

Blue Book

**Department of Environmental Quality
Office of Oil, Gas, and Minerals**

07 - Court Orders

Special Report

Mich. Court of Appeals affirms Supervisor's authority in setting well spacing

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The Michigan Court of Appeals recently rendered its decision in *Klinger v Department of Natural Resources and H & H Star Energy d/b/a PetroStar Energy* (interested party). This decision affirmed the broad powers of the Supervisor of Wells (Supervisor) with respect to establishing the size and shape of drilling units for field wide spacing.

The case involved a petition by PetroStar to field wide space the Burdell Gas Pool. The Boyce 1-19 Well, as the discovery well, penetrated the Prairie du Chien formation.

At the February 18, 1986, hearing before the Supervisor, PetroStar introduced evidence establishing this structure to be oval in shape with a northwest-southeast axis (See Figure I below). The discovery well had been voluntarily pooled into a 320 acre unit and PetroStar asked the Supervisor to establish the 320 acre discovery unit and three L-shaped 640 acre units as set forth in Figure II below. Geological, Geophysical, Petrophysical Engineering and Reservoir Engineering testimony was introduced.

Toward the conclusion of the February hearing, a producer with a nearby acreage position asked for a continuance which the Supervisor of Wells granted, not only on account of that request, but also because the Supervisor desired to have additional geophysical and reservoir data before rendering his field wide spacing order.

Prior to concluding the February hearing, PetroStar, in light of imminent leasehold expirations, sought an Interim Order allowing the drilling of a second well pending the concluding of the field wide spacing hearing on March 18th. Upon the showing that the location PetroStar proposed for the drilling of the second well would not adversely affect any of the spacing configurations being considered, the Supervisor issued the Interim Order.

During the second day of hearings, more geophysical evidence concerning two additional seismic lines and more reservoir engineering data, primarily designed to establish the drainage radius of the discovery well was introduced, as had been requested by the Supervisor. At the conclusion of the hearing, the Supervisor took the matter under advisement and on March 31, 1986, issued his order granting PetroStar's petition for the establishment of 3 L-shaped 640 acre drilling units and one 320 acre unit for the discovery well.

George and Susan Klinger, who are royalty owners of land lying immediately west of the 320 acre discovery unit, peti-

tioned the Ingham County Circuit Court for a review of the matter. The Klingers, whose property being located outside the discovery unit, would have been included in one of the L-shaped units, took position that their property should be included in the drilling unit for the discovery well. The Klingers also argued that their acreage was being drained by the discovery well and that the L-shaped configuration was not an appropriate drilling unit configuration for the development wells.

The gist of PetroStar's argument was that Courts are required to give deference to an administrative agency's (DNR) decision so long as that decision was based on competent, material and substantial evidence from the record as a whole. Moreover, PetroStar argued that the drainage which the Klingers asserted could not possibly have occurred at the time of the hearing, because the discovery well had not been hooked up to a gas pipeline. Thus there was no production and no possibility that gas could be migrating. Moreover, PetroStar took the position that the Klingers' concern over receiving their fair share of the gas would be appropriately addressed at proration hearings before the Public Service Commission.

Ingham County Circuit Court Judge Peter Houk sustained the Supervisor's order and specifically found that Supervisor's authority was sufficiently broad to allow him to establish L-shaped 640 acre drilling units. The Klingers appealed from Judge Houk's decision.

The three judge panel of the Michigan Court of Appeals unanimously affirmed Judge Houk's decision upholding the Supervisor's order. In a very succinct two page opinion, the Court of Appeals stated, among

other things, that the standard of review by which the court is guided is such that it will not overturn an administrative agency decision if the agency's decision is not arbitrary and capricious or contrary to the law or unsupported by competent, material and substantial evidence on the entire record.

Of particular significance is a fact that the Court of Appeals recognized the Supervisor's responsibility to prevent waste. The court stated that any spacing configuration other than that which the Supervisor decided upon would have constituted waste or would have failed to protect correlative rights. The argument illustrating the validity of this claim is that if the Supervisor had opted to establish seven rectangular 320 acre drilling units, three unnecessary wells would have had to have been drilled. The court also recognized that if the Supervisor opted to create square 640 acre units two full quarter sections of 160 acres each which were not underlain by the structure would be receiving royalty and would thereby dilute the royalty of others.

In conclusion, the significance of this decision that it upholds the broad authority of the Department of Natural Resources. This is particularly important because it represents another helpful case which allows industry members to rely on administrative agency decisions not being overturned merely because there might be another way the Supervisor could rule. Obviously, the more work that goes into preparation for an administrative hearing and the greater the level of testimony, the greater the likelihood that the court will find that the Supervisor's (or the Public Service Commission's) decision is supported by competent, material and substantial evidence on the whole record

New Drilling Permit Applications

(continued from page 2)

OTSEGO

Chester, T30N, R2W

- Antrim Gas State Chester ASE 3A State 6-26 (F) Sec 26 NW NE SE AP 891288 (ANT-1600') unit — NE SE (350N/972E)
- Antrim Gas State Chester ASE 3A State 7-26 (F) Sec 26 NW SE SW AP 891289 (ANT-1600') unit — SE SW (350N/350W)
- Antrim Gas State Chester ASE 3A State 8-26 (F) Sec 26 SE SW SE AP 891290 (ANT-1600') unit — SE SW (611S/970W)

ST. CLAIR

Kimball, T6N, R16E

- Lawrence Exploration House, et al 1-34B (W) SL: Sec 34 NE NW NW AP 891309 (BRV-4800') BHL: Sec 34 NE NW NW unit — NW NW (BHL:330N/1004W) Redrill PN 33942

• Private citizens of Michigan hold more than 20,000 jobs directly related to oil and

Big rigs move

(continued from page 5)

14, rigging down early this week on Shell Western E & P's State Lovells 1-25 in Section 25 of Crawford County's Lovells Township, T27N, R1W. Field reports that the well was production cased at total depth could not be confirmed.

Due for drilling is Shell's State South Branch 1-19, Section 19, South Branch Township (T25N, R1W) first of several deep and shallow wildcats either staked or permitted in the area by operators Shell, Leede Oil and Gas and PetroStar Energy. Location is approximately 11 miles south-southeast of the Connors Marsh Prairie du Chien gas discovery in Lovells Township. Target is 11,600 feet in the Prairie du Chien

gas exploration, production and supportive supply and services

DEPARTMENT OF
ATTORNEY GENERAL

MEMORANDUM

January 29, 1990

TO: David F. Hales, Director
Michigan Department of Natural Resources

FROM: Leo H. Friedman *LHF*
Assistant Attorney General
Natural Resources Division

X-2
a.

RE: Eyde Brothers Development Company, and Farmers Oil &
Gas Company; Ingham County CC No. 86-57412-AA

Enclosed for your information is a copy of a January 23, 1990 Opinion issued by Ingham County Circuit Court Judge James R. Giddings. The Court's Opinion affirms the Supervisor of Wells' Special Order #1-86 issued August 8, 1986.

Special Order #1-86 requires 640-acre spacing of gas wells drilled below the top of the Glenwood Member of the Black River Group in 51 counties of Michigan's lower peninsula. Special Order #1-86 was issued following extensive hearings conducted by the Supervisor of Wells.

This matter was handled by Assistant Attorney General Michael C. McDaniel, formerly of this division. An Order consistent with the Circuit Court's Opinion will be presented to the Court.

LHF/csl
Enc.

cc: Jack Bails
R. Thomas Segall ✓
Larry Witte
Bill Fulkerson
Division Attorneys

JAN 25 1990

STATE OF MICHIGAN

HEALTH CARE
FRAUD DIVISION

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

IN RE:

EYDE BROTHERS DEVELOPMENT COMPANY,
and FARMERS OIL & GAS COMPANY,

Petitioners.

DOCKET NO. 86-57412-AA

OPINION

Before the Court is an appeal from a decision of the Supervisor of Wells. Following a public comment hearing, a prehearing conference and a technical evidentiary hearing, the Supervisor issued Special Order 1-86 requiring 640-acre spacing of gas wells drilled below the top of the Glenwood Member of the Black River Group in fifty-one counties of Michigan's lower peninsula. Those counties are underlain by potentially productive zones of natural gas at depths greater than 7,000 feet in the Glenwood geological structure of the massive Prairie du Chien formations. Petitioners challenge this special spacing order for deep gas wells as unlawful and unsupported by competent, material and substantial evidence.

Special Order 1-86 was issued pursuant to the Oil and Gas Conservation Act (the Act), also known as the Supervisor of Wells Act, 1939 PA 61, as amended, MCL 319.1 et seq; MSA 13.139(1) et seq. This Act expresses the state's policies of protecting oil and gas resources from exploitation and waste and of fostering oil and gas development with a view to attaining maximum production and conservation. Section 4 of the Act, MCL 319.4; MSA 13.139(4), underscores this policy by categorically prohibiting waste "in the exploration for or in the development, production, or handling or use of oil or gas; or in the handling of any product thereof."

Under section 5 of the Act, MCL 319.5; MSA 13.139(5), the Supervisor is granted the broadest range of authority in fulfilling the statutory mandate to prevent waste and conserve these natural resources. As spelled out in several sections of the Act, the Supervisor's mission is to prevent waste in oil and gas drilling. Manufacturers Nat'l Bank of Detroit v Dep't of Natural

Resources, 420 Mich 128, 132; 362 NW2d 572 (1984); Traverse Oil Co v Chairman, Natural Resources Comm, 153 Mich App 679, 687; 396 NW2d 498 (1986); Wronski v Sun Oil Co, 89 Mich App 11, 19; 279 NW2d 564 (1979), lv den 407 Mich 863 (1979).

Section 7 of the Act, MCL 319.7; MSA 13.139(7), provides the procedure to be followed pursuant to the Supervisor's duty to prevent waste:

"Upon the initiative of the supervisor or the board, or upon 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, or direct the board to call a hearing, to determine whether or not waste is taking place or is reasonably imminent, and what action should be taken to prevent such waste. Whenever the supervisor so directs, the board shall hold a hearing and shall promptly make its findings and recommendations, and the supervisor shall promptly consider the same, promulgating such rules, regulations, or orders as he may deem necessary to prevent waste as defined herein, which he finds to exist or to be reasonably imminent." (Emphasis added.)

See also section 16, MCL 319.16; MSA 13.139(16), which provides that, except for emergency orders, the Supervisor's adoption of rules, regulations or orders requires public hearings. In all, these sections empower the Supervisor to respond to allegations of waste by rules, regulations or orders.

The drilling of unnecessary wells is declared "waste" in sections 2 and 13 of the Act, MCL 319.2(1); MSA 13.139(2)(1), and MCL 319.13; MSA 13.139(13). To foreclose the drilling of unnecessary wells and thus to prevent waste, section 13 also empowers the Supervisor to fix drilling units for each oil and gas pool. The same provision defines "drilling unit" as "the maximum area which may be efficiently and economically drained by 1 well."

The Supervisor's practice is to establish drilling units by both administrative rules and special orders. Rule 201, 1979 AC, R 299. . . , provides in part:

The following are the requirements for the location and spacing of wells to be drilled for oil or gas, except for wells to be drilled in gas storage reservoirs, liquid petroleum gas storage reservoirs, unitized areas, and other specifically designated areas or geological formations where special spacing

orders, rules or determinations are in effect:

"(a) The drilling unit for wells to be drilled for oil or gas shall be a legal subdivision of 40 acres, more or less, defined as a governmental surveyed quarter-quarter section of land. It shall conform to 1 of the quarter-quarters of a governmental surveyed section of land, allowances being made for the differences in the size and shape of sections as indicated by official governmental survey plats." (Emphasis added.)

In addition, Rule 203, 1979 AC, R 299.1203, provides for the adoption of special spacing orders:

"The development of an oil or gas field following the completion of a discovery well may warrant the adoption of a drilling unit and well spacing pattern other than that specified in R 229.1201(a). Any interested person may request, or the supervisor may schedule, a hearing to consider the need or desirability of adopting a special spacing order to apply to a designated area, field, pool, or geological formation. The drilling unit established by such special spacing order may be smaller or larger than the basic 40-acre unit prescribed in R 299.1201(a)." (Emphasis added.)

At the request of several interested parties, the Supervisor scheduled a hearing to determine whether a special spacing order for deep gas wells in fifty-one counties of the lower peninsula should be adopted. As a result of that hearing, the Supervisor determined that 640-acre units were required to avoid economic and physical waste, and to gather needed information about the maximum area that can be efficiently and economically drained by one well.

Petitioners' principal argument asserts that the Supervisor violated various provisions of the Administrative Procedures Act (APA) of 1969, MCL 24.201 et seq; MSA 3.560(101) et seq, by issuing the 640-acre spacing requirement in the form of an order in a contested case rather than as a promulgated rule. Petitioners challenge this "unauthorized exercise of power" on the basis that it denied their right to participate in a rule-making process, with the result that Petitioners' correlative rights as mineral owners were allegedly ignored.

More specifically, Petitioners argue that the Supervisor's special order is unlawful because it has the effect of "promulgating a new rule" in the course of an adjudicative

proceeding contrary to APA rule-making provisions. Section 41, MCL 24.241; MSA 3.560(141), sets forth elaborate procedures for promulgating agency rules. Section 7 of the APA, MCL 24.207; MSA 3.560(107), defines a "rule" as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability, which implements or applies law enforced or administered by the agency or which prescribes the organization, procedure or practice of the agency, . . ." (Emphasis added.) Petitioners contend that Special Order 1-86 fulfills such definitional criteria and is therefore a rule within the meaning of the APA.

Petitioners' objections in this regard are untimely. Cause 2-4-86 was noticed and conducted as a contested case. Petitioners had notice of and enjoyed the opportunity to participate in the hearing. They did in fact participate without objecting to the hearing being conducted as a contested case. Parties who have notice of the agency proceeding will not be heard to contend for the first time on appeal that the hearing should have been conducted as a rule-making proceeding. That contention must be raised before the agency at a time when the agency can consider its validity and conduct the proceeding accordingly. See Hufo Oils v Texas Railroad Comm, ___ Tex App ___; 717 SW2d 405, 409 (1986). Petitioners will not be permitted to remain silent, while lying in wait on the chance that the eventual order will be favorable, and -- being finally disappointed -- then complain for the first time before a reviewing court. Timely objection would have afforded the Supervisor an opportunity to amend or at least to consider the unlawfulness issues Petitioners now raise.

Courts will not act to contravene agency action when remedies available through administrative channels have not been pursued to completion. Ackerberg v Grant Community Hospital, 138 Mich App 295, 299; 360 NW2d 599 (1984). It is well settled that issues not raised below are generally beyond the scope of judicial review. Seligman & Associates, Inc v Michigan Employment Security Comm, 164 Mich App 507, 513; 417 NW2d 480 (1987); Taylor v United States Postal Service, 163 Mich App 77, 83-84; 413 NW2d 736 (1987).

Petitioners' failure to timely object precludes consideration by this Court of their claimed procedural irregularities.

Petitioners attempt to avoid waiver by asserting that these are jurisdictional objections which can be raised at any time and thus cannot be waived. They assert that Special Order 1-86 is a decision of "universal applicability" and thus is the unlawful product of adjudicative proceedings over which the Supervisor lacked jurisdiction. Petitioners are clearly wrong.

Ample case law supports the proposition that administrative agencies have full authority to set standards of general applicability by adjudicating individual cases rather than through formal rule-making procedures. Lawyers Title Ins Co v Chicago Title Ins Co, 161 Mich App 183, 194-197; 409 NW2d 774 (1987); Northern Michigan Exploration Co v Public Service Comm, 153 Mich App 635, 649; 396 NW2d 487 (1986). Agencies must be empowered to act by individual order as a matter of necessity and need not promulgate rules covering every conceivable situation before the fact. Michigan Ass'n of Public Employees v Michigan Employment Relations Comm, 153 Mich App 536, 547; 396 NW2d 473 (1986), lv den 428 Mich 856 (1987).

The Court of Appeals supplies a rationale and additional authority for these holdings in American Federation of State, County and Municipal Employees v Wayne County, 152 Mich App 87, 98; 393 NW2d 889 (1986), lv den 426 Mich 875 (1986):

"It is impossible to promulgate specific administrative rules in anticipation of every conceivable situation prior to the enforcement of a statute. Thompson v Dep't of Corrections, 143 Mich App 29, 32-33; 371 NW2d 472 (1985), conflicts order denied, 422 Mich 1238 (1985). An administrative agency may thus announce new principles of law through adjudicative proceedings in addition to doing so through its rule-making powers. DAIE v Comm'r of Ins, 119 Mich App 113, 117; 326 NW2d 444 (1982), lv den 417 Mich 1077 (1983). The effective administration of a statute by an administrative agency cannot always be accomplished through application of predetermined general rules. Rather, some principles of interpretation must evolve in response to actual cases in controversy presented to the agency. An administrative agency must therefore have the authority to act either by general rule or by individual order. SEC v Chenery Corp (Chenery II), 332

US 194, 202; 67 S Ct 1575; 91 L Ed 1995 (1947),
reh den 332 US 783; 68 S Ct 26; 92 L Ed 367
(1947). See also American Way Life Ins Co v
Comm'r of Ins, 131 Mich App 1, 5-6; 345 NW2d
634 (1983), lv den 419 Mich 937 (1984). The
decision of an agency to promulgate law through
rule-making or through adjudication rests
within the sound discretion of that agency even
where a rule breaks from past decisions or
where previously established rules are
reconsidered. NLRB v Bell Aerospace Co, 416
US 267, 294-295; 94 S Ct 1757; 40 L Ed 2d 134
(1974), dicta overruled in NLRB v Hendricks Co
Rural Electric Membership Corp, 454 US 170,
186-188; 102 S Ct 216; 70 L Ed 2d 323 (1981)."
(Emphasis added.)

See also Michigan Life Ins Co v Comm'r of Ins, 120 Mich App 552,
562; 328 NW2d 82 (1982), lv den 417 Mich 1077 (1983).

Michigan case authority follows the general rule found
in jurisdictions that subscribe to the Model State Administrative
Procedure Act. As summarized in 2 Am Jur 2d, Administrative Law,
§ 195, p 27, the promulgation of rules is not generally held to be
a prerequisite to an agency's exercise of power:

"In some situations there is not only the
power but also the duty of an administrative
agency to prescribe rules governing matters not
covered by statute. Since an administrative
agency, unlike a court, has ability to make new
law prospectively through the exercise of its
rulemaking powers, it has less reason to rely
upon ad hoc adjudication to formulate new
standards of conduct within the statutory
framework. The function of filling in the
interstices of the act should be performed, as
much as possible, through this quasi-
legislative promulgation of rules to be applied
in the future. But any rigid requirement to
that effect would make the administrative
process inflexible and incapable of dealing
with many of the specialized problems which
arise. Not every principle essential to the
effective administration of a statute can or
should be cast immediately into the mold of a
general rule. In performing its important
functions an administrative agency must be
equipped to act either by general rule or by
individual order. To insist upon one form of
action to the exclusion of the other is to
exalt form over necessity. There is thus a
very definite place for the case-by-case
evolution of statutory standards. The choice
made between proceeding by general rule or by
individual ad hoc litigation is one that lies
primarily in the informed discretion of the
administrative agency." (Emphasis added;
footnotes deleted.)

See also 73 CJS, Public Administrative Law & Procedure, § 91, pp
593-595.

This jurisdiction is embodied in section 7 of the Act, quoted supra, which authorizes the Supervisor to conduct adjudicative hearings and to issue orders of this type in contested cases. This conclusion is underscored by the APA definition of "rule," which in section 7(f) expressly excludes any "determination, decision or order in a contested case." MCL 24.207(f); MSA 3.560(107)(f). It necessarily follows that Special Order 1-86 is not a rule as defined by the APA. See Northern Michigan, supra, p 649; American Way Life Ins Co v Comm'r of Ins, 131 Mich App 1, 7; 345 NW2d 634 (1983), lv den 419 Mich 937 (1984).

There is another reason for rejecting Petitioners' claim that this special spacing order is tantamount to the adoption of a rule without proper promulgation. The APA provides that agency decisions taken pursuant to powers delegated to an agency by its enabling statute are not included in the APA concept of "rule." Thus, section 7(j) of the APA expressly excepts from rule status any "decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected thereby." MCL 24.207(j); MSA 3.560(107)(j).

In Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Services, 431 Mich 172, 187-188; 428 NW2d 335 (1988), the Michigan Supreme Court explained that courts will recognize agency decisions as being within the section 7(j) exception when there is an "explicit or implicit authorization for the action in question." Agency action that follows from its statutory authority is an exercise of permissive power and not a rule requiring formal adoption. Hinderer v Dep't of Social Services, 95 Mich App 716, 727; 291 NW2d 672 (1980), lv den 409 Mich 930 (1980); Colombini v Dep't of Social Services, 93 Mich App 157, 165; 286 NW2d 77 (1979); Village of Wolverine Lake v State Boundary Comm, 79 Mich App 56, 59; 261 NW2d 206 (1977), lv den 402 Mich 863 (1978). See also Kostyu v Dep't of Treasury, 170 Mich App 123, 132; 427 NW2d 566 (1988).

The Act expressly authorizes the Supervisor's special spacing order. As discussed above, sections 7 and 13, supra,

empower the Supervisor to fix drilling units by rules, regulations or orders. In addition, section 6, MCL 319.6; MSA 13.139(6), provides in part:

"The supervisor shall prevent the waste prohibited by this act. To that end, acting directly or through his authorized representatives, the supervisor, after consulting with the board, is specifically empowered:

"(a) To make and enforce rules subject to the approval of the commission, issue orders and instructions necessary to enforce such rules and to do whatever may be necessary with respect to the subject matter stated herein to carry out the purposes of this act, whether or not indicated, specified, or enumerated in this or any other section hereof.

* * *

"(j) To fix the spacing of wells and to regulate the production therefrom.

* * *

"(o) To make rules or orders for the classifications of wells as oil wells or gas wells; or wells drilled, or to be drilled, for secondary recovery projects, or for the disposal of salt water, brine or other oil or gas field wastes; or for the development of reservoirs for the storage of liquid or gaseous hydrocarbons, or for other means of development, extraction or production of hydrocarbons." (Emphasis added.)

These provisions unquestionably grant the Supervisor a permissive statutory power to act by rule and/or order when establishing drilling units and spacing wells. Special Order 1-86 is an exercise of such power and is thus excepted from formal adoption and promulgation requirements of the APA rule-making provisions.

Petitioners also challenge this order as arbitrary, capricious and an abuse of discretion. The Court finds that Special Order 1-86 is neither arbitrary nor capricious. The Supervisor did not act unlawfully, nor did he abuse his discretion, when he adopted in this adjudicative proceeding a new standard for the spacing of drilling units. Indeed, the "rule" announced in the order may not be as inflexible as Petitioners claim. The Supervisor may tailor exceptions to the 640-acre requirement in future adjudicative proceedings. In any event, that requirement is not a "rule" within the contemplation of the APA and thus did

not require quasi-legislative proceedings and formal promulgation for its lawful adoption.

Petitioners also complain that the special spacing order fails to protect their correlative rights as adjoining property owners in a communitized drilling unit contrary to section 13 of the Act, cited supra, which reads in part:

"The rules or orders of the supervisor shall, so far as it is practicable to do so, afford the owner of each property in a pool the opportunity to produce his just and equitable share of the oil or gas in the pool, being an amount, so far as can be practicably determined and obtained without waste, and without reducing the bottom hole pressure materially below the average for the pool, substantially in the proportion that the quantity of the recoverable oil or gas under such property bears to the total recoverable oil or gas in the pool, and for this purpose to use his just and equitable share of the reservoir energy."

This provision ends with the proviso that "such allowable production is or can be made without surface or underground waste."

Petitioners allege that their ownership interests were communitized or pooled with the interests of others when the special spacing order was established. They argue that this 640-acre spacing of deep gas drilling units "completely disregards" a mineral owner's just and equitable share of production because it supposedly allocates royalties according to surface acreage ownership within each unit irrespective of whether the land is barren or productive. They claim that such allocation will result in the unjust enrichment of both the operators and those owning barren land. They predict that 640-acre spacing will effectively deprive some royalty owners of property rights without fair compensation. Much of this argument is grounded on pure speculation.

The Michigan Supreme Court dealt with the same issue in Manufacturers Nat'l Bank, supra, involving Special Order 1-73, by which the Supervisor required 240-acre drilling units for gas wells in the Northern Trend, a narrow stretch of Niagara rock extending across the northern portion of the lower peninsula. The Court summarized the issue at pages 141-142:

"The essence of this case is plaintiffs'

claim that when the drilling unit was expanded to 240 acres, barren land was included within the unit, transferring some of plaintiffs' 1/8 royalty interest to the owners of barren land. Had this transfer occurred at the direction of the Supervisor of Wells, we might have to agree with plaintiffs that the action violated the statutes of this state. Michigan is an ownership-in-place state. That is, a surface owner owns the oil and gas beneath his land. Attorney General v Pere Marquette R Co, 263 Mich 431; 248 NW 860 (1933); Quinn v Pere Marquette R Co, 256 Mich 143; 239 NW 376 (1931). MCL 319.13; MSA 13.139(13) provides that when the Supervisor of Wells pools separate ownership interests within a drilling unit and allocates production to those lands he must do so on 'terms and conditions that are just and reasonable,' giving each landowner the 'opportunity to recover or receive his just and equitable share of the oil or gas.' An order of the supervisor allocating production to barren lands might not meet such a standard."

The Court determined, however, that the mere spacing of wells by the establishment of drilling units does not have the effect of transferring royalty interests or allocating production. As the Court pointed out at page 142, pooling separate ownership interests is an agency action distinctively different from fixing drilling units and spacing wells:

"MCL 319.13; MSA 13.139(13) allows the Supervisor of Wells to establish the size of the drilling units in an entire pool. That portion of the statute relating to drilling units makes no mention of altering ownership interests when determining the proper size for drilling units in a pool. Indeed, the ownership of the land involved is not even considered when determining the proper size for the units. 1 Summers, Oil and Gas, § 83, p 279. Therefore, we cannot agree with plaintiffs and the Court of Appeals when they state that plaintiffs' ownership interest was pooled with the interests of others when the 240-acre drilling unit was established."

The Court concluded at pages 143-144 that "the creation of a drilling unit pools no ownership interest whatsoever." Cf Traverse Oil Co, supra, pp 683-685; West Bay Exploration Co v Amoco Production Co, 148 Mich App 197, 209; 384 NW2d 134 (1986).

The text of Special Order 1-86 reveals absolutely no attempt by the Supervisor to alter, transfer or pool ownership interests within drilling units or to allocate or prorate production and royalty to the benefit of barren acreage. To the

contrary, this order does nothing more than to space wells and define the size of drilling units. As a matter of law, therefore, this special spacing order pooled "no ownership interest whatsoever," and thus could not adversely affect Petitioners' correlative rights as adjoining property owners in a given drilling unit.

Finally, Petitioners claim that this order must be vacated because its conclusion is unsupported by competent, material and substantial evidence on the whole record. The Supervisor concluded that the evidence supported the establishment of 640-acre drilling units for the efficient and economical drainage of gas reservoirs below the top of the Glenwood Member of the Black River Group. The agency record reveals abundant evidentiary support for this conclusion.

The technical hearing took three days and was conducted by an administrative law judge before the Supervisor of Wells and the Oil and Gas Advisory Board. These officials heard the testimony of several witnesses, including 14 experts, and received 89 exhibits into evidence. All but one of the expert witnesses recommended 640-acre spacing. The exception, Michael Sharp, suggested optimal spacing of 320 acres, but also admitted having no personal experience with Prairie du Chien fields or any other deep gas reservoirs in Michigan.

Petitioners chose not to call witnesses or to produce exhibits and limited their participation to a position statement, cross examination and closing argument. Although not agreeing with uniform 640-acre spacing, Petitioners did concede that normal spacing on 40-acre or even 80-acre drilling units was undesirable. Rather, they recommended a "producer's option" to drill on various size units, such as 160, 320 or 640 acres, depending on the particular site. In their view, the spacing of wells and the fixing of drilling units must be site-specific and tailored to the petrophysical characteristics of each gas pool.

Petitioners argue that the record does not contain sufficient reliable evidence to justify a deviation from normal

spacing requirements to the extent of a uniform 640-acre arrangement. Petitioners criticize the evidence on record as being "sparse and limited." They contend that, since "only limited evidence is available" and some of the exhibits and test results are "inconclusive," the Supervisor had insufficient data upon which to base his determinations. Petitioners conclude that the order is unsupported by substantial evidence because "competent, reliable evidence does not exist" regarding the Prairie du Chien fields.

The record does indicate that the geophysical stratigraphy of Prairie du Chien reservoirs is poorly understood. Some witnesses admitted it was premature to conclude with finality that 640-acre spacing will provide optimal efficiency of drainage. The Supervisor acknowledges as much in his order at page 2, but reasons that orderly development and containment of waste require agency action even on the basis of imperfect information:

"The increased technical knowledge and activity make it now appropriate to examine the future direction for orderly development. Knowledge of the reservoirs is not perfect; many questions will only be answered by future development and production. A century of oil and gas development has shown that decisions for subsequent development must be made early in that development to assure that it is orderly and not wasteful. If we are to await a substantial and unassailable body of data, a situation unlikely to occur, we would have the benefit of hindsight and a corresponding inability to correct the mistakes of the past."

Indeed, the order points out, at page 3, that more reliable tests were not performed because they would cause unacceptable levels of waste:

"There was a considerable amount of testimony concerning the expected drainage area for a deep gas well. Extensive production and test data does [sic] not exist. Most wells have had limited production to date. The wells have shown a productive capability in the range of several million cubic feet of gas per day. Generally, gas is flared during tests. To successfully perform reservoir limit tests on these wells, very large volumes of gas would have to be produced with the attendant waste of the gas. Prudence dictates that such testing is not appropriate."

The Supervisor and the Advisory Board did, however, review petrophysical data for six productive fields generally

representative of Prairie du Chien formations. Approximately 40 wells had been drilled below the Glenwood Member and 11 of them were productive. The knowledge gained from those experiences enabled the Supervisor to determine that the productive zones exhibited good permeability relative to porosity development. Accordingly, as the Supervisor found at page 4 of the order:

"To determine the maximum area to be effectively drained by one well, the general producing characteristics must be examined. Enough data exist to form the basis for predicting the likely drainage area for wells. Those wells that are producing have demonstrated strong stable production. It is clear that some of the wells are capable of draining very large areas. The permeability is generally very good for gas reservoirs."

On this record, the Supervisor could reasonably conclude that 640 acres would be the most economical and efficient spacing arrangement. The relative lack of data lends support to a larger, not smaller, spacing requirement. The effect of the Supervisor's order is to leave open the possibility of a denser spacing arrangement should subsequent information from newly drilled wells prove the data currently available to be inaccurate or misleadingly incomplete. Accordingly, the Court will defer to the Supervisor's judgment that it is preferable to maintain the flexibility to authorize additional wells and smaller drilling units later, if warranted.

Petitioners contend that their preferred "producer's option" enjoys more support in the record than uniform 640-acre spacing, and thus the Court should vacate the Supervisor's order. This contention must be rejected. Where the evidence will support two reasonably differing views, the authorities are clear that a reviewing court may not substitute its judgment for that of the agency. Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc, 393 Mich 116; 223 NW2d 283 (1974); Yankoviak v Public Service Comm, 349 Mich 641, 648; 85 NW2d 75 (1957). As stated by the Michigan Supreme Court in Detroit Symphony, supra, p 124:

"Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative

expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views."

Thus, it is the agency's exclusive province to decide between reasonably differing opinions. Chicago, M, St P & P R Co v Public Service Comm, 74 Mich App 678, 679-680; 254 NW2d 39 (1977), lv den 401 Mich 817 (1977). It is patently not the function of this Court to second-guess the Supervisor by resolving conflicts in the evidence of record or by passing judgment on the credibility of witnesses. Butcher v Dep't of Natural Resources, 158 Mich App 704, 707; 405 NW2d 149 (1987). The spacing sizes proposed by the parties are all within the realm of reasonableness and this Court may not properly disturb the Supervisor's choice in that regard.

As to substantial evidence, Thomas Township v John Sexton Corp of Michigan, 173 Mich App 507, 511; 434 NW2d 644 (1988), recites the standard:

"The substantial evidence standard is appropriate for this review of the NRC's final decision. 'Substantial evidence' means evidence which a reasonable mind would accept as sufficient to support a conclusion. It consists of more than a scintilla, but may be less than a preponderance of the evidence. Michigan appellate courts give considerable deference to administrative agencies' fact-finding and weighing of evidence. Felton v Dep't of Social Services, 161 Mich App 690, 695; 411 NW2d 829 (1987)."

Const 1963, art 6, § 28 provides that, where an administrative hearing is required, a reviewing court must determine whether the agency's decision is authorized by law and is supported by competent, material and substantial evidence on the whole record. Butcher, supra. Special Order 1-86 is lawful and supported by substantial evidence. This order is sufficiently clear in its findings of fact and conclusions of law. It appears that the Supervisor took a "hard look" at the salient problems posed by drilling for deep gas in the Prairie du Chien fields and resolved them appropriately. The Supervisor could properly conclude on this record that 640-acre spacing should be required.

AFFIRMED.



JAMES R. GIDDINGS
Circuit Judge

DATED: 1-23-90

DEPARTMENT OF
ATTORNEY GENERAL
MEMORANDUM

June 7, 1994

TO: Michael Moore
Deputy Director
Michigan Department of Natural Resources

FROM: James E. Riley *JK*
Assistant Attorney General
Natural Resources Division

RE: Michigan Environmental Trust Limited v. Natural Resources
Commission
Ingham County Circuit Court No. 92-72755-CZ

Please be advised that orders have been issued by the Ingham County Circuit Court which have resulted in the termination of the above litigation. On June 1, 1994, Circuit Court Judge Carolyn Stell approved and entered the consent order between the parties covering various issues we were able to successfully negotiate and, to those issues we could not agree upon, she entered a permanent injunction in the Plaintiff's favor. A copy of the consent order and permanent injunction are attached.

Under the consent judgment, various parties and the staff of the Michigan Department of Natural Resources will request the Supervisor of Wells to initiate proceedings to determine appropriate drilling units and well spacing for the Antrim formation. It is anticipated that those hearings will result in the establishment of larger drilling units than those currently utilized. If larger units are utilized, it is believed that less disruption to the natural resources will be caused by the gas industry in their exploration and development activities.

Because we were unable to reach agreement on the requirement that all Antrim producers must bore beneath streams as the appropriate method for stream crossings, we agreed that this issue should be decided by the court. Following the Plaintiff's filing of a motion for summary disposition, our response and a hearing, Judge Stell held in favor of the Plaintiff and has established the criteria by which the DNR must deal with Antrim pipeline stream crossings as set forth in the attached order. This order should be distributed to

Michael Moore
Deputy Director
Michigan Department of Natural Resources
Page 2

Land and Water Management Division which may deal with Antrim gas pipeline stream crossings in the 15 counties affected by the permanent injunction (page 4 of the order).

Don Inman, Tom Segall and Denise Gruben provided valuable assistance in resolving this matter. Denise spent many hours with the file and her knowledge and expertise was especially useful.

JER:mst
Attachment
cc: R. Thomas Segall ✓
 Don Inman
 Denise Gruben
 Larry Witte

9207446/moore

Dept. of Attorney General
RECEIVED

JUN 03 1994

STATE OF MICHIGAN

NATURAL RESOURCES
DIVISION

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

MICHIGAN ENVIRONMENTAL TRUST LIMITED,

Plaintiff,

vs.

File No. 92 72755 CZ

NATURAL RESOURCES COMMISSION OF THE
STATE OF MICHIGAN, and ROLAND HARMES,
as Director of the Department of
Natural Resources of the State of
Michigan, and as Supervisor of Wells
of the State of Michigan,

Judge Stell

Defendants,

and

SHELL WESTERN E&P INC., and
MICHIGAN OIL & GAS ASSOCIATION,

Intervenor Defendants.

Roderick K. Daane (P12430)
Bruce T. Wallace (P24148)
Mark R. Daane (P29345)
William J. Stapleton (P38339)
Attorneys for Plaintiff

Gary L. Hicks (P31645)
Assistant Attorney General
Attorney for Defendant
Natural Resources Division

Douglas A. Donnell (P33187)
William A. Horn (P33855)
Michael C. Haines (P24331)
Attorney for Intervenor,
Michigan Oil & Gas Association

Webb A. Smith (P20718)
Scott A. Storey (P30232)
Attorney for Intervenor,
Shell Western E&P Inc.
313 S. Washington Square
Lansing, Michigan 48933
(517)371-8100

X-5b

CONSENT ORDER

At a session of said Court, held in
the Circuit Court Rooms, Town Center
Bldg., City of Lansing, County of
Ingham, State of Michigan, on the
13th day of ~~May~~^{June}, 1994.

PRESENT: HONORABLE CAROLYN STELL, Circuit Judge

Plaintiff having filed a Complaint in this action under the Michigan Environmental Protection Act, and the parties having undertaken extensive discovery, and the parties having further reached a settlement of their disputed claims without any admissions of liability, and having stipulated to entry of this Consent Order.

NOW, THEREFORE, IT IS ORDERED AS FOLLOWS:

1. Michigan Environmental Trust, Ltd., Anglers of the Ausable, Inc., The Michigan Council of Trout Unlimited, Michigan Oil and Gas Association (MOGA), Shell Western E&P, and the staff at the Michigan Department of Natural Resources shall request that the Supervisor of Wells initiate proceedings to determine appropriate drilling units and well spacing for the Antrim formation.

2. Michigan Environmental Trust, Ltd., Anglers of the Ausable, Inc., The Michigan Council of Trout Unlimited, MOGA and the staff at the Michigan Department of Natural Resources shall jointly cause to be initiated a proceeding before the Supervisor of Wells for the purpose of establishing by order that well density for Antrim wells only shall be based on a minimum of 80 acres per well and a maximum of 160 acres per well. These parties will seek

a Supervisor's Order which would allow operators to develop the Antrim Shale at any density within this range, depending solely on operator discretion. The order sought by these parties would provide for an average number of wells per pooled tract, such that wells within such a tract would not be spaced on a rigorous symmetrical pattern, but rather the tract would be considered fully developed when the total number of acres divided by the total number of wells in that tract results in at least 80 and not more than 160 acres per well. Additionally, these parties will seek setback requirements of 330 feet from the outer boundaries of the pooled tract only, and will seek to eliminate setback requirements from quarter quarter section lines inside the tract.

3. The instant litigation shall be stayed pending the above proceeding before the Supervisor of Wells. If the Supervisor of Wells issues an Order providing for a density of no more than one well per 80 acres, the present case will be dismissed with prejudice and without costs to any party. If the Supervisor of Wells issues an order providing for a density of more than one well per 80 acres, Plaintiffs may, at their option, elect to continue the present litigation by filing written notice of such intent with the Court within ten (10) days from issuance of the Supervisor's Order.

4. To facilitate the hearing process, intervening Defendant MOGA will, within two weeks of the entry of this Order, volunteer to prepare a proposed notice of hearing for the Supervisor of Wells. Once approval by all parties has been

obtained, such notice will be submitted to the Supervisor of Wells, if he requests it.

5. The provisions of this Consent Order do not nullify or modify the provisions of any other final order of this Court, including any final order of this Court regarding stream crossings.

6. Nothing in this Consent Order shall be deemed an admission of liability by any party, and it is expressly acknowledged that the foregoing Consent Order has been agreed upon by the parties for the purpose of resolving and settling a disputed claim.

CAROLYN STELL

CAROLYN STELL, Circuit Judge

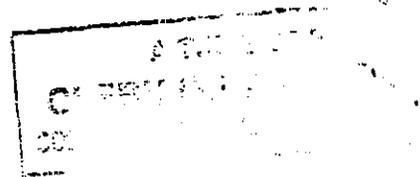
Approved as to Form:

Douglas A. Donnell by SAS
Douglas A. Donnell
Attorney for Michigan Oil & Gas Association

Scott A. Storey
Scott A. Storey
Attorney for Shell Western E&P inc.

Roderick K. Daane by SAS
Roderick K. Daane
Attorney for Plaintiffs

James E. Riley by SAS
James E. Riley
Attorney for Natural Resources Commission
of the State of Michigan



JUN 03 1994

STATE OF MICHIGAN

NATURAL RESOURCES
DIVISION

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

X-5c

**MICHIGAN ENVIRONMENTAL TRUST
LIMITED, a non-profit corporation, ANGLERS
OF THE AUSABLE, INC., and THE MICHIGAN
COUNCIL OF TROUT UNLIMITED,**

Plaintiffs,

Case No. 92-72755

vs.

JUDGE STELL

**NATURAL RESOURCES COMMISSION OF THE
STATE OF MICHIGAN, and ROLAND HARMES,
as Director of the Department of Natural
Resources of the State of Michigan, and as
Supervisor of Wells of the State of Michigan,**

**PERMANENT
INJUNCTION**

Defendants,

and

**SHELL WESTERN E & P, INC., and MICHIGAN
OIL & GAS ASSOCIATION,**

Intervenor Defendants.

Roderick K. Daane (P 12430)
Bruce T. Wallace (P 24148)
Mark R. Daane (P 29345)
William J. Stapleton (P 38339)
Attorneys for Plaintiffs

James E. Riley (P 23992)
Assistant Attorney General
**Attorney for Defendant NATURAL RESOURCES
COMMISSION and ROLAND HARMES**

Douglas A. Donnell (P 33187)
William A. Horn (P 33855)
Michael C. Haines (P 24331)
**Attorney for Intervenor MICHIGAN
OIL & GAS ASSOCIATION**

Webb A. Smith (P 20718)
Scott A. Storey (P 30232)
Attorney for Intervenor SHELL
WESTERN E&P, INC.

PERMANENT INJUNCTION

At a session of said Court, held in the Courthouse at the Town Plaza Suite, City of Lansing, County of Ingham, State of Michigan on the 1st day of June, 1994.

PRESENT: THE HONORABLE CAROLYN STELL, Circuit Judge

Plaintiffs having filed a Motion for Partial Summary Disposition seeking to permanently enjoin the State Defendants from issuing permits for Antrim gas pipeline crossings of aquatic resources in fifteen counties in northern Michigan unless such pipeline crossings are to be made by drilling or boring beneath the streambeds affected, oral argument having been presented and the Court being fully advised;

IT IS ORDERED that Plaintiffs' motion to enjoin the State Defendants from issuing stream crossing pipeline permits in connection with Antrim gas well development is granted subject to the following conditions:

1. At all times while this injunction is in effect, there shall be a presumption that stream crossings by Antrim gas pipelines create the least adverse environmental impact when made by drilling or boring beneath the streambed.
2. Permits may be issued by the State Defendants for Antrim gas pipeline stream crossings only after application of the presumption stated above.
3. Permits for Antrim pipeline stream crossings by methods other than drilling

or boring beneath the streambed may be issued only upon the determination by the State Defendants that the method of crossing selected will cause less environmental impact than crossing by drilling or boring, or that boring is impossible or will cause undue hardship for that particular stream crossing.

4 The burden of rebutting the presumption in favor of drilling or boring beneath streambeds rests upon the applicant-producer.

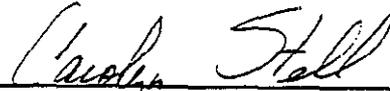
5 In the event that the State Defendants determine that an applicant has met its burden of proof and that an alternative stream boring permit should be issued, the State Defendants shall so notify all parties to this action and shall provide all such parties with all documentation furnished by the applicant to the State Defendants and with the State Defendants rationale for deciding to grant the application. In the event that a party to this case or an applicant-producer wishes to contest the determination of the State Defendant to either grant or deny such an application, the contesting party or parties shall have ten (10) days from receipt of written notice of the grant or denial within which to apply to this court for reversal of the State Defendants' determination.

6 This court will retain jurisdiction insofar as it may be necessary to rule on any such applications for reversal of the State Defendants' determination to grant or deny pipeline crossing applications.

7 Any party may apply to this court at any time for modification of this Order in the event of unforeseen changes of circumstances or conditions.

8 Except as provided above, this injunction shall be permanent and shall be in

effect in the following counties: Antrim, Crawford, Montmorency, Oscoda, Otsego, Alpena, Alcona,
Benzie, Charlevoix, Grand Traverse, Kalkaska, Mason, Lake, Roscommon and Manistee.



CAROLYN STELL, Circuit Judge

PREPARED BY:

Roderick K. Daane (P 12430)
HOOPER, HATHAWAY, PRICE,
BEUCHE & WALLACE
Attorneys for Plaintiffs

A TRUE COPY
CLERK OF THE COURT
30th JUDICIAL CIRCUIT COURT

HOOPER, HATHAWAY,
PRICE, BEUCHE
& WALLACE
ATTORNEYS AT LAW
128 SOUTH MAIN STREET
ANN ARBOR, MICHIGAN
48104-1943
1313) 682-4426

MICHIGAN DEPARTMENT OF NATURAL RESOURCES

INTEROFFICE COMMUNICATION

April 15, 1992

TO: ALL Geological Survey Division Supervisors
FROM: R. Thomas Segall, Chief, Geological Survey Division
SUBJECT: Court Order: Dart Energy v. Iosco Twp and DNR

The attached court order is provided for your information. It states that the Supervisor of Wells has regulatory authority over oil and gas injection wells and therefore these activities are exempted from being regulated pursuant to the Rural Township Zoning Act.

Attachment



cc: Mr. Michael Moore
Mr. Rufus Anderson
Mr. John MacGregor

X-1
a.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

DART ENERGY CORPORATION,
a Michigan Corporation,

Plaintiff-Counterdefendant

v

File #91-68695-AZ

IOSCO TOWNSHIP, MICHIGAN
DEPARTMENT OF NATURAL RESOURCES,
SUPERVISOR OF WELLS,

Defendants-Counterplaintiffs

James Anthony Siver (P33597)
Kevin V.B. Schumacher (P39332)
Attorneys for Plaintiff

T. Gilbert Parker (P25875)
Michael J. Kehoe (P33839)
Attorneys for Iosco Township

Roland Hwang (P32697)
Assistant Attorney General

ORDER

At a session of said Court, held in
the City of Lansing, Michigan on the
31st day of March,
1992.

PRESENT: HONORABLE WILLIAM E. COLLETTE

Upon the filing and reading of the Plaintiff's Motion, for
Summary Disposition and to Dismiss the Defendants Counter
Complaint, and the Court being fully informed therein;

IT IS ORDERED:

The Plaintiff's motion for Summary Disposition and Dismissal of the Defendants Counter Claim is GRANTED for the reason that there exists no genuine issue of material fact and that as a matter of law the Court finds:

1- Salt water brine and other oil field injection wells are subject to the jurisdiction of the Supervisor of Wells, under Act 61 of the Public Acts of 1939, being sections 319.1 et seq.;

2- The Supervisor of Wells has exclusive jurisdiction and authority over the administration and enforcement of oil & gas wells including brine disposal wells drilled pursuant to act 61;

3- Act 184 of the Public Acts of 1943, as amended, being the Rural Township Zoning Act, sections MCL 125.251 et seq. does not grant authority to the Township to promulgate zoning ordinances to regulate oil & gas, salt water brine and other oil field injection wells, drilled pursuant to Act 61;

4- Act 184 of the Public Acts of 1943, as amended, being the Rural Township Zoning Act, sections MCL 125.251 et seq. specifically excludes the Township from authority to promulgate zoning ordinances to regulate oil & gas, salt water brine and other oil field injection wells, drilled pursuant to Act 61;

5- The Iosco Township Zoning Ordinance is invalid as applied to oil & gas, salt water brine and other oil field injection wells regulated by Act 61; including the Dart owned Pohl 1-34A in Iosco Township, Livingston County, Michigan.

IT IS FURTHER ORDERED:

The Defendant Iosco Township's Counter Complaint to enjoin Dart from completing and using its brine injection well until applying for and obtaining a special use permit under the terms of the new Iosco Township Zoning Ordinance is **DISMISSED**.



William E. Collette
Circuit Judge

STATE OF MICHIGAN
COURT OF APPEALS

Tom W.
Share w/
appear 5/98

2/4/99 Copy Tom W.
Peg
Kevin
Reg V

COUNTY OF ALCONA,

Plaintiff-Appellee,

v

WOLVERINE ENVIRONMENTAL
PRODUCTION, INC.,

Defendant-Appellant.

FOR PUBLICATION

December 29, 1998

9:20 a.m.

No. 196934

Alcona Circuit Court

LC No. 96-009311 CE

COUNTY OF ALPENA,

Plaintiff-Appellee,

v

WOLVERINE ENVIRONMENTAL
PRODUCTION, INC.,

Defendant-Appellant.

No. 199408

Alpena Circuit Court

LC No. 96-001050 CE

Before: MacKenzie, P.J., and Bandstra and Markman, JJ.

MARKMAN, J.

Defendant Wolverine Environmental Production, Inc. appeals by leave granted the trial court's partial grants of summary disposition in favor of plaintiffs County of Alcona (Alcona) in Docket No. 196934 and County of Alpena (Alpena) in Docket No. 199408. In each of these cases, consolidated on appeal, defendant failed to obtain soil erosion and sedimentation permits as required by plaintiff counties in connection with earth changes relating to defendant's natural gas well sites. In Docket No. 196934, the trial court determined that Alcona was not preempted by the Legislature from enforcing or implementing soil erosion programs, including a permit process; and in Docket No. 199408 the trial court adopted the decision in Docket No. 196934 through collateral estoppel. We reverse and remand.

These cases involve a dispute over the authority granted by the Legislature to a county to manage soil erosion and sedimentation control under the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.*; MSA 13A.101 *et seq.* Defendant is involved in extensive natural gas drilling operations, including numerous gas wells, access roads, processing plants and pipelines in Alcona and Alpena Counties. For each of defendant's wells, defendant claims that it obtained a permit from the supervisor of wells,¹ Michigan Department of Environmental Quality (MDEQ) pursuant to the NREPA, MCL 324.101 *et seq.*; MSA 13A.101 *et seq.*; MCL 324.61501 *et seq.*; MSA 13A.61501 *et seq.*² This statute, under Part 91, the soil erosion and sedimentation control act, MCL 324.9101 *et seq.*; MSA 13A.9101 *et seq.*, also grants a county responsibility for the "administration and enforcement" of departmental rules concerning soil erosion and sedimentation control throughout the county. Ostensibly in accordance with this authority, Alcona adopted a soil erosion and sedimentation control ordinance,³ and Alpena adopted a resolution to enforce Part 91. Each county required defendant to obtain a permit from the respective county for earth moving activities related to the access roads, pipelines, and processing plants of defendant's well drilling operations. Alcona's "ordinance" contained additional substantive language to that contained in the MDEQ rules, which stated in part that "[a]ccess roads to well production sites shall be subject to permit requirements." Alpena's resolution did not contain additional substantive language, but Alpena did require a permit under the same circumstances as in the Alcona "ordinance".

Defendant failed to obtain permits from plaintiff counties in which its wells and ancillary activities were located. Thereafter, Alcona filed an action for injunctive relief and assessment of civil fines, and Alpena separately filed suit for injunctive relief, civil fines, and a surety for each well site, pipe or flow line, or central processing facility to insure the installation and completion of required corrective or protective measures. In both cases, defendant stated in its answer and affirmative defenses that the Legislature only delegated to counties the limited authority to enforce the rules promulgated by the MDEQ. In addition, defendant argued, its well activities were specifically exempted from soil erosion permit requirements in the rules because they were instead subject to the control and permit requirements of the supervisor of wells. Thus, where the rules did not require a permit, plaintiff had no separate authority for imposing such a requirement.

During the pendency of the suit for permanent injunctive relief, Alcona County filed a motion for a preliminary injunction, then withdrew its motion when defendant agreed to file permit applications in accordance with Alcona's ordinance and deposit permit fees into an escrow account. At this time, Alcona also filed a motion for summary disposition pursuant to MCR 2.116(C)(9) and (C)(10), on the issue of its authority to administer and enforce the statute. Defendant filed a motion to dismiss for failure to join the MDEQ and the supervisor of wells as necessary parties. On June 24, 1996, the trial court heard oral arguments regarding the parties' motions. The trial court stated that it would only consider the issue of jurisdiction between the county and the supervisor of wells, further stating that the question was whether the NREPA grants jurisdiction to counties for the enforcement of access roads and pipelines. On July 17, 1996, the court issued its opinion and order, characterizing the case as a jurisdictional dispute between plaintiff and the MDEQ/supervisor of wells regarding whether the supervisor of wells, under Part 615, had essentially preempted plaintiff's jurisdiction under Part 91. The court found that the Legislature did not intend to vest power over ancillary well activities exclusively with the supervisor of wells or preempt counties from implementing their own soil erosion programs.

Thus, the trial court granted Alcona's motion for partial summary disposition and struck defendant's affirmative defenses regarding jurisdiction.

Alpena also filed a motion for a preliminary injunction, which the trial court granted in June 1996.⁴ In August 1996, Alpena filed a motion for summary disposition, seeking to strike defendant's affirmative defenses and jury demand. The trial court heard oral arguments on October 7, 1996, and Alpena asserted that collateral estoppel bound the trial court to follow its decision with regard to Alcona, since the issues were the same in both cases. On November 4, 1996, the trial court issued an order granting Alpena's summary disposition motion on the basis of collateral estoppel and granting Alpena's motion to strike defendant's jury demand without prejudice, but denying the motion to strike defendant's entire answer. The court stayed the order pending the outcome on appeal. In April 1997, this Court granted leave to appeal in both cases and consolidated the appeals.

This Court reviews decisions on motions for summary disposition *de novo* to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). A motion for summary disposition pursuant to MCR 2.116(C)(9) seeks a determination whether the opposing party has failed to state a valid defense to the claim asserted against it. *In re Smith Estate*, 226 Mich App 285, 288; 574 NW2d 388 (1997). It is tested by the pleadings alone, with the court taking all well-pleaded allegations as true and determining whether the defenses are so clearly untenable as a matter of law that no factual development could possibly deny the plaintiff's right to recovery. *Id.*

MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to [judgment] as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik, supra.*]

Summary disposition on the basis of collateral estoppel, as in the Alpena case here, is pursuant to MCR 2.116(C)(7), *Lichon v American Universal Ins Co*, 435 Mich 408, 427 n 14; 459 NW2d 288 (1990), and in this regard the court may consider all affidavits, pleadings, and other documentary evidence, construing them in the light most favorable to the non-moving party. *McFadden v Imus*, 192 Mich App 629, 632; 481 NW2d 812 (1992).

In these cases, we are faced with a question of statutory interpretation, which is a question of law that this Court also reviews *de novo*. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997). Construction of administrative rules is also governed by the principles of statutory construction. *Attorney General v Lake States Wood Preserving, Inc*, 199 Mich App 149, 155; 501 NW2d 213 (1993). The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 611; 566 NW2d 571 (1997). The first step in determining intent is to look to the specific language of the statute. *Barr v Mt Brighton*, 215 Mich App 512, 516-17; 546 NW2d 273 (1996). When statutory language is clear and unambiguous, judicial interpretation to vary the plain

meaning of the statute is precluded *United States Fidelity & Guaranty Co v Amerisure Ins Co*, 195 Mich App 1, 5; 489 NW2d 115 (1992). "Statutory language should be construed reasonably and the purpose of the statute should be kept in mind" *Barr, supra* at 516. Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. *People v Lee*, 447 Mich 552, 557-58; 526 NW2d 882 (1994). Provisions of a statute are not construed in isolation, but, rather, in the context of other provisions of the same statute to give effect to the purpose of the whole enactment. *Guitar v Bieniek*, 402 Mich 152, 158; 262 NW2d 9 (1978). In examining the plain language of a statute, the maxim "*expressio unius est exclusio alterius*," the expression of one thing is the exclusion of another, means that the express mention of one thing in a statute implies the exclusion of other similar things *Amerisure, supra* at 6, 7. Similarly, "where powers are specifically conferred they cannot be extended by inference." Indeed, the inference is that it was intended that no other or greater power was given than that specified *Eikhoff v Charter Commission of City of Detroit*, 176 Mich 535, 540; 142 NW 746 (1913). Where an agency is charged to administer an act, as here, that agency's construction of the statute must be given deference, although it cannot be used to overcome the statute's plain meaning. *Western Michigan University Board of Control v State of Michigan*, 455 Mich 531, 544; 565 NW2d 828 (1997).

In these cases, we must look to the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq.*; MSA 13A.101 *et seq.*, to determine whether plaintiff counties had the authority to require defendant to obtain a county permit pursuant to Part 91 for "earth changes" to well access roads, pipelines, and processing facilities. Specifically, we must look to the interactions of Part 91, the soil erosion and sedimentation control act (SESCA), MCL 324.9101 *et seq.*; MSA 13A.9101 *et seq.*, the administrative rules enacted pursuant to Part 91, AACRS R 323.1701-1714, and Part 615, the supervisor of wells act, MCL 324.61501 *et seq.*; MSA 13A.61501 *et seq.* The stated purpose of Part 91 is to provide and implement "a unified statewide soil erosion and sedimentation control program." MCL 324.9103; MSA 13A.9103; MCL 324.9104; MSA 13A.9104. To accomplish this purpose, MCL 324.9105; MSA 13A.9105 provides:

(1) A county is responsible for the *administration and enforcement of the rules* throughout the county except within a city, village, or charter township that has in effect an ordinance conforming to this section and except with regard to land uses of authorized public agencies approved by the department pursuant to section 9110.

(2) The county board of commissioners, by *resolution*, shall designate a county agency, or a soil conservation district upon the concurrence of the soil conservation district, as the county enforcing agency responsible for administration and enforcement in the name of the county. The resolution may set forth a schedule of fees for inspections, plan reviews, and permits *and may set forth other matters relating to the administration and enforcement of this part and the rules*. A copy of the resolution and all subsequent amendments to the resolution shall be forwarded to the department. [Emphasis added.]

MCL 324.9101(10); MSA 13A.9101(10) defines "rules" as "the rules promulgated pursuant to section 9104." MCL 324.9104; MSA 13A.9104 states:

The *department*, with the assistance of the department of agriculture, shall promulgate rules for a *unified soil erosion and sedimentation control program*, including provisions for the review and approval of site plans, land use plans, or *permits relating to erosion control and sedimentation control*. The department shall notify and make copies of proposed rules available to state, local, county, and public agencies affected by this part for review and comment before promulgation. [Emphasis added.]

In accordance with these provisions in Part 91, the Department of Natural Resources (now the MDEQ) promulgated administrative rules establishing, in part, permit requirements for certain "earth changes."⁵ AACS R 323.1701-1714. Not all persons seeking to make "earth changes" are required to apply for a permit under Part 91. Specifically, AACS R 323.1704 states, in pertinent part:

(1) A land owner or developer who contracts for, allows or engages in an earth change in this state shall obtain a permit from the appropriate enforcing agency prior to commencement of an *earth change which is in connection with any of the following land use activities* which disturb 1 or more acres of land, or if the earth change is within 500 feet of a lake or stream of this state:

* * *

(g) Oil, gas, and mineral wells, *except the installation of those wells under permit from the supervisor of wells* and wherein the owner-operator is found by supervisor of wells to be in compliance with the conditions of the sediment act. [Emphasis added.]

In Part 615, the supervisor of wells is granted broad powers over all matters related to the regulation of oil and gas wells, including the prevention of waste and the conservation of gas and oil. MCL 324.61505, MSA 13A.61505, states:

The supervisor has jurisdiction and authority over the administration and enforcement of this part and *all matters relating to the prevention of waste and to the conservation of oil and gas in this state*. The supervisor also has jurisdiction and control of and over all persons and things necessary or proper to enforce effectively this part and all matters relating to the prevention of waste and the conservation of oil and gas [Emphasis added.]

"Waste" is defined in the statute to include, in part, "unreasonable damage to underground fresh or mineral waters," MCL 324.61501(P)(i)(B); MSA 13A.61501(P)(i)(B), and "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," MCL 324.61501(p)(ii)(B); MSA 13A.61501(p)(ii)(B). The supervisor of wells is specifically empowered to "do whatever may be

necessary with respect to the subject matter stated in this part to implement this part, whether or not indicated, specified, or enumerated,” MCL 324.61506(a); MSA 13A.61506(a). In addition, before a person begins drilling any well for oil or gas, he must apply for and receive a permit from the supervisor of wells. MCL 324.61525; MSA 13A.61525. “A permit shall not be issued to an owner or his or her authorized representative who has not complied with or is in violation of this part or any of the rules, requirements, or orders issued or promulgated by the supervisor or the department.” *Id.*

In the Alcona case below, and thus the Alpena case by the application of collateral estoppel, the trial court characterized the case as a jurisdictional dispute between Alcona and the supervisor of wells. The exact issue addressed by the trial court is not completely clear. The court seemed to believe that the issue was one of preemption, although the court mentioned preemption with regard to both enforcement of Part 91 and implementation of a county’s own system. However, in our judgment, we must answer two questions to determine whether defendant was required to obtain permits from the plaintiff counties in these cases. First, we must determine whether counties are granted the authority under Part 91 to either enforce the act or implement their own rules regarding soil and sedimentation. Second, if counties cannot implement their own independent rules, we must determine whether Part 91 limits counties’ authority to require permits for well access roads, pipelines, and processing facilities, in addition to wellheads.

Accordingly, to answer the first question and determine the authority of the counties here, we must look first to the language of Part 91. “It is elementary that a county has only such powers as have been granted to it by the Constitution or the State Legislature.” *Alan v County of Wayne*, 388 Mich 210, 245; 200 NW2d 628 (1972). MCL 324.9105(1); MSA 13A.9105(1) states that “[a] county is responsible for the *administration and enforcement* of the rules.” (Emphasis added). Pursuant to this responsibility, a county shall implement a resolution, which “may set forth a *schedule of fees* for inspections, plan reviews, and permits and may set forth *other matters relating to the administration and enforcement of this part and the rules*” MCL 324.9105(2); MSA 13A.9105(2) (Emphasis added). “The rules” are defined by the statute to mean “the rules promulgated pursuant to section 9104.” MCL 324.9101(10); MSA 13A.9101(10). A plain reading of these provisions seems to evidence a clear Legislative intent to vest counties with limited authority to enforce only the rules promulgated by the MDEQ. The provisions do not contain language allowing counties to implement their own rules. Since the power to enforce the rules was specifically conferred by the Legislature here, a reasonable inference is that it was intended that no other or greater power be given. *Eikhoff, supra* at 540. Thus, we will not infer a greater power, such as the power to implement separate county rules, unless such power is manifest within the statute in some way.

Second, looking to the context in which the language specific to county authority is found, we note that MCL 324.9106; MSA 13A.9106 provides that “[a] city, village, or charter township by ordinance may provide for soil erosion and sedimentation control on public and private land uses within its boundaries An ordinance may be more restrictive than . . . this part and the rules.” (Emphasis added). See *Guitar, supra* at 158. Thus, while the statutory language states that counties are to enact a resolution to “enforce” the MDEQ rules, cities, villages and townships are expressly authorized to enact ordinances that are more restrictive than the rules. Under the

maxim, "*expression unius est exclusio alterius*," which means that the express mention of one thing in a statute implies the exclusion of another, *Amerisure, supra* at 6, 7, the grant of authority to cities, villages, and township to provide for ordinances more restrictive than the rules necessarily implies a restriction on county authority. While the Legislature could have similarly provided authority for counties to adopt ordinances more restrictive than the state rules if it wanted, the absence of such a provision implies that the Legislature intended that counties only adopt resolutions that are not more restrictive than the rules. Counties are to merely "enforce" the rules as given. In this case the maxim of interpretation supports the plain language analysis regarding county authority. See *Amerisure, supra* at 6, 7.

Third, we recognize that the purpose of Part 91, the SESCA, is to protect Michigan waters and soil from the pollution of soil erosion and sedimentation through the implementation of a statewide program with uniform rules and guidelines to be "used both statewide and by local entities." *Nemeth v Abonmarche*, 457 Mich 16, 27-28; 576 NW2d 641 (1998). Given the purpose of a unified statewide soil erosion and control program, a necessary inference is that the Legislature would not authorize the implementation of a wide variety of different policies throughout the state. Under the trial court's analysis allowing independent county implementation of soil erosion and sedimentation control plans, each county in the state could potentially enact a different set of rules. This interpretation would essentially vitiate the statute's purpose of uniformity. Although the Legislature could choose to specifically allow a separate county-by-county implementation of policies, as it did with cities, villages, and townships in MCL 324.9106; MSA 13A.9106, we will not assume such a grant of authority in the face of the apparent purpose of a unified system of regulation. Overall, our reading of the statute, providing for county enforcement of a unified policy set forth by the Legislature and the MDEQ, upholds the evident purpose of the statute, as well as its plain language.

Based on these factors, the trial court, in our judgment, improperly determined that counties were allowed to implement their own soil erosion programs in the Alcona case and thus improperly applied this determination to the Alpena case by collateral estoppel. Instead, counties are only granted the authority by the Legislature to enforce the rules promulgated by the MDEQ. Indeed, Alcona and Alpena do not seem to argue that they are granted any authority to implement their own rules. Rather, they argue that their actions were merely enforcement of Part 91 and the administrative rules as they interpreted them. Defendant, however, asserts that even if the counties did have the power to enforce the rules, the permits issued under Part 615 exempted it from the permit requirements for well pads, flow lines, surface facilities, and access roads. Accordingly, we must now address the second question at issue in these cases to determine whether plaintiffs were allowed to "enforce" Part 91 permit requirements for ancillary well functions.

To determine whether the Legislature and the MDEQ intended for "earth changes" connected with the access roads, pipelines, and processing facilities of wells to require Part 91 permits where a Part 615 permit has already been issued, we must again look first to the language of the statute and rules at issue. MCL 324.9112; MSA 13A 9112 mandates that

"[a] person shall not maintain or undertake a land use or *earth change governed by this part or the rules* or governed by an applicable local ordinance, except in

accordance with this part and the rules or with the applicable local ordinance and pursuant to a permit approved by the appropriate county or local enforcing agency. [Emphasis added.]

Accordingly, we next examine the rules to determine what earth changes they govern: AACRS R 323.1704 states:

(1) A land owner or developer who contracts for, allows or engages in an earth change in this state shall obtain a permit from the appropriate enforcing agency prior to commencement of an *earth change which is in connection with any of the following land use activities* which disturb 1 or more acres of land, or if the earth change is within 500 feet of a lake or stream of this state:

* * *

(g) Oil, gas, and mineral wells, *except the installation of those wells under permit from the supervisor of wells* and wherein the owner-operator is found by supervisor of wells to be in compliance with the conditions of the sediment act. [Emphasis added.]

As a preliminary matter, we assume, without deciding, that defendant's earth changes fulfilled the conditions of section 1704(1) in order to address the exception to the permit requirement.⁶ The exception language at issue specifically encompasses "the installation of those wells under permit from the supervisor of wells." While plaintiffs agree that the wellhead itself is included under this exception, they do not believe that access roads, pipelines, and processing facilities are included within this language, and thus the counties should be able to enforce the permit requirement as to these activities regardless of the issuance of a Part 615 permit.⁷ However, the plain language of the exception is not limited to "wellheads" or any similar language explicitly limiting the permit exception to only the well site itself. Instead, the first portion of the rule language exempts "the installation of those wells . . ." In our judgment, this language seems to include a broader range of well facilities than merely the wellhead. The installation of wells would seem to necessitate the use of access roads, pipelines, and processing facilities: A well could not be set up without such facilities; they are an indispensable and integral part of the installation of a well and thus reasonably included within the exception language.

Second, we note that the "installation of those wells" language cannot be viewed in isolation, but instead must be viewed in context. The rule itself does not simply limit the exception to the installation of wells, but further states that the exception applies to "those wells under permit from the supervisor of wells." Thus, we must look to Part 615, the supervisor of wells act, to determine whether Part 615 permits apply to the additional parts of a well at issue here. The supervisor of wells is granted broad powers over the administration of oil and wells in Part 615. An important part of those powers is the prevention of waste, which includes, in part, "unreasonable damage to underground fresh or mineral waters," MCL 324.61501(P)(i)(B); MSA 13A.61501(P)(i)(B), and "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," MCL 324.61501(P)(ii)(B); MSA 13A.61501(P)(ii)(B). It is the declared policy of Part 615 that "this

part is to be construed liberally to give effect to sound policies of conservation and the prevention of waste and exploitation." MCL 324.61502; MSA 13A.61502. We find no language here limiting the authority of the supervisor of wells only to the "well site," but instead the supervisor of wells is granted authority over waste to soil and water in all "oil and gas operations." Thus, in our judgment, this includes soil erosion and sedimentation problems in connection with all parts of a well, not just a wellhead. We believe that the supervisor of wells exercises control over the soil erosion and sedimentation questions involving access roads, pipelines, and processing facilities of oil and gas wells since they produce waste in connection with oil and gas wells. Additionally, "[a] permit shall not be issued to an owner or his or her authorized representative who has not complied with or is in violation of this part or any of the rules, requirements, or orders issued or promulgated by the supervisor or the department." MCL 324.61525; MSA 13A.61525. Similarly, the Part 91 permit exception itself requires not only the Part 615 permit, but a finding by the supervisor of wells that the owner/operator of the wells is in compliance with Part 91. Therefore, a well owner will not receive a Part 615 permit unless he complies with the waste requirements promulgated not just by the supervisor of wells, but also by the DNR/MDEQ. Considering the supervisor of wells' authority over all aspects of waste in relation to wellheads as well as ancillary well facilities, it appears that any permit issued by the supervisor of wells would necessarily include such ancillary well facilities. Consequently, in our judgment, "those wells under permit from the supervisor of wells" refers to wellheads and their necessary ancillary facilities; and earth changes that could potentially impact soil erosion and sedimentation control in connection with the ancillary parts of oil and gas wells would fall within the exception to the Part 91 permit requirements.

Third, we again look to the purpose of Part 91 to determine whether our reading of the language of the exception is at odds with the stated intent of the Legislature here. The Executive Legislative Analysis, HB 4709, January 18, 1972, provides that "[t]he purpose of this bill is to provide for a statewide soil erosion and sedimentation control program with uniform rules and guidelines which may be used both statewide and by local entities to control soil erosion and sedimentation." *Nemeth, supra* at 27 n 4. With this purpose of uniformity in mind, it would not be logical for the Legislature to allow control over soil erosion and sedimentation to be placed with both the county enforcing agencies as well as the supervisor of wells. This dual control over access roads, pipelines, and processing facilities -- which could come into conflict since the supervisor of wells has its own rules for the prevention of waste and broader authority to do whatever is necessary for such prevention of waste -- would undermine the Part 91 purpose of statewide uniformity in this regard. The logical reason for the permit exception, consistent with the purpose of uniformity, would be to avoid duplicate regulation by both the supervisor of wells and the counties. The supervisor of wells must already enforce pollution controls relating to soil erosion and sedimentation control, and has special expertise with the problems of oil and gas well waste. Therefore, in our opinion, it is not surprising that the Legislature would provide for a regulatory framework whereby the supervisor of wells enforced all of the waste management policies in relation to oil and gas wells, including soil erosion and sedimentation control. Thus, in reading the exception to the county permit requirement logically with this purpose, we believe that earth changes in connection with wellheads, as well as access roads, pipelines, and processing facilities under permit from the supervisor of wells, are exempt from the additional permit requirements of the Part 91 rules.

In support of our analysis of the administrative rules' exception to the earth changes permit requirement, we rely on an April 2, 1996 memorandum from the Director of the MDEQ, Russell J. Harding. This memorandum states that it is the MDEQ's position that "a Part 615 permit to drill and operate shall exempt the following from the requirement to obtain a Part 91 permit: . . . well pads . . . flow lines . . . surface facilities . . . roads constructed solely for the purpose of access to well sites and surface facilities." In addition, the memorandum "revise[d] and clarif[ied]" a previous, 1993 memo from the DNR. The 1993 memorandum stated that counties were to have control over flow lines for Antrim gas projects because such projects were generally not in compliance with Part 91; thus they did not qualify under the well permit exception. However, Harding determined that this finding was too broad, including some projects that were in compliance with Part 91 and that would have been excepted from the permit requirement. Thus, Harding found that the 1993 memorandum did not comply with the requirements of the permit exception, and that pipelines should generally be included within the permit exception. Also, the 1993 memorandum stated that counties had authority over access roads, which Harding disagreed with because access roads were a necessary and integral part of drilling and production operations, Part 615 extended to all phases of oil and gas operations, including roads, and Part 615 should take precedence under the exception.⁸ Thus, the agency that promulgated the rules in question supports the conclusion here that ancillary well facilities are included within the well permit exception.

In contrast to this analysis, plaintiffs argue that two previous Attorney General opinions and the Supreme Court decision in *Addison Twp v Gout*, 435 Mich 809; 460 NW2d 215 (1990), mandate that we find that it is counties, and not the supervisor of wells, that are given control over soil erosion and sedimentation problems in the ancillary parts of wells. With regard to the two Attorney General opinions, plaintiffs argue that a finding that the general exceptions for mining and logging from Part 91 did not extend to ancillary and support facilities, such as access roads, ore transport routes, and processing plants and mills, must be extended by analogy to the permit exception for wells here. See OAG, 1997, No 6937, p 109 (April 7, 1997); OAG, 1994, No 6818, p 354 (September 15, 1994). However, two things distinguish the mining and logging exceptions from the well exception in our case. First and foremost, mining and logging are exempted from *all* portions of Part 91: There is no soil erosion and sedimentation control over mining or logging. In contrast, wells are not contained within this general exception language and are not exempt from soil erosion and sedimentation control. Wells are exempt only from the specific requirement of obtaining a soil erosion permit from the county under Part 91. Thus, we cannot merely apply the conclusions regarding the general exceptions to the more narrow permit exception. Second, following from the first factor, we note that the overall statutory purpose of protecting the environment is only furthered if the mining and logging language is narrowly construed. Since logging and mining are completely exempt from Part 91, there is a gap in soil erosion legislation of these pursuits. The Attorney General opinions were an attempt to limit the allegedly adverse impact these exceptions would have on the purpose of the statute by applying Part 91 to the related facilities of logging and mining such as access roads. In contrast, wells are not only still covered by Part 91, but are also covered by Part 615. There is certainly no gap in soil erosion legislation with regard to wells or their integral facilities. Our reading of the permit exception simply exempts well owners from the requirement to obtain a Part 91 permit, since they must already obtain a Part 615 permit which requires adherence to soil erosion legislation. Thus,

we see no need to follow the conclusions of the Attorney General opinions since the reasoning does not apply to the cases before us. See also *Michigan ex rel Oakland Co Prosecutor v Dep't of Corrections*, 199 Mich App 681, 691; 503 NW2d 465 (1993).

With regard to the Supreme Court decision in *Addison, supra*, the Court held in that case that according to the language of the Township Rural Zoning Act (TRZA), the jurisdiction of the supervisor of wells preempted the TRZA only with respect to oil and gas well sites and did not extend to processing plants and pipelines. There are several important distinctions between *Addison* and the cases before us that make *Addison* inapplicable here, in our judgment. First, *Addison* dealt with statutory construction of the Township Rural Zoning Act (TRZA), MCL 125.271; MSA 5.2963(1) and its connection to the supervisor of wells act. *Addison, supra* at 812. It did not even mention Part 91, the SESCO, or administrative rules promulgated pursuant to Part 91. Therefore, *Addison* does not address the same statute or the same connection between the statute and the supervisor of wells act that is before us here. Second, *Addison* is a case about the preemption of powers that were already granted by the Legislature to townships through the TRZA. *Addison, supra* at 814-15. In contrast, in our cases, preemption is not the question: There is no separate statute empowering counties to regulate soil erosion permits. Instead, we must determine whether the Legislature intended to grant any authority to counties to enforce such permit requirements for ancillary well functions. Third, the construction in *Addison* necessarily dealt with completely different language than that in Part 91 and the Part 91 administrative rules.⁹ Although plaintiffs argue that we need only look to the word "wells" in both statutes, we disagree; when reading statutory language, we must take into account the context in which words are used. *Lee, supra* at 557-58.

Fourth, the *Addison* Court determined that the purpose of the TRZA, to encourage or regulate the proper use of land and natural resources, did not conflict with that of the supervisor of wells to prevent waste, nor was uniformity necessary to effectuate the purposes. *Addison, supra* at 815. However, here, the logical reason for the permit exception, given the Part 91 purpose of uniform rules, would be to avoid duplicate regulation by both the supervisor of wells and the counties. Thus, the different statutory purposes between Part 91 and the TRZA also make *Addison* inapplicable to our cases. Fifth, in *Addison*, the DNR filed a brief in support of the township's right to zone, since the regulation of location and duration of a gas processing plant *in that case* did not regulate or control the operation of oil or gas wells or interfere with the authority vested in the supervisor of wells. *Addison, supra* at 818 n5, 821 (Levin, J. concurring). However, the DNR further stated that certain zoning regulations of ancillary facilities that affected authority "critical to the operation of the wells" might be impermissible. Thus, as defendant argues, the DNR itself would not have simply limited the application of the TRZA language to well sites, but would have instead applied the TRZA language to preempt township zoning where such zoning actually impacted on the supervisor of wells' jurisdiction relative to wells. This is consistent with our determination here, in part, that since the supervisor of wells has the authority to control soil erosion and sedimentation problems in ancillary well functions, the language of the permit exception applies to these ancillary well functions. Thus, although *Addison* appears in some respects to deal with a similar issue to that in the cases before us, we find the distinctions between these cases to be significant and, ultimately, dispositive that *Addison* does not compel a particular conclusion in the instant case.

On the basis of these factors, we conclude that the ancillary well facilities such as access roads, pipelines, and processing plants are included within the Part 91 permit exception for “the installation of those wells under permit from the supervisor of wells” AACRS R 323.1714(1)(g). Counties cannot require well owners and operators to obtain permits pursuant to Part 91 for wellheads, access roads, pipelines or processing facilities where they have a permit from the supervisor of wells and are found by the supervisor of wells to be in compliance with the conditions of the sediment act. *Id.* Allowing counties to require Part 91 permits with regard to these ancillary well facilities would ignore the plain language of the exception, view such language in isolation in spite of the fact that the language refers to Part 615, the supervisor of wells act, and thwart the purpose of the soil erosion and sedimentation control statute by allowing dual regulation. In our judgment, therefore, the trial court improperly granted Alcona’s and Alpena’s motions for summary disposition.¹⁰

Since the trial court also improperly determined that plaintiff counties could require Part 91 soil erosion permits for ancillary well facilities under permit from the supervisor of wells in Docket No. 196934, and applied this determination to Docket No. 199408 through collateral estoppel, we reverse the trial court’s grant of summary disposition in these cases and remand for further proceedings in accordance with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Stephen J. Markman
/s/ Barbara B. MacKenzie
/s/ Richard A. Bandstra

¹ “‘Supervisor’ or ‘supervisor of wells’ means the department.” MCL 324.61501(n); MSA 13A.61501(n). “‘Department’ means the director of the department of natural resources” MCL 324.301(b); MSA 13A.301(b).

² During the pendency of this case, the Department of Natural Resources was divided into two separate organizations the Department of Natural Resources and the Department of Environmental Quality. Presently, the supervisor of wells is under the jurisdiction of the MDEQ.

³ Alcona County contends that although its policy is labeled as an “ordinance,” it is actually only a regulation to enforce Part 91 and its administrative rules.

⁴ The same trial judge presided over both cases consolidated in this appeal.

⁵ “‘Earth change’ means a human-made change in the natural cover or topography of land, including cut and fill activities, which may result in or contribute to soil erosion or sedimentation of the waters of the state. Earth change does not include the practice of plowing and tilling soil for the purpose of crop production.” MCL 324.9101(5); MSA 13A.9101(5).

⁶ On appeal, defendant argues that a factual dispute existed as to whether defendant’s actual earth moving activities were “earth changes” as defined by MCL 324.9101(5); MSA 13A.9101(5), or whether defendant’s earth moving activities “disturb[ed] one or more acres of land, or if the earth change [was] within 500 feet of a lake or stream” so as to require a permit. Defendant argues that this factual dispute should have precluded summary disposition for plaintiff in Docket No.

196934. However, we note that the trial court only granted partial summary disposition in favor of plaintiff, reaching only the issues regarding county authority and specifically not addressing these factual questions. Moreover, neither party has provided this Court with any factual basis for resolving these issues. Therefore, this opinion does not address these issues and is limited to the issues decided by the trial court.

⁷ Although the trial court in the Alcona case found that defendant did have a permit from the supervisor of wells, there was no such finding in the Alpena case. Defendant claims to hold Part 615 permits for all of its wells.

⁸ Although an agency's construction of a statute cannot be used to overcome a statute's plain meaning, *WMU Board of Control, supra*, given that the MDEQ's finding here is plausible and is consistent with the language of the statute, it is entitled to reasonable deference, see *Michigan ex rel Oakland Co Prosecutor v Department of Corrections*, 199 Mich App 681, 692; 503 NW2d 465 (1993).

⁹ The IRZA states: "A township board shall not regulate or control the drilling, completion, or operation of oil or gas wells, or other wells drilled for oil or gas exploration purposes and shall not have jurisdiction with reference to the issuance of permits for the location, drilling, completion, operation, or abandonment of those wells. *The jurisdiction relative to wells shall be vested exclusively in the supervisor of wells of this state.*" MCL 125.271; MSA 5.2963(1) (Emphasis added).

¹⁰ Defendant appeals the trial court's adoption of the Alcona decision through collateral estoppel. However, since we determine that no county has the authority to require Part 91 permits for the ancillary well facilities at issue here, we need not address the collateral estoppel issue. Defendant also appeals the trial court's order to strike its jury demand. Although we must remand this case for an application of this opinion, we have effectively disposed of the case through our determination that counties cannot require well owners with Part 615 permits to obtain Part 91 permits from the counties. During oral arguments on appeal, Alpena's counsel conceded that there was no reason to address the jury issue if this Court determined that Alpena could not require defendant to obtain a county permit for its ancillary well facilities which were under permit from the supervisor of wells. Thus, we will not address this issue either.