CC: Pat McKay
Joyce BROKA, Sag. Bay D.O

State of Michigan

Court of Appeals

Lansing Office

TO ATTORNEYS OF RECORD:

Enclosed with this letter is the decision and opinion in the entitled matter. Under MCR 7.215(E), this opinion is the judgment of the Court of Appeals. The official date of the filing of this opinion is the date that is printed on it, and all time periods for further action under the rules will run from that date. See MCR 7.215(F) and (I), and MCR 7.302(C)(2)(b).

If the words *For Publication* appear on the face of this opinion, it will be published in the Michigan Appeals Reports. If the word *Unpublished* appears on the face of this opinion, it was not slated for publication at the time it was released. See MCR 7.215(A).

Although an opinion that is to be published is official as of the date that is printed on it, actual publication will be delayed until editorial work is completed in the Reporter's Office. This editorial work may result in slight changes in style or in citations when the opinion is published in the Michigan Appeals Reports.

I hereby certify that the annexed is a true and correct copy of the opinion filed in the record of the Court of Appeals in the entitled matter and that the date printed thereon is the actual date of filing.

Very truly yours,

Sandra Schultz Mengel
Chief Clerk

SSM/las

Encl.

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STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL and DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiffs-Appellants,

v

IMLAY CITY GAS AND OIL COMPANY,

Defendant/Cross-Defendant-Appellee,

and

TPI PETROLEUM, INC.,

Defendant/Cross-Plaintiff/Third-Party Plaintiff-Appellee,

and

KENNETH H. MATTIS,

Third-Party Defendant.

UNPUBLISHED
July 14, 2005

No. 254418
Ingham Circuit Court
LC No. 02-00971-CE

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted an order denying their motion for partial summary disposition. This action arose from defendant Imlay City Gas and Oil's alleged failure to comply with the terms of an administrative order (AO) issued pursuant to Part 201 of the Michigan Natural Resources and Environmental Protection Act (NREPA), MCL 324.20101 *et seq.* Imlay City is the predecessor in interest of TPI Petroleum, Inc. TPI was dismissed from this lawsuit by stipulation of the parties. We affirm.

At all times relevant to this appeal, Imlay City operated a commercial gasoline filling station in Caro, Michigan. On January 28, 1993, plaintiff Department of Environmental Quality (MDEQ)[1] confirmed a release of petroleum from one or more of the gas station's underground storage tanks. Plaintiffs informed Imlay City of its responsibilities under the Michigan Leaking Underground Storage Tanks Act, MCL 324.21301a *et seq.*, to remediate the site. Eventually, it was determined there was both on-site and off-site soil and groundwater contamination resulting from the tank leaks.

In 1997, MDEQ inspected the site and found twenty inches of gasoline in an off-site monitoring well. At that point, plaintiffs notified Imlay City that it was liable for clean up under NREPA. Plaintiffs claim that between July and September of 1997, they had numerous contacts with Imlay City and its environmental consultants urging them to take corrective action immediately due to the threat the contamination posed to human health and the environment. In early September 1997, Imlay City's work plan to complete delineation and remediation activities was accepted. Thereafter, plaintiffs warned Imlay City several times that it was failing to comply with the response activities on which the parties agreed and was therefore out of compliance with the work plan and NREPA requirements. By early 1998, contamination had been detected in three wells lying 1,600 feet downgradient from the original source of contamination.

Throughout 1998, the parties negotiated the scope of delineation and remediation activities necessary to clean up the site. On November 20, 1998, an AO for response activity was issued. Imlay City did not contest the order and communicated its intent to comply. On June 28, 2002, plaintiffs filed the instant lawsuit claiming that Imlay City had failed to comply with the AO and requesting a court order enforcing the terms of the AO, along with past and future response costs and civil penalties. On January 30, 2004, plaintiffs moved for partial summary disposition under MCR 2.116(C)(10). They supported their motion with a copy of the administrative record and an affidavit of MDEQ's project coordinator for the site. Imlay City responded that it had fully complied with the AO and with Part 213 of NREPA, or that there was at least a genuine issue of material fact with respect to compliance. Imlay City also relied on the administrative record, along with affidavits from environmental consultants. The trial court agreed that an issue of material fact existed regarding compliance and denied plaintiffs' motion.

Plaintiffs first argue that the trial court employed the wrong standard of review when reviewing the decision that the AO had been violated. They claim MCL 324.20137(5) mandates that the decision be reviewed under an arbitrary and capricious standard. We review the denial of a motion for summary disposition de novo. *Ditmore v Michalik*, 244 Mich App 569, 574; 625 NW2d 462 (2001). Issues of statutory interpretation are also reviewed de novo. *Jenkins v Patel*, 471 Mich 158, 162; 684 NW2d 346 (2004). MCL 324.20137(5) provides:

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[1] At that time the relationship between the parties began, the Michigan Department of Natural Resources (MDNR) was the state agency charged with environmental enforcement. Later, MDEQ was created and became Michigan's primary environmental enforcement agency. To avoid confusion, this opinion will only employ the acronym MDEQ.

> In any judicial action under this part, judicial review of any issues concerning the selection or adequacy of a response activity[2] taken, ordered, or agreed to by the state are limited to the administrative record. If the court finds that the record is incomplete or inadequate, the court may consider supplemental material in the action. In considering objections raised in a judicial action under this part, *the court shall uphold the state's decision in selecting a response activity unless the objecting party can demonstrate based on the administrative record that the decision was arbitrary and capricious or otherwise not in accordance with law.* In reviewing alleged procedural errors, the court may disallow costs or damages only to the extent the errors were so serious and related to matters of such central importance that the activity would have been significantly changed had the errors not been made. [Emphasis added.]

It is clear from the plain language of the MCL 324.20137(5) that the arbitrary and capricious standard applies to MDEQ's selection of a response activity, not defendant's compliance with the administrative order setting forth the required response activity.

Plaintiffs next argue that the court erred in failing to grant plaintiffs' motion under MCR 2.116(C)(10).[3] We disagree.

> "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004), quoting *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).]

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[2] "Response activity" is defined under MCL 324.20101(1)(ee) as follows:

> "Response activity" means evaluation, interim response activity, remedial action, demolition, or the taking of other actions necessary to protect the public health, safety, or welfare, or the environment or the natural resources. Response activity also includes health assessments or health effect studies carried out under the supervision, or with the approval of, the department of public health and enforcement actions related to any response activity.

[3] Although plaintiffs' summary disposition motion referred to the site coordinator's affidavit to establish violations of the administrative order, and the affidavit listed nine violations (a through i), we shall only address those raised in plaintiffs' brief on appeal.

Section 5.1 of the AO required defendant to use active free product recovery methods unless defendant provided documentation that a passive recovery method would influence the entire plume of contamination and would be the most effective method of recovery.[4] The affidavit of MDEQ's site coordinator stated that defendant had routinely used "ineffective passive free product recovery methods with only infrequent use of effective active methods." Plaintiffs further noted that they had on several occasions advised defendant to propose and implement active free product recovery methods, and defendant's failure to implement active methods had resulted in the migration of the contamination to a previously uncontaminated monitoring well. However, the portion of the administrative record provided on appeal contains several instances where the MDEQ rejected defendant's proposed active methods.

Moreover, defendant's secretary asserted that no measurable free product had been located at the property since September, 2002. In a January 2, 2002 letter, defendant's environmental consultant referred to site-specific data when he disputed the MDEQ's claim that the plume was expanding and stated that contaminant levels downgradient of the source had either stayed the same or decreased. Plaintiffs' counsel acknowledged at the hearing on the motion to enforce the administrative order that defendant had tested for free product for six months and not found it. And while MDEQ's March 2, 1999 letter and June 25, 2002 summation and conclusions of defendant's corrective actions indicated that vacuum extraction technology was the preferred method for free product recovery, defendant reported that the enhanced fluid recovery it performed on September 22, 2001, did not recover any separate phase hydrocarbons. Thus, a question of material fact existed whether defendant sufficiently documented that its passive recovery methods were effective and influenced the entire plume.[5]

Section 5.3 of the AO required defendant to define the full horizontal and vertical extent of both groundwater contamination and soil contamination to residential risk based screening levels. In MDEQ's June 25, 2002 summation and conclusions of defendant's corrective actions, the site coordinator indicated that groundwater contamination was not sufficiently defined laterally from monitor wells 10 and 31, and was not sufficiently defined downgradient from monitor well 33 southeast. A December 15, 2000 map produced by defendant's consultant

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[4] A March 2, 1999 letter from MDEQ's site coordinator to defendant's qualified consultant indicated that only site-specific documentation – presumably as opposed to historical performance or predictive modeling – would be accepted with respect to the effectiveness of any proposed passive recovery method. It is difficult to conceive how defendant could demonstrate with site-specific documentation that a passive recovery method was the most effective method of recovery without actually using the method to develop the site-specific documentation.

[5] Although plaintiffs argue that defendant was required to implement the February 15, 1999 work plan that was approved with conditions on March 23, 1999; defendant implemented an entirely different plan; and defendant failed to demonstrate to the trial court that another plan was submitted to and approved by the MDEQ, plaintiffs have failed to provide or cite to the February 15, 1999 work plan in the trial court record. Therefore, we consider this argument abandoned. A party may not leave it to this Court to search for the factual basis to sustain or reject a position, but must support factual statements with specific references to the record. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

demonstrates that monitor well 37 is located directly southeast of monitor well 33. According to a February 17, 2004 letter from defendant's counsel to the MDEQ, the level of contamination at monitor well 37 was below risk based screening levels. Moreover, a December 30, 2002 map produced by defendant's consultant demonstrates that monitor well 36 is located south of monitor well 31 and south southwest of monitor well 10. The February 17, 2004 letter also indicated that monitor well 36 contained contamination below risk based screening levels. Therefore, an issue of material fact existed whether the horizontal and vertical extent of groundwater was sufficiently determined.

With respect to soil contamination, a May 1999 monthly status report and a January 25, 2001 letter from MDEQ's site coordinator indicated that the consultant inappropriately relied on data obtained either at the time of, or before, the 1996 release, and the consultant's statement that the soil plume was below the utility corridor was insufficient without information regarding the utility depth. A July 28, 2000 final assessment review attached to an August 1, 2000 letter indicated that analytical data demonstrated soil contamination from ten to twenty feet deep to monitoring wells located north, northeast, south, and southeast of the site, but there was insufficient data to the northwest and southwest; it also indicated that soil contamination was identified at a three-foot depth, but that the extent of the shallow contamination was not adequately addressed. MDEQ's site coordinator claimed in a June 25, 2002 letter that no soil investigation had occurred since February 13, 2001; however, the attached June 25, 2002 summation and conclusions of corrective actions acknowledged that defendant repeatedly asserted that the extent of soil contamination was defined. The January 2, 2002 letter from defendant's consultant indicated that samples collected in August 2001 from soil gas vapor wells in the westerly direction indicated non-detectable concentrations of analyzed compounds. Moreover, the consultant indicated that expanded sampling was conducted according to a February 13, 2001 discussion with MDEQ staff, and the results were submitted with the consultant's FAR amendment. An issue of material fact existed whether the extent of soil contamination was adequately defined.

Section 5.3 of the AO also required defendant to notify members of the public who were directly impacted by the contamination. The MDEQ site coordinator identified two addresses in the April 28 to May 12, 1999 leaking underground storage tank audit report, which may have been located within the area of contamination, but whose owners were not notified. Defendant's consultant's January 2, 2002 letter indicated that Figure 17 and Attachment IV of the October 8, 1999 FAR identified eighty-seven properties and owners who were affected and who received notice, and stated that additional owners would be notified when data confirmed that their property was contaminated above risk based screening levels. In its January 25, 2001 letter, the MDEQ indicated for the first time that easement holders, utilities, and highway authorities had to be notified. In its June 25, 2002 notice of continuing violation, the MDEQ countered that defendant had only sent eighty-one notices; the remaining six properties were listed as having unknown owners, and no additional attempts to identify the unknown owners were made. The letter also indicated that defendant failed to document notification of the previously identified property owners who were entitled to notification.

Only a portion of the administrative record, which did not include the October 8, 1999 FAR, was provided to this Court on appeal. Although the site coordinator identified two addresses to which notice was not sent, there is no proof before this Court that these two

addresses were located within the area of contamination. Moreover, although the MDEQ indicated that defendant was required to notify easement holders, utilities, and highway authorities, plaintiffs have not provided any evidence that easements were located within the area of contamination or provided the names of owners of utilities who were not notified. Given that monitor well 9 appears to have been installed within the highway right of way according to defendant's map, it is at least an issue of fact whether highway authorities were provided sufficient notice. Therefore, it is not possible to determine whether the eighty-seven notices documented in the October 8, 1999 FAR were sufficient, and a question of material fact exists with respect to the sufficiency of notice.

Sections 5.5 and 5.6 of the AO required defendant to submit a final assessment report (FAR) containing a corrective action plan and to implement the plan once it was approved. Plaintiffs claim defendant failed to submit an approvable FAR because defendant failed to provide an appropriate corrective action plan and failed to determine the extent of the contamination; however as previously indicated, because issues of material fact existed whether an appropriate corrective action plan was submitted and whether defendant sufficiently determined the extent of contamination, an issue of material fact exists whether defendant complied with sections 5.5 and 5.6.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Donald S. Owens