

**STATE OF MICHIGAN
DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT**

ORDER OF THE SUPERVISOR OF WELLS

IN THE MATTER OF

THE APPEAL TITAN ENERGY, LLC OF THE)
ASSISTANT SUPERVISOR OF WELLS ORDER IN)
CAUSE NUMBER 18-2007 REGARDING THE)
TRENTON AND BLACK RIVER FORMATION WELLS) ORDER NO. 18-2007
WITHIN 15 SOUTHERN MICHIGAN COUNTIES) ON APPEAL
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ORDER ON APPEAL

Before 2008, the production of oil and gas in the Trenton-Black River Formation in 15 southern Michigan counties was governed by over 30 individual Supervisor's Orders. As a result, staff of the Office of Geological Survey (OGS) requested the Assistant Supervisor of Wells clarify the situation. To that end, the Assistant Supervisor of Wells noticed the matter for hearing by soliciting input from interested persons. Seven answers were filed in response to the notice and an evidentiary hearing was conducted. Subsequently, the Assistant Supervisor of Wells issued an Opinion and Order on December 26, 2008, which was amended by an Opinion and Order dated May 15, 2009 (collectively "Order"). The Order sets forth oil and gas production allowables, establishes spacing and location of wells, provides for exceptions, and addresses other issues regarding development of oil and gas in the Trenton-Black River Formation. Titan Energy, LLC (Titan) challenged that Order in a suit filed in the Ingham County Circuit Court. To resolve that suit, the Court directed Titan to file an Appeal to the Director of the Department of Natural Resources and Environment (DNRE).¹ MCL 324.61503(2) and R 324.1212.

¹ The administration of Part 615 was transferred from the Department of Environmental Quality to the DNRE under Executive Order 2009-45, effective January 17, 2010. MCL 324.99919

Upon receipt of the Appeal, the parties to the original action were provided the opportunity to file answers. Continental Resources, Inc. (Continental) and the OGS, through the Attorney General, filed answers, and thus, along with Titan, are the parties to this Appeal. Under a Scheduling Order, Titan filed a Brief in support of its position, Continental and the OGS filed Responses, and Titan filed a Reply. R 324.1212(3). Both Continental and the OGS support the Order. Titan, the OGS, and Continental all requested oral argument on their briefs, and the oral argument was held on June 30, 2010.²

I. Procedural Issues

The first issue Titan raises is the standard of review utilized in the Appeal. On this point, Titan argues that this proceeding is a contested case governed by the Administrative Procedures Act (APA). MCL 24.201 *et seq.* Accordingly, Titan contends the proper standard of review on appeal to the Director is whether the Order “was supported by the record.” Titan Reply Brief, p. 6. Conversely, the OGS argues that the proceeding is not a contested case hearing under the APA, and the proper standard of review on appeal for the Director is whether the decision was “authorized by law.” The OGS Brief, p. 2. Continental agrees with the OGS that the case is not a contested case and characterizes it as a technical evidentiary hearing. Continental Brief, p. 1.

The implication of the parties’ argument on the standard of review is that the Director is, to some degree, limited in reviewing an Order of the Assistant Supervisor of Wells in an Appeal. There are two fundamental flaws in this argument. First, the argument is contrary to the functions of the DNRE in the administration of Part 615, under which the Director is the Supervisor of Wells. MCL 324.61501(o). In that capacity, the authority to administer the statutory scheme is delegated from the Director to the Assistant Supervisor of Wells. However, that delegation does not divest the Director of the authority granted by the statute. As it pertains to this matter, the Director

² Continental did not participate in the oral argument.

is responsible for rendering the final agency decision when an Appeal is filed under R 324.1212. In so doing, the Director is not constrained by the intermediate decision of the Assistant Supervisor of Wells. Rather, the Director is responsible for rendering the final agency decision, which in this case entails a determination on the advisability of an Order to regulate the development of oil and gas in the Trenton-Black River Formation within 15 southern Michigan counties.

The second flaw in the respective standards of review advocated by the parties is that they apply to judicial review of the final agency decision. Specifically, whether that review is performed under the relevant provisions of the APA or the Revised Judicature Act.³ Both of these statutes are legislative enactments giving effect to the constitutional guarantee (Const 1963, art 6, §28) of judicial review of an agency action. See *McAvoy v H. B. Sherman Co.*, 401 Mich 419, 442; 258 NW2d 414 (1977); *Southeastern Oakland County Incinerator Authority v Department of Natural Resources*, 176 Mich App 434, 438; 440 NW2d 649 (1989). The process at issue in this matter is the formulation of that decision, which a court then reviews under the applicable standard.

This leaves the second issue raised by the parties: the nature of the underlying action. Specifically, whether it is a contested case as the term is defined in MCL 24.203(3). In support of its argument that this proceeding is a contested case, Titan asserts that the Notice of Hearing invited participation “as a party in the hearing by presenting evidence or cross-examining witnesses.” Titan Reply Brief, p. 4. It further argues that it became a “named party” to the case along with six other persons and entities that filed answers. Titan also notes that the Part 615 administrative rules provide for both contested and uncontested hearings, and under R 324.1205(1) (a), this case involves a field-wide application, and thus it is a contested hearing. Titan Reply Brief, p. 5. There are a number of deficiencies in this argument.

³ The “authorized by law” standard advocated by the OGS derives from the Revised Judicature Act, MCL 600.631, one of the three methods under which an agency action is reviewed by a court. See *Viculin v Dept of Civil Service*, 386 Mich 375; 192 NW2d 449 (1971).

There is no dispute among the parties that this case was conducted as an evidentiary hearing in that witnesses were sworn, examined and subject to cross-examination. However, this process does not make the proceeding a contested case, which is defined in the APA as “a proceeding...in which a determination of the legal rights, duties or privileges of a named party is required by law to be made by an agency.....” MCL 24.203(3). The “required by law” provision is implicated in two possible manners. The first is constitutional due process protection. See US Const, Am XIV; Const 1963, art 1, § 17. See also *Goldberg v Kelly*, 397 US 254; 90 S Ct 1011; 25 L Ed2d 287 (1970), *Bundo v City of Walled Lake*, 395 Mich 679; 238 NW2d 154 (1976). The second arises by a statutory or regulatory authorization.⁴ The question is whether either principle is implicated by this case.

Both the United States Constitution and the Michigan Constitution contain similar language regarding due process protection of property interests: “No person shall be deprived of life, liberty, or property, without due process of law.” In this case Titan does not argue that it has a constitutionally protected right to a contested case. Further, I conclude, as a Matter of Law, Titan does not have a right to a hearing under due process principles.

The second manner in which the right to a contested case hearing arises is by grant in a statute or rule. See *Delly v Bureau of State Lottery*, 183 Mich App 258, 263; 454 NW2d 141 (1990); *McBride v Pontiac School Dist.*, 218 Mich App 113, 122; 553 NW2d 646 (1996). See also *LeDuc*, supra, § 6:02, p. 391. Controlling this inquiry is a basic tenant of administrative law: an agency has only those powers provided to it by statute. See *York v Detroit*, 438 Mich 744, 275 NW2d 346 (1991); *Coffman v State Board of Examiners in Optometry*, 331 Mich 582; 50 NW2d 322 (1951). In general, the right to conduct a contested case must be authorized by statute or administrative rule

⁴ The APA is not self-executing, thus entitlement to a contested case hearing under its auspices derives from an independent statutory provision: “Because an evidentiary hearing is not required by statute in connection with a transfer request, such a proceeding is not a contested case and therefore is not covered by the appeals procedure of the APA. [Citations omitted].” *J & P Market, Inc v Liquor Control Comm.*, 199 Mich App 646, 650; 502 NW2d 374 (1993) See also *Kelly Downs, Inc v Racing Commission*, 60 Mich App 539; 231 NW2d 443 (1975).

because “doubtful power does not exist.” See *In Re Quality Service Standard*, 204 Mich App 607, 611; 516 NW2d 142 (1994). In this case, the relevant statute is Part 615, and the rules promulgated under its authority.

Titan does not point to any authority under Part 615 requiring that the Supervisor conduct a contested case hearing before issuing an order of the type at issue in this case. In fact, the Supervisor has broad authority under Part 615 to issue orders for the prevention of waste. MCL 324.61507. Although a hearing is called for in this section, an evidentiary hearing is not required. Importantly, the Supervisor is specifically authorized to issue orders to prevent waste and to fix the spacing and regulate production from wells. MCL 324.61506(a) and (j). Hearings are not required under these provisions. Titan’s reliance on R 324.1205 to support its position that the procedure is a contested case is also misplaced. The Rule contemplates that a petition is filed and that the Supervisor finds it to be “complete, reasonable, and appropriate . . .” R 324.1205(1). In this case, there was no petition filed requesting relief from the Supervisor. The OGS staff informally requested that the Supervisor consider issuing an order establishing spacing and allowables, among other issues, in a certain geographic area for wells in the Trenton-Black River Formation. The administrative rules further provide that: “Hearings may be held to receive evidence pertaining to the need or desirability of an action or order by the supervisor. A hearing may be scheduled at the initiative of the supervisor or by the supervisor upon the receipt of a petition . . .” R 324.1201. By use of the word “may” in this Rule, hearings under this provision are discretionary. Through its Rule, the Department has indicated a preference for gathering information through a contested case hearing process before issuing an order. This procedural preference does not create the right to a contested case hearing under Part 615 or the Rules.

As noted, the APA defines a contested case as “a proceeding . . . in which a determination of the legal rights, duties or privileges of a named party is required . . .” MCL 24.203(3). Titan argues that when it filed its answer to the Notice of Hearing, it and others, became a “named party.” Titan Reply Brief, p 5. However, the hearing in

this case was initiated by the OGS staff and noticed for hearing by the Assistant Supervisor under the authority of MCL 324.61506. There were no named parties listed, but instead the notice solicited answers from interested persons, a process wholly incompatible with the definition of "contested case" under the APA. Several persons and entities did file timely answers to the notice, and each became a party to the proceeding. However, they did not become "named" parties as required to invoke a contested case in the first instance. MCL 24.203(3). This statutory language is clear and unambiguous and must be applied as written. *Federated Publications, Inc. v City of Lansing*, 467 Mich 98, 107; 649 NW2d 383 (2002). If the language of the statute is clear, then the statute is to be enforced as written. *Id.* Thus, because "the legal rights, duties, or privileges of a named party" were not determined, the proceeding was not a contested case, and I so conclude, as a Matter of Law. The fact that the hearing was conducted consistent with the APA does not change this result. See *McBride v Pontiac School District*, 218 Mich App 113; 553 NW2d 646 (1996). The Assistant Supervisor merely preferred to gather technical information regarding the issues through a formal process that was consistent with the APA.

Based on the foregoing, I conclude, as a Matter of Law, there is no mandate in Part 615 or its administrative rules that requires a contested case hearing or an evidentiary hearing be held before issuance of an Order of the nature at issue in this case. MCL 324.61506.

II. Substantive Issues

Turning to the substantive issues raised by Titan, it claims that the Assistant Supervisor failed to take into account the record as a whole when issuing the Order. The basis for this claim is its position that there should be "separate spacing and allowable protocol for the Trenton-Black River Formation wells at depths at or below 4,000 feet from the surface." Titan Reply Brief, p. 7. Its expert witness testified that fractures at that depth are approximately 660 feet wide, which is the width of a 20-acre

drilling unit.⁵ With the use of new 3-d seismic technology, these fractures can be identified with sufficient precision making 20-acre drilling units more efficient and, thus, prevent waste by excluding unproductive rock.⁶

Generally, persons interested in this proceeding supported either 20-acre or 40-acre drilling units, and offered evidence accordingly. The evidence preponderates in support of 40-acre drilling units for the 15 county areas under consideration.⁷ Titan is the only participant that presented evidence regarding differences in the Trenton-Black River Formation above and below 4,000 feet from the surface.⁸ Titan argues that the Assistant Supervisor completely ignored this testimony. Oral Argument, Tr. p. 23. The Assistant Supervisor rejected 20-acre drilling units and adopted 40-acre units comprised of combining two 20-acre parcels, each of which shall consist of the north and south or east and west halves of a quarter-quarter section or of adjacent quarter-quarter sections. Order, p. 15. Contrary to Titan's argument, the Order does specifically acknowledge Titan's evidence regarding the alleged differences in the Trenton-Black River Formation above and below 4,000 from the surface. Order, p. 7. The record reflects that evidence of both 20-acre and 40-acre drilling units was proffered including well setbacks and the use of 3-d seismic technology to identify potential reservoirs. The Assistant Supervisor considered the benefits and detriments of each drilling unit size in the Order, and determined that the 40-acre drilling unit is preferable from a prevention of waste perspective. Further, Mr. Dean's testimony regarding Titan's support for 20-acre units is based on a portion of the Albion Scipio Field⁹, while the Order covers 15 counties.¹⁰

⁵ See Tr. Vol V, p. 940 (Deans); Tr. Vol V, p. 820 (Deans); Tr. Vol V, p. 917 (Suckle).

⁶ See Tr. Vol V, p. 890 (Woods).

⁷ For example see Tr. Vol I, pp. 149-150 (Murry); Tr. Vol III, p. 487 (Stelzer); Tr. Vol I, p. 18 (Godbold); Tr. Vol V, p. 766 (Brock); Tr. Vol IV, p. 635 (Sandveit).

⁸ The participants in this case stipulated that the formation covered by this Order consists of a certain depth as measured in the Mobil Oil Corporation Reeve Unit No. 1 well. Order, pp. 4-5. The stipulation does not differentiate the formation by various depths as advocated by Titan.

⁹ Tr. Vol V, p. 815.

¹⁰ At oral argument, Titan submitted its proposed changes to the Order. Its proposed paragraph 5.b. discusses a "non-standard drilling unit" applicable only to five of the 15 counties covered by the Order.

I find it would be inappropriate to establish a drilling unit size and configuration for the 15 county area covered by the Order based on Titan's analysis and experience in a portion the Albion Scipio Field. Based on this record, the Assistant Supervisor is correct in that 40-acre drilling units constructed of adjacent 20-acre parcels provide flexibility and is the maximum area that can be efficiently and economically drained by one well. MCL 324.61513(2). I find, for the 15 county area addressed by the Order, 20-acre drilling units would result in the drilling of unnecessary wells.

Although the Order concludes that 40-acre drilling units are generally preferable to 20-acre drilling units, it does provide for exceptions. For instance, a second well may be drilled on a 40-acre drilling unit and be provided an additional allowable for gas production. Order, p. 16. The second well can be produced if the operator shows, on filing a petition for a contested case, that the second well is in a separate reservoir.¹¹ *Id.* Titan argues that because an operator must file a petition and present evidence to establish a second well on a 40-acre drilling unit, that the exception is burdensome and wasteful. Reply Brief, p. 12. Although the requirement of filing a petition for an exception may be more burdensome than an administrative approval, the record supports this procedure as a mechanism to provide notice to adjacent owners and operators.¹²

Along these same lines, Titan argues that the Order provides for a one-half production allowable for a well on a 20-acre unit, and this allowable is inappropriate for wells below 4,000 feet. Reply Brief, p. 14. This argument is merely a different view of Titan's position that 20-acre drilling units are more appropriate than are 40-acre units. Further, the Order does not limit the production from two wells on a 40-acre unit to a one-half allowable if it can be shown the wells are in separate reservoirs. Order, p. 16.

Based on the forgoing, it is abundantly clear that the Assistant Supervisor did consider the entire record in this matter and properly set the drilling unit size,

¹¹ This type of hearing would be a contested case hearing because a named person files a petition and a determination of the legal rights, duties or privileges of a named party is required. " MCL 24.203(3).

¹² Further, the administrative rules allow an operator to petition the Supervisor to seek exceptions to proration allowables. R 324.611.

production allowables, and exceptions based on the entirety of the record, and his technical knowledge and expertise. Further, I conclude the Supervisor has broad authority and is specifically authorized to issue orders regarding the spacing and proration of wells. MCL 324.61506(a) and (j). Based on the above, it is determined that Order Number 18-2007, as amended, should be affirmed and, therefore, this Appeal must be denied.

NOW, THEREFORE, IT IS ORDERED:

1. The Appeal of Titan Energy, LLC is DENIED.
2. The Assistant Supervisor's Order 18-2007, as amended, is ADOPTED and INCORPORATED into this Order on Appeal.
3. This Order on Appeal constitutes the final agency decision on the request of the Office of Geological Survey staff for an Order of the Supervisor of Wells regarding the Trenton-Black River Formation in southern Michigan.

Dated: 9/16/10



Rebecca Humphries, Director
Department of Natural Resources and Environment