



Overlook Lake Michigan from Arcadia Dunes this winter. Photo by Nate Richardson

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The MELJ is a publication of the State Bar of Michigan's Environmental Law Section and exists to provide the Section's membership a forum for sharing information and discussing environmental topics relevant to the legal community in the State. To that end, the MELJ encourages the open exchange of legal discourse on a variety of environmental topics, but does not endorse particular viewpoints or positions unless otherwise recognized by the Section. Any opinions espoused by the articles contained within are attributable to solely their respective authors and are not representative of the SBM, the Section, or its members generally. Publication is neither an endorsement nor a rejection of a particular position by the Environmental Law Section.

The Environmental Law Section's Chair's Report From Kelly Martorano

I am honored and excited to begin my term as the newest chair of the Environmental Law Section and look forward to a productive and fun year. The Section leadership has some exciting ideas for the coming year that we hope will intrigue and engage the current Section membership and also attract new members.



However, first I want to thank Scott Steiner for turning over the Section on a high note. His leadership and commitment to promoting the Section over the last year and driving forward improvements has put us in the position of being one of the top Sections in the Michigan Bar. I recently attended the Section Chair Orientation in Lansing and was so proud to see our Section's web page and the Environmental Law Journal being used as an example of what other Sections can achieve.

Please check out the [web page](#) and set up your profile on SBM Connect while you are there. SBM Connect will be one of the ways we will be working to keep our members informed and distribute news about events and current environmental issues. There is a nice tutorial on using SBM Connect that the Section posted in 2017 that should help you get started, if needed.

In 2019, the Environmental Law Section plans to continue offering high quality and relevant webinars and programs to its members. The content of recent webinars has ranged from information on cross border environmental issues with Canada to information on the Endangered Species Act. Look for more timely and informative webinars and programs in 2019, including a new initiative to present the basics of environmental law for new lawyers and lawyers who need to understand environmental issues, but do not concentrate solely on environmental law.

In addition to the informative webinars and programs, the Section is always looking for articles and content to add to our top-notch Environmental Law Journal. If you have any ideas or would like to write an article, please reach out to us.

The Section is also planning to have some fun this year! Look for one or two meet-ups intended to reconnect with old colleagues, meet new ones, and mentor young lawyers who want to hear and learn what the practice of environmental law is all about.

Finally, thank you to all of the Environmental Law Section Chairs that have come before me and have made the Section what it is today! I look forward to engaging with many of you this year and meeting and talking with new members of the Section. Please feel free to reach out to me at any point this year with your ideas or comments.

Editor Highlight: Lydia Barbash-Riley & Joni Roach



The MELJ's spring issue featured an introduction to two of its new editors—Nicholas Leonard and Allison Collins, but also hard at work on its Editorial Committee are Joni Roach and Lydia Barbash-Riley.

Joni is a research attorney with the Michigan Court of Appeals in Grand Rapids, MI. She attended law school at Michigan State University School of Law, where she was a published member of the law review, a professor's teaching assistant, and a research assistant. Joni completed multiple externships in law school, working for the Chapter 13 bankruptcy trustee and a judge in the Western District of Michigan among others. Before law school, Joni studied professional writing and computer science at Grand Valley State University. She worked in the field of e-commerce for approximately five years before making the decision to attend law school. Joni's interest in the environment stems from her wonderful memories of camping, swimming, biking, and hiking as a child with her family in northern Michigan. In her free time, Joni volunteers at a local cat shelter, and enjoys mountain biking, hiking, reading, and writing.

Lydia Barbash-Riley is an associate attorney with Olson, Bzdok & Howard, P.C. specializing in environmental, energy, and Indian law. She represents public interest clients in proceedings before the Michigan Public Service Commission and in other environmental and land use litigation matters. Lydia also has experience counseling municipal and private clients regarding environmental due diligence and brownfield redevelopment.

Lydia received her J.D. cum laude from the Indiana University Maurer School of Law in Bloomington, where she was the Editor-In-Chief of the Indiana Journal of Global Legal Studies. During law school, she gained experience working to protect natural and cultural resources in the public and non-profit sectors as a legal intern with the National Oceanic and Atmospheric Administration and the Conservation Law Center. Lydia also earned a Master of Public Affairs in Environmental Policy and Natural Resource Management from Indiana University's School of Public and Environmental Affairs and a B.A. in political science with honors in the liberal arts from the University of Wisconsin-Madison. Prior to law school, Lydia was a Community Environmental Development Promoter in the Dominican Republic with the U.S. Peace Corps. Lydia currently serves on the Board of Directors of the Land Conservancy of West Michigan. Outside of the office, she enjoys hiking and SCUBA diving in the Great Lakes.





The Michigan Supreme Court Affirms 90-day Appeal Period for Permits to Install for Existing Air Pollution Sources



Christopher M. Bzdok & Tracy J. Andrews
Principal and Of Counsel, respectively, to
Olson, Bzdok & Howard P.C.

In July, the Michigan Supreme Court held in *South Dearborn Environmental Improvement Association v Michigan Department of Environmental Quality* that challenges to a Permit to Install for an existing source of air pollution are subject to a 90-day appeal period under Part 55 of the Natural Resources and Environmental Protection Act (NREPA).¹ While historically the consensus view was that all air permit challenges under Part 55 were subject to a 90-day appeal period,² this proposition had never been tested prior to the *South Dearborn* case. These authors believe that the Supreme Court's opinion settles this question in a way that promotes uniformity and makes the process for seeking judicial review of air pollution permits logical and comprehensible.

Background

In 2014, the Michigan Department of Environmental Quality (MDEQ) issued what it termed a “revised” Permit to Install (PTI) to Severstal, a Russian company that owned the former Ford Rouge steel mill in Dearborn, Michigan. The steel mill is a major source of air pollution under Part 55 of NREPA and the Clean Air Act.³

In 2006, the MDEQ had issued an original PTI to Severstal to install pollution control equipment that was intended to resolve a series of violation notices brought by the agency under Part 55. After the equipment was installed, Severstal performed stack tests that showed several emissions sources at the steel mill were exceeding the permit limits. The MDEQ issued another violation notice to Severstal, who proposed to come into compliance by increasing the permit’s emission limits for certain criteria pollutants by hundreds or, in some cases, thousands of tons per year; as well as large percentage increases in the emissions of certain toxic metals.

¹ The full case name is *South Dearborn Environmental Improvement Ass'n, Inc., Detroiters Working for Environmental Justice, Original United Citizens of Southwest Detroit, and Sierra Club v Mich Dep't of Environmental Quality, Dan Wyant, and AK Steel Corp*, 502 Mich 349; ___ NW2d ___ (2018) (Docket Nos. 154524 and 154526). Part 55 of NREPA is MCL 324.5505 *et seq.*

² See, for example, *Michigan Appellate Handbook* (ICLE), Appendix A, Table of Selected Appeal Periods, stating 90 days for “Air pollution; appeal of permit decision of Department of Environmental Quality – to circuit court” and citing as authority MCL 324.5505(8) and MCL 324.5506(14). As further evidence of a consensus view, in this case the MDEQ did not support AK Steel’s position until after the Court of Appeals opinion.

³ 42 USC 7401 *et seq.*

At first the MDEQ rejected Severstal’s request. However, after the Michigan Economic Development Corporation intervened on Severstal’s behalf, the MDEQ eventually agreed. The MDEQ noticed a “revised” PTI for public comment in February 2014. The South Dearborn Environmental Improvement Association and other community groups objected to the revised PTI on several grounds, including the MDEQ’s decision to apply only those regulations in effect at the time the original permit was issued in 2006—rather than regulations in effect at the time of the permit decision. Nevertheless, the MDEQ issued the revised PTI on May 12, 2014. Shortly after the MDEQ issued the permit, AK Steel bought the facility from Severstal.

“[T]he Court of Appeals agreed . . . [that] the applicable court rule was MCR 7.119—which provides 60 days to appeal . . .”

The community groups appealed the permit to Wayne County Circuit Court on July 10, 2014—which was 59 days after the MDEQ issued the permit. Five months later, AK Steel filed a motion to dismiss, arguing that the citizens groups’ appeal was untimely. AK Steel argued that MCL 324.5505(8) provided an appeal within 90 days for PTIs for only new sources; and MCL 324.5506(14) provided an appeal within 90 days only for renewable operating permits (ROPs). Therefore, the steel company argued, an appeal of a PTI for an existing source is governed by Section 631 of the Revised Judicature Act (RJA),

which states that if judicial review of an agency decision “has not otherwise been provided for by law,” an appeal “shall be made in accordance with the rules of the Supreme Court.”⁴ AK Steel argued that MCR 7.123 was the applicable court rule, and provided only 21 days for an appeal of a PTI for an existing source.

The Circuit Court denied AK Steel’s motion, holding that the appeal was timely because Part 55 provided for it to be filed within 90 days. The Circuit Court held that MCL 324.5505(8) directs appeals of PTIs for existing sources over to MCL 324.5506(14) via an explicit cross-reference; and that MCL 324.5506(14) provides for appeals of permits for existing sources to be filed within 90 days.

AK Steel applied for leave to the Court of Appeals, who agreed to hear the appeal. On July 12, 2016, the Court of Appeals affirmed the Circuit Court—but on different grounds.⁵ The Court of Appeals agreed with AK Steel’s argument that neither MCL 324.5505(8) nor MCL 324.5506(14) set forth an appeal period for a PTI for an existing source.

However, the Court of Appeals agreed with the community groups’ argument that if Part 55 did not provide a 90-day appeal period for PTIs from existing sources, and the appeal was governed by RJA Section 631 instead, then the applicable court rule was MCR 7.119—which provides 60 days to appeal—rather than MCR 7.123, which provides only 21 days. Titled “Appeals from Agencies Governed by the Administrative Procedures Act,” MCR 7.119 states that it “governs an appeal to the circuit court from an agency decision where MCL 24.201 *et seq.* [the APA] applies.” The Court of Appeals held that because MCR 7.119 applied, MCR 7.123—which is the catch-all

⁴ MCL 600.631.

⁵ *South Dearborn Environmental Improvement Ass’n et al v Dep’t of Environmental Quality*, 316 Mich App 265; 891 NW2d 233 (2016).

for “an appeal to the circuit court from an agency decision that is not governed by another rule in this subchapter”—did not apply.

After the denial of motions for reconsideration, both AK Steel and the MDEQ applied for leave to the Michigan Supreme Court. In lieu of granting leave, the Supreme Court directed the parties to file supplemental briefs on the issues raised in the application, and held oral argument. On July 17, 2018, the Supreme Court issued an opinion affirming the result but on the basis of Part 55, rather than RJA 631 and MCR 7.119; and by a vote of 4 to 3.

The Supreme Court’s Opinion

The majority opinion was written by Justice Richard Bernstein, joined by Justices McCormack, Viviano, and Clement. The opinion began by noting that “the focus of this appeal is on the interplay of MCL 324.5505(8) and MCL 324.5506(14).” As quoted by the Court, MCL 324.5505(8) states:

Any person may appeal the issuance or denial by the [the MDEQ] of a permit to install, a general permit, or a permit to operate authorized in rules promulgated under [MCL 324.5505(6)], for a new source in accordance with ... MCL 600.631.... Petitions for review shall be the exclusive means to obtain judicial review of such a permit and shall be filed within 90 days after the final permit action, except that a petition may be filed after that deadline only if the petition is based solely on grounds arising after the deadline for judicial review. Such a petition shall be filed no later than 90 days after the new grounds for review arise. *Appeals of permit actions for existing sources are subject to section 5506(14).*⁶

The Court noted that while the reference in this section to a 90-day period is limited to PTIs for new sources, the last sentence specifically addresses existing sources. The Court concluded that “The plain language of this sentence indicates that we turn to MCL 324.5506(14) for the rules governing appeals of permit actions for an existing source...”⁷

MCL 324.5506(14), in turn, provides:

A person who owns or operates an existing source that is required to obtain an operating permit under this section, a general permit, or a permit to operate authorized under rules promulgated under section 5505(6) may file a petition with the [the MDEQ] for review of the denial of his or her application for such a permit, the revision of any emissions limitation, standard, or condition, or a proposed revocation of his or her permit. This review shall be conducted pursuant to the contested case and judicial review procedures of the administrative procedures act ..., being [MCL 24.201 to MCL 24.328]. Any person may appeal the issuance or denial of an operating permit in accordance with [MCL 600.631]. A petition for

⁶ *South Dearborn*, 502 Mich at 362; slip op at 9.

⁷ *Id.* at 362-63; slip op at 10.

judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action...⁸

The Court recognized that the fourth sentence of the above passage “has been the focus of the disagreement in this case.”⁹ Rejecting arguments that the sentence should be read as referring to only operating permits, the Court held that the proper reading needed to construe the cross-reference in MCL 324.5508(5) together with the fourth sentence in MCL 324.5506(14). To do so, the Court relied on the presence of an indefinite article preceding the word “permit” in MCL 324.5506(14), which “suggests that the statute refers to more than one type of permit.”¹⁰ The Court also found it noteworthy that the fourth sentence’s use of the bare “permit” contrasted with the more specific nomenclature used for other specific types of permits elsewhere in the two statutory sections. “Four permit types are mentioned by name in MCL 324.5505(8) and MCL 324.5506(14), which indicates that the Legislature knew how to be specific when it so intended.”¹¹ The Court also noted that “when the Legislature wanted to use ‘permit’ to refer to a particular previously referenced permit, it used more restrictive language.”¹² On these bases, the Court concluded:

[A] petition for judicial review of a permit to install for an existing source must be filed within 90 days of the permit being issued. Such a reading harmonizes the meaning of these two statutes.¹³

The Court therefore affirmed the Court of Appeals in part but for different reasons; vacated the section of the Court of Appeals’ opinion determining that MCR 7.119 established the appeal period if Part 55 did not; and remanded the case to the Circuit Court for further proceedings. Justice Wilder, joined by Chief Justice Markman and Justice Zahra, dissented.

Conclusion

As a result of the Supreme Court’s decision, all challenges to air permits under MCL 324.5505(8) and 324.5506(14) are subject to the same 90-day appeal period. The authors believe this conclusion is grounded in sound textual analysis; and that it also makes sense as a matter of policy. The *South Dearborn* decision confirms the existence of a uniform appeal period for air pollution permit challenges, which is a reasoned approach that will promote adjudication of the critical public health issues associated with these permits on the merits, rather than dismissing them based on a trap for the unwary.

⁸ Quoted in *id.* at 366-67; slip op at 14.

⁹ *Id.* at 367; slip op at 15.

¹⁰ *Id.* at 368; slip op at 16.

¹¹ *Id.* at 369-70; slip op at 17.

¹² *Id.* at 370-71; slip op at 18.

¹³ *Id.* at 372; slip op at 22.

What You Might Have Missed

Events of Interest to the Michigan Environmental Law Community

Great Lakes Environmental Law Center's Annual Blue Water Bash **November 15, 2018, Detroit**

The Great Lakes Environmental Law Center hosted its fifth annual blue water bash at Tony V's to celebrate a year of successful work and to honor a distinguished actor in the environmental field. This year's honoree is [Detroit City Council Member Raquel Castañeda-López](#). The GLELC dubbed her the "Legislator of the Year" for her work spearheading the passage of the [Detroit Fugitive Dust Ordinance](#) last fall and her perseverance as a steadfast advocate in addressing air quality issues in Southwest Detroit.



Webinar: Ontario Bar Association ELS and SBM ELS: Examining Shared Environmental Interests **Nov. 12, 2018**

Members of the Environmental Law Section and the Ontario Bar Association discussed environmental law topics relevant to lawyers on both sides of the border. The speakers included Jaffrey K. Haynes of Beier Howlett, Mark Mattson of Swim, Drink, Fish, Theresa McClenaghan of the Canadian Environmental Law Association, and Professor Nicholas Schroek of the University of Detroit Mercy Law School. They discussed the impact of the deep geological (nuclear waste) repository, development patterns, storm, sewage, and chemical run-off on the Great Lakes. Their presentations addressed the similarities and differences of legislative frameworks in Michigan and Ontario.

Joint Environmental Law Conference **Nov. 8, 2018, Lansing**

The Joint Environmental Law Conference, co-sponsored with the West Michigan and East Michigan Chapters of the Air & Waste Management Association, was held in early November at the Lansing Community College West Campus. The Conference featured key note addresses from EPA Region 5 Administrator Cathy Stepp and MDEQ Director Heidi Grether.



SBM NEXT Conference Sept. 26-28, 2018, Grand Rapids

The ELS provided programming during the Conference. Margrethe Kearney of the Environmental Law and Policy Center and Todd Schebor of Dykema organized a presentation by Janet McCabe, Former Acting Assistant Administrator for the Office of Air and Radiation, and Jim Roush and Matt Hall of Consumers Energy regarding the EPA's proposed Affordable Clean Energy rule—a rule intended to replace the Clean Power Plan rule. Sean Hammond of the Michigan Environmental Council provided an update on new public acts regarding environmental, energy, and land use matters that were passed by the Michigan Legislature since last year's annual meeting.

Following the Section meeting, the Council held its annual election meeting. Outgoing Chair Scott Steiner of Rhoades McKee passed the gavel on to Chair-Elect Kelly Martorano of Dickenson Wright (above left). By nomination and confirmation of Section members present, Jim Enright transitioned from Secretary-Treasurer to Chair Elect and Tammy Helminski of Barnes & Thornburg filled his position as Secretary-Treasurer. In addition, Lydia Barbash-Riley of Olson, Bzdok & Howard, and Kurt Kissling of Pepper Hamilton were selected to serve on the Council while Todd Schebor of Dykema, and Paul Collins of Miller, Canfield, Paddock & Stone were confirmed to serve a second term on the Council. Chris Dunsky was honored for his years of dedication to the Section and his commitment to leading this publication (right). Following the meeting, the Section sponsored a happy hour at Bistro Bella that was well attended. The next Council meeting will be in December TBD.



Webinar: A Closer Look at the Endangered Species Act September 18, 2018

The Natural Resources, Energy, & Sustainability Committee of the Michigan Bar's Environmental Law Section hosted a webinar focused on unique issues that arise in endangered species actions. Susan Topp of Topp Law lead the webinar, which examined the burden of proof and how it has been applied in actions brought to protect birds and bats in wind turbine cases. In addition, the speakers discussed the role of the U.S. Fish and Wildlife Service and other state and federal agencies that implement the Endangered Species Act and related protection laws.

Webinar: A Legal Perspective on PFOS/PFAS Contamination Issues July 10, 2018

The Hazardous Substances & Brownfields Committee of the Michigan Bar's Environmental Law Section hosted a [webinar](#) focused on the legal issues that arise at sites contaminated with

PFOS/PFAS. Presenters included Ben Fruchey of Foley Baron Metzger & Juip, Ryan Thomas, an environmental scientist at GHD, and Taryn McKnight, a product manager at Test America.

Webinar: Latest Perspectives on Vapor Intrusion Litigation
June 28, 2018

Lawyers and experts involved in vapor intrusion litigation must react and adapt to regularly changing programs at the state and federal level. This webinar addressed the latest in vapor intrusion litigation and featured panelists Jon Rohrer, PG, of Roux Associates, James Ray of Robinson & Cole LLP, and Michael Goodstein of Hunsucker Goodstein. They discussed issues related to conflicting guidance and regulatory programs, changing toxicity data and target levels, the presence of other contaminant sources, and how these matters impact personal injury and property damage claims.

Summer Program: Crisis Mode: What do you do when it all hits the fan?
June 14, 2018, Bath Township

The SBM ELS held a Council meeting and hosted a [summer program](#) at the Michigan Wildlife Conservancy's Bengal Wildlife Center. The program consisted of a discussion among panelists Scott Sinkwitts of Consumers Energy, Daniel Cherrin of North Coast Strategies, Tom Heiden of Latham & Watkins, and Herschell Fink of Jaffe Raitt Heuer & Weiss. This broad team of individuals with varied skill sets discussed how they address high-profile crisis situations. The panelist identified effective (and ineffective) coordination and response efforts.

A recording of the webinar and Joint Conference materials can be found under in the [Section Library](#).

* Do you have an upcoming event that may be of interest to the environmental law community?
Let us know and it may be featured in the next issue of MELJ.

If you are not already a member of the Environmental Law Section,

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Membership dues are only \$30 and FREE for law students and new members to the bar.



Viewpoint: Assessing Michigan's Response to the Flint Water Crisis: The Lead and Copper Rule and Executive Directive 2018-3

Nick Leonard

Executive Director

The Great Lakes Environmental Law Center¹

The Flint Water Crisis represents one of the most serious failings of environmental law and the administrative state in American history. The Lead and Copper rule, the primary regulation in existence to ensure that the drinking water delivered to people's homes is safe, did not serve its primary function. Why that is the case is partially due to loopholes and gaps in the lead and copper rule, on which the Flint Water Crisis shone a bright light. However, the problem was not purely a matter of the language of the lead and copper rule failing to adequately protect the public health. The Crisis was also created by a failure of action on the part of the Michigan Department of Environmental Quality (MDEQ), the U.S. Environmental Protection Agency (EPA), and many non-governmental environmental watchdogs to listen to residents. After all, Flint residents started to raise the alarm bell about their drinking water immediately after the water system switched its water source by contacting experts to have the lead levels in the drinking water from their taps tested. For over one and a half years, residents of Flint and other advocates were derided as being misinformed and much worse. In the end, it was the people in charge of protecting Flint's drinking water that admitted to being misinformed, with residents being left to live with the consequences.

The question of how the Flint Water Crisis came to be is one that has been examined by numerous residents, agencies, commissions, organizations, journalists, and many others. Michigan's recent amendments to this rule address many of the gaps and loopholes in the regulations. However, the root cause of the Flint Water Crisis is much more complex than a few loopholes and gaps in the administrative code. The Michigan Civil Rights Commission, in its comprehensive report on the Crisis, concluded that the history of systemic racism in Flint made it a likely location for the failure of adequate regulatory oversight that occurred. Specifically, the report concluded that “[t]he lack of political clout left the residents with nowhere to turn, no way to have their voices heard.”² This is a problem borne of emergency managers and the stripping of local residents with the democratic control of their affairs, antiquated civil rights statutes that lack teeth for modern forms of racial and economic discrimination, and a lack of state leadership on issues such as environmental justice.

¹ In accordance with the MELJ's mission statement regarding publication of viewpoint articles, the positions advanced within this piece are those of the author and do not purport to represent the Environmental Law Section's position on any legal issue.

² Michigan Civil Rights Commission, *The Flint Water Crisis: Systemic Racism Through the Lens of Flint* (February 17, 2017), p 4, <https://www.michigan.gov/documents/mdcr/VFlintCrisisRep-F-Edited3-13-17_554317_7.pdf>

Given the recent extensive updates to the Michigan Lead and Copper Rule³ and Executive Directive 2018-3,⁴ now is an appropriate time to assess how Michigan has addressed the primary causes of the Flint Water Crisis. First, this article will highlight the extensive changes made to the Michigan Lead and Copper Rule this past summer. Second, this article will analyze Executive Directive 2018-3, which was the result of recommendations made by an Environmental Justice Work Group convened in the wake of the Crisis to develop environmental justice recommendations to Governor Snyder.

The History of Lead Contamination

Documentation of the negative impact of lead on human beings can be found as far back as ancient Egypt.⁵ In modern times, many European countries banned the use of lead-based interior paints in 1909.⁶ Despite this, water systems and regulators were slow to regulate the presence of lead in drinking water infrastructure. It was not until 1986 that the federal Safe Drinking Water Act was amended to require that any pipe, solder, or flux used in a public water system or any plumbing in residential or nonresidential facilities providing water for human consumption be “lead free.”⁷ However, when initially adopted, the phrase “lead free” was a misnomer, as it did not prohibit the presence of lead in plumbing fixtures. Instead, the phrase “lead free” was specifically defined to require only that solders and flux contain not more than 0.2% lead, and that pipes and pipe fittings contain not more than 8% lead.⁸

In 1991, the EPA enacted the first iteration of the Lead and Copper Rule pursuant to the Safe Drinking Water Act.⁹ Later, in 2011, the federal Safe Drinking Water Act was amended to lower the amount of lead that could be in pipes and pipe fittings from not more than 8% to not more than 0.25%.¹⁰ However, given the lateness of the regulatory response, the unfortunate truth for residents in cities with old plumbing infrastructure, such as Flint, is that lead is likely present somewhere in the drinking water plumbing system.¹¹ One study has found that the use of lead service lines, which are the pipes that connect homes and apartment buildings to street mains, was pervasive,

³ Michigan Department of Environmental Quality, *Rule Promulgation*, <https://www.michigan.gov/deq/0,4561,7-135-3313_3675_3691-9647--,00.html> (accessed September 22, 2018).

⁴ Executive Directive No. 2018-3 (effective July 25, 2018).

⁵ Anna Clark, *The Poisoned City*, (Hungry Holt and Co., 2018), p 86.

⁶ *Id.* at p 265 n 26.

⁷ 42 USC 300g-6.

⁸ Safe Drinking Water Act Amendments of 1986, 100 Stat 642 (Enacted June 19, 1986).

⁹ 56 Fed Reg 26460 (June 7, 1991).

¹⁰ Reduction of Lead in Drinking Water Act, 111 PL 380, 124 Stat 4131 (Enacted January 4, 2011).

¹¹ Estimates of the number of lead service lines in the United States vary, but the “best estimates range between 3.3 million and 10 million.” Clark, p 98.

particularly in large Midwestern cities.¹² To make matters worse, it is often challenging for water systems and residents alike to identify if lead has been used in any portion of the service line leading to their home. A survey conducted by the American Water Works Association estimated that there are 6.1 million complete or partial lead service lines in the United States that remain in operation, serving 15 million to 22 million people.¹³

The federal Safe Drinking Water Act requires the EPA to establish maximum contaminant level goals (MCLGs) and national primary drinking water regulations for contaminants that may have an adverse effect on the health of persons that are known or anticipated to occur in public water systems.¹⁴ MCLGs are not regulatory requirements, but instead aspirational health goals that are set at a level at which “no known or anticipated adverse effects on the health of persons occur and which allows for an adequate margin of safety.”¹⁵ Since there is no safe level of lead in drinking water, federal regulations have established an MCLG of zero.¹⁶

“[T]he American Water Works Association estimated that there are 6.1 million complete or partial lead service lines in the United States.”

The primary way lead enters drinking water is through the corrosion of pipes in the drinking water distribution system by water. This presents a unique problem, since water generally becomes contaminated with lead *after* it leaves the drinking water treatment system, at some point in the distribution system. As such, the federal Lead and Copper Rule primarily aims to ensure that drinking water systems are preventing the corrosion of pipes, monitoring for lead in customer’s taps, and providing customers with public education materials.

The Safe Drinking Water Act is similar to many other federal environmental laws in that it embraces the concept of cooperative federalism, meaning it allows states, including Michigan, to propose and implement their own regulatory programs in order to achieve compliance with its mandates. Additionally, similar to many other environmental laws, states are free to take more stringent action than what federal law and regulation mandate. In the wake of the Flint Water Crisis, the MDEQ did just that in the summer of 2018, when it made significant revisions to the Lead and Copper Rule under the Michigan Safe Drinking Water Act.

¹² Werner Troesken and Patricia E. Beeson, *The significance of Lead Water Mains in American Cities: Some Historical Evidence* (January 2003), p 182, <<http://www.nber.org/chapters/c9632.pdf>>.

¹³ David A. Cornwell, Richard A. Brown, and Steve H. Via, *National Survey of Lead Service Line Occurrence* (2016), p E182, <http://media.mlive.com/news_impact/other/jaw201604cornwell_pr.pdf>.

¹⁴ 42 USC 300g-1(b)(1)(A).

¹⁵ 42 USC 300g-1(b)(4).

¹⁶ 40 CFR 141.51(b) (1996).

The Lead and Copper Rule: Distribution Systems Materials Inventory

The revised Lead and Copper Rule requires water suppliers to complete a distribution system materials inventory (DSMI) according to a schedule set by rule. By the start of 2020, every supplier must complete and submit a preliminary DSMI which must consist of a “thorough assessment of distribution system materials based on existing sources of information.”¹⁷ By the start of 2025, every supplier must submit a complete DSMI, which must identify where lead is present in piping, storage structures, pumps, and controls used to deliver water to the public, including in service lines.¹⁸ Notably, this inventory requirement applies to all portions of a service line, even the portion that exists on a customer’s private property.¹⁹

Once a supplier completes its DSMI, it must do two things to notify customers of both lead service lines and service lines of unknown contents. For the customer served by the service line, the supplier must notify the customer within 30 days if it determines that their service line contains lead,²⁰ and must notify any customer of a service line with unknown contents of the potential for lead in the service line.²¹ For the community as a whole, the supplier must include the number of lead service lines, the number of service lines of unknown material, and the total number of service lines in the system in their annual consumer confidence report.²²

The requirement for suppliers to complete and submit a DSMI addresses a significant regulatory gap in the Lead and Copper Rule. Previously, a supplier had to conduct a limited materials evaluation of its system to identify appropriate taps for lead sampling.²³ The requirement that all suppliers conduct a complete DSMI addresses a big issue mentioned above, which is that many suppliers are unaware where lead is in their drinking water distribution system.

The Lead and Copper Rule: Number and Frequency of Tap Samples, Tiering Criteria, and Action Level

One of the most foundational requirements of the Lead and Copper Rule is that each system must take a certain number of samples from the tap and test them for lead concentration. If the value at the 90th percentile of all lead samples collected exceeds the “action level,” then additional requirements aimed at reducing the amount of lead in the system are triggered. Given this, there are three things that are very important: first, the number and frequency of tap samples that a

¹⁷ Mich Admin Code, R 325.11604(c)(i).

¹⁸ Mich Admin Code, R 325.11604(c)(ii).

¹⁹ Mich Admin Code, R 325.11604(c)(iii).

²⁰ Mich Admin Code, R 325.11604(c)(v).

²¹ Mich Admin Code, R 325.11604(c)(iv).

²² Mich Admin Code, R 325.11604(c)(vi).

²³ See Mich Admin Code, R 325.10710a(1)(a).

system must collect; second, where those samples must be collected from; third, what the action level is that triggers additional response measures from the water system.

1) Number and Frequency of Tap Samples

In regard to the frequency and number of samples, the general rule is that every system must collect at least a one-liter sample at 5 to 100 sites, depending on the number of people served by the system, every six months.²⁴ While these general requirements remain unchanged in the revised Lead and Copper Rule, more stringent requirements were added for certain water systems to be eligible to reduce their monitoring frequency to once every three years.²⁵

2) Tiering Criteria

In regards to the selection of sites where sampling is done, this must be done in accordance with “tiering criteria.” There are three tiers of sampling sites, and a system is required to collect all tap samples from tier 1 sites. Only if there is an insufficient number of tier 1 sites can a system collect tap samples from tier 2 sites with the same being true for tier 3 sites. Tier 1 sites are meant to represent the single-family homes and, under certain circumstances, multi-family buildings, with the highest potential risk for lead exposure. However, the original rule contained a couple of loopholes. First, the previous Lead and Copper Rule permitted structures that contain copper pipes soldered with lead and installed after 1982 to be considered tier 1 sites, and allowed a water system to collect 50% of its samples from such sites and 50% from sites served by a lead service line.²⁶ Second, the original rule did not contain sufficient safeguards to ensure that sites identified by the water system as tier 1 sites actually met the required qualifications. This loophole was brought to light in Flint, where the selection of tier 1 sites was based on a materials evaluation survey submitted by the water system. Based on this survey, the Flint water system reported that all 2014 and 2015 tier 1 sites had lead service lines.²⁷ However, this information was not properly verified, and once the MDEQ reviewed the selection of tier 1 sites in 2015, it discovered only 6 sites had information that confirmed their tier 1 status.²⁸

The revised Lead and Copper Rule addresses both of these loopholes. The revised rule eliminated the option for water systems to collect up to 50% of their tier 1 samples from sites with copper pipes soldered with lead and installed after 1982. Instead, tier 1 sites must be structures that contain lead pipes, or structures served by a lead service line.²⁹ Single family structures containing copper

²⁴ See Mich Admin Code, R 325.10710a(3); Mich Admin Code, R 325.10710a(4)(c).

²⁵ See Mich Admin Code, R 325.10710a(4)(d)(iii).

²⁶ Mich Admin Code, R 325.10710a(1)(h).

²⁷ U.S. Environmental Protection Agency, *Review of the Michigan Department of Environmental Quality Drinking Water Program 2016: Final Report* (October 24, 2017), p 26, <<https://www.epa.gov/sites/production/files/2017-10/documents/final-2016-michigan-program-review-full-report-20171024.pdf>>.

²⁸ *Id.*

²⁹ Mich Admin Code, R 325.10710a(1)(c).

pipes soldered with lead were reclassified as tier 3 sites.³⁰ This is significant because it means a water system must exhaust all lead service line sites at single family and multi-family residences before using copper-with-lead-solder sites, which increases the likelihood that the samples collected by the water system will be the sites with the highest potential for risk for lead exposure. In regard to the second loophole, which was the possibility that sampling sites were being improperly classified, the DMSI requirements described above are partially meant to inform the identification of sampling locations and to address the informational deficiencies that previously existed.³¹

3) Lead Action Level

One of the more convoluted parts of the Lead and Copper Rule is the action level. This level serves as the threshold concentration of lead in drinking water that, if exceeded, will trigger additional requirements for the water system. Prior to the revisions, Michigan's Lead and Copper Rule mirrored the federal Lead and Copper Rule with regard to action level. The action level contained in the federal Lead and Copper Rule is convoluted for two reasons. First, while we know there is no safe level of lead exposure, the action level for lead in the federal Lead and Copper Rule is 0.015 mg/L.³² Therefore, it's possible for a system to be below the action level but for someone to be harmed from lead in their drinking water. Second, compliance with the action level is determined by system basis, not on an individual tap basis. According to the federal Lead and Copper Rule, the lead action level is exceeded if the ninetieth percentile lead level exceeds 0.015 mg/L.³³ Put another way, the lead action level is exceeded "if the concentration of lead in more than 10 percent of tap water samples collected during any monitoring period is greater than 0.015 mg/L."³⁴ What this means is that the lead concentrations at one or more sampling locations may be above the action level, but the system may still be in compliance with the action level.

The revised Michigan Lead and Copper Rule made a significant change to the action level provisions. First, the revised rule lowers the lead action level from the ninetieth percentile lead level of 0.015 mg/L, which is the requirement established by federal regulations, to 0.012 mg/L.³⁵

³⁰ Mich Admin Code, R 325.10710a(1)(e).

³¹ See Mich Admin Code, R 325.10710a(1)(a).

³² 40 CFR 141.80(c)(1) (2007).

³³ *Id.*

³⁴ U.S. Environmental Protection Agency, *Lead and Copper Monitoring and Reporting Guidance for Public Water Systems* (February 2002), p 34. <<https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100DP2P.txt>>.

³⁵ Mich Admin Code, R 325.10604f(1)(c).

This requirement will become effective in 2025.³⁶ The requirement that a system provide notice of the individual tap results to the persons served by the tap remained largely unchanged for lead.³⁷

The Lead and Copper Rule: Tap Sampling Procedures

One of the primary regulatory issues raised in the aftermath of the Flint Water Crisis was the MDEQ's invalidation of certain samples. Specifically, several samples were taken from a home on Browning Avenue between January and June of 2015.³⁸ At the time, these samples were invalidated and thus not included in the ninetieth percentile lead level calculation. The EPA later concluded that there was not sufficient documentation to invalidate these samples.³⁹ If the samples were included in the calculation, it may have caused the ninetieth percentile calculation to exceed the action level, and triggered an earlier response by the MDEQ. To say the least, sampling procedures are very important to accurately determine if the lead action level has been exceeded. As such, the revised Lead and Copper Rule added details to ensure more consistent tap sampling.

First, the revised rule prohibits systematic flushing of a tap prior to sampling, and prohibits the cleaning or removal of a tap aerator in anticipation of sampling any tap.⁴⁰ Second, the revised rule requires sites served by lead service lines to take an additional sample. While all sites must collect a one-liter first draw sample,⁴¹ a site served by a lead service line must also take a second sample of the 5th liter of water to come out of the tap during sampling.⁴² The purpose of this 5th liter sample is that it is likely to represent the water that has been sitting in the lead service line, which may present a higher risk to health than the water sitting inside the building's plumbing system.

The Lead and Copper Rule: Lead Service Line Replacements

At the end of the day, one of the most effective ways to prevent lead contamination of drinking water is to get rid of its source, which is the lead fixtures that exist throughout many drinking water systems. Cities such as Lansing and Madison have already completed efforts to replace all lead service lines.⁴³ Under the revised Lead and Copper Rule, all public water systems in Michigan will soon be required to follow suit.

³⁶ *Id.*

³⁷ Mich Admin Code, R 325.10410(5).

³⁸ *Review of the Michigan Department of Environmental Quality Drinking Water Program 2016*, p 26.

³⁹ *Id.*

⁴⁰ Mich Admin Code, R 325.10710a(2)(a)(i); Mich Admin Code, R 325.10710a(2)(b)(i).

⁴¹ Mich Admin Code, R 325.10710a(2)(a)(ii); Mich Admin Code, R 325.10710a(2)(b)(i)(B).

⁴² Mich Admin Code, R 325.10710a(2)(b)(i)(C).

⁴³ Gerstein, *Lansing Replaces City's Final Lead Service Line*, Detroit News (December 14, 2016), <<https://www.detroitnews.com/story/news/local/michigan/2016/12/14/lansing-lead-service-line/95435604/>>.

Under the former Lead and Copper Rule, a system that exceeded the lead action level after implementing corrosion control was required to replace at least 7% of the lead service lines in its distribution system annually until tap samples were below the lead action level for two consecutive monitoring periods.⁴⁴ This requirement is still present in the revised Lead and Copper Rule for systems that exceed the lead action level.⁴⁵ In addition to this requirement, all systems, regardless of whether they are below the action level, must replace any lead service line and galvanized service line if it is or was connected to lead piping by 2041.⁴⁶ The definition of “lead service line” has been slightly revised, and is notably broad. A lead service line is: “a service line which is made of lead or any lead pigtail, lead gooseneck, or other lead fitting that is connected to the service line, or both.”⁴⁷ Additionally, a definition of “service line” has been added to the revised rule. A service line is: “the pipe from the discharge of the corporation fitting to customer site piping or to the building plumbing at the first shut-off valve inside the building, or 18 inches inside the building, whichever is shorter.”⁴⁸ These definitions are particularly notable because the revised rule is very clear that the water system’s mandate to replace all lead service lines and certain galvanized service lines applies to the entire line, even if the customer owns a portion of the service line.⁴⁹

The Lead and Copper Rule: Public Education Materials

Public education is a key component of the revised Lead and Copper Rule. Under the Safe Drinking Water Act, each system is required to submit an annual report to its consumers and regulators.⁵⁰ This annual report is meant to communicate the system’s performance for that year regarding compliance with drinking water laws and regulations in a relatively readable format. The revised Lead and Copper Rule now requires information from the distribution system material inventory to be included in this annual report. Additionally, systems that exceed the lead action level must deliver public education materials to their customers.⁵¹ The revised rule includes a number of additional detailed requirements with which systems must comply when creating and distributing public education materials under such a circumstance.

⁴⁴ 40 CFR 141.84 (2007).

⁴⁵ Mich Admin Code, R 325.10604f(5).

⁴⁶ Mich Admin Code, R 325.10604f(6)(a); Mich Admin Code, R 325.10604f(6)(b).

⁴⁷ Mich Admin Code, R 325.10105(r).

⁴⁸ Mich Admin Code, R 325.10108(e).

⁴⁹ Mich Admin Code, R 325.10604f(6)(e).

⁵⁰ 42 USC 300g-3(c)(4).

⁵¹ Mich Admin Code, R 325.10410(1).

Environmental Justice

While gaps and loopholes in the Lead and Copper Rule were certainly addressed by the revised rule, as the Michigan Civil Rights Commission's report highlighted, the causes of the Flint Water Crisis are deeper and more insidious. Environmental justice is a concept that grew out of the environmental movement starting in the 1980's and 1990's. This concept seeks to be a solution to its counterpoint, which is environmental injustice. Starting in the mid-1980's, community leaders in communities of color and low income began to realize their communities were disproportionately subjected to a variety of environmental risks. Environmental justice first gained national attention in 1982, when a community in North Carolina protested the dumping of polychlorinated biphenyls (PCBs) in a landfill in a low-income community of color.⁵² In 1983, the Government Accounting Office conducted a study that found hazardous waste facilities were disproportionately located near communities with majority black and brown residents.⁵³

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Environmental justice has been defined in multiple ways. The EPA defines it as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”⁵⁴ In the wake of the Flint Water Crisis, errors made by our regulatory agencies in charge of administering the Lead and Copper Rule were revealed. The most consequential error was the failure of the Flint water system to maintain optimized corrosion control treatment after it switched its source water to the Flint River.⁵⁵ However, this error was not the result of a loophole; it was the result of improper administration of regulations meant to protect the public health.⁵⁶ The Lead and Copper Rule plainly requires a water system with optimized corrosion control to notify the MDEQ as early as possible prior to the addition of a new source,⁵⁷ and to continuously maintain

⁵² National Institute of Environmental Health Sciences, *Advancing Environmental Justice* (July 2015), p 5, <https://www.niehs.nih.gov/research/supported/assets/docs/a_c/advancing_environmental_justice_508.pdf> (accessed February 12, 2017).

⁵³ United States General Accounting Office, *Siting of Hazardous Waste Landfills And Their Correlation With Racial And Economic Status Of Surrounding Communities* (June 1, 1983).

⁵⁴ U.S. Environmental Protection Agency, *Environmental Justice*, <<https://www.epa.gov/environmentaljustice>> (accessed September 23, 2018).

⁵⁵ *Review of the Michigan Department of Environmental Quality Drinking Water Program 2016*, p 23.

⁵⁶ *Id.*

⁵⁷ Mich Admin Code, R 325.10710a(4)(d)(vii); Mich Admin Code, R 325.10710d(a)(iii).

its optimal corrosion control treatment.⁵⁸ These requirements existed before, during, and after the Flint Water Crisis. However, when the Flint water system switched to a new source, the MDEQ did not require the system to maintain its optimized corrosion control treatment or otherwise revise it.⁵⁹ As a result, the highly corrosive water from the Flint River caused high levels of lead to leach from the pipes into the water. Additionally, the MDEQ did not issue any violation for the system failing to submit timely lead and copper reports in January and July of 2015, which may have delayed the MDEQ's response.⁶⁰ This, too, was an existing requirement.

Given that Flint is a majority-black city with a median household income of \$28,015, the question that many Flint residents and environmental advocates asked was whether this crisis would have occurred and been allowed to play out in a different community in the same tragic fashion as it did in a low-income community of color. The succinct answer from the Michigan Civil Rights Commission was “no,” and the history of environmental injustice backs it up. As such, any assessment of the response to the Flint Water Crisis must address the systemic racism that was at the heart of the crisis.

Executive Directive 2018-3

Partially in response to the assertion by the Michigan Civil Rights Commission that the causes of the Flint Water Crisis were rooted in systemic racism, in February of 2017 Governor Snyder created the Environmental Justice Work Group “to develop and provide recommendations to the Governor that improve environmental justice awareness and engagement in state and local agencies.”⁶¹ The group consisted of a number of environmental advocates and, in March of 2018, the group submitted 26 pages of recommendations to the Governor. On July 25, 2018, Governor Snyder signed Executive Directive 2018-3 adopting two recommendations made by the Work Group. The directive created an Environmental Justice Interagency Work Group consisting of the Department of Civil Rights, the Michigan Economic Development Corporation, the Department of Environmental Quality, the Department of Health and Human Services, and the Department of Transportation.⁶² This interagency group has been charged with, among other things, reviewing and considering environmental justice issues brought to its attention, assisting departments in the development of environmental justice policies and procedures, and recommending measures to promote environmental justice in the state.⁶³ Additionally, Governor Snyder created the new position of “environmental justice ombudsman” to serve as the statewide point of contact for the

⁵⁸ Mich Admin Code, R 325.10604f(2)(b).

⁵⁹ *Review of the Michigan Department of Environmental Quality Drinking Water Program 2016*, p 23.

⁶⁰ *Id.* at 29.

⁶¹ Environmental Justice Work Group Report (Mar. 2018), p 4
https://www.michigan.gov/documents/snyder/Environmental%20Justice%20Work%20Group%20Report%20616102_7.pdf.

⁶² Executive Directive No. 2018-3.

⁶³ *Id.*

public to raise concerns regarding potential environmental justice issues.⁶⁴ Given the stark nature of the Flint Water Crisis as one of the most haunting environmental justice issues in modern America, is this enough? It is too early to tell, but there is cause for pessimism.

“[M]any states have taken more aggressive legislative, regulatory, and policy action to further environmental justice while Michigan has remained in the veritable dark ages.”

and policy action to further environmental justice while Michigan has remained in the veritable dark ages.⁶⁷ This has been illustrated in other divisions within the MDEQ, the agency with the most central role in promoting environmental justice.

The air quality division, in response to comments submitted by low-income communities of color, has stated that it strives “to protect the health and welfare of all citizens of the State of Michigan equally” and that since environmental laws are meant to protect all segments of our society, it does not investigate the economic or racial demographics of the area that is maximally impacted by the decisions it makes.⁶⁸ Instead, it simply analyzes whether the applicable laws and regulations that exist to protect the public health are being complied with.⁶⁹ To put it frankly, this is a misrepresentation of the concept of environmental justice. This mistaken concept ignores the root cause of the Flint Water Crisis, and all other environmental injustices, which is systemic racism. In order to address that problem, the MDEQ, as well as other state agencies, must first correct their mistaken understanding of what environmental justice is, and how it can be implemented. The only way to ensure that another environmental injustice such as the Flint Water Crisis does not

⁶⁴ Office of Governor Rick Synder, *Gov. Rick Snyder Issues Executive Directive Implementing Recommendations of Environmental Justice Work Group* (July 25, 2018), <https://www.michigan.gov/snyder/0,4668,7-277-57577_57657-473811--.00.html>.

⁶⁵ Executive Directive No. 2007-23, effective November 21, 2017.

⁶⁶ Michigan Environmental Justice Coalition, *MI EJ Plan 2009/2010*, <<https://michiganenvironmentaljusticecoalition.wordpress.com/comparison-of-draft-2009-mi-ej-plan-and-final-2010-mi-ej-plan/>> (accessed September 23, 2018).

⁶⁷ See, American Bar Association and Hastings College of Law, *Environmental Justice for All: A Fifty State Survey of Legislation, Policies and Cases* (Feb. 15, 2010).

⁶⁸ Michigan Department of Environmental Quality, *Response to Comments Document, Dearborn Industrial Generation, LLC, Permit to Install No. 163-17*.

⁶⁹ *Id.*

occur again is by the future Governor and state agencies, particularly the MDEQ, taking affirmative actions, including the enactment of laws, regulations, and policies, that specifically exist to address the fact that communities of color and lower income have been and continue to be disproportionately subjected to a higher level of environmental risks than wealthy, white communities. What form that should take is provided for in the draft Michigan's Environmental Justice Plan from 2010. Until these affirmative actions are taken by the state, we will have addressed only the symptom of the problem, but not the disease that caused it.



Downstream Litigation: *Henry v. Dow Chemical Co.* and Claim Accrual in Toxic Tort Cases

*Brandon M. H. Schumacher &
Allison M. Collins*
Associates, Foster Swift Collins &
Smith, PC



On January 24, 2018, the Michigan

Supreme Court overturned the Court of Appeals majority opinion in *Henry v Dow Chemical Co (Henry III)*, and adopted the lone dissenting judge's rationale in remanding the case to the Saginaw County Circuit Court for further proceedings.¹ The issue for the circuit court to resolve was when did the plaintiffs' toxic tort claim accrue: 1984 or 2002? Filed in 2003, the *Henry* case's complex, prolonged litigation history has addressed novel issues of Michigan law, ranging from the viability of medical monitoring claims² to the standard for class certification in a class action.³ While the *Henry III* order is only one page and unsigned, the order adopting the Court of Appeals' dissent is significant because it reinforces when a toxic tort claim accrues, and therefore when the statute of limitations begins to run on such claims. Moreover, *Henry III* also makes clear why early recognition of an accrued claim is essential to circumvent Michigan's statutory barriers in place to avoid a wait-and-see approach to toxic tort litigation. However, the case also leaves several concerns for the Michigan Legislature to consider.

Dioxins in the Tittabawassee Flood Plain

The Dow Chemical Company (defendant) has maintained a facility in Midland, Michigan (the Midland facility) on the bank of the Tittabawassee River since 1897.⁴ For decades, the Midland facility has produced numerous products, including "styrene, butadiene, picric acid, mustard gas, Saran Wrap, Styrofoam, Agent Orange, and various pesticides."⁵ The Midland facility's production of chlorine-based products resulted in the creation of by-products commonly known as

¹ *Henry v Dow Chemical Co*, 501 Mich 965, 905 NW2d 601 (2018) (*Henry III*).

² *Henry v Dow Chemical Co*, 473 Mich 63, 67–68, 81–83; 701 NW2d 684 (2005) (*Henry I*).

³ *Henry v Dow Chemical Co*, 484 Mich 483, 496–507; 772 NW2d 301 (2009) (*Henry II*).

⁴ *Henry I*, 473 Mich at 69; United States Environmental Protection Agency, *Superfund Site: Tittabawassee River, Saginaw River & Bay* <<https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Cleanup&id=0503250#bkground>> (accessed October 2, 2018).

⁵ *Id.*, quoting Michigan Department of Community Health, Division of Environmental and Occupational Epidemiology, *Pilot Exposure Investigation: Dioxin Exposure in Adults Living in the Tittabawassee River Flood Plain, Saginaw County, Michigan*, May 25, 2004, p 4.

dioxins.⁶ Dioxins can be created both intentionally and unintentionally by varying methods, such as burning trash, manufacturing chemicals, or smoking a cigarette.⁷ Once created, dioxins can contaminate soil, air, and water, and can be transferred to humans via direct contact with skin, inhalation, or consumption of animal fats or breast milk.⁸ Dioxins are considered carcinogenic and are described as “hazardous chemical[s] believed to cause a variety of health problems such as cancer, liver disease, and birth defects.”⁹

Dioxin presence in the Tittabawassee flood plain has been public knowledge since the 1970s, and Dow’s Midland facility is believed to be the most significant producer of dioxins on the waterway.¹⁰ Once discovered and confirmed, governmental response to the dioxin contaminated Tittabawassee floodplain was swift:

[S]tate and federal regulatory notices were released, Congressional hearings were held, a Michigan Attorney General Special Task Force was formed, an EPA study released in 1985 confirmed that defendant’s wastewater was the source of the dioxin in the river, and a 1986 publication of the DNR warned residents to avoid contact with floodwater downstream from defendant’s Midland plant.¹¹

Eventually, the U.S. Environmental Protection Agency (EPA) selected the Tittabawassee flood plain as a Superfund site in 1987, and EPA has since maintained oversight over Dow’s cleanup efforts.¹²

⁶ See United States Environmental Protection Agency, *Superfund Site: Tittabawassee River, Saginaw River & Bay* <<https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Cleanup&id=0503250#bkground>> (accessed October 2, 2018); see also United States Environmental Protection Agency, *Learn About Dioxin* <<https://www.epa.gov/dioxin/learn-about-dioxin>> (accessed October 2, 2018) (“Dioxins refers to a group of toxic chemical compounds that share certain chemical structures and biological characteristics Several hundred of these chemicals exist and are members of three closely related families: Chlorinated dibenzo-p-dioxins (CDDs), Chlorinated dibenzofurans (CDFs) and Certain polychlorinated biphenyls (PCBs). CDDs and CDFs are not created intentionally, but are produced as a result of human activities like the backyard burning of trash. Natural processes like forest fires also produce CDDs and CDFs. PCBs are manufactured products, but they are no longer produced in the United States.”).

⁷ *Id.*

⁸ See Minnesota Department of Health, *Facts About Dioxins* <<http://www.health.state.mn.us/divs/eh/risk/chemhazards/dioxins.html>> (accessed October 2, 2018).

⁹ *Henry I*, 473 Mich at 69.

¹⁰ See United States Environmental Protection Agency, *Risk Management Recommendations for Dioxin Contamination at Midland, Michigan*, December 1988, pp 5–8 (detailing dioxin investigation from 1978 to 1988).

¹¹ See *Henry v Dow Chemical Co*, 319 Mich App 704, 731; 905 NW2d 422 (2017) (Gadola, J., dissenting), rev’d in part by *Henry v Dow Chemical Co*, 501 Mich 965; 905 NW2d 601 (2018).

¹² See United States Environmental Protection Agency, *Superfund Site: Tittabawassee River, Saginaw River & Bay* <<https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Cleanup&id=0503250#bkground>> (accessed October 2, 2018).

In 2000, General Motors Corporation was testing soil samples near the Tittabawassee and Saginaw Rivers when it discovered dioxin contaminated soil.¹³ By 2001, the Michigan Department of Environmental Quality (MDEQ) confirmed dioxin contamination in the soil, and indicated that Dow's Midland facility was the dioxin's likely source.¹⁴ MDEQ published a public bulletin in February 2002 informing residents in the floodplain of its environmental assessment and findings related to dioxin contamination.¹⁵

The residents who lived in the flood plain and along the river subsequently filed suit in the Saginaw County Circuit Court in March 2003. After years of litigation, and numerous appearances in the Michigan Supreme Court, Dow moved for summary disposition on July 17, 2015, under MCR 2.116(C)(7) arguing that the statute of limitations had run on the plaintiffs' nuisance and negligence claims.¹⁶ The Saginaw County Circuit Court denied the motion.¹⁷ Dow sought leave to appeal the Circuit Court's decision in the Court of Appeals, which was denied. The Michigan Supreme Court, on application for leave, remanded the case to the Court of Appeals for consideration of Dow's previously denied application.¹⁸ This set the stage for the beginning of the end of *Henry*.

The Majority, the Dissent, and the Reversal

Unlike other orders in the *Henry v Dow Chemical Co* saga, the *Henry III* order is only one page. However, the order's ramifications on toxic tort litigation are immense. Understanding the brevity of the *Henry III* order requires examination of the Court of Appeals' decision, and why the Supreme Court reversed in short form.

The Court of Appeals was to decide whether the Saginaw County Circuit Court's denial of summary disposition under MCR 2.116(C)(7) was appropriate.¹⁹ Neither the plaintiffs nor Dow disputed that the plaintiffs' nuisance and negligence claims were controlled by a three-year statute of limitations.²⁰ Moreover, the parties did not dispute the plaintiffs' claims were subject to the claim accrual statute, MCL 600.5827, which provides, "[e]xcept as otherwise expressly provided,

¹³ *Henry I*, 473 Mich at 69.

¹⁴ See Michigan Department of Environmental Quality, *Final Report, Phase II Tittabawassee/Saginaw River Dioxin Flood Plain Sampling Study*, June 2003, p 42.

¹⁵ *Henry*, 319 Mich App at 731 (Gadola, J., dissenting).

¹⁶ *Id.* at 709.

¹⁷ *Id.* at 712–14.

¹⁸ *Id.*

¹⁹ *Id.* at 714.

²⁰ See MCL 600.5805(2), as amended by 2018 PA 183 (formerly MCL 600.5805(10)).

the period of limitations runs from the time the claim accrues. The claim accrues . . . at the time the wrong upon which the claim is based was done regardless of the time when damage results.”

The parties’ dispute instead centered on when the plaintiffs’ claims accrued for purposes of the three-year statute of limitations.²¹ Dow argued the claims accrued in 1984, thus making them untimely, while plaintiffs argued the claims were timely because they did not accrue until 2002 when the MDEQ published its bulletin regarding dioxin contamination of the soil. To settle this dispute, the Court of Appeals had to determine where *Henry III* fit within two Michigan Supreme

“*Trentadue* abrogated the discovery doctrine after finding ‘the statutory scheme is exclusive and thus precludes th[e] common-law practice of tolling accrual based on discovery.’”

Court precedents interpreting MCL 600.5805(2) and 5827: *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263; 696 NW2d 646 (2005) and *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007).

In *Garg*, the Michigan Supreme Court held that Michigan law does not recognize the “continuing violations” doctrine. The Court explained that nothing in the applicable statute of limitations “permits a plaintiff to recover for injuries outside the limitations period when they are susceptible to being characterized as ‘continuing violations.’ To allow recovery for such claims is simply to extend the limitations period beyond that which was expressly established by the Legislature.”²² Furthermore, the Michigan Supreme Court in *Trentadue* interpreted MCL 600.5827, and explained that the “wrong is done when the plaintiff is harmed rather than when the defendant acted.”²³ As a consequence of this statutory language, the Court in *Trentadue* abrogated the discovery doctrine after finding “the statutory scheme is exclusive and thus precludes th[e] common-law practice of tolling accrual based on discovery in cases where none of the statutory tolling provisions apply.”²⁴ In the Court’s view, while the Michigan Legislature had provided for limited circumstances where a discovery rule could apply,²⁵ the lack of such a rule was dispositive of the Legislature’s intent to have the statute of limitations run immediately rather than upon a plaintiff’s discovery.²⁶

²¹ *Henry*, 319 Mich App at 715.

²² *Garg*, 472 Mich at 282.

²³ *Trentadue*, 479 Mich at 388 (citation omitted).

²⁴ *Id.* at 389.

²⁵ See MCL 600.5838 (malpractice discovery rule), 5838a (medical malpractice discovery rule), 5839 (gross negligence on the part of contractors, licensed architects, or professional engineers discovery rule), and 5855 (discovery rule for fraudulently concealed claims).

²⁶ *Trentadue*, 479 Mich at 391–93.

Based on *Garg* and *Trentadue*, the *Henry* plaintiffs could not piggyback a new claim on a previous claim, and there was no argument to be made for tolling the statute of limitations. The plaintiffs needed to articulate that their claims accrued within three years of when they filed suit in 2003, or the claims were time barred. Dow argued that the plaintiffs' alleged injury, dioxin contamination of their property, accrued no later than 1984 when the public, and by extension property owners on the Tittabawassee flood plain, was made aware and put on notice of dioxin presence in the Tittabawassee River, meaning the statute of limitations expired well before 2003.²⁷ But, while plaintiffs conceded they knew of the 1984 contamination, they argued that they were not harmed until 2002 when MDEQ confirmed toxic levels of dioxin on their particular property miles downstream from the original area of contamination.²⁸ The Court of Appeals majority agreed with the plaintiffs, albeit for a different reason.

The Court of Appeals majority in *Henry III* reiterated that a claim does not accrue until all elements of a claim are present, and cited the plaintiffs' damages—loss of use and enjoyment of their property and diminution in property value—as markers for when the claims accrued.²⁹ Although dioxin was present in the Tittabawassee River, the *Henry III* majority reasoned the plaintiffs were not “damaged” until 2002 when MDEQ notified them of soil contamination, which resulted in diminished property values.³⁰ Prior to such notification, plaintiffs were free to sell their properties for economic gain and use the property fully; afterwards, no such enjoyment was feasible.³¹ The Court of Appeals majority rejected Dow’s argument that mere knowledge of contamination in the Tittabawassee River in the 1980s was sufficient to put all property owners on notice that their properties were potentially affected by dioxin.³² In other words, damages did not occur when potential dioxin contamination was disclosed, but only when there was concrete evidence of toxic levels of dioxin in the soil. Because public notification of toxic dioxin levels in soil did not occur until 2002, the Court of Appeals majority did not invoke the abrogated common law discovery rule or continuing violations doctrine in finding the plaintiffs’ claims timely.³³

The lone dissenting judge to the Court of Appeals opinion started with the same basic premises of claim accrual as the majority, but took a different approach to the role plaintiffs’ damages played in determining the claims’ accrual date.³⁴ The Court of Appeals dissent looked to the plaintiffs’

²⁷ *Henry*, 319 Mich App at 717.

²⁸ *Id.* at 719.

²⁹ *Id.* at 719–20.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 717–19.

³³ *Id.* at 720–22. The Court of Appeals majority also evaluated other arguments by the defendant, but they are unimportant to the claim accrual focus of this article.

³⁴ *Id.* at 734–36 (Gadola, J., dissenting).

alleged injury and presence of dioxin on their property, and reasoned that the 2002 MDEQ notice informed the plaintiffs of the extent of their harm and damages, but was not dispositive of when the plaintiffs' injuries and damages initially occurred.³⁵ The harm, the Court of Appeals dissent concluded, occurred "when the dioxin dumped into the river by defendant reached plaintiffs' properties or otherwise reached a particular plaintiff. A claim then accrued, regardless of whether it was possible at that time to calculate the level of monetary damage."³⁶ Drawing from *Trentadue*, the Court of Appeals dissent implied that the majority applied a form of the discovery rule based on the newly discovered and more extensive damages to judicially toll the statute of limitations, instead of abiding by the strict accrual requirements of MCL 600.5827.³⁷ As such, the dissent would have remanded to the circuit court to determine when the dioxin first reached each of the plaintiffs' properties, since this was the proper measure of when the harm occurred.³⁸

Despite the lengthy divided decision of the Court of Appeals, the Michigan Supreme Court unanimously reversed and remanded the case to the circuit court by adopting the dissenting judge's opinion.³⁹ Fifteen years after the *Henry* lawsuit commenced, the Saginaw County Circuit Court dismissed the lawsuit as barred by the statute of limitations because the plaintiffs' claims accrued well before 2002.⁴⁰

Is *Henry III* Consistent with Existing Law, and What Does a Textualist Construction of the Claim Accrual Statute Mean for Toxic Tort Litigation?

The *Henry III* order and its reasoning fit well within Michigan's current law and jurisprudence. Since the early 2000's, the Michigan Supreme Court has embodied a textualist approach to interpreting and constructing statutes. The textualist approach focuses on the text of the statute to instruct judicial decisions. Unless the text is ambiguous, the textualist method requires a judge to apply the statute as written.⁴¹ The Michigan Supreme Court usually adheres to this method of statutory interpretation, most commonly referred to as textualism. The Michigan Supreme Court, for better or worse, used this method of interpretation in deciding *Henry III*.

In *Henry III*, the text at issue was MCL 600.5827. Again, the statute reads "[e]xcept as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues . . . at the time the wrong upon which the claim is based was done regardless of the time

³⁵ *Id.* at 735 ("The MDEQ bulletin did not place the dioxins in plaintiff's soil.").

³⁶ *Id.* at 736.

³⁷ *Id.* at 735–36.

³⁸ *Id.* at 736.

³⁹ *Henry III*, 501 Mich at 965.

⁴⁰ See Terry Camp, *Judge Quietly Dismisses Henry vs. Dow Chemical Lawsuit Over River Contamination*, ABC News 12 (August 8, 2018) <<http://www.abc12.com/content/news/Judge-quietly-dismisses-Henry-vs-Dow-Chemical-lawsuit-over-river-contamination-490369551.html>>.

⁴¹ See *Gardner v Dep't of Treasury*, 498 Mich 1, 6; 869 NW2d 199 (2015).

when damage results.” This text is unambiguous: a claim accrues when the wrong is done, not when damages result.⁴² While the statute does not answer when exactly a claim accrues in every single case, it directs a court to pinpoint the starting date for the statute of limitations at some point in the facts—when the plaintiff is initially harmed.

Henry III may have created a publicly unpopular result, but the fact remains that the Michigan Supreme Court is consistent in its textualist determinations of claim accrual, from the decision in *Garg* denouncing the continuing violations doctrine, to *Trentadue* abrogating the discovery rule, and now *Henry III* strictly reinforcing statutory mandates for claim accrual. If the statute does not provide for tolling the statute of limitations, then the statute will run from the moment the harm occurs, even if the full extent of the harm is not discovered for years—or in the case of *Henry*—for decades.

But what does a textualist construction mean for toxic tort litigation? Determining when a plaintiff’s toxic tort claim accrues may present challenges that are not present in the typical personal injury or property damage tort case. *Henry III*’s strict adherence to the claim accrual statute necessarily means that as soon as a plaintiff is harmed or plausibly believes that he or she may have been harmed by environmental contamination, an attorney must act promptly to file a lawsuit within the appropriate statute of limitations, even if the full extent of the harm or damages is unknown and may not be known for some time. This raises the obvious concern of determining when the potential plaintiff’s claim crosses the threshold from speculative to plausible to sufficiently state a claim for which relief can be granted. After all, not every toxic tort is a conspicuous oil spill that intrudes onto beach front property; sometimes the plaintiff’s harm is concealed for long latency periods. For example, Erin Brockovich’s infamous PGE hexavalent chromium case (contamination in the 1960’s) was unknown to the plaintiffs until medical conditions caused further inquiry years later. Additionally, strict adherence to statutory claim accrual leaves open the possibility that individuals harmed by substances that are not currently considered contaminants, but that are later classified as such, are left with limited recourse under state law.

“Determining when a plaintiff’s toxic tort claim accrues may present challenges that are not present in the typical personal injury or property damage tort case.”

What are the possible consequences of *Henry III*? There may be increased pressure on the Legislature to amend MCL 600.5827 to address the somewhat unique claim accrual concerns presented by toxic tort litigation. Michigan courts may also see more reliance on other statutory provisions, such as the fraudulent concealment exception to the statute of limitations embodied in MCL 600.5855, or in the appropriate context, the harsh and unreasonable consequences exception,⁴³ both of which relieve a plaintiff from strict compliance with applicable statutory notice requirements and/or the statute of limitations under certain, specified circumstances. Other possibilities include lawsuits being increasingly filed shortly after reports of potential

⁴² A statute’s text is ambiguous when a term contained therein “is equally susceptible to more than a single meaning.” *Lansing Mayor v Pub Serv Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004).

⁴³ See *Rusha v Dep’t of Corrections*, 307 Mich App 300, 311; 859 NW2d 735 (2014).

contamination events, regardless of concrete evidence of injury or damage, in an effort to preserve potential claims, particularly for claims against state agencies or officials that are subject to the Court of Claims' notice provision, MCL 600.6431. There may also be a shift toward federal lawsuits to address toxic tort claims. In any event, the impact of *Henry III* will surely be felt downstream by future toxic tort litigation, with issues regarding claim accrual increasingly in the limelight.

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- Even if you are unsure, but you might be interested in accepting student resumes for possible internship positions, fill out this [CONTACT FORM](#).
- ELS plans to create a directory of possible internship opportunities that will be passed along to the student environmental groups at each of the Michigan law schools. Help us provide opportunities for Michigan students to learn the law here in Michigan. We want Michigan students to stay and practicing here in Michigan after graduation.

Leaky Tanks and Oily Water

Joni Roach

Research Attorney, Michigan Court of Appeals



In September 2015, the Michigan Department of Environmental Quality (DEQ) filed a lawsuit against BP, PLC, BP Holdings North America Limited, and BP America, Inc., (collectively BP), arguing that BP used false or misleading statements when it applied for financial reimbursement from the Michigan Underground Storage Tank Financial Assurance Fund (the Fund).¹ Specifically, the DEQ alleged that BP failed to disclose insurance coverage for the cleanup of leaking petroleum storage tanks; therefore, the DEQ claimed that BP was doubly reimbursed.

The Fund

The Fund, established in 1989, partially reimbursed gas station owners and operators for the cost of corrective actions addressing leaking underground storage tanks.² The Fund was financed by a 7/8 cent per gallon fee on all refined petroleum sold in or imported into the state.³ Applicants were asked to certify statutory and regulatory compliance,⁴ and to disclose insurance coverage.⁵ The Fund was insolvent by 1995.⁶ The Fund stopped accepting new applications for reimbursement in June 1995; however, the Fund continues to make payments for approved applications.⁷

Fraud Allegations

Allegations that oil companies, including BP, were doubly reimbursed for the clean-up of leaking storage tanks—once from state government funds and again from insurance companies—have been made in other states.⁸ Thomas Schruben, an environmental consultant who formerly worked

¹ Michigan Underground Storage Tank Financial Assurance Act, MCL 299.801 *et seq.*, repealed by 1994 PA 451.

² Clifford A. Knaggs, *Michigan's Financial Assurance Experience, MUSTFA to Insurance to MUSTA*, p 2, <<http://neiwpcc.org/tanks2015old/tanks2015presentations/3-Tuesday/States in Transition/Knaggs.MI FR Experience.pdf>> (accessed September 12, 2018).

³ *Id.*

⁴ *Id.*

⁵ *Dep't of Environmental Quality v BP*, unpublished per curiam opinion of the Court of Appeals, issued December 12, 2017 (Docket No. 333864), pp 1-2.

⁶ Knaggs, p 3; Pete Bosanic, *New Michigan UST Cleanup Fund Signed Into Law*, <<https://www.pmenv.com/resources/new-michigan-ust-cleanup-fund-signed-into-law>> (accessed September 12, 2018).

⁷ *Dep't of Environmental Quality*, unpub op at 2.

⁸ Mica Rosenberg, *Exclusive: Duo Tracks Double Dipping in U.S. Oil Firms' Toxic Tank Clean Up*, Reuters (Feb 10, 2014), <<https://www.reuters.com/article/us-usa-environment-tanks/exclusive-duo-tracks-double-dipping-in-u-s-oil-firms-toxic-tank-cleanup-idUSBREA1905G20140210>>.

as an environmental engineer at the U.S. Environmental Protection Agency, and attorney Dennis Pantazis of Wiggins Childs Pantazis Fisher Goldfarb LLC, discovered evidence that oil companies “double dipped” by accepting state funds and insurance payments for the same tank clean up.⁹ Several states, including Colorado, New Mexico, Arizona, and Utah reached settlement agreements with oil companies on the basis of their evidence.¹⁰

In March 2015, Ohio filed a lawsuit against BP. According to an official press release from the Ohio Attorney General’s office, Ohio claimed that “BP wrongfully obtained \$33.3 million in reimbursements . . . after submitting its applications to the Petroleum Board, claiming it had no insurance for the leaks when it actually had layers of insurance and often accepted insurance money for the same releases.”¹¹ Ohio accused BP of various violations of Ohio law, including subrogation, indemnification, breach of contract, unjust enrichment, negligent misrepresentation, and conversion.¹² That case is scheduled for trial in July and August 2019.¹³

Dep’t of Environmental Quality v BP

Meanwhile, BP moved for summary disposition in the Michigan case pursuant to MCR 2.116(C)(7), on the basis of the statute of limitations.¹⁴ BP asserted that the DEQ’s claim accrued on June 29, 1995, at the latest, because the Fund did not accept new applications after that date and the lawsuit was brought on the basis of alleged fraudulent statements made in BP’s applications for reimbursement.¹⁵ Thus, BP contended that the six-year statute of limitations expired in 2001, which was 14 years before the DEQ filed its complaint in 2015.¹⁶

The trial court denied BP’s motion.¹⁷ The trial court applied a common-law discovery rule that paused the accrual of DEQ’s claim to allow the DEQ to use discovery to produce more specific information regarding BP’s alleged fraudulent conduct and pinpoint the accrual date of the

⁹ *Id.*

¹⁰ *Id.* For example, Colorado signed settlement agreements with three oil companies for \$35 million. *Id.*

¹¹ Ohio Attorney General, *Ohio Sues BP for \$33 Million in Wrongful Oil Tank Clean-Up Compensation* (March 2, 2015), <[https://www.ohioattorneygeneral.gov/Media/News-Releases/March-2015/Ohio-Sues-BP-for-\\$33-Million-in-Wrongful-Oil-Tank](https://www.ohioattorneygeneral.gov/Media/News-Releases/March-2015/Ohio-Sues-BP-for-$33-Million-in-Wrongful-Oil-Tank)>.

¹² *Id.*

¹³ Stipulated Proposed Case Schedule, June 14, 2018, <https://ohcourtportal.tylerhost.net/Portal/DocumentViewer/Index/_vUAQSOwD8oSEnkezmqXG5BI4ckk6attu8i-PoLXZC_wcSEFQtQuBYwpB0_HM8Lady_U5ExqG2UribYNh5iGhOpjuKFTAJF0OYYd1lm4HuUFPkgofG33KIgANWjbZ0?p=0> (accessed September 12, 2018).

¹⁴ *Dep’t of Environmental Quality*, unpub op at 2.

¹⁵ *Id.* at 4.

¹⁶ *Id.*

¹⁷ *Id.* at 1.

claim.¹⁸ In addition, the trial court determined that a public policy exception applied to the statute of limitations in this case.¹⁹ Finally, the trial court concluded that MCL 600.5821(4)²⁰ exempted the DEQ's claims from the statute of limitations.²¹

BP filed an application for leave to appeal the trial court's decision with the Michigan Court of Appeals, which was granted.²² In an unpublished opinion, the Court of Appeals determined that the six-year statute of limitations for personal actions in MCL 600.5813²³ barred the DEQ's claims.²⁴ The Court explained that the state and its subdivisions, including the DEQ, were subject to the six-year statute of limitations for personal actions pursuant to MCL 600.5821(3).²⁵ As a result, the "statutory framework preclude[d] application of the common-law discovery rule" and any public policy exceptions.²⁶ The Court determined that "statutes of limitations reflect public policy considerations" because "[t]hey balance a plaintiff's opportunity to bring a lawsuit with a defendant's opportunity to defend against a lawsuit while protecting courts from the burden of stale claims."²⁷ Finally, the Court concluded that the DEQ's claims were not exempt from the statute of limitations under MCL 600.5821(4), because this case did "not concern costs incurred during maintenance, care, or treatment of any individual."²⁸

¹⁸ *Id.* at 3; see also *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 388-389; 738 NW2d 664 (2007) (stating that under the common-law discovery rule, "a claim does not accrue until a plaintiff knows, or objectively should know, that he has a cause of action and can allege it in a proper complaint").

¹⁹ *Dep't of Environmental Quality*, unpub op at 3.

²⁰ MCL 600.5821(4) states that

[a]ctions brought in the name of this state, the people of this state, or any political subdivision of this state, or in the name of any officer or otherwise for the benefit of this state or a political subdivision of this state for the recovery of the cost of maintenance, care, and treatment of persons in hospitals, homes, schools, and other state institutions are not subject to the statute of limitations and may be brought at any time without limitation, notwithstanding any contrary provisions of a statute.

²¹ *Dep't of Environmental Quality*, unpub at 3.

²² *Dep't of Environmental Quality*, unpublished order of the Court of Appeals, entered November 21, 2016 (Docket No. 333864),

²³ Pursuant to MCL 600.5813, "[a]ll other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes."

²⁴ *Dep't of Environmental Quality*, unpub op at 2.

²⁵ MCL 600.5821(3) states that "The periods of limitations prescribed for personal actions apply equally to personal actions brought in the name of the people of this state, in the name of any officer of this state, or otherwise for the benefit of this state, subject to the exceptions contained" in MCL 600.5821(4); *Dep't of Environmental Quality v BP*, unpublished per curiam opinion of the Court of Appeals, issued December 12, 2017 (Docket No. 333864), p 2.

²⁶ *Dep't of Environmental Quality*, unpub at 3.

²⁷ *Id.*

²⁸ *Id.*

The Court also rejected the MDEQ's argument that it was not subject to the statute of limitations because this was actually an action in rem, which proceeds against the property at issue itself.²⁹

**"The Court explained
that '[r]etroactive
application of a statute
does not breathe new life
into a claim already
barred by the statute of
limitations.'"**

The Court explained that MDEQ's suit was not an action in rem because BP had not "been adjudged responsible for civil fines or criminal penalties."³⁰ Finally, the Court rejected the MDEQ's argument that the Legislature's intent to apply MCL 324.21548(2)³¹ retroactively defeated the statute of limitations.³² The Court explained that "[r]etroactive application of a statute does not breathe new life into a claim already barred by the statute of limitations."³³

The Court stated that the MDEQ made allegations of false, misleading, or fraudulent claims by BP in a letter that was prepared on November 16, 2010.³⁴ Thus, the Court concluded that the letter showed "that the MDEQ knew or should have known about [its] claims no later than November 16, 2010.³⁵ The Court explained that even if BP "fraudulently concealed the basis of the MDEQ's claims, the MDEQ should have brought suit within two years of its November 2010 letter."³⁶

Consequently, the Court summarized that "the six-year statutory period of limitations applied to the MDEQ's claims" and that "[e]ven assuming fraudulent concealing of the claims, the MDEQ brought suit more than two years beyond its discovery of the claims."³⁷ The Court reversed the

²⁹ *Id.* MCL 324.21548(9), in pertinent part, states that "[m]oney owed pursuant to this section constitutes a claim and lien by the authority upon any real or personal property owned either directly or indirectly by the person."

³⁰ *Dep't of Environmental Quality*, unpub op at 3-4.

³¹ MCL 324.21548(2) provides:

A person who makes or submits or causes to be made or submitted either directly or indirectly any statement, report, application, claim, bid, work invoice, or other request for payment or indemnification under this part knowing that the statement, report, affidavit, application, claim, bid, work invoice, or other request for payment or indemnification is false, misleading, or fraudulent, or who commits a fraudulent practice, is subject to a civil fine of not more than \$50,000.00 or twice the amount submitted, whichever is greater. In addition to any civil fine imposed under this subsection, a person found responsible under this subsection shall pay restitution to the authority for the amount received in violation of this subsection. The legislature intends that this subsection be given retroactive application.

³² *Dep't of Environmental Quality*, unpub op at 4.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

trial court's denial of BP's motion for summary disposition and remanded the case to the trial court to grant summary disposition in BP's favor under MCR. 2.116(C)(7).³⁸

A New Fund; A New Hope?

The Environmental Protection Agency has called leaky underground storage tanks "the single largest threat to groundwater in the United States."³⁹ Many of these tanks were built in the 1950s and 60s, and have corroded over time.⁴⁰ Michigan has approximately 9,000 leaking underground storage tanks, one of the highest in the country.⁴¹ However, despite the risk posed by these leaking tanks and the insolvency of the fund, all hope is not lost. In 2012, the Legislature created an advisory board to recommend a new fund for the clean-up of leaking underground storage tanks, the Michigan Underground Storage Tank Authority (MUSTA).⁴² Based on the board's recommendations, the Legislature created the MUSTA Fund in 2014.⁴³ The MUSTA Fund utilizes many private-insurance components, such as claim limits, claim periods, and deductibles.⁴⁴ Interestingly, an individual who knowingly submits a fraudulent request for payment or indemnification to the MUSTA Fund is guilty of a felony punishable by a maximum of five years' imprisonment, a maximum fine of \$50,000.00, or both.⁴⁵ Optimistically, the MUSTA Fund, which started accepting applications in 2015,⁴⁶ will benefit from the Legislature's additional fraud protections and help Michigan decrease the number of dangerous leaking underground storage tanks that may affect its water.

³⁸ *Id.* at 5.

³⁹ *Exclusive: Duo Tracks Double Dipping in U.S. Oil Firms' Toxic Tank Clean Up.*

⁴⁰ *Id.*

⁴¹ See United States Environmental Protection Agency, *The National LUST Cleanup Backlog: A Study of Opportunities, State Summary Chapter: Michigan*, September 2011, p 3, <https://www.epa.gov/sites/production/files/2014-03/documents/backlog_michigan.pdf> (stating that as of April 2009, Michigan still had 9, 169 leaking underground tanks in its backlog); see also *New Michigan UST Cleanup Signed into Law* (explaining that Michigan has 8,500 leaking underground tanks). Michigan was invited to participate in the EPA's backlog study because it had one of the largest backlogs in the United States. United States Environmental Protection Agency, p 3.

⁴² MCL 324.21524; Saulius K. Mikalonis, Plunkett Cooney, *New Michigan Underground Storage Tank Fund Helps Owners Comply With Release Requirements* <<https://www.plunkettcooney.com/blogs-environmentalandenergylawblog.Michigan-UST-release-assistance-available>> (posted May 23, 2016) (accessed September 12, 2018).

⁴³ 2014 PA 416.

⁴⁴ *New Michigan Underground Storage Tank Fund Helps Owners Comply With Release Requirements.*

⁴⁵ MCL 324.21548(1).

⁴⁶ *New Michigan UST Cleanup Signed into Law.*

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