

**State of Michigan
Court of Appeals**

Gary Cooley and Ban Michigan Fracking,

Plaintiffs-Appellants,

v

Court of Claims Case # 16-000050-MZ

Hon. Michael J. Talbot

CA Case # 334133

Appeal filed: 8-2-16

Michigan Department of Environmental
Quality,

Defendant-Appellee.

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Appellants' Opening Brief
Oral argument requested

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I. Introduction and jurisdiction

This is a FOIA case. Without answering the complaint, defendant DEQ moved for summary disposition. The court of claims granted it for failure to state a claim on June 23, 2016. After an unsuccessful motion for reconsideration, this timely appeal followed on August 2.

The court of claims had jurisdiction under MCL 600.6419(1)(a). This court has jurisdiction under MCR 7.203(A)(1).

II. Question presented

Whether DEQ carried its heavy burden to exempt from FOIA a neighbor's request for environmental and other information about a supposed mineral well in the state forest, where the complaint asserted the well was not a mineral well but a gas-oil well, there are no minerals in the county, and DEQ acted on the operator's bare assertion the well would be a mineral well without conducting its own investigation.

III. Proceedings

On September 22, 2015, plaintiffs filed FOIA request # 6723-15 with defendant DEQ.¹

On October 1, 2015, DEQ denied it.²

On October 10, 2015, plaintiffs appealed the denial to DEQ director Dan Wyant.³

1 Complaint exhibit 7.

2 Complaint exhibit 8.

3 Complaint exhibit 9.

On October 21, 2015, plaintiffs provided reasons in support of the appeal.⁴

On November 5, 2015, DEQ denied the appeal and informed plaintiffs they could commence a civil action “in circuit court” within 180 days.⁵

On February 29, 2016, plaintiffs sued in the court of claims. The case was assigned to Judge Stephens.

On May 3, 2016, defendants moved for summary disposition under MCR 2.116(C)(8) (legal sufficiency) and (C)(10) (factual sufficiency).

On May 27, 2016, plaintiffs responded to the motion.

On June 23, 2016, the case was re-assigned to Judge Talbot. He granted the motion but only for failure to state a claim.

On July 14, 2016, plaintiffs moved for reconsideration. The same day the court denied the motion.

On August 2, 2016, plaintiffs appealed as of right to this court.

IV. Facts

A. Facts of the complaint

The operator is Marathon Oil. The well is called “State Beaver Creek D4-11” or colloquially “D4-11” or (by Marathon) “the science well.” It is in Crawford County. Marathon applied for the permit on June 10, 2015. According to the application, the

4 Complaint exhibit 6.

5 Complaint exhibit 11.

formation at total depth of 4700 feet was the “Amherstburg.” The Amherstburg is a non-shale fossil-bearing formation where Michigan operators historically have sought oil. It is in the “Detroit River” group.

By checking a box on item 1(b) and signing the permit application, Marathon indicated D4-11 would be a “test” well under part 625. And by not writing the word “exploratory” in item 23, according to the instructions on the back Marathon indicated D4-11 would not be an exploratory well.⁶

Based on these two items, DEQ acquiesced in Marathon's assertions: D4-11 is a “a mineral well subject to Part 625⁷ [the part of NREPA⁸ which covers mineral wells]; and it is not a 'test well for exploratory purposes.’”⁹

According to the definition of “test well” that would mean DEQ believes D4-11 is a well to “obtain geological or geophysical information or other subsurface data” related to “minerals.”¹⁰

There is no claim and no evidence DEQ attempted to verify independently whether D4-11 actually tested “minerals.” By contrast, page 1 of an application for a well drilled under part 615, which covers gas-oil wells, identifies gas or oil as the objective.¹¹

6 Complaint exhibit 2.

7 MCL 324.62501 et seq.

8 MCL 324.101 et seq.

9 Complaint exhibit 11.

10 Complaint ¶ 6.

11 Complaint exhibit 3.

Since no exploration occurred, the intended testing would have to have been of minerals known to be present. Review of the 64 forms on the DEQ “forms” web page noted below shows no form in which DEQ would have asked Marathon to verify or even state that minerals were actually present at D4-11, much less to identify the particular mineral it wanted to test. DEQ's own information is that there are no minerals anywhere in Crawford County.¹² Gas and oil are not minerals.¹³

Prior to the suit DEQ would not even say whether it did grant a permit for D4-11. But in its motion DEQ admitted it.

The only evidence cited by DEQ and by the court of claims that D4-11 actually is a test well under part 625 is Marathon's non-notarized assertion to that effect by a check in a box in the permit application.¹⁴

Minerals generally are not extracted by drilling in Michigan, but some are extracted by “solution mining,” which part 625 does cover.

Marathon Oil's major activity in the state is exploring and extracting oil and gas, as its name implies. In fact it is producing gas from another well just a ½-mile away, drilled at almost the same depth using the same “Ensign 161” drill rig. Having a design suited for oil-gas exploration, this rig saw service in the massive oil fields of western

12 Complaint exhibit 1.

13 Complaint ¶¶ 10-11; MCL 324.62518, MCL 324.61501 et seq, particularly 61502, 61527.

14 DEQ brief to court of claims in support of motion for summary disposition, p 5 and exhibit A (which is the same as plaintiffs' complaint exhibit 2).

North Dakota before coming to D4-11 and at a neighboring well immediately afterward.

On September 22, 2015, plaintiffs made the FOIA request. The motivation: People like plaintiff Gary Cooley who bird, hunt, hike, or snowmobile in the state forest around there are entitled to know. The hole is just a mile through the forest from his place. Particularly he wants the environmental impact assessment (EIA) which accompanied the application. The complaint noted the EIA has information about water wells, wetlands, surface waters, endangered species, high-volume fracturing, chemicals, pad facilities, soil erosion, and disposal of fluids and brines.

This last sentence needs clarification. Counsel has noticed a mistaken fact in the complaint which will be corrected should the case be remanded. Review of the “forms” page on DEQ's website¹⁵ under “Division, Office of Oil, Gas, and Minerals,” at this writing shows links to 64 different forms, some of which relate to part 615 (which covers gas and oil wells), some to part 625, and some to both. In referencing the EIA, complaint ¶ 20 attached as exhibit 4 the DEQ form for EIAs required by part 615, titled “EQP 7200-19.” See also complaint ¶ 35. But as seen on the “forms” website page, part 625 uses a different EIA form, “EQP 7500-3.” Exhibit 4 should have been this form.

The two EIA forms are a bit different. For instance the one for mineral wells does not ask if high-volume fracturing will be utilized or the names of any chemicals used. But form “EQP 7130” does allow for directional drilling and fracturing of mineral wells,

15 “DEQ Public forms”, <http://www.deq.state.mi.us/deqforms/default.asp> .

without distinction as to low- or high-volume.

At the time of the September 22 FOIA request, drilling was not yet complete.

On October 2 while the request was pending, a worker came out to speak to visiting observers, saying he was Marathon's "safety man." Safety of course would be a position of importance at a rig nearly 100 feet in height which runs day and night. Presumably the project supervisor authorized his mission.

As Ensign 161 hummed behind him, the safety man said the company hoped to find gas or oil.

Plaintiffs recorded and uploaded a 43-second video of the operating rig a few days later on October 6.¹⁶

On October 16 drilling was complete. Ensign 161 moved to a site in the woods next door where it started exploring for gas and oil in the Detroit River group. Left behind at D4-11 was a blowout preventer. Otherwise the pad was deserted.

Meanwhile on October 1 DEQ denied the request. Plaintiffs appealed it to DEQ director Dan Wyant on October 10.

On October 21, plaintiffs provided the reasons in support, which as the complaint relates, included the following facts:

[A]t D4-11 the rig was testing for gas and oil. Gas and oil are not "minerals."¹⁷

16 "The Science Well' in Crawford County: totally secret", https://youtu.be/XWn_0DroCKQ .

17 Complaint exhibit 6.

The complaint itself added that D4-11 was “drilled partially or completely to explore for oil and gas.”¹⁸

On November 5 DEQ denied the FOIA request, saying if plaintiffs disagreed they could sue “in circuit court.” Plaintiffs sued in the court of claims.

B. Other facts of which the court may take notice.

The complaint stated as a fact that D4-11 was not a mineral well and there are no minerals in Crawford County which could be tested. On its face as elaborated below, this fact if true meant the relied-on mineral-well defenses should have been rejected for purposes of stating a claim.

But DEQ's motion was also based partially on MCR 2.116(C)(10), which allows summary disposition if there are no genuine issues of material fact. Accordingly in their response to the motion plaintiffs pointed to several public facts of which the court may take notice. The purpose was to show how unlikely it was that D4-11 would be testing for any of the three principal DEQ-regulated minerals in Michigan and how likely it was D4-11 was testing gas or oil. The “likeliness” issue would be relevant in any civil suit, like this one, where plaintiffs need prove facts only by a preponderance. If necessary the complaint could be amended specifically to assert the following facts:

18 Complaint ¶ 46.

- A DEQ web page names the principal ores which Michigan regulates under the mineral well program. They are salt, brine, and potash.¹⁹
- Salt and brine are abundant in Michigan and have little economic value compared to oil and gas, which are fuels. It is unlikely Marathon would spend the millions necessary to transport and operate D4-11 if it were only testing salt or brine.
- The famed Detroit Salt Company produces a million tons of rock salt each year.²⁰ (This fact was stated plaintiffs' motion for reconsideration not the response to the DEQ's motion.)
- As for potash, the Geological Repository for Research and Education at Western Michigan University has announced the rediscovery of a lucrative high-quality deposit underlying Osceola and Mecosta Counties 90 miles away – the “Borgen Bed” – that could surpass the state's historical oil and gas production revenues.²¹ But according to researchers at the Repository, the potash is from rock deposited in the Silurian geologic period,²² hundreds of millions of years ago. The Silurian is an earlier period than that of the Detroit River group and the Amherstburg.²³
- Marathon Oil is an oil company. At its website²⁴ at this writing, a search for the word “potash” yields zero results. Searches for “oil” or “natural gas” yield hundreds.
- According to Kenneth K. Landes, writing for the US department of interior in 1951, the Amherstburg is sometimes called “black lime”:

19 Exhibit 12, “Solution Mining, Brine Extraction, And Exploration Test Holes”, http://www.michigan.gov/deq/0,4561,7-135-3311_18442-309491--,00.html .

20 Exhibit 13, Crain's, 10-18-10, “Detroit's underground rock salt mine sold”, <http://www.crainsdetroit.com/article/20101018/FREE/101019888/detroits-underground-rock-salt-mine-sold>

21 Exhibit 14, WMU News, 9-10-13, “WMU research facility assists in rediscovery of rare mineral deposit,” <https://wmich.edu/news/2013/09/9197>

22 Exhibit 15, WMU magazine, “Potash: Michigan's Next Billion-Dollar Industry?”, <http://mipotash.com/wp-content/uploads/2015/09/WMUMagazinePotashStory.pdf>

23 Exhibit 16, US department of interior, Kenneth K. Landes, “Detroit River Group in the Michigan Basin” (1951), pages 1-3, <http://pubs.usgs.gov/circ/1951/0133/report.pdf> , noted at complaint ¶ 19 note 21.

24 <http://www.marathonoil.com/>

The outstanding characteristic of the carbonate rock in the Amherstburg formation is its relatively dark color. ... The Amherstburg has therefore been referred to by many geologists as the “Black Lime.”²⁵

- According to gas-oil commentator Matt Wandel in September 2015, that means it contains oil:

The Amherstburg is part of the Detroit River Group of rocks of Middle Devonian age. ... The outstanding characteristic of the carbonate rock in the Amherstburg formation is its relatively dark color which earns it the nickname from many geologists as the Black Lime. ... The Black Lime is thick and underlies our entire state. The Black Lime contains oil.²⁶

- The Amherstburg has been explored by oil-petroleum prospectors in nine Michigan counties: Arenac, Bay, Clare, Isabella, Lapeer, Mecosta, Midland, Sanilac, and Tuscola.²⁷

V. The holding of the court of claims

The court reviewed the facts including particularly:

As alleged in the complaint, Marathon's permit application identified the well at issue as a test well under Part 625 of the NREPA.²⁸

Therefore the information sought was confidential, the court held. The opinion rejected as irrelevant the Marathon safety man's statement that the company hoped to

25 Exhibit 16, US department of interior, Kenneth K. Landes, “Detroit River Group in the Michigan Basin” (1951) page 9,
<http://pubs.usgs.gov/circ/1951/0133/report.pdf> .

26 Exhibit 17, Michigan Oil & Gas Monthly – September 2015, Matt Wandel,
<http://www.respectmyplanet.org/publications/michigan/michigan-oil-gas-monthly-september-2015>

27 Michigan Geological Repository for Research and Education, Casey Jones Drill Cuttings Collection,
<http://wsh060.westhills.wmich.edu/MGRRE/data/files/CaseyJonesCuttings.htm>

28 Decision, p 2.

find oil, reasoning that if in fact oil were discovered it would become legal for Marathon at that time to apply to convert D4-11 to a part 615 oil well.

The opinion also rejected a second reason proffered by plaintiffs, that the confidentiality period had not begun at the time they made the FOIA request. Plaintiffs do not appeal this latter ruling.

VI. The standard of review

The standard of review of a summary holding that a complaint is legally insufficient is *de novo*.

VII. Applicable statutes and rules

FOIA:

MCL 15.243(1)(d):

A public body may exempt from disclosure as a public record under this act any of the following: ... Records or information specifically described and exempted from disclosure by statute.

Mineral wells (part 625):

MCL 324.62501(g):

“Mineral well” means any well subject to this part.

MCL 324.62501(e):

“Exploratory purposes” means test well drilling for the specific purpose of discovering or outlining an *orebody or mineable mineral* resource.²⁹

29 Emphasis added.

MCL 324.62501(o):

“Test well” means a well, core hole, core test, observation well, or other well drilled from the surface to *determine the presence of a mineral, mineral resource, ore, or rock unit*, or to obtain geological or geophysical information or other subsurface data related to *mineral exploration and extraction*. Test well does not include holes drilled in the operation of a quarry, open pit, or underground mine, or any wells not related to mineral exploration or extraction.³⁰

MCL 324.62508(d)

The supervisor of mineral wells, acting directly or through his or her deputy or authorized representative, may do any of the following: ... (d) Require on all wells the keeping and filing of logs containing data that are appropriate to the purposes of this part. Logs on brine and test wells shall be held confidential for 10 years after completion and shall not be open to public inspection during that time except by written consent of the owner or operator. Logs for test wells drilled for exploratory purposes shall be held confidential until released by the owner or operator....

MCL 324.62509(5)

All information and records pertaining to the application for and issuance of permits for wells subject to this [mineral wells] part shall be held confidential in the same manner as provided for logs and reports on these wells.

Mineral well administrative rules.³¹

Gas-oil wells (part 615):

MCL 324.61525(1):

A person *shall not drill* or begin the drilling of any well *for oil or gas*, for secondary recovery, or a well for the disposal of salt water, or brine produced in association with oil or gas operations or other oil field wastes, or wells for the development of reservoirs for the storage of liquid or gaseous hydrocarbons, *except as authorized by a permit* to drill and operate the well issued by the supervisor of wells pursuant to part 13 and unless the

30 Emphasis added.

31 R 299.2301 et seq.

person files with the supervisor a bond as provided in section 61506....³²

R 324.102(m):

As used in these rules: ... “*Drilling operations*” means all of the physical and mechanical aspects of constructing a well for the *exploration* or production of *oil or gas*, or both ... and includes all of the following:

- (i) Moving drilling equipment onto the drill site.
- (ii) Penetration of the ground by the drill bit and drilling of the well bore.
- (iii) Casing and sealing of the well bore.

Construction of well sites and access roads.³³

Gas-oil well administrative rules.³⁴

DEQ forms (part 615 or 625).³⁵

Form EQP 7200-01, “Application for permit to drill/deepen/convert and operate well”, applicable to both part 615 and part 625.³⁶

Form EQP 7500-3, “Environmental impact assessment for mineral wells and surface facilities”, applicable only to part 625.³⁷

Form EQC 7200-4, “Permit Application Instructions for Individual Test Wells ”, applicable only to part 625.³⁸

Form EQP 7200-19, “Environmental impact assessment”, applicable only to part 615.³⁹

32 Emphasis added.

33 Emphasis added.

34 R 324.101 et seq.

35 “DEQ Public forms”, <http://www.deq.state.mi.us/deqforms/default.asp> .

36 Exhibit 18, http://www.michigan.gov/documents/deq/EQP_7200-01_Application_for_Permit_363238_7.doc

37 Exhibit 19, http://www.michigan.gov/documents/deq/EQP_7500-3_Environmental_Impact_Assessment_for_Mineral_Wells_060415_491281_7.doc

38 Exhibit 20, http://www.michigan.gov/documents/deq/EQC_7200-4_Application_Instructions_for_Individual_Test_Wells_2015_490950_7.doc

39 Exhibit 21, http://www.michigan.gov/documents/deq/EQP_7200-

Form EQP 7130, “Record of well completion”, applicable to both part 615 and part 625.⁴⁰

VIII. Argument

A. **The complaint stated a FOIA claim simply by stating D4-11 is not a mineral well, which renders irrelevant all DEQ defenses premised on D4-11 being a mineral well.**

DEQ has promulgated a series of administrative rules under part 625.⁴¹ It also promulgated a series of forms detailing questions to be asked of applicants for both gas-oil and mineral wells.⁴² Neither the rules nor the forms require DEQ to ask an applicant whether a proposed well really will be a mineral well. One form, “EQC 7200-4”, which details instructions for filling out a mineral well permit application, does ask in item 14 for:

Description of the testing program, including pressure tests on casing strings, and any planned drill stem tests.

But this would appear to inquire only about the testing equipment, not the specimens to be tested, or whether the specimens actually consist of a mineral such as potash.

In this case DEQ does not claim it asked if there was potash or some other mineral in the Amherstburg. Nor does it claim it already knew the answer. Just the opposite: It

40 *19 Environmental Impact Assessment 364508_7.doc*
Exhibit 22,
http://www.michigan.gov/documents/deq/EQP_7130_Record_of_Well_Completion_0112_410780_7.doc

41 R 299.2301 et seq.

42 “DEQ Public forms”, <http://www.deq.state.mi.us/deqforms/default.asp> .

says there are no minerals of any kind in Crawford County.⁴³ Even so, without doing any independent investigation it accepted Marathon's representation that D4-11 would be a non-exploratory mineral test well.

The complaint states that D4-11 is not a mineral well. For purposes of MCR 2.116(C)(8), that is an absolute true fact. Therefore at the pleading stage defenses premised on D4-11 being a mineral well – MCL 15.243(1)(d), 324.62508(d) and 62509(5) – fail.

B. FOIA exemptions are affirmative defenses on which the state bears the burden of proof, and a decision to uphold an exemption must be supported by particularized findings of fact.

Though the court of claims ruled only as to (C)(8), DEQ had also moved as to (C)(10). In the event that DEQ re-raises the (C)(10) issue here plaintiffs would add the following:

The only fact found by the court of claims in support of the exemption was that Marathon had identified D4-11 as a non-exploratory test well under part 625. As seen, DEQ did no independent investigation to verify that fact. And Marathon is not a party. There is no evidence of the fact other than Marathon's self-interested non-notarized hearsay assertion. Given that FOIA is a pro-disclosure statute, DEQ as the moving party had the burden of proof in any (C)(10) motion, it offered nothing but hearsay, and in any

⁴³ Complaint exhibit 1.

event any disposition should have awaited the close of discovery,⁴⁴ its motion had to fail at this stage. Agencies bear a heavy burden as to exemptions in FOIA cases.

Exemptions are affirmative defenses. They are construed narrowly, and particularized findings of fact must underlie a decision to allow one.

But plaintiffs did not simply rest on these general principles. To prevail they need only disprove the contention that D4-11 is a mineral well. They have no affirmative duty to show it is a gas-oil well.

Even so, they have done that. In addition to the facts marshaled in section IV(C) above, the following facts are in the record. They establish a good circumstantial case:

- There are no minerals in Crawford County.
- Gas and oil are not minerals.
- Ensign 161's design is suited for gas-oil exploration and the rig was used for gas-oil exploration in North Dakota before and in Michigan immediately after drilling D4-11.
- Marathon's major activity in Michigan is exploring for and extracting gas and oil.
- The permit application stated D4-11 would target the “Amherstburg” formation where Michigan oil prospectors have frequently looked.

44 *Herald Co v City of Bay City*, 463 Mich 111, 119 (2000); *Practical Political Consulting v Secretary of State*, 287 Mich App 434, 465 (2010) ; *Swickard v Wayne County Medical Examiner*, 438 Mich 536, 543-44 (1991); *Messenger v Consumer & Industry Services*, 238 Mich App 524, 532, 536 (1999); *Townsend v Chase Manhattan Mfg Corp*, 254 Mich App 133, 140 (2002); *American Community Mutual Insurance Co v Commissioner of Insurance*, 195 Mich App 351, 363 (1992).

- Marathon left behind a blowout preventer, something which DEQ requires only for gas-oil wells.⁴⁵ Mineral rules require preventers only “during drilling.”⁴⁶
- Marathon's safety man stated during the drilling operation that Marathon hoped to find gas or oil, meaning in the most literal commonsense sense that Marathon was “exploring” for oil. Mere exploration means that D4-11 was a gas-oil well under part 615.⁴⁷

Had Marathon applied under part 615 for D4-11 as a gas-oil well, there would have been only limited confidentiality, and then only if Marathon requested it, and even then confidentiality would have lasted just 90 days.⁴⁸

IX. Conclusion

Plaintiffs have no facts to contend that DEQ and Marathon arranged a sweetheart deal to keep this particular well secret. Rather it appears from the 64 DEQ forms that it never asks any operator who is testing minerals known to be present – as opposed to exploring to see whether they are present – to demonstrate the point. If so, DEQ invites a train of abuse from industry operators desiring to maintain secrecy by falsely stating their objectives while not under oath.

Plaintiffs invite DEQ and the court to review the 64 forms and point out any which plaintiffs may have overlooked, which could establish that Marathon indeed had

45 R 324.406(1)(a).

46 R 299.2356(1)(a).

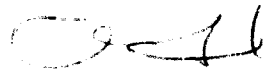
47 MCL 324.61502, 61504, 61505a, 61506(t), 61506c; R 324.102(h), 102(m), 303(2), 416(3), 1008(1)(e), 1008(7), 1013.

48 MCL 324.61506(d).

to have identified a mineral which was there for D4-11 to test, before DEQ granted the permit.

Wherefore they ask the court to reverse the court of claims, and remand for further proceedings.

Respectfully submitted,

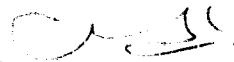


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Certificate of Service

Ellis Boal certifies that on the above date he served the above counsel with the above pleading, both by email and by regular mail at his above addresses.



Ellis Boal