

**STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES**

IN THE MATTER OF:

Docket No.: 18-016205

Petition of Michigan Citizens for Water Conservation on the permits issued to Michigan Potash Operating LLC

Agency No.: 61328, 61329, 61330

Part(s): 625, Mineral Wells

Agency: Department of Environment, Great Lakes, and Energy

Case Type: Oil, Gas and Minerals Division

**Issued and entered
this 26th day of August 2021
by Daniel L. Pulter
Administrative Law Judge**

FINAL DECISION AND ORDER ON REMAND

This contested case involves applications for permits for eight solution mining wells and three disposal wells filed by Michigan Potash Operating LLC (Permittee) under Part 625, Mineral Wells, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended. MCL 324.62501, *et seq.* The Oil, Gas and Minerals Division (Division) of the Department of Environment, Great Lakes, and Energy (EGLE) ¹ issued the permits on June 1, 2018. That agency action was challenged by Michigan Citizens for Water Conservation (Petitioner) by filing a Petition for Contested Case Hearing on July 31, 2018. This contested case was originally dismissed by an Order of this Tribunal entered on September 10, 2019 (2019 Order), due to lack of subject matter jurisdiction. By an Order entered on June 11, 2020 (Order of Remand), a Panel of the Environmental Permit Review Commission remanded the case to this Tribunal for “consideration of the merits of the case....” In accordance with the Panel’s directives, a contested case hearing was conducted on May 14, 2021. See Procedural History, *infra*.

¹ The permits in this case were issued by the Department of Environmental Quality (DEQ). Pursuant to Executive Order 2019-06, effective April 22, 2019, the name of the agency was changed to the Department of Environment, Great Lakes, and Energy. All citations in the record to DEQ shall be treated as a reference to EGLE.

JURISDICTION

In each contested case, this Tribunal addresses jurisdiction in two sections of the decision. The first is the right to a contested case under the regulatory program for which the permit(s) is sought. The second is the jurisdiction of the agency over the activity proposed in the application. In the 2019 Order, the proposed activity was determined to be regulated under Part 625, but the case was dismissed because no right to a contested case existed under that statute. Because this Tribunal respectfully disagrees with the decision of the Panel finding jurisdiction and remanding this contested case, and because there are no extant cases that have construed the 2018 legislative amendments to Part 13 of the NREPA, this Tribunal will once again address the applicable jurisdiction for a contested case under the facts before the Tribunal.

As stated in the 2019 Order, jurisdiction for a contested case arises in one of two manners. The first implicates fundamental due process protections, such as the termination of an existing license. *Bundo v City of Walled Lake*, 395 Mich 679; 238 NW2d 154 (1976); *D LeDuc*, Michigan Administrative Law § 7.10 (2014). None of the parties suggest that such due process considerations are involved here. The second manner by which the right to a contested case hearing arises is by the express grant in a statute or rule, such as the provisions of the NREPA. See *Delly v Bureau of State Lottery*, 183 Mich App 258, 263; 454 NW2d 141 (1990); *LeDuc*, supra, §6:02. When jurisdiction is premised on a statute, the agency has only those powers provided to it by statute. See *York v Detroit*, 438 Mich 744; 475 NW2d 346 (1991). Absent that lawful authority to perform its function, this Tribunal lacks subject matter jurisdiction and “any action with respect to such a cause, other than to dismiss it, is absolutely void.” *Fox v Board of Regents of the University of Michigan*, 375 Mich 238, 242; 134 NW2d 146 (1965). Therefore, any right to conduct a contested case hearing must be authorized by a statute within the NREPA or the Administrative Rules promulgated under the NREPA.

In this case, however, Part 625 of the NREPA does not grant the right to a contested case to challenge a permit after its issuance. The permits were issued pursuant to § 62509(1), which provides that “[a] person shall not drill ... any brine, storage, or waste disposal well, or convert any well for these uses, ... except as authorized by a permit issued by the supervisor of mineral wells....” MCL 324.62509(1). That provision also provides that “[t]he supervisor of mineral wells may schedule a public hearing to consider the need or advisability of permitting the drilling or operating of a storage or waste disposal well, or converting a well for these uses, if the public safety or other interests are involved.” *Id.* Hence, before a permit is issued, a public hearing may be held to determine the advisability of issuing it.

The Administrative Rules flesh out the requirements for such a hearing.² In short, an application for a permit to drill must be filed by the applicant, and a notice must be served upon property owners within the area of review. Upon receipt of such notice, a third party may file a petition for a public hearing provided they have “an interest in the matter proposed for hearing.” At the hearing, the Supervisor can receive evidence to determine if a permit should be denied. The Supervisor is to issue or deny the permit within 11 days of the hearing. Once a decision is reached by the Supervisor of Mineral Wells, an “owner” or a “permittee” may file an appeal to the Director of the Department.³ The appeal is on the record established at the hearing.

In this case, no evidence was presented that a petition for public hearing was filed by the Petitioner while the applications were pending before the Supervisor of Mineral Wells.⁴ Instead of appealing the issuance of the permits to the Environmental Permit Review Commission, a Petition for Contested Case Hearing was filed with this Tribunal. Upon review of the parties’ briefs seeking summary disposition, this Tribunal determined that it lacked subject matter jurisdiction to conduct a contested case hearing. Therefore, the 2019 Order was entered dismissing the contested case.

In the Order of Remand, a Panel of the Environmental Permit Review Commission cited to four statutory provisions. First, the Panel cited § 1301(f) of the NREPA, which provides that the definition of “permit” includes a permit, operating license or registration required by § 62509. MCL 324.1301(f)(xxxiv). Second, the Panel cited § 88 of the APA, which provides that, “[i]n a contested case regarding a permit ... the designation of a presiding officer, the effect of a decision by a presiding officer, the availability of other administrative remedies, and judicial review are controlled by sections 1315 and 1317” of the NREPA. MCL 24.288. Third, the Panel cited § 1301(g) which defines the word “permit” for a second time in the 2018 amendments to Part 13.⁵ MCL 324.1301(g). Finally, the Panel cited to § 1317(1), noting its language provides that, “[i]n a contested case regarding a permit, an administrative law judge shall preside, make the final decision, and issue the final decision and order for the department....” MCL 324.1317(1).

Following its citation to these provisions, the Panel held:

After review of the above statutory amendments, ... the Panel finds that the Petitioner’s failure to petition for a Supervisor of Mineral Wells hearing prior to issuance of the permits ... should not deprive Petitioner of its opportunity for a contested case hearing after the permits were issued. The Panel finds

² See generally R 299.2311; R 299.2321; R 299.2501; R 299.2320; R 299.2318(5); R 299.2512(1); R 299.2512(2).

³ Under the 2018 amendments to Part 13, this appeal would be properly brought before the Environmental Permit Review Commission. MCL 324.1317(1).

⁴ Moreover, there was no evidence presented that the Petitioner “has an interest in the matter proposed for hearing.” R 299.2501.

⁵ It appears this statute was intended to exclude from the definition those permits where the applicant is the state of Michigan or a political subdivision of the state. See MCL 324.1301(g)(i).

that amendments to NREPA ... and the Administrative Procedures Act ... in 2018, clearly establish that the Tribunal has subject matter jurisdiction over the petition for contested case hearing regarding permits issued by EGLE to [Permittee] under Part 625 of NREPA.

Order of Remand at p 3. In effect, the Order of Remand held that, under Part 13 and the APA, the Petitioner has the right to a contested case hearing after the permit was issued under Part 625. However, the Order of Remand is inconsistent with fundamental principles of administrative law.

First, the Order of Remand acknowledged “the Petitioner’s failure to petition for a Supervisor of Mineral Wells hearing prior to the issuance of the permits...” Order of Remand at p 3. This requirement is jurisdictional. To be entitled to a hearing, an interested party must file a Petition with the Supervisor of Mineral Wells (and not with this Tribunal). R 299.2501. The contents of a “proper written petition” are contained in Rule 2502. R 299.2502. Under the Administrative Rules, the petition is a predicate for the hearing. The failure to file a petition with the Supervisor of Mineral Wells before the issuance of the permits is fatal to the right to conduct a hearing under Part 625. See *Lakeshore Group v Altman*, 2021 WL 2022837 at *7 n 10 (Mich May 20, 2021), citing *Huffman v Indiana Office of Environmental Adjudication*, 811 NE2d 806, 812-813 (Ind. 2004) (holding that “the statute, and only the statute, defines the class of persons who can seek administrative review of agency action”).

Second, once the permits are issued, the only review authorized by Part 625 or its Administrative Rules is an appeal to the Director of the Department, R 299.2512(1), which is now taken to the Environmental Permit Review Commission under § 1317(1). MCL 324.1317(1). As noted *supra*, the Administrative Rules have limited the right to request an appeal to “owners” and “permittees.” R 299.2512(1). Moreover, such an appeal is on the record established at the hearing. R 299.2512(2). A party is not entitled to an opportunity to create a new record, such as in a new contested case hearing. In this case, the Petitioner filed a Petition for Contested Case Hearing with this Tribunal instead of filing an appeal with the Environmental Permit Review Commission. Moreover, such Petition did not describe the Petitioner as either an “owner” or a “permittee.” Further, the Petitioner sought leave to create a record before this Tribunal instead of basing its review on an existing record.

Third, none of the statutory provisions cited in the Order of Remand create the right to a contested case hearing. For example, § 1317(1) provides that “in a contested case hearing” the administrative law judge (ALJ) shall preside and issue the Final Decision and Order (FDO) on behalf of the Department. MCL 324.1317(1). This provision does not create an independent right to a contested case, but only applies when the underlying statute provides the right to a hearing. In other words, where this Tribunal has jurisdiction, the ALJ presides over the hearing and issues an FDO. There are simply no provisions of Part 625 or its Administrative Rules which authorize a challenge before this Tribunal to a permit after its issuance, nor did the Order of Remand cite to any such statutory authority.

For each of the foregoing reasons, the Order of Remand was in error and the remand to this Tribunal was improvidently entered. However, this Tribunal is, despite the lack of jurisdiction, constrained to follow the directions of the Panel to “consider the merits of this case.” As a result, a contested case hearing was conducted on May 14, 2021. The hearing was conducted via videoconference on the Microsoft Teams platform due to COVID-19.

PARTIES

The Petitioner was represented by Ross A. Hammersley of the firm Olson Bzdok & Howard PC. The Petitioner did not offer direct testimony or exhibits.⁶

The Division was represented by Assistant Attorneys General Daniel P. Bock and Megan Elise Miller. The Division offered the testimony of Jennifer Ferrigan, the Division’s permit coordinator who reviewed the applications; and Ray Vugrinovich, the Division’s hydrogen sulfide specialist. Through these witnesses, the Division entered Exhibits R-1 through R-14.⁷

The Permittee was represented by Kevin V.B. Schumacher of the firm Glassen, Rhead McLean, Campbell and Schumacher. The Permittee offered the testimony of Steven Happ, an expert in well drilling and hydrogen sulfide management; and Theodore Anthony Pagano, the General Manager for the Permittee. Through these witnesses, the Permittee entered Exhibits I-1 through I-15.

STIPULATIONS ON THE RECORD

During the Pre-Hearing Conference held on May 2, 2019, the Parties stipulated that:

1. The Permittee, Michigan Potash Operating LLC, is the proper applicant;
2. The Department of Environment, Great Lakes, and Energy (EGLE) has jurisdiction; and

⁶ Prior to the hearing, the Petitioner numbered twenty-one exhibits which it intended to admit in this case. Exhibits P-1 through P-21. Both the Division and the Permittee filed Motions in Limine. The Permittee sought to exclude Exhibit P-18, while the Division sought to exclude Exhibits P-7, P-17, and P-18. The Petitioner withdrew Exhibits P-7 and P-17, and this Tribunal granted the Motion in Limine with respect to P-18. See Tr 9-16. Because the Petitioner never proffered Exhibits P-1 through P-17 and P-19 through P-21 for admission into evidence, they have not been included in the record. Exhibit P-18 has been marked “rejected” but has been included in the record for the purposes of review. See R 792.10126(2).

⁷ The exhibits in this contested case were submitted electronically in portable document format (PDF). All references to exhibit page numbers are to the PDF page number of the electronic exhibit, not the page number at the bottom of the exhibit.

3. The proposed activity is regulated, and a permit is required.

Scheduling Order entered on May 6, 2019.⁸ Stipulations by the Parties are evidence and are binding on the Parties. MCL 24.278. Since these stipulations are factual; I adopt them as Findings of Fact.

PROCEDURAL HISTORY

On July 31, 2018, a Petition for Contested Case Hearing was filed by the Petitioner. An Application for Intervention was filed by the Permittee, and an Order granting intervention was entered. A Pre-Hearing Conference was held in the matter on May 2, 2019. A Scheduling Order was entered, scheduling the deadline for filing Motions for Summary Disposition.

Pursuant to the deadline in the Scheduling Order, the Permittee and the Division both filed Motions for Summary Disposition. The Petitioner filed a Brief in Opposition to such Motions, and both the Permittee and the Division filed a Reply Brief. Upon review of the Parties' briefs seeking summary disposition, this Tribunal determined that it lacked subject matter jurisdiction to conduct a contested case hearing. Therefore, the 2019 Order dismissing the contested case was entered.

Consistent with the Order of Remand, a Pre-Hearing Conference was conducted. At the Conference, the Petitioner requested an opportunity to supplement its evidence on standing. As a result, and pursuant to an Order entered on August 13, 2020, the Petitioner filed a Brief on the issue of standing, and responses were filed by the Division and the Permittee. In their Briefs, both the Division and the Permittee advised that they were not challenging the Petitioner's standing.⁹

A number of subsequent Orders were entered in 2021 that: provided the Parties an opportunity to file supplemental briefs to their Motions for Summary Disposition and Responses filed in 2018; granted, in part, and denied, in part, the Motions for Summary Disposition filed by the Division and the Permittee; denied the Permittee's Motion for Reconsideration; and scheduled the hearing in this case for May 14, 2021. Due to the Order on the Motions for Summary Disposition, the sole remaining issue for this contested case is whether the permits required appropriate monitoring equipment and procedures for handling hydrogen sulfide-bearing gas.

⁸ Of the so-called "standard stipulations," the Petitioner was not willing to stipulate that "the application was processed correctly."

⁹ As a result, this Tribunal never made a finding that the Petitioner "has an interest in the matter proposed for hearing." R 299.2501.

FINDINGS OF FACT

The Permittee filed applications for permits for eight solution mining wells and three disposal wells.¹⁰ The disposal wells are named MPC 1D, MPC 2D, and MPC 3D. Exhibits R-2, R-3, and R-4. The applications for permit to drill the disposal wells were originally filed on or about April 17 or 18, 2017. Exhibits R-2, R-3 and R-4 at p 3. During the application process, the applications were revised on or about August 7, 2017. Tr 26-27; *id* at p 2. The applications were again revised by filings on or about November 14, 2017. See page 1 of Exhibits R-2, R-3 and R-4.

The applications originally provided that sour oil or gas was not expected in the three disposal wells. See Question 18 on page 3 of Exhibits R-2, R-3 and R-4. “Sour oil or gas” is a hydrocarbon that contains hydrogen sulfide. Tr 30-31. Hydrogen sulfide (or H₂S) gas can cause health issues at low concentrations and can be acutely toxic at higher concentrations or can cause death. Tr 31. As a result, Part 625 provides rules and regulations governing H₂S. Tr 31-32. See also R 299.2472.

After Ms. Ferrigan performed her review of the initial applications, she discussed with her colleagues the potential for H₂S in the proposed wells. Tr 33. It was determined that the proposed disposal wells would be required to drill through the Lucas Formation, which in certain areas of the state is known to have small quantities of H₂S gas. Tr 33. It was further determined that there was no indication of H₂S in the immediate vicinity of the proposed wells. Tr 34. Nevertheless, due to a small chance of an H₂S exposure, Ms. Ferrigan concluded that it would be prudent to have the applicant revise its applications to answer Question 18 “Yes” so that H₂S precautions could be employed. Tr 33. Therefore, the two revised filings for each permit application were amended to recite that sour oil or gas was expected. See Question 18 on pages 1 and 2 of Exhibits R-2, R-3 and R-4.

In addition, the Applications also inquire whether the well is expected to encounter H₂S. Specifically, Question 6 on page 8 of the Application asks “[i]s the well expected to encounter hydrogen sulfide (H₂S)?” Exhibits R-2, Exhibit R-3 and Exhibit R-4 at p 8. The Permittee answered “yes” to this question. In addition, the application asks the applicant to “list formations expected to contain H₂S....” *Id*. In Response, the Permittee identified “Lucas Formation – Class IV.”¹¹ *Id*. Class IV is part of the assigned classification system used in Part 615 of the NREPA. Tr 35; R 324.1102(e)(iv). A Class IV well is the lowest

¹⁰ Neither the Applications for the solution mining wells nor the permits were made a part of the record.

¹¹ While it is unclear from the record, the answer to this question in the application was most likely revised in the refiled applications.

classification of H₂S for wells in that set of Rules.¹² Tr 35. The classification in the Application is used to communicate to personnel at the agency and in the industry the probable concentration of H₂S to be encountered, if at all. Tr 36. A Class IV classification does not mean that H₂S will be encountered, but that if it is, it will be at these lowest concentrations. Tr 36.

Ms. Ferrigan opined that she does not expect an uncontrolled release of H₂S from the proposed disposal wells. Tr 34. She also opined that an uncontrolled release from these wells would not pose a threat to public safety. *Id.* The blowout preventer to be installed on the wells is required to contain “sour trim,” which is material that can withstand H₂S corrosion. Tr 37. The requirement for sour trim to be installed in the blowout preventers is to preclude uncontrolled releases of H₂S. Tr 37. Moreover, after drilling, the Lucas Formation will be behind casing, and any H₂S gas in the formation would be isolated. Tr 34-35, 56. Because Ms. Ferrigan does not expect an uncontrolled release of H₂S from the proposed disposal wells, and because an uncontrolled release from these wells would not pose a threat to public safety, the permits issued by the Division merely provide that “H₂S monitoring equipment and procedures for handling H₂S-bearing gas – if encountered – are prudent.” Exhibits R-6, R-7 and R-8 at p 2; Exhibits R-9, R-10, R-11 at p 1. This recommendation was contained in the permits out of an abundance of caution. Tr 62, 64. Ms. Ferrigan also opined that the proposed disposal wells are not a public health risk to neighboring property owners, because there are no residences within a 30-foot radius of the proposed drill locations. Tr 65, 68. See also R 324.1102(e)(iv) (a Class IV H₂S well is one “that has a 100-[parts per million (ppm)] radius of exposure of less than 30 feet”).

Mr. Vugrinovich is tasked with the responsibility of determining whether a well proposed in an application will likely encounter H₂S while it is being drilled. Tr 77. He assigned the Class IV H₂S classification to the proposed disposal wells. Tr 77. The 100-ppm radius of exposure was chosen because below that concentration the effects on a person’s physiology might be unpleasant – irritation of the eyes, nose and throat, and perhaps headaches – but not fatal. Tr 78. The 100-ppm radius of exposure from a Class IV well would be an uncontrolled release of H₂S of 30 feet or less. *Id.* To prevent the uncontrolled release of H₂S gas, the wells are equipped with a blowout preventer with sour trim, and the drilling mud will serve to confine fluids to the formations in which they occur. Tr 37, 79. Upon review of records of surrounding wells, Mr. Vugrinovich concluded that it was not likely that the proposed disposal wells would encounter H₂S in sufficient concentrations, or that an uncontrolled release of gas from such wells would have a deleterious impact upon public safety. Tr 79-80. In reviewing a map of the wells drilled in the locale of the proposed disposal wells, there were no wells where the Lucas Formation produced H₂S gas. Tr 83; Exhibit R-13. The closest wells in which the Lucas Formation produced H₂S gas are more than 20 miles away from the proposed disposal

¹² By Rule, a Class IV H₂S well is one “that has a 100-ppm radius of exposure of less than 30 feet and a hydrogen sulfide content in the gas of not less than 300 ppm.” R 324.1102(e)(iv).

wells. Tr 85; Exhibit R-13. Mr. Vugrinovich opined that the proposed disposal wells are not likely to encounter hydrogen sulfide, and that the uncontrolled release of H₂S, should it be encountered, would not likely cause a threat to public safety. Tr 87.

Mr. Happ also opined that, “there is little to no risk of an uncontrolled release of hydrogen sulfide gas from the drilling of [the Permittee’s] Class IV wells ... [a]nd the likelihood of encountering any hydrogen sulfide gas during drilling of the disposal wells is very low.” Tr 114. A 30-foot radius of exposure does not extend beyond the well pad and will thus not affect lands owned or controlled by parties other than the Permittee. Tr 121. Mr. Happ also opined that to obtain 100 ppm concentration at 30 feet, the escape rate of the gas must be 480,980 cubic feet. Tr 119. However, there is not sufficient reservoir pressure to produce 480,980 cubic feet in any of the zones that will be drilled by the disposal wells. Tr 125. When the Division required sour trim equipment in the blow-out preventer, the Division mandated H₂S safety readiness, with all tools necessary to deal with H₂S during drilling of the wells. Tr 122-123. The drilling mud will also be monitored with electronic monitors for the presence of H₂S during drilling. Tr 123.

While the drilling permits provide that H₂S monitoring equipment and procedures for the handling of H₂S-bearing gas are “prudent,” the drilling will be continuously monitored by H₂S sensors at four locations on the drilling rig. Tr 124-125. If any of the alarms trigger, the rig will immediately start shutting-in the well, and all personnel must evacuate and meet at a predetermined muster location. Tr 125. Moreover, if H₂S is encountered on the drilling rig floor, the blowout preventor located in the doghouse will be shut in. *Id.* If H₂S is encountered at the mud tanks, the workers will immediately evacuate the area and report to the muster location while the driller shuts-in the well. *Id.* Before drilling commences, everyone on the wellsite will receive training, including instructions specifically related to H₂S procedures. *Id.* If H₂S gas is unexpectedly brought to the surface, it will be immediately incinerated and rendered harmless at the flare stack. Tr 127. Because H₂S could be encountered, no trespassing signs will be posted at the wellsite entrance, and any guests on location must be admitted by the Permittee’s personnel to ensure that everyone at the wellsite is known and accounted for. *Id.* The Permittee will also be employing a contingency plan due to the possibility of an H₂S release. Tr 178. Based on the foregoing, Mr. Happ opined that there is little or no risk of an uncontrolled release of hydrogen sulfide gas from the drilling of the disposal wells, and even if there was an unlikely uncontrolled release of H₂S, it would not pose a threat to public safety. Tr 133.

Finally, Mr. Pagano opined that there is very little likelihood of encountering H₂S in the disposal wells, and there is close to a zero percent possibility of an uncontrolled release. Tr 151. Moreover, in the event H₂S is encountered, it would be in such low concentrations and pressures that it can be adequately dealt with by the Permittee. Tr 151-152. This opinion is also based on the fact that these disposal wells are not high-pressured oil and

gas wells, but are disposal wells and brine wells, which have little to no reservoir pressure. Tr 152. In addition, the Lucas Formation will be cemented and cased behind pipe. Tr 154. This formation is behind casing, because it is under-pressured which means that circulation can be lost in this formation during drilling (*i.e.*, drilling mud would enter the formation). Tr 154, 155. The very fact that these three wells are contemplated as disposal wells is because it is unlikely that any formation in the well will be over-pressured. Tr 154.

Part 625, Mineral Wells

I. Jurisdiction

Section 62509 provides that “[a] person shall not drill or begin the drilling of any brine, storage, or waste disposal well ... except as authorized by a permit issued by the supervisor of mineral wells....” MCL 324.62509(1). See also MCL 324.62516(b). Because this contested case involves applications for permits for eight solution mining wells and three disposal wells filed by the Permittee, the proposed project will be reviewed under the Part 625 permitting standards.¹³

II. Rule 2472(1)

In its Petition for contested case, the Petitioner alleged that the permits “provide no factual basis upon which it can be reasonably concluded that the supervisor of wells [sic] considered and imposed the necessary Hydrogen Sulfide safety requirements upon the Applicant, nor that the Applicant was found in compliance therewith prior to the granting of the permits.”¹⁴ Petition at p 8. To determine if the Supervisor of Mineral Wells imposed appropriate and necessary H₂S requirements upon the Permittee, a review of terms of Rule 2472(1) is warranted. That Rule provides that, “[i]f the supervisor of mineral wells or authorized representative of the supervisor of mineral wells determines a proposed well is likely to encounter hydrogen sulfide during drilling ... and that the uncontrolled release of the hydrogen sulfide will pose a threat to public safety, the well shall be subject to the provisions of” Rules 2473-2483 and Rule 2489. R 299.2472(1). Once properly promulgated, Administrative Rules have the force and effect of law. *Clonlara, Inc v State Bd of Education*, 442 Mich 230, 239; 501 NW2d 88 (1993). Hence, “the rules made by an agency to govern its activity cannot be violated or waived by the agency that issued the rules.” *Micu v City of Warren*, 147 Mich App 573, 584; 382 NW2d 823 (1985).

¹³ In the Order entered on March 18, 2021, this Tribunal held that a solution mining well was subject to the terms of Part 625.

¹⁴ Summary Disposition was granted in favor of the Permittee and the Division on all other allegations contained in the Petition. See Order entered on March 18, 2021.

Therefore, Rule 2472(1) requires two factual findings in this case: (1) whether the proposed disposal wells are likely to encounter hydrogen sulfide during drilling; and (2) whether the uncontrolled release of hydrogen sulfide will pose a threat to public safety. Each of these questions will be addressed herein.

A. Will H₂S Be Encountered During Drilling?

From the record, it is clear that the proposed disposal wells will be drilling through the Lucas Formation. Tr 33; Exhibit R-14. The Lucas Formation is known to contain H₂S. Tr 33. However, in reviewing a map of the wells drilled in the locale of the proposed disposal wells, there were no wells where the Lucas Formation produced H₂S gas. Tr 83; Exhibit R-13. The closest wells in which the Lucas Formation produced H₂S gas are more than 20 miles away from the proposed disposal wells. Tr 85; Exhibit R-13. Ms. Ferrigan opined that “there’s a small chance” that the proposed disposal wells will encounter H₂S, but “it’s not likely that it will.” Tr 34. Mr. Vugrinovich opined that the proposed disposal wells are not likely to encounter hydrogen sulfide. Tr 87. Mr. Happ also opined that, “the likelihood of encountering any hydrogen sulfide gas during drilling of the disposal wells is very low.” Tr 114. Finally, Mr. Pagano opined that there is very little likelihood of encountering H₂S in the disposal wells. Tr 151. Based on the evidence that there is “a small chance” or a “very low” likelihood of encountering H₂S gas in these wells, this Tribunal is unable to find that H₂S will be absent during the drilling of the proposed disposal wells. Therefore, this Tribunal finds, as a Matter of Fact, that H₂S may be encountered during the drilling of the three disposal wells.

B. Will the Uncontrolled Release of H₂S Pose a Threat to Public Safety?

To answer this question, this Tribunal will first review how the Division determines whether there will be an uncontrolled release of H₂S that poses a threat to public safety. It should be noted that the Division has established a four-tier classification system for H₂S levels in wells drilled in the state of Michigan. See R 324.1102(e)(i) – (iv). Mr. Vugrinovich assigned the Class IV H₂S classification for the proposed disposal wells. Tr 77. A Class IV H₂S well is the lowest classification. R 324.1102(e). In the revised Applications, the Permittee also identified the proposed disposal wells as Class IV H₂S wells. Exhibits R-2, Exhibit R-3 and Exhibit R-4 at p 8. Similarly, Ms. Ferrigan testified that, “the Lucas Formation has been known to have small quantities of hydrogen sulfide gas that Part 615 wells would classify it as Class IV.” Tr 33-34.

By Administrative Rule, a Class IV H₂S well is “a well that has a 100-ppm radius of exposure of less than 30 feet and a hydrogen sulfide content in the gas of not less than 300 ppm.” R 324.1102(e)(iv). However, Rule 1102 is applicable to wells governed by

Part 615, Supervisor of Wells, for oil and gas operations. See R 324.101 (“These rules govern oil and gas operations in the state of Michigan”). There is no similar H2S classification system contained within the Administrative Rules for Part 625. Indeed, neither Part 625 nor its Administrative Rules define an “uncontrolled release of H2S” and provide no guidance to determine whether such a release poses a threat to public safety.

Ms. Ferrigan testified that the Part 615 classification was used to communicate to people within the agency and the industry. Tr 35-36. The classification is a shorthand reference to explain the amount of H2S that may be encountered in the well. Tr 36. Mr. Vugrinovich also testified that the Division staff and personnel in the industry have a qualitative understanding of the H2S classifications from the Administrative Rules for Part 615 as far as public safety is concerned. Tr 79. Therefore, the agency has thus relied upon the standards set forth in the Rule 1102 classifications for its determination of whether “the uncontrolled release of the hydrogen sulfide will pose a threat to public safety....”

The evidence in this case indicates that there will not be an uncontrolled release of hydrogen sulfide that will pose a threat to public safety. Specifically, the 100-ppm radius of exposure from a Class IV well would be an uncontrolled release of H2S of 30 feet or less. Tr 78. However, there are no houses within a 30-foot radius of the well locations. Tr 65. The 30-foot radius is the approximate radius of the drilling rig, so the concentration of H2S in the atmosphere at nearby residences was anticipated to be lower than the concentrations contained in Rule 1102(e)(iv). Tr 66. Indeed, Mr. Happ opined that, to obtain 100 ppm concentration at 30 feet, the escape rate of the gas must be 480,980 cubic feet. Tr 119. However, there is not sufficient reservoir pressure to produce 480,980 cubic feet in any of the zones that will be drilled by the disposal wells. Tr 125. Indeed, Mr. Vugrinovich opined that it was not likely that the proposed disposal wells would encounter H2S in sufficient concentrations, or that an uncontrolled release of gas from such wells would have a deleterious impact upon public safety. Tr 79-80.

While the proposed disposal wells will not pose a threat to nearby residences, it also appears that the wells will not pose a threat to personnel working on the rig. Specifically, the Division has required “sour trim” in the blowout preventers employed in the drilling rigs. Tr 37. Sour trim is material that can withstand H2S corrosion that is installed in the blowout preventers to preclude uncontrolled releases of H2S. Tr 37. In addition to sour trim, the drilling mud will serve to confine fluids (including H2S gas) to the formations in which they occur. Tr 79. In fact, the drilling mud will be monitored with electronic devices for the presence of H2S gas during drilling. Tr 123. If H2S gas is released into the drilling mud, all gases from the rig will be immediately incinerated and rendered harmless at the flare stack.¹⁵ Tr 127.

¹⁵ See R 299.2487(1) (“A permittee of a well shall ensure that an incinerator or flare ... is designed and equipped to prevent release of unburned gas to the atmosphere”).

Moreover, the drilling will be continuously monitored by H₂S sensors at four locations on the drilling rig. Tr 124-125. If any of the alarms trigger, the rig will immediately start shutting-in the well, and all personnel will evacuate and meet at a predetermined muster location. Tr 125. Also, if H₂S is encountered on the drilling rig floor, the blowout preventor located in the doghouse will be shut in. *Id.* If H₂S is encountered at the mud tanks, the workers will immediately evacuate the area and report to the muster location while the driller shuts-in the well. *Id.* Before drilling commences, everyone on the wellsite will receive training, including instructions specifically related to H₂S procedures. *Id.* Because H₂S gas could be encountered, no trespassing signs will be posted at the wellsite entrance, and any guests on location must be admitted by the Permittee's personnel to ensure that everyone at the wellsite is known and accounted for. *Id.* The Permittee will also be employing a contingency plan due to the possibility of an H₂S release.¹⁶ Tr 178.

From the facts in the record, I find, as a Matter of Fact, that the uncontrolled release of H₂S from the proposed disposal wells does not pose a threat to public safety.

III. Rule 2472(4)

In addition to the foregoing, Rule 2472(4) provides, in part, "if hydrogen-sulfide-producing strata are isolated behind casing, then it shall no longer be subject to the provisions of this part." R 299.2472(4). This portion of Rule 2472 is ambiguous, because the Rule speaks in terms of "no longer" being subject to the provisions of Part 12 of the Administrative Rules.¹⁷ The Court of Appeals has made it clear that the canons of statutory construction apply to both statutes and administrative rules. *United Parcel Serv v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007). To resolve the ambiguity of this phrase, it is helpful to review the canons of statutory construction.

Specifically, the fundamental purpose of statutory construction is to assist in both discovering and giving effect to legislative intent. *Ansell v Department of Commerce*, 222 Mich App 347, 355; 564 NW2d 519 (1997). If the language of a statute is unclear or of a doubtful meaning, it must be given a reasonable construction, looking to the legislative purpose. *Blackwell v Bornstein*, 100 Mich App 550, 554; 299 NW2d 397 (1980). When construing a statutory phrase, the meaning of the phrase itself must be considered, but also its placement and purpose within the statutory scheme. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). In this case, to determine "legislative intent," it is necessary to discern the Division's purpose in enacting the Rule.

¹⁶ For a description of the requisites of a contingency plan, see R 299.2478.

¹⁷ Part 12 is that portion of the Rules promulgated under the authority of Part 625 of the NREPA relating to Hydrogen Sulfide Management. See R 299.2471 to R 299.2491.

This Rule indicates that the provisions of Part 12 are germane for an applicant that is drilling brine wells or disposal wells. Nevertheless, the Rule indicates that the provisions of Part 12 may “no longer” be required when the applicant places the H₂S-bearing formations behind casing. It should be noted that Rule 2479 – which is also located in this statutory scheme – similarly provides that Rules 2480-2483 are applicable “until all formations or strata suspected to contain hydrogen sulfide are cased off....” R 299.2479. By using the phrase “no longer,” I conclude, as a Matter of Law, that the applicant is exempt from the terms of Part 12 when and only when the H₂S-bearing formations are placed behind casing. Up until that point in time, an applicant may be subject to the provisions of Part 12, including the requirement for the Supervisor of Minerals Wells to determine whether a proposed well is likely to encounter hydrogen sulfide during drilling and whether the uncontrolled release of the hydrogen sulfide will pose a threat to public safety. R 299.2472(1).

It is uncontroverted that the Lucas Formation will be placed behind casing. Tr 34-35. Therefore, I find, as a Matter of Fact, that once the formation is isolated behind casing, the proposed disposal wells will “no longer” be subject to the terms and conditions of Rules 2473-2483 and 2489.

IV. Application of Rules 2473-2483 and 2489

Rule 2472 provides that, “[i]f the supervisor of mineral wells or authorized representative of the supervisor of mineral wells determines a proposed well is likely to encounter hydrogen sulfide during drilling, ... and that the uncontrolled release of the hydrogen sulfide will pose a threat to public safety, the well shall be subject to the provisions of R 299.2473 to R 299.2483 and R 299.2490.” R 299.2472(1). In applying this Rule in this case, Ms. Ferrigan opined that an uncontrolled release of H₂S gas from the proposed disposal wells was unlikely to pose a threat to public safety. Tr 34. As a result, Ms. Ferrigan concluded that the H₂S Rules of Part 12 do not apply in this case. Tr 41. Ms. Ferrigan further concluded that because the H₂S Rules do not apply, the Division does not have authority to impose regulations when they do not apply. *Id.* Therefore, each of the permits issued in this case provide that “H₂S monitoring equipment and procedures for handling H₂S-bearing gas – if encountered – are prudent.” Exhibits R-6, R-7 and R-8 at p 2; Exhibits R-9, R-10, R-11 at p 1. However, the Petitioner challenges the Supervisor of Mineral Wells’ decision to leave the discretion to employ the requirements of Sections 2473-2483 and 2490 to the prudence of the Permittee. Petition at p 8.

Initially, it must be recalled that a well “shall be subject to” the H₂S requirements of Rules 2473-2483 and 2489 when the Supervisor of Mineral Wells makes the two-prong determination of Rule 2472(1). R 299.2472(1). When a well is not subject to these Rules, I conclude, as a Matter of Law, that the Supervisor of Mineral Wells may not require an

applicant to comply with Rules 2473-2483 and 2489. Therefore, I find, as a Matter of Fact, that it was appropriate for the Supervisor to recommend that the Permittee exercise prudence in employing the equipment and procedures referenced in such Rules.

Even if, *arguendo*, such equipment or procedures were required in this case, the evidence indicates that the Permittee has voluntarily elected to comply with most of such provisions of Part 12. Specifically, Rule 2473 relates to the requirement to employ non-corrosive metal components on the drilling rig, such as “sour trim” in the blowout preventer. R 299.2473. As noted, the blowout preventer in this case will be equipped with “sour trim.” Tr 122-123. Rule 2474 relates to setback distances for drilling wells. R 299.2474. As noted, the Class IV wells in this case will be located more than 30-feet from residences, because the applicable radius of exposure is 30 feet. Tr 66. Rule 2475 relates to training of agents, employees and representatives of the applicant. R 299.2475. As noted, everyone on the wellsite will receive training before drilling commences, including instructions specifically related to H2S procedures. Tr 125. Rule 2476 relates to safeguards for securing nonproducing wells. R 299.2476. Since this contested case concerns the issuance of permits to drill, this Rule is inapplicable. Rule 2477 relates to the posting of warning signs at the wellsite. R 299.2477. The testimony in this case indicates that warning signs will be posted at the wellsite. Tr 127. Rule 2478 relates to a requirement for the creation and use of contingency plans for drilling. As noted, the Permittee will also be employing a contingency plan due to the possibility of an H2S release. Tr 178. Rule 2479 merely provides that compliance with Rules 2480-2483 “shall continue until all formations or strata suspected to contain hydrogen sulfide are cased off ... or drilled and demonstrated not to be productive of hydrogen sulfide.” R 299.2479. As noted, the Lucas Formation will be placed behind casing. Tr 34-35. Rule 2480 provides that the permittee is to establish primary and secondary briefing areas at the drilling site. R 299.2480. As noted, the evidence in this case indicates that the Permittee has established a “muster location” in the event of an H2S discharge. Tr 125. Rule 2481 provides for the establishment of an emergency preparedness coordinator at the wellsite. R 299.2481. No evidence was presented at the hearing regarding such a coordinator. Rule 2482 provides for the use of wind direction indicators. R 299.2482. The record indicates that the Permittee will employ wind direction indicators. T 176. Rule 2483 provides for the employment of various protective equipment at the wellsite, such as visual and audible alarms, as well as hydrogen sulfide sensors. R 299.2483. As noted, the drilling will be continuously monitored by H2S sensors at four locations on the drilling rig. Tr 124-125. It is inferred that these monitors will employ both visual and audio warning signals. See *Zytkewick v Ford Motor Co*, 340 Mich 309, 318; 65 NW2d 813 (1954) (evidence includes reasonable inferences that can be drawn from the facts). Rule 2489 is inapplicable herein because it relates to servicing an existing well, rather than the drilling of a new well. R 299.2489.

Therefore, from the foregoing, I find, as a Matter of Fact, that the Permittee has substantially complied with Rules 2473-2483 and 2489, even though it was not obligated to comply with such provisions. Accordingly, based on the entirety of the record in this case, I find, as a Matter of Fact, that the Supervisor of Mineral Wells considered and imposed the necessary Hydrogen Sulfide safety requirements upon the Permittee, and that the Permittee's planned safety procedures and equipment will protect public safety.

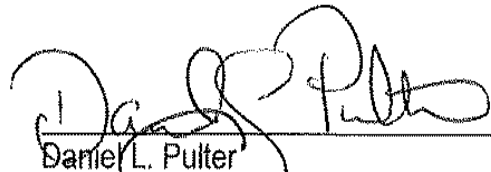
CONCLUSIONS OF LAW

Based on the Findings of Fact, I conclude, as a Matter of Law:

1. The Permittee's applications for a permit were properly processed.
2. The proposed activity is regulated under Part 625. MCL 324.62509(1). See also MCL 324.62516(b).
3. The applicant is exempt from the terms of Part 12 of the Administrative Rules promulgated under Part 625 when and only when the H₂S-bearing formations are placed behind casing. R 299.2472(4); R 299.2479.
4. When a well is not subject to Part 12 of the Administrative Rules promulgated under Part 625, the Supervisor of Mineral Wells may not require an applicant to comply with Rules 2473-2483 and 2489. R 299.2472(1); R 299.2472(4); R 299.2479.

FINAL DECISION AND ORDER

The activity proposed in the Applications for a drilling permit under Part 625 (as contained in Exhibits R-2, R-3 and R-4) is **APPROVED**.



Daniel L. Pulter
Administrative Law Judge

REVIEW OF THIS DECISION

In light of the 2018 amendments to the Natural Resources and Environmental Protection Act (NREPA), MCL 324.1301, *et seq.*, the right to seek review of this decision may vary based on the particular Part of the NREPA under which this contested case was brought. To ascertain the correct manner to seek review of this decision and the correct time frame

for review, the parties and/or their legal counsel should examine the applicable statutes and administrative rules.

PROOF OF SERVICE

I certify that I served a copy of the foregoing document upon all parties and/or attorneys, by electronic delivery, unless indicated others, this 26th day of August 2021.



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