State of Michigan
Ingham County Circuit Court

Paul Brady,

Plaintiff,

v

Case No: 13-648-AA
Hon: Clinton Canady III
Filed: 6/13/13

Michigan Department of Environmental Quality and Encana Oil & Gas (USA) Inc,

Defendants,
_____/

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Plaintiff's Response to Motions for Summary Disposition
and
Supplemental Brief for a Preliminary Injunction

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I. Introduction

This brief responds to defendants' pending motions for summary disposition. Should the court reject those motions as plaintiff contends, the last section responds to Encana's brief which arreived today, and summarizes why a preliminary injunction should be entered temporarily stopping the 13 contested wells.

The wells which plaintiff Paul Brady seeks to stop were permitted to Encana under part 615[1] of NREPA in a way that violated MDEQ rules in two ways. They were located closer together than 660 feet, and MDEQ did not examine the likelihood the wells might interfere with each other. Brady also seeks a MEPA declaration that such wells not be permitted in the future.

The 660-foot rule and the requirement of examining interference apply because Encana sought a spacing exception under R 324.303(2).[2]

Well locations are measured at the surface.[3] Locations of the contested wells were permitted though only 50-55 feet apart, in violation of the 660-foot rule. The distances are shown on company maps of the wellpads.[4]

MDEQ's non-examination of the interference data, is in effect admitted in a FOIA response for the 3 wells on wellpad B.[5]

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1 MCL 324.61501 et seq.
2 See R 324.303(2)(c) and (d).
3 R 324.103(t).
4 Brady affidavit, ¶ 1, exhibit 16.
5 Boal affidavit, ¶¶ 10-11, exhibits 17, 25-28.

The same admission is expected for the 10 other wells on pads A and C, when pending interrogatories are answered. Two of the questions are:

> 5. Please identify any dates, locations, and names of people involved or present, where DEQ personnel examined or discussed or corresponded about [Encana's claimed interference] data, prior to permits for the subject wells being issued . . . .
>
> 7. Is there any written record prior to the permits being issued of DEQ having made a judgment that, in the words of R 324.303(2)(d): "The distance between wells prevents interference"? If so please provide a copy. . . .

Indeed, Encana's motion received today does not contend MDEQ actually looked at the data.

The contested wells are gigantic hydraulically fractured horizontal frack wells. Some have measured depths of over 4 miles, and projected water usage of 31,500,000 gallons.[6]

Exhibit 29[7] is the cover page of a recent academic report on hydraulic fracturing – also called "fracking" – in Michigan, showing a sketch of the vertical and horizontal parts of wellbores. The fractures are seen on the bottom right of the sketch, except the fracture zone can extend much farther than the sketch indicates. One fracture in Pennsylvania is reported to be 1800 feet long.[8] Last month an Encana fracture in New Mexico reportedly traveled a half-mile to blow out an old oil well.[9]

Interference arises underground when pressure in one wellbore is affected by

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6 Brady affidavit, ¶¶ 17-18 .
7 Brady affidavit, ¶ 14.
8 Brady affidavit, ¶ 28, exhibit 18.
9 Brady affidavit, ¶ 30.

pressure in an adjacent wellbore. Interference can result in spills at the surface. An incident near Innisfail Alberta in 2012 reportedly resulted in 20,000 gallons of oil and frack fluid being spilled onto a farmer's field, and 100 trees being coated with a fine mist.[10] An underground communication incident involving Encana fracking in New Mexico last month reportedly resulted in 200 barrels of frack fluid, oil, and water contaminating the soil.[11]

As seen, interference can result between wellbores separated by distances well over 900 feet. This was the separation distance Encana originally claimed for the contested wells, though anti-collision data later showed a closer distance.[12] The situation is aggravated when the surface holes are located 50-55 feet apart, as here.

Interference can be avoided. Tools are reportedly available to monitor streaming pressures from one site to another.[13]

When Encana applied for the wells early this year it offered to show MDEQ data from 3 previous wells. The data supposedly would disprove the possibility of interference among the 13 contested wells. But the 3 comparators, fracked two years ago, were significantly smaller. There were no adjacent wellbores at the time they were fracked. Monitoring pressures from one to another would have been impossible. Importantly, Encana did not promise to frack the new wellbores at the same or lower

10 Brady affidavit, ¶¶ 28-29, exhibits 18, 19.
11 Brady affidavit, ¶ 30.
12 Boal affidavit, ¶ 10, exhibits 26-28.
13 Brady affidavit, ¶ 29, exhibit 19.

pressures than the comparators. So data from the comparators would prove little.[14] Equally importantly, Encana did not offer a diagram or show the dimensions of the fracture planning zones. In any case, whatever data Encana offered, the DEQ did not examine.[15]

Brady, as an ordinary driver and recreational snowmobiler who regularly ventures through the deep forest near the wellbores has an abiding interest in the matter.[16]

The claims in this case arise under MEPA[17] and the RJA.[18]

MDEQ and Encana move for summary disposition arguing that (1) Brady has not exhausted administrative remedies, (2) he lacks standing, and (3) he does not state a MEPA claim.

In this brief, the terms DEQ, MDEQ, and "supervisor of wells" will be used interchangeably.

II. Administrative exhaustion

The exhaustion argument is led by MDEQ, which says Brady can get recourse only if he first requests an evidentiary hearing under part 12 of MDEQ rules and then completes the process.[19]

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14 Brady affidavit, ¶¶ 21-22.
15 Brady affidavit, ¶ 23; Boal affidavit, ¶¶ 10-13, exhibits 17, 24-28.
16 Brady affidavit, ¶¶ 26-31, exhibits 18-19.
17 MCL 324.1701 et seq.
18 MCL 600.631.
19 R 324.1201 et seq.

But administrative proceedings under part 12 would be expensive and one-sided. No court has ordered an objector to a well permit to exhaust, though one court did have the chance.[20]

A. Standard of review regarding administrative exhaustion

Citing *Citizens for Common Sense in Government v Attorney General*,[21] Encana says that, should the court hold Brady had to exhaust before suing, the court's only option then is to dismiss the case. But MEPA says just the opposite:

> If administrative, licensing, or other proceedings are required or available to determine the legality of the defendant's conduct, the court may direct the parties to seek relief in such proceedings.... If the court directs parties to seek relief as provided in this section, *the court may grant temporary equitable relief* if necessary for the protection of the air, water, and other natural resources, or the public trust in these resources from pollution, impairment, or destruction....[22]

Unlike the campaign finance law in *Citizens for Common Sense* (which vested exclusive power to enforce it in the secretary of state and added that there is no private right of action[23]), as seen below the permitting process of part 615 does not allow administrative proceedings for Brady, much less require them. Neither do RJA or MEPA.

MDEQ has a different view from Encana; the court need not dismiss the case if Brady were to petition administratively now, it says. And the court can order Encana not to drill during the proceedings, the MDEQ brief says at pages 7-9.

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20 See *Schommer v DNR*, below.
21 242 Mich App 43 (2000).
22 MCL 324.1704(2) (emphasis added).
23 MCL 169.215(17).

B. The permitting process

Under part 615, notice of any permit application has to be given to the surface owner and the county. Townships have to be notified only if they have a population over 70,000, which none of the townships in this case have. If the county submits written comments and recommendations during the permit process MDEQ has to consider them.[24] But comments from a landowner like Brady can be ignored. Otherwise stated, he had no right to a notice or an opportunity to be heard. That means a permit proceeding is by definition not a "contested case" under the APA, and the APA does not apply.[25]

The permitting process would allow an administrative appeal of a permit if it were denied and Encana were the one appealing. But it is not a two-way street. Brady cannot appeal.[26]

A governor-approved integrated assessment of fracking is now in progress at the University of Michigan, with a steering committee of stakeholders from industry, the governor's office, the research community, and environmental groups. Its technical report on "Policy/Law" issued just last month lamented:

24 MCL 324.61525(4); R 324.201(2)(d).
25 MCL 24.203(3).
26 MCL 324.61503(2).

> Unlike many environmental permitting programs, oil and gas well programs do not historically give the general public the formal opportunity to review and comment on permit applications, or require agencies to respond to comments.... Michigan law gives local governments the opportunity to comment, but not the general public.....[27]

In saying this, the assessment only acknowledged part 12 as a tool for deciding issues of compulsory pooling, not permitting.[28] Acceptance of defendants' position would mean the "Policy/Law" report was wrong.

To remedy the lack of public participation, a bill was introduced in the Michigan House this summer. It would require the MDEQ, on request of anyone who is adversely affected by wells like the ones here, to hold a public hearing and receive and consider comments and recommendations of interested people.[29] The bill has not been enacted, nor have committee hearings been held. Were the bill to become law, defendants' arguments might hold water. As it is, Brady had no due process rights in permitting, and no formal way to object to the wells.

Encana cites Dean LeDuc's treatise for the proposition that the RJA "requires that an appellant first exhaust all administrative remedies."[30] But the passage cites no

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27 Gosman, *Hydraulic Fracturing in the State of Michigan: Policy/Law Technical Report*, Graham Sustainability Institute Integrated Assessment Report Series, Volume II, Report 6 (9/3/13), p. 19, *http://graham.umich.edu/media/files/HF-06-Policy-Law.pdf* .

28 Gosman, *Hydraulic Fracturing in the State of Michigan: Policy/Law Technical Report*, Graham Sustainability Institute Integrated Assessment Report Series, Volume II, Report 6 (9/3/13), p. 6, text at footnotes 75, 76, 78, *http://graham.umich.edu/media/files/HF-06-Policy-Law.pdf* .

29 HB 4899, 97th Legislature, 2013-2014 Session.

30 Encana brief p 4.

Michigan authority. Even if the proposition were accepted, for Brady in the permitting process, "all" administrative remedies equates to "no" administrative remedies.

C. The part 12 process

(Part 12 is not in a numbering sequence with part 615. Part 12[31] is a set of administrative rules dealing with oil-and-gas hearings. Part 615[32] is a set of statutes within NREPA, dealing with permits for oil and gas wells, conservation, and prevention of waste.)

Part 12 makes no mention of contested cases. It mentions only uncontested cases.[33] The first sentence says the purpose of a hearing is "to receive evidence pertaining to the need or desirability of an action or an order by the supervisor."[34] The legality of a permit already issued does not seem to be contemplated. Contested cases are covered in oil-and-gas rules other than part 12.[35] These other rules can be invoked, as mentioned, only by a producer or a mineral owner and Brady isn't one.[36]

Page 4 of the MDEQ brief purports to describe the part 12 hearing process, but it is full of frivolous mis-cites. Two of them[37] have no application to anything involving part 615.[38] A third one does not exist.[39]

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31 R 324.1201 et seq.
32 MCL 324.61501 et seq.
33 R 324.1205(1)(c).
34 R 324.1201.
35 R 324.3(2).
36 MCL 324.61501(k), 61503(2).
37 R 324.71(1), 324.71(2).
38 See R 324.3(2).
39 R 324.26(1).

A fourth one says Brady can "appeal" to the circuit court, but the brief's cite is to a statute which contains no reference to the action being an "appeal." Just the opposite: it allows TROs and injunctions against MDEQ for "any matter or thing arising under" part 615, and it has no exhaustion requirement.[40]

There are several procedural requirements for a part 12 hearing. One of them, applicable to spacing orders, says Brady would have to submit "Well production, testing history, and other applicable reservoir and geological data." He doesn't have that data nor does he have a way to get it.[41] Without it the MDEQ can return his petition.[42]

If he somehow gets past that hurdle, the MDEQ then determines whether the petition will be heard. The hearing would be considered in one of two categories, adoption of an order of statewide/fieldwide concern, or consideration of a local concern.[43] The former category would not fit here because Brady would not be seeking adoption of an order. He just wants the current rules enforced on undisputed facts.

Processing under part 12 is expensive. On receipt of a petition, the MDEQ is to prepare a notice of the hearing and then Brady has to serve it on various persons. The notice must contain certain required information.[44] He would also have to publish it in:

40 MCL 324.61517(1).
41 Brady affidavit, ¶ 24.
42 R 324.1202(2)(d), (4).
43 R 324.1205(1)(a) or (b).
44 R 324.1204(1), (2), (7).

> an oil and gas industry publication circulated in Michigan and in a newspaper of general circulation in the county or counties involved with the matter to be heard.[45]

The statewide industry publication is *Michigan Oil and Gas News* (MOGN). The general-circulation paper in Kalkaska County is the *Leader & Kalkaskian* (L&K). If a recent legal notice in MOGN is any guide, the display would occupy about 20 column inches.[46]

MOGN is a private publication of the Michigan Oil and Gas Association (MOGA), which allows non-MOGA members to subscribe. Brady is neither a MOGA member nor a subscriber.[47] Inquiry was made of the MOGN editor whether it would accept a legal notice ad from such a person, and if so what would be the rates. Accepting it would be at the publisher's discretion, the editor responded, and the charge would be $22/column inch.[48] So for 20 inches it would cost Brady $484. The same-size ad in L&K would come to $126.[49] The two together would total $610.

If the MOGN publisher exercised discretion and refused the notice, part 12 proceedings would be aborted.

After a hearing and final decision under part 12, if the finding were against Brady, not being an owner or producer he could not appeal to the MDEQ director, whereas

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45 R 324.1204(3).
46 Boal affidavit, ¶ 7, exhibit 21.
47 Brady affidavit, ¶ 25.
48 Boal affidavit, ¶¶ 5-6, exhibit 20.
49 Boal affidavit, ¶ 8.

Encana could if the finding were against it.[50] If Brady somehow were given an equal privilege and allowed to appeal, he would have to file another petition, purchase and file a copy of the transcript of the first hearing, and publish another notice in the newspapers.[51]

The transcript plus another $610 would drive his likely total expenses into the thousands of dollars. Brady is not in the gas or oil business. It is just wrong to put him to any expense at all to vindicate environmental rights.

D. Argument as to exhaustion under RJA

The purpose of a part 12 evidentiary hearing would be to allow Brady to prove: (1) 55 feet is a shorter distance than 660 feet and (2) MDEQ did not examine Encana's interference data at least as to wellpad B, and there was no indication of fracture planning, and MDEQ did not make an independent judgment about interference. These facts are already proved in the court record, so the evidentiary hearing would serve no purpose.

Other than in *Hughes v MDEQ*,[52] no defendant has ever argued that RJA requires exhaustion. And no court (including *Hughes*) has accepted it.

MDEQ cites *W A Foote Memorial Hospital v DPH,*[53] which did not arise under RJA. In both the statutes under which that plaintiff sued,

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50 R 324.1212(1); MCL 324.61501(k).
51 R 324.1212(2), (4).
52 Discussed below.
53 210 Mich App 516, 521-22, 534 NW2d 206 (1995).

> the *Legislature specified* that aggrieved parties may challenge defendant's decision to issue or deny CONs in the circuit court *only after* exhausting their administrative remedies. . . .[54]

The statutes in the case also specified time limits for starting the challenge. By contrast, RJA has no command that he exhaust first, much less a time limit within which to start exhausting.

MDEQ cites *Bois Blanc Island Township v Natural Resources Commission*[55] for the proposition that the APA does apply to MDEQ permitting, and that MDEQ cannot suspend a permit without giving Encana an administrative hearing first. But *Bois Blanc Island* did not arise under part 615. The agency there sought to terminate sanitary landfill sites which had operated for years. The court carefully distinguished that case's facts from one like this one, where the agency's original permit is being disputed:

> Turning to whether the contested-case provisions of the APA apply in the present case, this Court has previously held that the provisions of the APA governing contested cases apply in licensing situations only when the licensing is required to be preceded by notice and an opportunity for hearing. *Kelly Downs Inc v Racing Comm*, 60 Mich App 539, 547, 231 NW2d 443 (1975). See also *TDN Enterprises, Inc v Liquor Control Comm*, 90 Mich App 437, 439, 280 NW2d 622 (1979). The statutes upon which the DNR relies to issue the sanitary landfill permits . . . do not provide that the issuance of the permits be preceded by notice and an opportunity for a hearing. However, unlike *Kelly Downs* and *TDN Enterprises*, each of which involved an agency's original decision whether to issue a license, the instant case involves a "license" which has been in effect for several years.[56]

Encana has not begun operating the permits. Under *Bois Blanc Township* reasoning, the

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54 210 Mich App at 522 (emphasis added); MCL 333.22231, 333.22232.

55 158 Mich App 239 (1987). See also *Rogers v State Board of Cosmetology*, 68 Mich App 751 (1976); MCL 24.292.

56 158 Mich App at 244.

APA does not apply.

As to Encana's right to notice and an opportunity to be heard, the company is present in the court where due process is accorded to all.

Encana cites *Citizens for Common Sense,* discussed above. Again, that case arose under a statute which vests exclusive enforcement power in the secretary or state, and says explicitly "there is no private right of action, either in law or in equity, under this act."

In *Schommer v DNR*[57] the court considered a challenge by plaintiffs – a producer and a group of mineral owners – to the DNR's (predecessor to the MDEQ) refusal to permit a well. The parties agreed the APA did not apply (albeit for different reasons).[58] The court considered claims under part 615, and under the RJA.[59] The court dismissed the part 615 case for failure to exhaust. That ruling doesn't help defendants here because as mentioned part 615 provides for administrative appeals only by producers or mineral owners.[60] As to the RJA, the court dismissed only for untimeliness – the suit was not brought within 21 days. The DNR didn't try to argue non-exhaustion under RJA.

Finally, MDEQ cites colloquy from *Hughes v MDEQ* in this circuit, and asserts Judge Collette accepted the exhaustion argument. It cites the following transcript lines

57 162 Mich App 110 (1987).
58 162 Mich App at 122 n 1.
59 Particularly the predecessor to MCL 324.61517(1).
60 MCL 324.61501(k), 61503(2).

for a contention that Judge Collette "ruled that this Court could not revoke permits if a plaintiff did not first exhaust administrative remedies":

> [MR. BOCK:] One other point I would like to make, Your Honor, is just that some of the relief that's sought in the Plaintiffs' motion here is, I don't believe, available, specifically, declaring that certain permits are rescinded. There is a --
>
> THE COURT: There is a procedure, I understand. I am well aware of what the law is.
>
> MR. BOCK: In that case, Your Honor, you know, if the Court wants some authority on that I have a case I brought with me today.
>
> THE COURT: No, I am aware that you got to give people *due process*.
>
> MR. BOCK: Sure. And so I just wanted to say that we request that this is the wrong forum for that.
>
> . . .
>
> MR. BOAL: All I need is to have their permit rescinded.
>
> THE COURT: Well, Mr. Boal, I don't know that I can revoke a properly issued permit on my ruling here. I can only affect the way people do business. I cannot revoke someone's permit that has been in effect without them having *a right to contest* that.[61]

As seen in the colloquy, the judge's reasoning was that the *Hughes* plaintiffs had come to court without giving Encana due process. (They had not formally served the company as a defendant.) Contrary to MDEQ, the judge said nothing in the colloquy about a supposed failure to exhaust administrative remedies. More importantly his ultimate written decision, which MDEQ did not provide to this court, *said nothing*

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61 *Hughes v MDEQ*, Ingham County Circuit Court # 12-497-CE, 9/19/12 hearing transcript, page 15 lines 4-16, page 17 lines 23-25, page 18 lines 1-4 (emphasis added).

about exhausting administrative remedies. Judge Collette decided the case on other grounds, which are now under appeal.[62]

But mindful of his admonition about due process, Brady did make Encana a formal party here.

E. Argument as to exhaustion under MEPA

MEPA provides substantive environmental rights, and imposes a duty on agencies like MDEQ to consider the likely environmental effects of proposed conduct. As an example, the Department of Transportation's failure to to consider the likely environmental effects and alternatives before the approval of a highway project violated its substantive duties under MEPA. The supreme court nullified DOT approval.[63]

More to the point, MEPA explicitly rejects the doctrine of exhaustion:

> MEPA provides for immediate judicial review of allegedly harmful conduct. The statute does not require exhaustion of administrative remedies before a plaintiff files suit in circuit court.[64]

It would be reversible error for a trial court to defer to an administrative agency's conclusion that no pollution, impairment or destruction of a natural resource will occur:

> While we understand the trial judge's reluctance to substitute his judgment for that of an agency with experience and expertise, the Michigan environmental protection act requires independent, *de novo* determinations by the courts.[65]

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62 Court of appeals docket # 312902. On May 24 the court denied MDEQ's motion to dismiss the appeal.

63 *Michigan State Highway Commission v Vanderkloot*, 392 Mich 159 (1974). See also *Ray v Mason County Drain Commissioner,* 393 Mich 294, 306 (1975).

64 *Preserve The Dunes Inc v MDEQ*, 471 Mich 508, 514, 684 NW2d 847, 850 (2004).

65 *WMEAC v NRC*, 405 Mich 741, 752 (1979).

III. Brady's standing

A. Standing as to RJA

Encana argues Brady may not sue under the RJA because he wasn't a party in the permitting process. MDEQ does not join the argument.

The only party in the permitting process was Encana. So the argument means it could sue if a permit were rejected, but no one else could – regardless of the egregiousness of the violation – if the shoe were on the other foot. The plaintiff would have to wait and suffer the damages first.

Encana cites two cases, *Federated Insurance Co v Oakland County Road Commission*[66] and *Abel v Grossman Investments*.[67] Both were discussed in the court of appeals' very recent decision in *In re Application of Encana Oil & Gas Inc re Garfield 36 Pipeline*.[68] Setting aside that *Federated Insurance* may have been undermined by later decisions, the court held one need not be a "party" to appeal. Being a "party in interest" – described as "a broader term" – is sufficient:

> [U]nder MCR 7.203(A), there are situations where a non-party to a case is an aggrieved party with standing to appeal.... Contrary to petitioner's discussion of [*Federated Insurance*] its holding was not based on the Attorney General not being a named party.... Rather, the Attorney General was manifestly not an aggrieved party....

The same can be said of an "aggrieved party" under MCR 7.103(A) which governs appeals to this court. True, the statute in *Application of Encana Oil & Gas* specifically

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66 475 Mich 286 (2006).

67 ___ Mich App ___, case # 308939, 8/15/13.

68 ___ Mich App ___, cases ## 315058, 315064 (9/25/13), attached.

allowed a "party in interest" to appeal whereas RJA does not. But neither does RJA restrict appeals to "parties." Certainly Brady with his snowmobiling has demonstrated a recreational, safety, and public health "interest." And certainly he is "aggrieved."

B. **Standing as to MEPA**

Encana next asks the court to reject Brady's MEPA standing, as well as our supreme court's most recent explication of the whole notion of "standing" in *Lansing Schools Education Association.*[69] This the court cannot do. MDEQ does not join the argument.

Even if Encana's wish were granted some day and *Lansing Schools* were overruled, Brady would still have standing. He lives and regularly recreates too close to the wells for his pleas to be ignored.

The doctrine of recreational standing is recognized by the Michigan and US supreme courts. A plaintiff may proceed under the doctrine if damage to observable habitat is threatened on land adjacent to what he or she regularly traverses.[70] The courts have been adamant that only a NIMBY plaintiff will qualify.[71] Every time he jumps on

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69 *Lansing Schools Education Association v Lansing Board of Education*, 487 Mich 349 (2010).

70 *Michigan Citizens for Water Conservation v Nestlé Waters North America,* 479 Mich 280, 300, 310, 737 NW2d 447, 458, 463 (2007); *Friends of the Earth v Laidlaw Environmental Services Inc,* 528 US 167, 182-83 (2000); *Sierra Club v Morton*, 405 US 727, 735 (1972); *Lujan v Defenders of Wildlife*, 504 US 555, 562-563 (1992); *Cantrell v City of Long Beach,* 241 F3d 674, 681 (CA9, 2001).

71 Compare *Lujan v National Wildlife Federation*, 497 US 871, 886-89 (1990) (assertions that the affiants use unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur, are not sufficient); *Lujan v Defenders of Wildlife*, 504 US 555, 562-64

his snowmobile that's just what Brady is.

IV. Does Brady state a MEPA claim?

Under MEPA Brady does not just seek rescission of the permits and an injunction against Encana proceeding under them. He also seeks a declaration[72] that DEQ may not issue permits under spacing exceptions to anyone in the future, either for too-close wells, or for wells where it has not examined the interference issue.

Encana says Brady's only claim is fear of a personal injury. MDEQ does not join the argument.

Brady agrees if injury were his only potential harm this would not be a MEPA case. The purpose of MEPA is to "protect ... the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."[73] However, the risk of sloshing through thousands of gallons of frack fluid on the forest floor and seeing the trees coated with a fine mist does make it a MEPA case.

Next, Encana cites *Preserve The Dunes*:

> An administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA.... [MEPA] offers no basis for invalidating an issued permit for reasons unrelated to the permit holder's conduct."[74]

(1992) (assertions that affiants traveled to foreign lands to observe rare species in the past and have unspecific intent to return in the future are insufficient).

72 MCL 324.1701(1).

73 MCL 324.1701(1).

74 *Preserve The Dunes v DEQ*, 471 Mich 508, 519, 524 (2004).

Preserve The Dunes does not undermine this case. It was about a sand mining permit.[75] The permittee TechniSand was ineligible, because it had purchased the operation after a certain cutoff date in the sand law. DEQ granted the permit anyway. The plaintiff sued DEQ and TechniSand under the sand law and separately under MEPA. The sand claim was time-barred, but a 7-day bench trial ensued where the plaintiff tried to prove independent MEPA violations by TechniSand. The plaintiff failed. TechniSand was innocent under MEPA, save for the single issue of untimely purchase of the operation. The court of appeals held untimely purchase indeed was a MEPA violation. But the supreme court reversed for the reasons above quoted. The mere date that someone bought property can't prove anything. TechniSand might have violated the sand law, but it didn't violate MEPA.

The *Preserve The Dunes* majority did not overrule, disapprove, or even mention *Wortelboer v Benzie County*[76] or *West Michigan Environmental Action Council v Natural Resources Commission,*[77] which had held issuance of a well permit is sufficient to invoke MEPA. This was because those cases had included a caveat consistent with *Preserve the Dunes*: The permittee's action must "rise[] to the level of an impairment or destruction of a natural resource so as to constitute an environmental risk."[78]

"Environmental risk" is just what we have here. Encana says placing too-close

75 MCL 324.63701 et seq.
76 212 Mich App 208 (1995).
77 405 Mich 741 (1979).
78 212 Mich App at 220.

wells in a situation where interference might happen "cannot harm the environment."[79] But surface spills brought about by underground interference where the surface holes are too close do harm the environment. They can be avoided if DEQ will just do its job, look at the data, review the fracture planning zone, and space out the wellhead locations.

Moreover, Encana shares guilt because even if DEQ had looked at the data, it was from small old wells that had no adjacent wellbores when they were fracked. The company didn't diagram a fracture planning zone, and it didn't promise the frack pressure would be the same or lower than in the old wells.[80]

V. Defendants should be ordered to show cause why a preliminary injunction should not be issued.

The reason the pleadings have been amended and supplemented so many times is because of the short 21-day limitation period, and serial permitting by MDEQ.

At the time of Brady's amended brief for a preliminary injunction on September 3, the most recent pleading had just named Encana formally as a defendant. It was in the process of being served. Counsel had not yet appeared for it.

Since the preliminary injunction brief, Brady moved to add the 5 wells of wellpad C to the case, under the same theories as wellpads A and B. MDEQ's September 18 permits for those wells, and Encana's unrequited offer to share the data from the same 3

79 Encana brief, page 9.
80 Brady affidavit, ¶¶ 21-22, 29.

small old wells that had no nearby bores on the fracking dates, are documented in Brady's affidavit.[81]

Exhibit 16 to the affidavit has a schematic drawing of all 13 contested wells on the 3 wellpads, plus the 4 completed wells which are already on the 2 existing pads (A and C).

The September 3 brief noted Encana's plans for hundreds of wells throughout the northern lower peninsula. The problem of well spacing would likely recur, the brief said, and it was important that all of them follow MDEQ rules to the letter.

There is no question that the surface locations of the wells are less than 660 feet apart. At least as to wellpad B there is also no question that MDEQ failed to examine interference data. There is no question an environmental agency has an obligation to check that data. Soon when the pending interrogatories are answered, we will likely find out MDEQ neglected the wells of pads A and C, the same as pad B. This is enough to keep the case alive, and keep Encana from inflicting irreparable harm in the meantime.

Today plaintiff's counsel received an Encana brief opposing the preliminary injunction. The brief has several obvious defects:

* Shifting from reliance on the data from the three comparator wells cited last winter, Encana now cites two *other* wells. At page 11 it claims the other wells were fracked within 900 feet of an existing well, there were no interference or communication problems, and DEQ considered and relied on them in making a judgment there would be no interference in *these*

81 Brady affidavit, ¶¶ 21-23; Boal affidavit, ¶¶ 10-12, exhibits 25-28.

wells which are contested here. No data is provided as to the pressure utilized in the two wells, whether they were 900 feet apart, or whether they were in any way comparable. No affidavit supports the claim, and the other wells are irrelevant.

* Exhibits B, C, and D of the brief are unauthenticated, which wipes out its argument on page 5.

* Exhibit F, a blank DEQ form on which Encana relies at page 7, has a different title and is a different form than the one it used to apply for the spacing exceptions in this case. The title of exhibit F is "Application for voluntarily pooled spacing unit: Antrim USP or rule 303 exception." The title of the form Encana actually used was "Application for rule 303 exception." Exhibit F is irrelevant.

* In arguing on pages 7-9 (based on a different subsection of the spacing rule) that the 660-foot rule actually applies to "the bottom hole location or productive subsurface portion of the wellbore," Encana ignores that neither the statute nor the rules define those terms. And it diminishes the crystal clarity of R 324.103(t) which defines "well location."

* It says on page 11 that DEQ has a good record since 1952 regulating 12,000 frack wells in the state. But it ignores that the huge majority of those historic wells were vertical, not of the new horizontal type, and they typically used only 50,000 gallons of water. This is ⅙ of a percent of the 31,500,000 gallons Encana intends for 3 of the contested wells in this case. DEQ's record of regulating small old vertical wells is irrelevant to this case.

* Finally it claims on page 12 that if Brady succeeds in this suit the result would be an increase in land impact and surface disturbance, contrary to the public interest and to the environmental interests he purports to assert. The claim is conjecture, again unaccompanied by affidavit. Equally, the result might be the company would find it uneconomical to site a large number of separate pads, and too destructive of the state forest to explore here.

VI. Conclusion

Wherefore the court should deny the motions for summary disposition, and order defendants to show cause why they should not be enjoined.

Until they do show cause Encana should be instructed not to begin moving earth.

Respectfully submitted,

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Dated: October 24, 2013

Certificate of Service

Ellis Boal certifies that on October 24, 2013, he mailed a copy of the above pleading, and the affidavits of Paul Brady and Ellis Boal, to:

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Ellis Boal

Court of Appeals, State of Michigan

ORDER

In re Application of Encana Oil & Gas Inc re Garfield 36 Pipeline; In re Application of Encana Oil & Gas re Beaver Creek Pipeline

Docket Nos. 315058; 315064

LC Nos. 00-017195; 00-017196

Patrick M. Meter
Presiding Judge

Peter D. O'Connell

Donald S. Owens
Judges

The Court orders that the motion to dismiss is DENIED because petitioner-appellee (petitioner) has not established that this Court lacks jurisdiction over these appeals. Petitioner's argument that appellants are not parties in interest within the meaning of MCL 462.26 because they were not parties to the Michigan Public Service Commission (MPSC) proceedings must be rejected because, by equating the phrase "party in interest" used in that statutory provision with the term "party," petitioner would improperly render the words "in interest" nugatory or mere surplusage. See, e.g., *Whitman v City of Burton*, 493 Mich 303, 311-312; 831 NW 323 (2013). Rather, by using the broader phrase "party in interest," the Legislature has necessarily allowed persons or entities who are not parties to the relevant MPSC case to file an appeal of right from the relevant types of MPSC orders. Further, contrary to petitioner's argument that one needs to be a party to a case to be an aggrieved party under MCR 7.203(A), there are situations where a non-party to a case is an aggrieved party with standing to appeal. See *Abel v Grossman Investments Co*, ___ Mich App ___; ____ NW2d ___ (Docket No. 308939, issued August 15, 2013). Also, *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286; 715 NW2d 846 (2006), is inapplicable. Contrary to petitioner's discussion of that case its holding was not based on the Attorney General not being a named party. See *id.*, 296 n 10. Rather, the Attorney General was manifestly not an aggrieved party in that case because he was not pursuing an appeal based on an interest in the outcome of the particular case but merely to dispute this Court's construction of a statute. See *id.*, 290. Thus, we need not consider whether *Federated Ins Co* has been undermined by *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). However, we note that review of the June 28, 2013 MPSC order is not in the scope of the present appeals from January 31, 2013 orders of the MPSC. Rather, appellants may only challenge the January 31, 2013 MPSC orders appealed from in the present appeals.

Presiding Judge

Owens, J., would grant the motion to dismiss.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

SEP 25 2013
Date

Chief Clerk