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ONE J

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Table of Contents

I. Introduction	730
II. Legislation.....	730
A. Earth Change Permits	730
III. Administrative Law	730
A. Hazardous Wastes.....	730
B. Air Pollution Renewable Operating Permits and Permits to Install.	730
IV. Common Law	731

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A. The Antrim Shale Formation Order..... 731
 B. Confidentiality of Documents Related to Permit Applications..... 732
 C. Requirements for Environmental Impact Analysis..... 733
 D. Pipeline Easements 733
 V. Conclusion 734

I. Introduction

This year, the Michigan legislature extended the earth change permit exemption to mineral well exploration and development activities. The Department of Environmental Quality finalized a set of environmental protection rules, but provided several exemptions for oil and gas producers. Michigan saw minimum developments in oil and gas common law.

II. Legislation

A. Earth Change Permits

A permit is no longer required for earth changes associated with mineral well exploration and development activities regulated under Part 625 of the Natural Resources and Environmental Protection Act (“NREPA”).¹ This permit exemption was previously limited to activities regulated under Part 615.²

III. Administrative Law

A. Hazardous Wastes

Wastes associated with the exploration, development, or production of crude oil or natural gas, including drilling fluids and produced waters, are not considered “hazardous wastes” for purposes of part 111 of the NREPA and the accompanying rules.³

B. Air Pollution Renewable Operating Permits and Permits to Install

Emissions from oil or gas exploration or production wells or pipeline compressors or pump stations shall not be aggregated with emissions from other similar units to determine whether the units or stations are “major sources” of air pollution requiring a renewable operating permit under Rule

1. S.B. 129, 99th Leg., Reg. Sess. (Mich. 2017).

2. *Id.*

3. MICH. ADMIN. CODE r. 299.9204(2)(f) (West 2017).

336.1210.⁴ Piping and storage of “sweet natural gas,” including venting and purging gas lines, is considered “insignificant activity” and need not be included in an application for a renewable operating permit.⁵ Oil and gas processing equipment listed in Rule 336.1288 need not be included in an application for a renewable operating permit.⁶

The routine and emergency venting of natural gas from transmission and distribution systems, or field gas from gathering lines, does not require a “permit to install” under Rule 336.1201(1) if certain conditions are met.⁷ Equipment for the separation or fractionation of “sweet natural gas” and equipment used for oil and gas well drilling, testing, completion, rework, and plugging activities is also exempt from a “permit to install” as long as certain requirements are met.⁸

The emission of “volatile organic compounds” from natural gas processing equipment in certain enumerated counties must be subject to a monitoring program that meets the requirements delineated in Rule 336.1629.⁹

IV. Common Law

A. The Antrim Shale Formation Order

The Court of Appeals of Michigan (the “Court”) upheld the order of the Michigan Public Service Commission (the “Commission”) granting natural gas producers approval to operate wells in the Antrim Shale Formation under vacuum.¹⁰ The appellant oil companies argued that the Commission exceeded its statutory authority by making the order generally applicable, rather than applicable only to the parties to the case.¹¹ The Court pointed out that an order in a contested case may be given general applicability if the order was issued after public notice and a public hearing.¹² Since the Commission invited “proposals by all interested persons” and “took extensive public testimony,” the Court held that the Commission did not

4. *Id.* r. 336.1211(1)(a)(i)(C).

5. *Id.* r. 336.1212(2)(l).

6. *Id.* r. 336.1212(3)(i).

7. *Id.* r. 336.1285(2)(mm).

8. *Id.* r. 336.1288(2)(d)-(e).

9. *Id.* r. 336.1629.

10. *In re Antrim Shale Formation re Operation of Wells Under Vacuum*, 899 N.W.2d 799, 801 (Mich. Ct. App. 2017).

11. *Id.* at 803.

12. *Id.* at 804 (citing MICH. COMP. LAWS § 24.232(6) (West 2016)).

exceed its statutory authority, because the order was issued after a public notice and hearing.¹³

The appellants also argued that the Commission's order was unlawful because it failed to protect the correlative rights of other owners of wells by apportioning the natural gas from the common pool.¹⁴ However, the expert testimony provided to the Commission stated that there was no way to determine where any of the gas comes from.¹⁵ Thus, the Court concluded that the Commission acted lawfully because there was no evidence of a common pool of gas.¹⁶

Lastly, the appellants argued that the Commission's order was unreasonable because competent, material, and substantial evidence did not support its findings regarding safety, lack of waste, and impact on correlative rights.¹⁷ The Court cited expert testimony taken by the Commission regarding each of the issues, and explained that the Commission was entitled to accept this evidence even if contrary evidence existed.¹⁸ Thus, the Court concluded, the Commission's order was not unreasonable.¹⁹

B. Confidentiality of Documents Related to Permit Applications

The Court considered the parameters of the confidentiality protections for permit applicants under Mich. Comp. Laws § 324.62508(d).²⁰ After Marathon Oil Company applied for and received a permit to drill a test well, the plaintiffs submitted a Freedom of Information Act request to the Department of Environmental Quality (the "Department"), requesting numerous documents related to the application, including correspondence, testing data, and notes of conversations.²¹ The Department denied the request, citing the confidentiality provisions applicable to wells under Part 625 of the NREPA.²²

The plaintiffs argued that Marathon's well was "drilled partially or completely to explore for oil and gas," rather than "solely for purposes

13. *Id.*

14. *Id.*

15. *Id.* at 805.

16. *Id.*

17. *Id.*

18. *Id.* (citation omitted).

19. *Id.*

20. *Cooley v. Dep't of Env'tl. Quality*, No. 334133, 2017 WL 1034497 (Mich. Ct. App. Mar. 16, 2017).

21. *Id.* at *1.

22. *Id.*

related to minerals or mineral exploration.”²³ Thus, they contended, the Department should have issued a permit under Part 615, and the confidentiality provisions of Part 625 should not apply.²⁴

To resolve the issue, the Court looked to the language of Rule 299.2323, which provides, “an applicant seeking to convert a well drilled under [Part 625] to a use allowed under Part 615 of the [NREPA] shall apply for and obtain a permit as provided in that part.”²⁵ Once such a permit is issued, “a permit issued under [Part 625] shall terminate and be without force and effect.”²⁶ The Court construed this language to mean that the confidentiality protections of Part 625 apply until a permit under Part 615 is issued.²⁷ Thus, the bare allegation in the plaintiff’s complaint that the well was “not a mineral well” was not sufficient to prevent the confidentiality provisions of Part 625 from applying to the well.²⁸

C. Requirements for Environmental Impact Analysis

The Court considered the sufficiency of evidence presented in an Environmental Impact Analysis performed in connection with an application for a permit to construct and operate natural gas pipelines.²⁹ The plaintiffs argued that the Michigan Public Service Commission was required to apply the “federal vicinity rule”³⁰ in considering the environmental impact of the proposed pipeline.³¹ The Court concluded that neither the Michigan Environmental Protection Act nor the decision of the Supreme Court of Michigan in *In re Highway US-24, in Bloomfield Township, Oakland County*³² required the Commission to apply the “federal vicinity rule.”³³

D. Pipeline Easements

The Court considered the legality of an easement granted by the Department of Natural Resources (“DNR”) to Encana Oil & Gas, Inc. for a

23. *Id.*

24. *Id.*

25. *Id.* at *2 (quoting MICH. ADMIN. CODE r. 229.2323(1) (West 2017)).

26. *Id.* (quoting MICH. ADMIN. CODE r. 229.2323(2) (West 2017)).

27. *Id.*

28. *Id.*

29. *In re Application of Encana Oil & Gas re Garfield 36 Pipeline*, Nos. 329781 & 329909, 2017 WL 2130276, at *7 (Mich. Ct. App. May 16, 2017).

30. 18 C.F.R. § 380.12(e)(5) (West 2016).

31. *Encana*, 2017 WL 2130276, at *7.

32. 220 N.W.2d 416 (Mich. 1974).

33. *Encana*, 2017 WL 2130276, at *7.

gas pipeline.³⁴ First, the plaintiffs contended that the 35-foot wide easement violated the DNR's policy specifying a maximum easement width of 20 feet.³⁵ The Court explained that the DNR's policy regarding the width of an easement is a recommendation rather than a hard-and-fast rule.³⁶ Furthermore, a wider easement was warranted for safety reasons, due to the fact that the pipeline was a "high pressure gathering line."³⁷ Thus, the DNR did not act improperly in granting a 35-foot-wide easement.³⁸

Next, the plaintiffs contended that contractors hired by Encana failed to preserve a protected species within the easement, which constitutes a breach of its duty under the easement requiring the DNR to revoke the easement.³⁹ The Court held that the alleged failure of the independent contractors to preserve the protected species did not require the DNR to revoke the easement.⁴⁰ Rather, the DNR may exercise a certain amount of discretion regarding whether to revoke an easement.⁴¹

Lastly, the plaintiffs contended that the easement should have been revoked because Encana "failed to use the easement within two years," as required by the terms of the easement.⁴² Encana had started installing the pipeline within two years.⁴³ However, the Commission later vacated its order authorizing the pipelines and did not reapprove the pipelines until more than two years after the easements were issued.⁴⁴ The Court concluded that this did not constitute a breach of the easement, because there was no language that required Encana to determine the legality of the grant of the easement before commencing the project.⁴⁵

V. Conclusion

The new environmental rules promulgated by the Department of Environmental Quality are extensive, but the rules contain several

34. *Buggs v. Dep't of Nat. Res.*, No. 329782, 2017 WL 2131506, at *1 (Mich. Ct. App. May 16, 2017).

35. *Id.*

36. *Id.* at *2.

37. *Id.*

38. *Id.*

39. *Id.* at *3.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

exemptions for oil and gas producers. The developments in oil and gas common law demonstrate that Michigan courts are still showing broad deference to the expert judgment of administrative agencies and protecting the confidentiality of oil and gas producers who apply for permits.