

**STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
SUPERVISOR OF WELLS**

THE PETITION OF PAUL BRADY AND AUGUST JYLA, TO)
CONTEST SPACING EXCEPTIONS GRANTED UNDER)
R 324.303 IN KALKASKA COUNTY, MICHIGAN, AND FOR) CAUSE NO. 01-2014
CREATION OF A SPACING ORDER FOR THE UTICA)
SHALE FORMATION AND THE COLLINGWOOD SHALE)
FORMATION)
_____)

PETITION

This matter was brought before the Supervisor of Wells ("Supervisor") pursuant to an Order issued by Ingham County Circuit Court Judge Clinton Canady III, dated November 13, 2013. That order granted the motion of the Michigan Department of Environmental Quality (MDEQ) (in which Encana Oil & Gas [USA] Inc. ["Encana"] concurred) for summary disposition and directed the Petitioners Paul Brady and August Jyla ("Petitioners") to file a petition for an administrative hearing before the Supervisor.

The Petitioners filed a Verified Petition to Contest Spacing Exceptions Pursuant to Rule 324.1201 and for Investigation and Creation of an Order by the Supervisor Spacing the Utica Collingwood Formation Pursuant to Rule 324.302 ("Petition"). The Petition was dated December 6, 2013.

The Petitioners allege that Brady and his family reside in close proximity to permitted wells that rely on spacing exceptions recently granted to Encana for oil and gas wells targeted for the Utica Shale Formation and Collingwood Shale Formation (the "Utica/Collingwood") in Excelsior and Oliver Townships, Kalkaska County, Michigan to wit:

Pad A:

State Excelsior 1-14 HDI, Permit #60746
State Excelsior 1-12 HDI, Permit #60747
State Excelsior 1-11 HDI, Permit #60748
State Excelsior 2-14 HDI, Permit #60749
State Excelsior 2-12 HDI, Permit #60750

Pad C:

State Oliver 3-13 HDI, Permit #60818
State Excelsior 4-25 HDI, Permit #60819
State Oliver 2-13 HDI, Permit #60820
State Oliver 1-13 HDI, Permit #60821
State Excelsior 5-25 HDI, Permit #60822

Pad B:

State Excelsior 3-12 HDI, Permit #60765
State Excelsior 4-12 HDI, Permit #60766
State Excelsior 5-12 HDI, Permit #60767

The Petitioners also allege that Petitioner Brady and his family reside in close proximity to pending applications for permits for the Black River Conserv. Assoc. 1-9 HDI and 6-9 HDI in Bear Lake South Township, Kalkaska County, Michigan, which also contain requests for spacing exceptions similar to those already issued in connection with the permits referenced above.

Petitioner Brady alleges that he and his family use and enjoy adjacent state lands, including those within drilling units of such drilling permits. He alleges that the proposed spacing orders will result in likely adverse impacts of his family's property, and his family's property values, and endanger their health and safety because of the likely interference and adverse risk and impacts from the spacing exceptions and/or orders.

Similarly, Petitioner Jyla alleges that his land is situated in close proximity to the permitted well locations which rely on spacing exceptions recently granted to Encana on Pad C. Petitioner Jyla alleges impacts on his correlative rights in oil and gas. Petitioner Jyla further alleges that the spacing exceptions or orders are likely to result in adverse impacts on the use and enjoyment of his family's property and adjacent state lands, and threaten their health and safety because of the likely interference and adverse risk and impacts from the spacing exceptions and/or orders.

As a result, the Petitioners request a determination that the pending applications and/or spacing exception orders are based on administratively incomplete information as required by law and rules; suspension of permits for Pads A, B, and C and cessation of issuance of permits for other Utica/Collingwood wells; production of various documents, data and information; and the promulgation of a uniform spacing order for the Utica/Collingwood.

The Joneses support the Petitioners' Petition as they allegedly also "reside in close proximity to the permits which rely on spacing exceptions recently granted to Encana . . ."

JURISDICTION

The development of oil and gas in this state is regulated under Part 615, Supervisor of Wells, of the Natural Resources and Environmental Protection Act,

1994 PA 451, as amended (NREPA), MCL 324.61501, et seq. Part 615 directs the Supervisor to prevent "waste," and gives the Supervisor jurisdiction and authority over all matters relating to the prevention of waste. MCL 324.61506 and 324.61505, respectively. "Waste" is defined as including, among other things, the locating, spacing, or drilling of a well or wells in a manner to reduce or tend to reduce the total quantity of oil or gas ultimately recoverable from any pool; unnecessary damage to or destruction of the surface, soils, animal, fish, or aquatic life, property, or other environmental values from or by oil and gas operations; unnecessary endangerment of public health, safety, or welfare from or by oil and gas operations; and the drilling of unnecessary wells. MCL 324.61501(q). Part 615 specifically authorizes the Supervisor to require the locating, drilling, casing, sealing, and operating of wells drilled for oil and gas to be done in such manner and by such means as to prevent the escape of oil or gas out of one stratum into another. MCL 324.61506(c). Further, Part 615 authorizes the Supervisor to fix the spacing of wells and to regulate the production from wells. MCL 324.61506(j).

Part 615 provides that, upon the verified complaint of any person interested in the subject matter alleging that waste is taking place or is reasonably imminent, the Supervisor shall call a hearing to determine whether or not waste is taking place or is reasonably imminent, and what action should be taken to prevent that waste. MCL 324.61507. Hearings in such matters are governed by the applicable provisions of the Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.201, et seq. See 1996 MR 9, R 324.1203. Such causes are delegated by the Supervisor to the Assistant Supervisor of Wells for hearings and decisions.

PROCEDURAL HISTORY

The Petition in this matter was dated December 6, 2013. The Assistant Supervisor issued a Notice of Hearing on January 17, 2014. The Notice identified three issues:

1. The Petitioners' request for the Supervisor to determine pending applications and spacing exceptions to be inadequate, determine whether fractures have or are likely to intersect, and suspend existing permits.

2. The Petitioners' request for the Supervisor to request certain technical and scientific data from Encana for all wells in the Utica/Collingwood and evaluate the data to determine fracture characteristics and extent.

3. The Petitioners' request for a uniform spacing order for the Utica/Collingwood.

In the Notice the Assistant Supervisor scheduled a hearing for March 4, 2014, to consider issues 1 and 2, and stated that issue 3 would be considered at a later date.

The Respondent Encana and the Respondent MDEQ filed answers to the Petition and motions for partial summary disposition alleging that the Petitioners' assertions regarding setback requirements for well location were based on an erroneous reading of Administrative Rules R 324.303(2)(c) and R 324.301(1)(b)(i). Additionally, the MDEQ argued that application of the Petitioners' interpretation of those rules would create waste. The Petitioners responded that the rules governing spacing and location of oil and gas wells are unjustifiably ambiguous and confusing, requiring clarification for future well permitting decisions and that the Petitioners' reading of the relevant rules was a reasonable one.

Kosco Energy Group, LLC ("Kosco") filed an answer to the Petition stating in particular its position as to well spacing. Mark Jones also filed an answer to the Petition stating his concurrence with the position of the Petitioners and also objecting to noise and truck traffic. That answer was signed only by Mark Jones but purported to also represent Todd Jones.¹

1. Prehearing Conference

Because a number of questions were raised that required clarification, the Assistant Supervisor issued an order on February 28, 2014, converting the March 4, hearing to a prehearing conference.

¹ The Joneses did not file a Petition in this matter seeking any independent relief for themselves. Instead, the Joneses are Respondents to the Brady/Jyla Petition. The issues related to truck traffic and noise are, thus, not appropriate for consideration in this cause. See also the section on Standing set forth herein.

At the prehearing conference, a Scheduling Order was issued which, in part, required the Petitioners and Respondent Kosco to file More Definite Statements on or before March 18, 2014. Both parties did so in a timely manner.

The Petitioners' More Definite Statement expanded on their original Petition by discussing jurisdiction, standing, ripeness of claims, and the MDEQ's statutory and regulatory duties. The Petitioners' request for relief was similar to that in their Petition and requested productions of certain information, documents, and data; the suspension of the permits and spacing exceptions at issue during the pendency of these proceedings; the suspension of the consideration or issuance of any further spacing exceptions during the pendency of these proceedings; and costs.

In addition, the Scheduling Order provided a schedule for the filing of motions for discovery, and additional and/or supplemental motions for summary disposition and responses to any such motions filed.

At the prehearing, the Assistant Supervisor established that the request for a uniform spacing order for the Utica/Collingwood would be a matter to be considered for a separate proceeding as it was the second request made for such an order (the other being made by Kosco).

2. Motions Filed

Pursuant to the Scheduling Order, the following motions and responses were filed:

1. The Petitioners filed a Motion for Discovery on March 17, 2014, the MDEQ filed an Answer in Opposition on April 1, 2014, and the Petitioners filed a Response to the MDEQ's Answer on April 10, 2014.

2. Encana filed a Motion for Summary Disposition (with supporting brief) challenging the Petitioners' standing on April 10, 2014, the Petitioners filed a Response (with supporting brief) on April 22, 2014, and Encana filed a Reply (brief) on April 24, 2014.

3. Encana filed a Motion for Summary Disposition challenging Mark and Todd Jones' standing and their allegations regarding flaws in the permitting

process (with supporting brief) on April 10, 2014, the Joneses filed an Answer on April 22, 2014, the MDEQ filed a Brief in Response on April 22, 2014, and Encana filed a Reply (brief) on April 24, 2014.

4. Encana filed a Motion for Summary Disposition challenging the Petitioners' allegations regarding flaws in the permitting process (with supporting brief) on April 10, 2014, the Petitioners filed a Response (with supporting brief) on April 22, 2014, the MDEQ filed a Brief in Response on April 22, 2014, and Encana filed a Reply (brief) on April 24, 2014.

5. Encana filed a Motion for Summary Disposition regarding claims raised by Kosco on April 10, 2014, and Kosco filed an Answer on April 22, 2014.

6. The MDEQ filed a Second Motion for Summary Disposition challenging the Petitioners' standing, the Petitioners' allegations regarding flaws in the permitting process, and the ripeness of one claim by the Petitioners (with supporting brief) on April 11, 2014, and the Petitioners filed a Response (with supporting brief) on April 22, 2014.

Pursuant to the Scheduling Order, oral argument on all motions was tentatively scheduled (at the discretion of the Assistant Supervisor) for Friday, May 2, 2014.

Because the issues of the parties were well defined and thoroughly briefed by the parties in pleadings (including all motions, responses, replies, and briefs), the Assistant Supervisor opted to dispense with oral argument, and cancelled the hearing on oral argument.

FINDINGS OF FACT

Question 1: Standing

One of the first matters of concern raised by the Respondents Encana and the MDEQ is that of standing of the Petitioners and the Joneses to bring their claims against the MDEQ and Encana.

The Petitioners claim that they will be harmed due to the proximity of their property to the subject proposed well sites and because of impairment of their use and enjoyment of State lands adjacent to the well sites and within the associated drilling units. They claim that due to alleged interference and communication between wells that there is a particular hazard associated with the subject wells and permits.

The Petitioners claim that they have standing pursuant to Michigan Administrative Code R 324.1201 and MCL 324.61507 as "interested persons," and cite case law (*Karrip v Cannon Tp*, 115 Mich App 726, 733 [1982]) to support their position.

The Joneses support the Petition and also allege they "reside in close proximity to permits which rely on spacing exceptions recently granted to Encana . . ." Thus, the Joneses are similarly situated to the Petitioners as property owners in the vicinity.

Encana states that the Petitioners and Joneses do not have standing as they fail to meet the criteria set forth in *Lansing School Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372 (2010), *Duck Lake Riparian Owners Ass'n v Fruitland Twp*, unpublished opinion per curiam of the Court of Appeals, issued March 6, 2014, (Docket No. 312295), and *Joseph v Grand Blanc Twp*, 5 Mich App 566 (1967). In part, Encana argues that, under the above standards, the Petitioners' ownership of nearby property is of no consequence because merely owning adjoining or nearby property does not per se confer standing (*Duck Lake*), that the Petitioners have failed to allege any harm distinct from the general public and have, thus, failed to allege a special injury, right or substantial interest that will be detrimentally affected in a manner different from the citizenry at large (*Lansing*), and neither the Petitioners' nor the Joneses own any property within an existing drilling unit, so there can be no interference or communication between the subject wells proposed by Encana and any well on the Petitioners' or the Joneses' property (the only potential for interference or communication to which the Petitioners allude will be between Encana's own wells). Encana argues that the Joneses fail to have standing for the same reason as the Petitioners.

The MDEQ concurs with Encana because the Petitioners and the Joneses are not owners within the drilling unit and there is no indication that waste or harm of any kind will occur.

As to the issue of standing, I find that the rules regarding standing as set forth in the brief of Encana and the MDEQ to be controlling in this matter and I also find the rationale in support of summary disposition as set forth therein to be persuasive. I find the Petitioners and the Joneses failed to show any special or particular hazard from the proposed wells or existing or proposed permits.

I find that Part 615 and the Administrative Rules thereunder do not confer standing on "any person" but on "interested persons" and that an "interested person" is a person who has a personal interest or involvement in an action. I find that the Petitioners and the Joneses do not have any personal interest or involvement in the permits or spacing exceptions at issue because they are not owners of property within the drilling unit at issue. I find that the Petitioners' and the Joneses' speculative and generalized allegations of harm, when they are not property owners within the unit and have not alleged any harm different from that which could be alleged by the citizenry at large, do not confer standing to challenge the permits or spacing exceptions in this matter either statutorily or under case law. I find that the Petitioners and the Joneses have alleged no special injury, right, or substantial interest that will be detrimentally affected in a manner different from the general citizenry at large and have, thus, not met the test for standing under *Lansing*. Further, I find that living adjacent to the drilling unit and using state lands are not interests that rise to the level of "interested person" for the purposes of the statute or rules because "*merely owning adjoining or nearby property does not per se convey standing*" under *Duck Lake*.

While I have determined that the parties do not have standing in this matter, rendering all remaining issues moot, I wish to briefly address the issues of well location and the permitting process to clarify my position on those matters.

Question 2: Location of Wells

The Petitioners state that the subject wells have surface locations 55 to 65 feet apart and allege therefore that they do not meet the requirements of Rule 303(2)(c) that “a well is not located closer than ... 660 feet from adjacent wells.” The Respondents Encana and the MDEQ argue that the separation distance refers to the distance between the productive subsurface portions of wellbores.

I find that the reference to separation distance for “wells” in Rule 303(2)(c) refers to the open subsurface portion of the well where hydrocarbons enter the well bore (which may be referred to as the “bottom hole” location). To require a 660-foot separation between surface locations would in fact potentially result in waste.

The Petitioners further allege that the distances between the subsurface portions of the proposed wellbores have not been shown to be large enough to prevent interference or communication (the Petitioners use the terms synonymously) between wellbores or fractures. The Petitioners assert that this situation may result in environmental and safety concerns, presumably by “communication” of fluids from a wellbore that is being hydraulically fractured into another wellbore in the vicinity. The Respondents Encana and the MDEQ argue that there is no demonstrated risk from proximity of subsurface portions of the wellbores; and that “interference” and “communication” are not the same. The Respondent MDEQ argues further that the agency did consider the issue of interference; that interference pertains to the issue of spacing of wellbores for efficient development of a reservoir, and that communication between wellbores is not in itself detrimental. The MDEQ further argues that, in the unlikely event that interference does occur between the wells, the only party harmed would be Encana.

The Petitioners argue that Special Order 1-73 was not intended to apply to the Utica/Collingwood. The Respondents Encana and the MDEQ argue that Special Order 1-73 is effective for the Utica/Collingwood, especially when applied in conjunction with Rule R 324.303. The Petitioners further argue that the setback between wellbores and drilling unit boundaries may allow for fractures to extend outside of the drilling unit.

I find that the proposed wells meet the setback requirements of Special Order 1-73 and the Rules. I find that the Petitioners confuse the meanings and implications of interference as compared to communication; and that interference is an issue that is more properly raised in connection with a general spacing order for the Utica/Collingwood. I find that potential communication of fluids between wellbores in itself does not pose an environmental or safety problem. Such communication can pose a risk if the nearby wellbore is not constructed properly, or not plugged properly in the case of an abandoned well; however, the Petitioners have not alleged that this is the case here. I find that, from the perspective of hydrocarbon drainage, the question of fractures extending beyond a drilling unit boundary is akin to the question of drainage of hydrocarbons from areas outside of a drilling unit—i.e., the protection for an offsetting owner is to have a well drilled (or in this case, hydraulically fractured) in a drilling unit that incorporates his or her property.

Question 3: Flaws in Permitting Process

The Petitioners request the Supervisor to determine that permitting and/or spacing exception decisions for the subject wells was based on information that is not administratively complete as required by law and rules. The Petitioners claim that the spacing exception applications submitted by Encana to the MDEQ contain insufficient information to satisfy the MDEQ's statutory and regulatory duties to prevent waste, interference, the drilling of unnecessary wells, or even to satisfy the MDEQ's own definition of a permit application's "administrative completeness." The Petitioners request that the MDEQ produce, or require Encana to produce, data, evidence, or other information that could justify the MDEQ's decision to approve and authorize the above described spacing exceptions, including but not limited to all microseismic data, geophone records, reservoir mapping or modeling, fracture mapping, stimulated reservoir volume, and real time production.

The Respondents Encana and the MDEQ argue that the MDEQ has sufficient information to make the permit decisions; and that in any event additional information

would not result in an improvement in protection of the environment or public health and safety.

I find that the MDEQ has the requisite information and data to make an informed decision on the subject permits, and fulfilled the requirements of the Rules.

Question 4: Uniform Spacing Order for the Utica/Collingwood

As discussed and established at the prehearing in this matter, the issue of a general spacing order is being considered a separate matter from that of the Petitioners' challenges to permitting and spacing exceptions in this matter. Kosco's request for a uniform spacing order for the Utica/Collingwood was raised in Cause No. 13-2013. This question will be considered for a separate proceeding.

Other Questions: Ripeness and Discovery

A question of ripeness as to one or more of the permit applications was addressed by the Petitioners and the MDEQ. In addition, the Petitioners moved for discovery in the form of interrogatories and requests for production of documents to the MDEQ. In light of the findings as to standing, it is not necessary to address these issues here.

CONCLUSIONS OF LAW

Based on the findings of fact, I conclude, as a matter of law:

1. The applicable well spacing and location requirements for the subject wells are established by Special Order No. 1-73 and Rule R 324.303.
2. The Supervisor has jurisdiction over the subject matter and the persons interested therein.
3. Due notice of the time, place, and purpose of the hearing was given as required by law, and all interested persons were afforded an opportunity to be heard. 1996 MR 9, R 324.1204.

OPINION AND ORDER

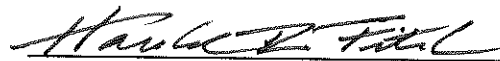
1. Based upon my consideration of the record as a whole and as supported by competent, material, and substantial evidence, I find that the Petitioners and the Joneses lack standing to challenge the permits and spacing exceptions at issue and hereby grant Encana and the MDEQ's motions for summary disposition as to all claims by the Petitioners and the Joneses.

2. Because the Petitioners and the Joneses lack standing, all remaining issues regarding location of wells, suspension of permits, alleged flaws in the permitting process, ripeness, and discovery are moot.

3. The hearings scheduled for May 27 and 30, 2014, in this matter are cancelled and this matter is hereby concluded.

4. This Order shall be effective immediately.

Dated: May 16, 2014



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