes*, but agreed it was a dispute of opinion not fact.

Reason for the primacy application

DEQ has given no concrete motivation or reason for the application or its timing this year other than that it wants the power.

- The auditor general found in September 2013 that OOGM didn't complete field inspections of all well sites at the targeted inspection frequencies, and didn't consistently document inspection and violation information in the DEQ database or maintain supporting documentation related to violations in the wells' hard-copy files. *http://audgen.michigan.gov/finalpdfs/12_13/r761030013.pdf* .
- DEQ does not claim to expect a change in the number or types of class II injection well applications in the future.
- Though you claimed at the meeting that duplication of DEQ and EPA effort was

inefficient, when queried in our correspondence of December 5 and 8 about Michigan not being a primacy state while Ohio had been one for almost 30 years, you agreed "EPA has performed satisfactorily, in fact we have had a long history of dual regulation...." Other important oil-gas-producing states including Pennsylvania and New York do not have or seek primacy.

- During the Q&A meeting Hal stated that industry people had expressed interest in DEQ primacy at various times over the years. Asked if any environmental groups had expressed the same interest, he said no.
- The primacy issue will be mooted in part if the 2006 ballot initiative of the Committee to Ban Fracking in Michigan succeeds. Part of the initiative would ban disposal of horizontal frack waste in the state. It might be prudent to wait to see what happens with that, particularly in light of New York's precedential December 17 decision to ban high volume horizontal fracking altogether, including in the Utica shale which also underlies Michigan. See *http://letsbanfracking.org* for the exact language of the initiative.

Conclusion

At the meeting I said Ban Michigan Fracking was deeply skeptical of the primacy application. We are now convinced to oppose it. Mishandling of the public hearing issue, and abdication on two important substantive definitions, tell us that DEQ lacks competence.

As you know, Marathon Oil acquired 430,000 acres of undeveloped leasehold from Encana this summer, and bought 148,000 more acres at the October DNR auction. So in sum it plans to develop over 900 square miles of leasehold rights. Those wells are going to require a lot more disposal space.

If EPA steps aside and leaves DEQ to mind the store, Marathon will have the benefit of the same fast-and-loose procedures DEQ has applied here. DEQ will have discretion under GWPG-19 ¶ 5.6(e)(2) to refuse public hearing requests on permits, for instance on a claim that a requester who regularly recreates in the area supposedly lacks standing. Compare *Friends of the Earth v Laidlaw Environmental Services Inc*, 528 US 167, 182-83 (2000); *Cantrell v City of Long Beach*, 241 F3d 674, 680-81 (CA9, 2001); *Sierra Club v Morton*, 405 US 727, 735 (1972); *Lujan v Defenders of*

Wildlife, 504 US 555, 562-563 (1992); *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 479 Mich 280, 300, 310 (2007).

Questionable approvals of new injection applications will multiply with little thought or public input.

DEQ should end consideration of a UIC primacy program.

Ellis

Attachments:

commentAcceptancePeriod.pdf	186 KB
deqPublicInvolvementHandbook-page6.pdf	2.5 MB
guide_uic_guidance-19_primacy_app.pdf	140 KB
hughesCoaDecision.pdf	20.8 KB
Re UIC Primacy.pdf	2.7 MB
reservoirDefinition-API.pdf	997 KB
websiteMeetingAnnouncement.pdf	146 KB
Your article 'When is a well....' frack wells as injection wells.pdf	1.3 MB