

From: "Fitch, Hal (DEQ)" <FITCHH@michigan.gov>
Date: February 6, 2014 at 2:10:22 PM EST
Subject: Reply to your February 5, 2014, letter

Dear Ms. Barnes and Ms. Morris

Thank you for the chance to discuss your concerns at our meeting with Representative McMillin on February 5, 2014. Following is my response to questions you raised in the letter you provided to me at the meeting. I have listed each of your questions with my response in italics. Please note that many of your questions call for a legal interpretation. My responses are not to be taken as legal advice; they are simply our own interpretation of the authority of the Department of Environmental Quality (DEQ) or description of our procedures. You may wish to seek legal counsel from a qualified attorney before pursuing action on these issues.

COMPULSORY POOLING

1. Why isn't compulsory pooling of someone's private property rights considered an eminent domain "taking" of private land, and thus subject to Michigan Constitution protections?

- Please cite authority and provide examples, if any.

Response: Under common law in Michigan oil and gas are subject to the right of capture; the law acknowledges that a person may drain oil or gas from a neighbor's property and reduce it to his or her possession. The remedy for the neighbor is to drill his or her own well. In the early days of oil and gas development, this resulted in drilling numerous wells on small individual parcels. The DEQ is charged with preventing waste, which includes the drilling of unnecessary wells. To fulfill that duty we designate drilling units. A drilling unit is a tract of land of a specified size and configuration on which one well may be drilled. There is often more than one mineral owner within a unit. If one or more of the mineral owners desire to drill and another owner does not agree, the law provides for compulsory pooling as a means to honor the rights of those who desire to drill while providing compensation for oil or gas drained from the property of those who do not agree. I do not have a ready reference to the common law cases on this topic. Provisions on pooling can be found in Part 615, Supervisor of Wells, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA). Section 61513(4) of that statute states in part: "The pooling of properties or parts of properties is permitted, and, if not agreed upon, the supervisor may require pooling of properties or parts of properties in any case when and to the extent that the smallness or shape of a separately owned tract or tracts would, under the enforcement of a uniform spacing plan or proration or drilling unit, otherwise deprive or tend to deprive the owner of such tract of the opportunity to recover or receive his or her just and equitable share of the oil or gas and gas energy in the pool..."

2. Currently NREPA regulations allow the DEQ Supervisor of Wells to order the pooling of private lands into a drilling unit. Can and would the DEQ also pool municipally owned property into a unit over a city's objections?

Response: There is no statutory bar to the Supervisor of Wells pooling municipal properties.

- Please cite authority and provide examples of municipalities who have had their land pooled, if any.

Response: I cannot name any specific instances of this from memory, and it would take considerable research of our files to cite examples.

- Do statutes such as the Home Rule City Act or others give local control to cities apply?

Response: I do not know of any legal provisions that would prevent pooling of municipal property.

- What is the legal and policy justification for this State sanctioning of eminent domain by private companies?

Response: Compulsory pooling is not sanctioning of eminent domain, as discussed above.

3. When a company begins to compile oil and gas rights to form a drilling unit, do they have to outline the area where they are seeking to drill prior to obtaining the permit?

Response: A company must designate a proposed drilling unit as part of an application for a permit to drill and operate an oil or gas well. The drilling unit must conform to state requirements under Part 615 of the NREPA.

- How is the public supposed to monitor private activity of the oil company as property acquisitions happen around them?

Examples:

- You are adjacent to an area, that may become part of a drilling unit, but aren't in the area yourself.

Response: There is no requirement under Michigan law for an oil company to divulge information on private leases.

- Or, if you are in a proposed area, but have not yet been approached by the company?

Response: A company cannot begin drilling until it has made a good faith effort to obtain leases or other rights to explore for and produce oil or gas from all of the owners of oil and gas rights within a drilling unit.

- How would the public know when the company has enough acreage to begin compulsory pooling?

Response: Owners of oil and gas rights within an area proposed to be compulsorily pooled will receive a notice of a hearing. The notice must also be published in a newspaper of general circulation in the county or counties where the property proposed to be pooled is located.

- How is a land-owner notified of rights if their property is subject to pooling? What if they are adjacent to property, or have an ownership interest such as publicly-held land (like Rochester parks)

Response: See above as to notices of hearings. A notice specifies the actions a party must take to participate in the hearing. A person should consult a qualified attorney as to their other legal rights.

- Can the company amend the area where they'd like to drill based on whether they are getting enough voluntary cooperation?

Response: Yes. This would require filing of a new permit application.

LOCAL CONTROL

4. Could you provide examples of ordinances or other regulations a city has tried to enact that the DEQ has, is, or would challenge regarding regulating horizontal oil and gas drilling, either directly/indirectly?

- Please provide examples, and cite authority relied upon for pre-empting local control.

Response: The DEQ might take action in a case where a local ordinance interferes with the DEQ's mandated responsibilities. I cannot be more specific than that without getting into legal interpretations.

5. Could you provide examples of ordinances or other regulations that the DEQ would not challenge?

- Please provide examples, and cite authority relied upon.

Response: I cannot speculate on this; it would depend heavily on the specifics of the case.

I recognize that these are complicated issues. Please contact me if you have additional questions.

Sincerely,

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