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The above image from the City of Grand Rapids website is a teaser for an article inside this issue of the MELJ—themed sustainability. Each article tackles a different legal topic that involves issues of sustainability. At a time when nothing seems stable, take a look inside this issue to consider how environmental lawyers are addressing sustainability in a variety of legal contexts.

In This Issue

The Environmental Law Section's Chair's Report from James Enright on Meeting Challenges

I hope this finds all of you well. I had planned to write about challenges facing Michigan and environmental lawyers—and that was before the coronavirus pandemic erupted. Michigan's environmental challenges have not gone away, although our recent focus, understandably, has been elsewhere. These challenges, some present, some further off, include:

Rising waters. The Great Lakes are all rising, with Lake Michigan setting a record in March.[1] Inland waters are also affected, and even the ground in many areas is close to saturation. Waterfront homes, roads, and other infrastructure are threatened, and shoreline activities are being curtailed, all challenging our ability to protect these resources in conjunction with their human use. At least four parts of NREPA are involved,[2] as well as state and federal administrative programs. And these protections have never been administered in such a time-sensitive situation.

Climate change secondary impacts. You are all especially familiar with existing and projected effects of climate change. Michigan, at least, is projected to retain a temperate climate for several decades until at least 2100, as well as having abundant fresh water and being well above rising oceans.[3] Sounds like a pretty nice place to move to, especially in light of projected conditions elsewhere, and several million people may wish to become Michiganders. If that happens, the pressure to develop will be intense, precipitating another string of resource use conflicts that will be decided in the Legislature, agencies, and judicial system.

More emerging contaminants. PFAS, ethylene oxide, 1,4-dioxane. There will be something else after them, and something else after that. Because issues with some of the major PFAS compounds are impacts from their intended use, rather than from waste disposal as that term is commonly used, prevention of additional PFAS-type situations may involve toxic substance evaluation and control in addition to waste management to an extent that has not been attempted yet in this country.

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[1] U.S. Army Corps of Engineers, Detroit District, *Monthly Bulletin of Lake Levels for the Great Lakes*, p 2 (April 2020) ("New record high monthly mean water levels were set on Lakes Michigan, Huron, St. Clair, and Erie in March 2020. All three lakes surpassed their previous records set in 1986.")

[2] NREPA: Part 301, Inland Lakes and Streams MCL 324.30101; Part 307, Inland Lake Levels, MCL 324.30701; Part 323, Shorelands Protection and Management, MCL 324.32301; Part 353, Sand Dunes Protection and Management, MCL 324.35301; Part 31, Floodplains and Water Resources Protection, MCL 324.3101; and Part 303, Wetlands Protection, MCL 324.30301. The author also suspects that many environmental practitioners will become more familiar the Drain Code, MCL 280.1 et seq.

[3] See, e.g., University of Michigan & Michigan State University, *Great Lakes Integrated Sciences and Assessments: Great Lakes Regional Climate Change Maps*. See also Grist staff, *We Broke Down what Climate Change will do, Region by Region* (Nov. 29, 2018) ("The Midwest may actually experience migration into the region because of climate change.") (quoting Professor Maria Carmen Lemos of the University of Michigan's School for Environment and Sustainability).

Legal representation of people of modest means. The usual participants in environmental law matters are governments, businesses (predominantly larger ones), interest organizations, and sometimes well-off individuals. In the large scheme, the interests of most individuals are to be protected by governments, but this fails when individual interests don't align with an existing cause of action or when the government itself is part of the problem.

Legislative expertise. Michigan's term limits have resulted in short-term legislators who are unable to develop expertise before moving on, and a loss of institutional memory. An example of the latter may be bills seeking to return part of the environmental cleanup statute to its pre-1995 status, undoing a successful reform.[4] Unless term limits are reformed, environmental law expertise lies with practitioners, including the AG.

Changes in the practice. Environmental law has been one of the most fact-intensive practice areas for over 100 years. We are likely on a steeply-rising curve of data gathering and analysis, and practitioners will have to keep up. The scope of the practice has been expanding from its core of common law and air-water-waste protections to include more work in energy generation and distribution, and regulation of outdoor applications of biotech may come next. And there is an ongoing demographic shift in the composition of the environmental law bar.[5]

Environmental law has clearly not been standing still and these challenges suggest that the pace of change is going to pick up. Who is going to help you meet these challenges? Where can you go for continuing education, especially in a state without mandatory CLE?

The Environmental Law Section provides the continuing education you need to practice in Michigan. And, if this Section is to meet that need, practitioners should proactively make their needs known to the Section's leadership and Council and, in turn, share their own expertise in the educational effort.

Finally, returning to our current situation for a moment. Queen Elizabeth II best summarized our position in her April 5 speech, saying "We should take comfort that while we may have still more to endure, better days will return. We will be with our friends again. We will be with our families again. We will meet again."

We will.[6]

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[4] House Bill No 4212, Michigan Legislature (2019)

[5] Most prominently, the decline in section participation generally, and the departure of the Baby Boom generation from practice. Compare State Bar of Michigan Section Demographics, p 101 (2014-2015) with State Bar of Michigan Section Demographics, p 89 (2019).

[6] Thanks to Eileen C. Enright for editing.

Environmental Marketing Claims and the FTC's "Revised Green Guides"

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In today's increasingly eco-conscious society, "green claims," i.e., advertising claims touting a product or service's environmental benefits, remain on the rise among marketers. Also increasing is consumer demand for "environmentally friendly" products as consumers become more aware and educated about environmental issues that directly affect our planet. Needless to say, marketers' green claims have a significant impact on consumers as they seek out products and services that they perceive to be less harmful and more preserving of our planet.

With consumers being drawn more than ever to products that help them be more environmentally responsible, green advertising claims are an important marketing tool for many companies across various industries. Putting their trust in the companies that advertise these "eco-friendly" products and services to them, consumers expect not to be misled into believing a product is more eco-friendly than it actually is. The Federal Trade Commission (FTC) has taken steps to help marketers avoid making deceptive advertising claims by providing several useful resources, in particular, its Guides for the Use of Environmental Marketing Claims, known as the "Revised Green Guides." The basic principles of the FTC's Revised Green Guides are that an advertisement should be truthful, not misleading or deceptive, and have adequate substantiation to support all reasonably interpreted claims, and the Guides follow the FTC Act's truth-in-advertising principles.

Though many companies are not going to make a blatantly false claim, it is not difficult to find yourself in the gray area where a reasonable consumer might see an advertisement as deceptive. So, it is important for marketers to be prepared and to use the Revised Green Guides as a user-friendly resource to keep them out of trouble by avoiding misleading consumers with eco-friendly claims.

History of the Green Guides

The Green Guides were first promulgated in 1992, located at 16 CFR Part 260 *et seq.*,, for the purpose of helping marketers avoid making misleading environmental claims. They were revised in 1996 and updated in 1998. Fourteen years later, in October 2012, following a significant uptick in "green claims" by marketers and a growing number of consumer complaints of "greenwashing," the FTC again revised the Green Guides as a further effort to reduce deceptive marketing practices in advertising environmental benefits of a product or service. The Revised Green Guides not only provide clarification and further guidance for several commonly used terms such as "recycled" or

[1] This article should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer on any specific legal questions you may have concerning your situation.

"recyclable," but also add several new sections to address issues of growing concern among consumers.

Highlights From the Revised Green Guides: What They Cover and What They Do Not Cover

The 2012 Revised Green Guides cover general principles that apply to all environmental marketing claims, guidance on how consumers are likely to interpret certain claims, how marketers can substantiate those claims, and how marketers can qualify their claims to avoid deception. An especially helpful component of the Revised Green Guides is the examples of acceptable and unacceptable claims within each topic section. The Revised Green Guides include several new topics, including certifications and seals of approval, carbon offset claims, "free-of" claims, "non-toxic" claims, "made with renewable energy" claims, and "made with renewable materials" claims.

The following are some highlights from the Revised Green Guides,[2] some of which carried through from the original principles of the Green Guides, and others are additions focused on either new issues or areas of concern.

- **General environmental benefit claims.** The Revised Green Guides prohibit the use of general environmental benefit claims, such as "green" or "eco-friendly," explaining that the meaning of such claims could be interpreted in various ways by reasonable consumers, and it is highly unlikely a marketer would have the substantiation to support all reasonable interpretations of such claims. The FTC, therefore, cautions against making general environmental benefit claims and encourages marketers to appropriately qualify the claim in some way, such as through a clear and conspicuous disclosure or by simply tying the claim to a specific product attribute. The Revised Green Guides provide several examples for reference. See 16 CFR 260.4.

- **Certifications and seals of approval.** These are considered "endorsements" that are covered by the FTC's Endorsement and Testimonial Guides.[3] 16 CFR 260.6.

- **"Non-toxic" claims.** Marketers should have strong scientific and reliable evidence to substantiate the claim, including evidence that the product is non-toxic to humans *and* the environment. See 16 CFR 260.10.

- **"Recycled" or "recyclable" claims.** An unqualified recyclable claim can be made if a substantial majority (defined in the guides as 60%) of consumers or communities have access to recycling facilities. If available to less than the stated 60%, then marketers should qualify the claim, for example, by stating the percentage of consumers or communities that have access. See 16 CFR 260.12 and 260.13.

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2 The below topics, as well as several additional topics, are more thoroughly addressed in the Revised Green Guides, the full text of which can be seen here

3 These guidelines can be found here.

- **Clarification of "degradable" claims.** An unqualified "degradable" claim must be substantiated by evidence that the entire product or package will completely break down within a "reasonably short period of time" after disposal, which the FTC defines as one year. Items that go to a landfill should not be linked to a "degradable" claim because they would likely not meet the one-year rule. See 16 CFR 260.8.

Notably, there are a few commonly used terms that the FTC chose not to interpret in the Revised Green Guides, including, for example, the term "sustainable." When considering the topic for the 2012 Updates, the FTC declined to address sustainability claims because the FTC did not feel it had sufficient evidence on which to base general marketing guidance. Whether the FTC has gathered such evidence since 2012 is unclear. Even though claims of "sustainability" have proliferated in recent years, it remains uncertain when the FTC will provide guidance on those claims in the context of environmental marketing.

The FTC also declined to provide an interpretation of "natural" and "organic" claims, explaining that the Food and Drug Administration (FDA) and the United States Department of Agriculture (USDA) currently also regulate the use of the terms "natural" and "organic" in advertising and the FTC does not wish to issue conflicting guidance.

In the meantime, for the terms the FTC declined to interpret in the Revised Green Guides, marketers should be aware they remain subject to the general standard of Section 5 of the FTC Act[4] and should understand the importance of qualifying their claims appropriately to avoid deception. Marketers should ensure that they have substantiation for any reasonable interpretation of the claims they have made in the context of the *entire* advertisement.

Enforcement

The Revised Green Guides are not law. They do not preempt federal, state, or local laws and cannot be used independently to bring an action. Rather, the Revised Green Guides are a non-binding administrative interpretation by the FTC of Section 5 of the Federal Trade Commission Act (FTC Act). Although the Green Guides do not have the effect of law, the FTC can bring an enforcement action under Section 5 of the FTC Act, which generally prohibits unfair and deceptive advertising practices, if a marketer makes an environmental claim that is inconsistent with the Revised Green Guides. Green claims can also come under attack by a competitor through a challenge in the National Advertising Division (NAD) of the Better Business Bureau, which looks to the Revised Green Guides for guidance when confronted with an environmental marketing claim.

[4] 15 USC 43.

Marketers would be wise to consider and follow the guidance provided in the Revised Green Guides to avoid finding themselves at the wrong end of an FTC action or NAD challenge.

Useful Pointers & Best Practices from a Current Practitioner

- **Context is key.** Consider the *entire* message. Identify all express *and implied* claims in the advertisement, and ensure marketers have adequate substantiation for not only express statements in the ad, but also any reasonable interpretations based on implied claims in the ad. A good example of the importance of considering the entire ad and its context is found in the Revised Green Guides. The example advertisement says "Buy our printer. Make a change." The text is in **green** font and alongside a picture of the printer sitting in a bird's nest on a tree branch, surrounded by a dense forest. The FTC instructs that this is an unqualified general environmental benefit claim that a marketer should not make without appropriate disclosures to avoid deceiving consumers.

- **Understand and be mindful of the increased level of substantiation**, namely *competent and reliable scientific evidence*, required for "general environmental benefit" claims and certain other claims such as carbon offsets. If a marketer wants to make a general claim that their product or service is "eco-friendly" or "Green" or "planet-friendly", they should first—before publishing the claim—make sure they have substantiation meeting the higher standard of competent and reliable scientific evidence for *all* reasonable interpretations of the claim. Barring such substantiation, which the FTC cautions is very difficult to achieve, marketers should qualify the claims appropriately to avoid misleading consumers.

- **Keep a record.** It is a good idea to create a good faith contemporaneous record of what terms mean to the party using them when those terms are not defined in the Revised Green Guides. Such a record should consider the general advertising guidelines of being truthful, not misleading or deceptive, and having adequate substantiation to support all reasonable interpretations of the claims from the relevant consumer's perspective.

- **Ensure substantiation** is in place before making the claim. A company's best practice is to have preexisting evidence to substantiate its claims, especially if the company intends to make an unqualified claim.

- **The Revised Green Guides are applicable to not only "consumer" products** or purchases, but also in the business-to-business context. Indeed, whoever the audience, whether it's a consumer or another business, they are relying on the message conveyed when making their purchasing decision. The Revised Green Guides apply to that message, and so an advertiser should ensure it has adequate substantiation.

- **Independent third-party testing and certification**[5] by a recognized testing entity are going to be stronger and more credible than a company's own "in-house" testing or

[5] For example, if the claim is that a product is "biodegradable", the advertiser, among other things, needs to have substantiation based on testing that demonstrates the product really is biodegradable.

certification. While in-house testing can be used, it must be rigorously conducted according to an established industry standard that directly relates to such a claim.

- **Be specific.** Stating the specific environmental benefit of a product can help avoid making general environmental benefit claims that are going to be subject to the highest scrutiny. An example is "made with 45% recycled content."

Remember, the FTC's Green Guides are a marketer's friend, covering an array of important topics and providing significant guidance with a host of examples for reference while navigating the development and substantiation of an environmentally friendly claim for products or services. Refer to them early and often in the process of claim development and substantiation.

ELS is still here: Don't forget about our webinar library

Environmental Law Section Online Library

Many of ELS's webinars are available in the ELS online library under the webinar tab. They make for good viewing during shelter-at-home.

Here's a list of ELS's currently available webinars.

- 2019
  - Duck! Insiders Review the Late 2018 Legislation
  - The Challenging Effects of Dynamic Great Lakes Shorelines on Zoning & Planning in Coastal Communities
- 2018
  - A Closer Look at the Endangered Species Act
  - A Legal Perspective on PFOS/PFAS Contamination Issues, Tuesday, July 10
  - Examining Shared Environmental Interests Webinar, Nov. 12
  - Updated-Lender's Perspective on Environmental Issues
- 2017
  - Endangered Species Act and Land Use Webinar 030717
  - Environmental Layer's Next Frontier -Vapor Intrusion 033017
  - Using SBM Connect to Connect with Environmental Law Section Lawyers
  - Vapor Intrusion Issues in Transactional Due Diligence and Due Care
- 2015
  - Allocation and Agreement Webinar Materials 2015 05 27
  - Michigan's Adaptive Management Plan to Address Lake Erie Issues
  - Webinar: The ELS Presents Statutory Update 2015
- 2014
  - Great Lakes Legacy Program: Managing Contaminated Sediment
  - Great Lakes Water Levels: Past, Present, and Future
  - Let the River Run Free-Pigeon River Dam Litigation
  - Resource Extraction and Management in Michigan: Hot Issues
  - The Environmental Lawyer's Role in Transactions
- 2013
  - Perspectives on Recent Wetlands Amendments in Michigan
  - The K.I.S.S. Principle in Environmental Litigation
- 2011
  - Michigan's New Energy Development

ELS still has the capability of hosting webinars, and in fact, this might be a very good time to do so. If you'd like to put on a webinar, please contact Mary Anne Parks directly at parks.maryanne@gmail.com for assistance.

Energy & Environmental Regulations in Michigan's Cannabis Industry

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"Humanity has the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs."[1]

Sustainability is changing how governments and corporations respond to their operations to maintain profitability and operational ability while considering impacts to environmental and societal interests. Virtually every major corporation in the world has some form of sustainability initiative that considers their operations' effects on the triple bottom line: people, profits, and planet. For example, Ford Motor Company recently issued its 2018/2019 Sustainability Report, representing its 20th year of issuing such a report, which outlines the company-wide efforts and progress towards its sustainability goals.[2] Given that the global legal cannabis market is estimated to be $73.6 billion by 2027,[3] those in that industry will likely face the same pressures to make their businesses more environmentally and socially sound.

Incentives to become more sustainable come in many forms. There are voluntary efforts by concerned businesses. For example, there are organizations that cannabis businesses can join and from whom they can obtain certifications that distinguish them from their competitors as "sustainable" businesses. For the purposes of illustration, this includes organizations like the Cannabis Conservancy[4] or Clean Green.[5]

For those who need more persuasion, state and local governments may mandate more sustainable operations, either as part of the licensing process or as a result of ongoing enforcement efforts.

The focus of this article is current governmental requirements that either incentivize or require cannabis businesses to become or remain more sustainable. As Michigan's cannabis industry is relatively new, the discussion will include examples of what is occurring in other jurisdictions in addition to what specific requirements may presently exist in this state. Finally, while it will touch upon social aspects of sustainability, most of the focus will be on environmental requirements.

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1 Report of the World Commission on Environment and Development, *Our Common Future* (1987), p 16, ¶ 27.

2 Ford Motor Company 2018/2019 Sustainability Report.

3 Press release, Legal Marijuana Market Worth $73.6 Billion By 2027, Grand View Research (May 2019).

4 The Cannabis Conservancy (accessed March 20, 2020).

5 Clean Green (accessed March 20, 2020).

Impacts of Cannabis Businesses on Energy, Water, and Resource Use

Michigan has established legal regimes for medical[6] and recreational[7] use of cannabis. Regulators recognized pretty quickly that this new industry would pose challenges similar to any other industry and commissioned a white paper to outline some of the environmental impacts of the cannabis industry. The resulting report details some general concerns and potentially applicable laws and regulations that may apply.[8]

Along with environmental impacts, cannabis grow and processing facilities require significant amounts of energy, often in areas that do not have adequate infrastructure to provide that energy. I have explored that issue in several blog entries.[9] The energy demand is significant and addressing the use of energy resources is another aspect of sustainability.

How Other Jurisdictions Address Concerns About the Impacts of Cannabis Production

Neither the Michigan medical nor adult-use statutes require consideration of environmental impacts or energy use for the operation of cannabis facilities. Other states and local governments outside of Michigan have identified ways to address the external costs of cannabis production.

Responses in Other States

Most recently, Illinois passed an adult-use cannabis statute, the Cannabis Regulation and Tax Act (CRTA).[10] It also provides for the medical use of cannabis under the Compassionate Use of Medical Cannabis Program Act.[11] The CRTA includes specific requirements relating to resource use by both medical and recreational cannabis businesses.

To operate a cannabis business in Illinois, a shop must obtain a conditional license from the state. Illinois scores applications for conditional licenses on a 250-point scale. The submission of labor, environmental, and social equity plans are among the elements to be considered. The labor and employment practices plan allows for the submission of plans for five points that will provide for a beneficial working environment, including health care, education, living wages, and a labor peace agreement.[12] The environmental plan is worth five points and may "demonstrate an environmental plan of action to minimize the carbon footprint, environmental impact, and resource needs for the dispensary, which may include, without limitation, recycling cannabis product

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6 MCL 333.27101 *et seq*.

7 MCL 333.27951 *et seq*.

8 Michigan Department of Environmental Quality Marijuana Workgroup, *White Paper: The Environmental Impacts of the Marihuana Industry* (September 17, 2018).

9 Saulius Mikalonis, *Energy-Intensive Cannabis Industry to Boost Demand on Electric Grid in Michigan*, Crain's Detroit Business (May 14, 2019).

10 410 ILL COMP STAT 705 (2019).

11 410 ILL COMP STAT 130 (2019).

12 410 ILL COMP STAT 705/15-30(c)(6) (2019).

packaging."[13] By far, the largest amount of points (50) is available for those who qualify as a "Social Equity Applicant."[14] If the number of complete applicants in a particular region exceed the number of available licenses, the points determine who will receive a license.

The dispensing locations are not the source for most environmental impacts related to cannabis, however. The CRTA imposes stricter requirements for cultivation centers. These mirror the social equity requirements described above, but more intensive resource and environmental requirements, too.

> "[D]ispensing locations are not the source for most environmental impacts …[there are] stricter requirements for cultivation centers."

Those applying for cultivation licenses must demonstrate how they will provide estimates of energy use, how they will obtain that energy (either through a provider or self-generation), whether they will adopt a sustainable energy use and conservation policy, their water use, whether they will adopt a sustainable water use or conservation policy, their waste management and whether they will adopt a waste reduction policy.[15] Further, a cultivation facility will need to establish a recycling plan,[16] a commitment to comply with federal, state, and local environmental requirements,[17] and develop a "technology standard for resource efficiency."[18] Regarding the final requirement, the facility must meet or exceed standards for lighting, heating, ventilation, and air conditioning (HVAC) systems, water use and filtration systems for removing contaminants from wastewater—all of which are subject to monitoring and reporting.

It is fair to say that Illinois' statute is presently the most detailed and expansive when it comes to sustainability principals. Other states also have or are developing standards:

- Massachusetts—The State has mandated energy use restrictions for cultivators and non-growing establishments when submitting their "Management and Operations Profiles" as part of their initial applications. There are requirements for lighting technology and limitations on energy use for growers. Areas for compliance include energy efficiency, use of renewable energy, reduction in demand, and involving the business in Mass Save, which

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13 410 ILL COMP STAT 705/15-30(c)(7) (2019).

14 410 ILL COMP STAT 705/15-30(c)(5) (2019). A "Social Equity Applicant" is one that has at least 51% ownership and control who has lived in a "Disproportionately Impacted Area" for at least 5 of the last 10 years, an applicant that has been arrested for or convicted for offenses eligible for expungement under the CRTA (essentially, cannabis offenses) or is a member of an impacted family, or for applicants with at least 10 employees, 51% of them must live in a Disproportionately Impacted Area or have been arrested or convicted of a crime that may be expunged under the CRTA. 410 ILL COMP STAT 705/1-10 (2019).

15 410 ILL COMP STAT 705/20-15(a)(18) (2019).

16 410 ILL COMP STAT 705/20-15(a)(21) (2019).

17 410 ILL COMP STAT 705/20-15(a)(22) (2019).

18 410 ILL COMP STAT 705/20-15(a)(23) (2019).

provides energy assessments and audits. There is also guidance for best management practices for water use, waste management, and integrated pest management.[19]

- Colorado—Colorado is well aware of the resource intensity of cannabis growing and processing. The State recently passed legislation that imposes requirements on renewable energy, energy efficiency, and reductions in greenhouse gas emissions with the ultimate goal of making Colorado's electrical grid free of fossil fuels by 2040.[20] As part of the State's goal to reduce greenhouse gas emissions by 50% by 2030, the Department of Public Health and Environment has instituted two pilot projects, one of which is designed to recycle carbon dioxide for cultivation[21] and the other to provide resources for energy management, using utility companies and electric cooperatives.[22] The Boulder County has developed a Cannabis Energy Impact Offset Fund, which requires growers to report energy use and offset 100% of their energy use and provides funds to implement local projects to reduce greenhouse gas emissions.[23] The City of Denver provides a guide for best management practices for cannabis businesses that include tips for energy use, water use, and environmental compliance.[24] Colorado has also established special licenses, known as "micro licenses," in an effort to provide opportunities in low income areas.[25]

- Oregon—The State requires all applicants for grower's licenses to submit a form forecasting the applicant's water and energy usage.[26] Upon renewal, the grower must supply a report on actual electricity and water usage.[27] The State also provides an energy use calculator so that the applicant and those seeking renewal of licenses can estimate their energy usage.[28] The City of Portland provides incentives in the form of fee reductions for cannabis businesses who adopt social equity programs.[29]

How are Michigan State and Local Governments Addressing Sustainability?

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19 Cannabis Control Commission, *Energy and Environment Compiled Guidance* (January 2020).

20 Colo Rev Stat §§ 40-1-101 *et seq*.

21 Colorado Department of Health & Environment, *CO2 Capture and Reuse Pilot Project*.

22 Office of Governor Jared Polis, *Gov. Polis Announces Green, Innovative Pilot Programs to Increase Efficiency in Cannabis and Beer Industries* (January 29, 2020), (accessed March 21, 2020).

23 Boulder County, *Cannabis Energy Impact Offset Fund* (accessed March 21, 2020).

24 City of Denver, *Cannabis Environmental Best Management Practices Guide* (October 2018).

25 2019 SB 224 (Sunset Regulated Marijuana).

26 OR ADMIN R 845-025-1030(6)(g)(B)(i).

27 OR ADMIN R 845-025-1030(6)(g)(B)(ii).

28 Oregon Department of Energy, *Indoor Cannabis Cultivator Energy Use Estimator Oregon Department of Energy* (accessed March, 21, 2010).

29 City of Portland Oregon, *Social Equity Program: Details and Benefits for Qualifying Businesses* (accessed March 21, 2020).

The environmental impact on business operations is just one part of sustainability. The social cost of operations is another aspect of sustainability and Michigan's adult-use statute does require consideration of those factors. However, unlike the statutes identified above, Michigan's medical use and recreational statutes do not require similar considerations related to energy and the environment.

Environment and Energy

Under Michigan's medical use statute, local governments possess significant control over the operation of facilities within their jurisdictions. In addition to obtaining a state license for operation, cannabis business must also receive local licenses, procedures for which vary from municipality to municipality. There are a large of number of local ordinances and some of them have included considerations of energy use and environmental controls.

For the most part, the environmental controls take the form of requirements for compliance with Michigan's environmental statutes. Cannabis-specific requirements tend to focus on controlling odors and wastewater from the facilities. As long as an ordinance is not directly contradictory to the state statute, the local government may regulate these types of activities.

Some local ordinances do require consideration of energy usage. In addition to grow and processing facilities' heavy use of electricity, many of these facilities are being constructed in rural areas that do not have the electrical infrastructure to provide adequate power, but have very affordable land prices. As examples, the following communities have addressed those concerns in their ordinances:

- Bay City: As part of its application process for local licensing, Bay City requires prospective licensees to submit electrical plans to the local utility so that it could do a load review and must pay for any necessary overbuild of primary and secondary utility lines, transformer costs, labor costs, and equipment costs. The local utility may also deny electrical service to those applicants that cannot meet the load acceptance review or that are in a location that cannot be adequately serviced.[30]

- Ann Arbor: In October 2019, Ann Arbor amended its ordinances to require cannabis growers and microbusinesses in their applications to provide an estimate of water usage[31] and to provide a description of energy needs and improvements that must include a minimum of 10% of the facility's energy usage from on-site solar panels.[32] They must also provide annual reports documenting "energy used, water used, and sanitary sewer discharge[s]."[33]

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30 Bay City Code, § 30-706(b)(8)(f).

31 Ann Arbor Code, Unified Development Code, ch 55, § 5.16.3(G)(6)(e)(ii).

32 Ann Arbor Code, Unified Development Code, ch 55, § 5.16.3(G)(6)(e)(iv).

33 Ann Arbor Code, Unified Development Code, ch 55, § 5.16.3(G)(6)(e)(v).

- Grand Rapids: Also in October 2019, Grand Rapids amended its cannabis ordinances to include enrollment in the City's 2030 District[34] before operations commence.[35] Section 7.367 of the Grand Rapids Code, titled "Environmental Sustainability," requires growers and microbusinesses to submit an environmental sustainability plan within six months of operation detailing an analysis of energy load, forecasting annual greenhouse gas emissions, identifying water efficiency measures, listing of wastewater pollution loads and toxicity, and a solid waste management plan.[36] It also requires use of energy efficient lighting and a whole building energy audit.[37] Finally, all license renewals must include an energy sustainability plan and proof of compliance with annual reporting requirements.[38]

Social Equity

Briefly, the adult-use statute provides that the Michigan Marihuana Regulatory Agency (MRA) develop "a plan to promote and encourage participation in the marijuana industry by people from communities that have been disproportionately impacted by marijuana prohibition and enforcement and to positively impact those communities."[39] Known as the "social equity program," the MRA has developed a program to provide incentives for people residing in communities specifically identified as disproportionally impacted by previous enforcement of criminal cannabis statutes.

The state has "social equity representatives" that provide a variety of services to those communities, including responding to specific questions, providing one-on-one assistance in completing and submitting license applications, distributing educational resources, and coordinating the availability of resources from other public and private sources. Residents in the identified communities may take advantage of reduced charges for application, license, and renewal fees.

Conclusion

The legal use of cannabis, both medicinally and recreationally, is in its infancy as an industry. Government interest in the regulation of cannabis businesses and in addressing external costs has just begun. As more data is generated about their operations, we can expect more direct regulation, including that of their environmental and social costs.

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34 The Grand Rapids 2030 District is a public-private partnership to create energy efficient buildings and promote options for mobility within the City. Several cities have signed on to their own 2030 Districts.

35 Grand Rapids Code, tit VII, ch 105, § 7.367(1).

36 Grand Rapids Code, tit VII, ch 105, § 7.367(2)(a).

37 Grand Rapids Code, tit VII, ch 105, § 7.367(2)(b-c).

38 Grand Rapids Code, tit VII, ch 105, § 7.367(2)(d).

39 MCL 333.27958(1)(j).

Some states have begun to address some of those concerns, but Michigan is not yet one of them. Some local governments in Michigan are taking advantage of their broad powers under the medical and recreational cannabis acts and focusing on local priorities with respect to resource use, environmental impacts, and social equity. As imitation is the sincerest form of flattery, communities that have not addressed those issues may be looking to their fellow municipal governments and out-of-state regulators for clues as to how to proceed.

As an industry, cannabis businesses, particularly growers and processors, should look down the road to see how their businesses may be impacted. There are significant costs to starting up that may prevent those businesses from making investments to reduce energy and water usage. But, given the potential financial success of this industry, they can expect future regulations that may require them to make investments not currently required.

Planning ahead may make the transition less disruptive and may put them in a better place to compete in the market. As cannabis is a commodity, it is not too far a stretch to imagine a time in the not-so-distant future when instead of competition between Michigan market participants, growers and processors will be competing against businesses in other states. At that point, those that are able to provide product more efficiently and sustainably may be in a better position to survive and thrive in the long term.

Help a law student during COVID-19

ELS is asking for information on any opportunities for students who have been left without a summer internship due to COVID-19.

- Are you or your practice willing to expand your externship class to consider some COVID-19 hardship applicants?
- Can you host a virtual law student volunteer intern this summer?
- Can you provide even a few substantial research assignments where students would be able to work closely with you as they develop a meaningful writing sample?

Any of the above opportunities would be an enormous assistance. Please email Amanda Urban at ajurban@umich.edu if you can help.

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

Join NOW

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

Case Study: Best Practices for Stormwater Management in the City of Grand Rapids

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Director of Water Programs, West Michigan Environmental Action Council[1] and Chair of the City of Grand Rapids Stormwater Oversight Commission

Municipalities are required under the federal Clean Water Act[2] to minimize polluted discharges to our waterways, including stormwater runoff[3] and combined sewer overflows.[4] In Michigan, the Department of Environment, Great Lakes, and Energy (EGLE) is authorized by the U.S. Environmental Protection Agency (US EPA) to manage the National Pollution Discharge Elimination System (NPDES) permit program. Phase I permittees include industrial facilities and municipal separate storm sewer systems (MS4s) serving populations greater than 100,000, while Phase II permittees include MS4s serving populations of 100,000 or less and construction sites disturbing 1-5 acres.[5] The Michigan Natural Resources and Environmental Protection Act (NREPA)[6] charges EGLE, formerly Department of Environmental Quality (DEQ), with the protection and conservation of the waters of the state, and grants it control over the management of pollution of surface and underground waters of the state and the Great Lakes.[7]

Stormwater Pollution 101

Stormwater runoff is the biggest source of pollution to our lakes, rivers, and streams. Everything we do on the land affects our waterways, and stormwater runoff contributes to water quality and water quantity issues for communities and residents downstream. When rain falls to the ground in a natural system, it soaks into the soil or is absorbed by plants and trees. However, as we develop the land for residential, commercial, agricultural, and industrial uses, we create barriers that force the water to flow over impermeable surfaces until it reaches a waterbody, storm drain, or other stormwater control feature. Water quality is affected by pollutants such as street dust, eroded

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[1] West Michigan Environmental Action Council (WMEAC) was founded in 1968 to address environmental issues – including water quality issues – through advocacy, education, and community action. Its current mission is to inform, engage and nurture an inclusive community acting together to protect natural resources, mitigate climate impacts, and build a resilient West Michigan.

[2] 33 USC 1251 *et seq*.

[3] 40 CFR 122 through 40 CFR 124.

[4] U.S. Environmental Protection Agency, *Combined Sewer Overflow (CSO) Control Policy*, 59 Fed Reg 18688 (April 19, 1994).

[5] *Id.* at 18690 "E. Implementation Responsibilities"; see also 55 FR 47990 (November 16, 1990); 64 FR 68722 (December 8, 1999).

[6] MCL 324.3101 *et seq*.

[7] MCL 324.3103(1).

sediments, heavy metals, road salt, oil and grease, organic matter, nutrients, and pesticides; and as more water flows into streams and rivers, it can result in unstable and eroding channels, loss of instream habitat, and more severe and more frequent flooding.[8]

In addition to these "nonpoint source" pollutants that come from a variety of contributors, many communities also struggle with a "point source" of pollution from wastewater treatment facilities that have combined sewers. A combined sewer system collects stormwater runoff, domestic sewage, and industrial wastewater in one pipe that transports the wastewater to a sewage plant for treatment before discharging into a waterbody. Heavy rain events or snowmelt can sometimes exceed the capacity of the system, and untreated stormwater and wastewater will discharge directly into nearby rivers, streams, and other waterbodies.[9] Municipalities with combined sewer systems are often under a federal consent decree to update their stormwater systems to prevent these combined sewer overflows (CSOs).[10]

"[T]he establishment of a stormwater utility in Michigan is particularly challenging in light of the *Bolt* and *Jackson* decisions."

Funding for Stormwater Management

Local communities expend significant resources on the construction, operation, and management of stormwater systems, especially when water quality and flooding issues, regulatory requirements, and population growth are taken into account. Funding for stormwater programs can come from a number of different sources including service and stormwater utility fees, property taxes paid into a general fund, special assessment districts, system development charges (i.e., connection fees or tie-in charges), and grant and loan programs.[11] While each of these alternatives comes with advantages and disadvantages, the establishment of a stormwater utility in Michigan is particularly challenging in light of the *Bolt*[12] and *Jackson*[13] decisions.

In *Bolt v. City of Lansing*, the Michigan Supreme Court held that the City of Lansing's stormwater service charge was a tax, and not a fee. In applying a three-part test based on the Headlee Amendment, the Court found that:

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[8] AD Steinman, ES Isely, & K Thompson, *Stormwater runoff to an impaired lake: impacts and solutions*, 187 Environmental Monitoring and Assessment 549 (2015).

[9] US Environmental Protection Agency, *National Pollutant Discharge Elimination System (NPDES):Combined Sewer Overflows (CSOs)* (accessed March 10, 2020).

[10] US Environmental Protection Agency, *Status of Civil Judicial Consent Decrees Addressing Combined Sewer Systems (CSOs)* (accessed March 26, 2020).

[11] US Environmental Protection Agency Region III, *Funding Stormwater Programs* EPA 833-F-070012 (January 2008).

[12] *Bolt v. City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998).

[13] *Jackson Co v. City of Jackson*, 302 Mich App 90; 836 NW2d 903 (2013).

1. The service charge was not a user fee, because its stated purpose was not regulatory, but only to raise revenues to pay for stormwater infrastructure;

2. It was not proportionate to the necessary costs of the services, and it was borne by users who would not benefit from the service provided; i.e., continued separation of the combined sewer system; and

3. It was not voluntary, in that there was no way a property owner could refuse the service.[14]

In *Jackson Co v. City of Jackson*, the Court of Appeals reviewed a new Jackson city ordinance that created a stormwater utility and a stormwater management fee. Using the *Bolt* test, the court similarly found that the stormwater charge was a tax and not a fee. Although the ordinance's stated purposed was regulatory, as well as revenue-raising, the revenue-raising component outweighed the regulatory component; the stormwater fee did not confer specific benefits on property owners paying the fee, but rather to the community at large; and the fee was effectively compulsory as it did not guarantee "all property owners would receive a 100 percent credit" and the only way to get a credit was to "spend their own funds on improvements to their respective properties."[15]

Although there are municipalities in Michigan with stormwater utility fees (e.g., Ann Arbor and Marquette), municipalities enacting a new stormwater utility system would likely be subject to a legal challenge, which creates a chilling effect on the enactment of such regulations.

Green Infrastructure

Stormwater has been historically managed to move water offsite as quickly as possible through a series of pipes and ditches. However, this "grey infrastructure" just moved the water – and its associated problems – from one site upstream to another site downstream. So, as communities were beginning to bear the brunt of managing their own stormwater discharges in the 1990s, new solutions began to emerge that integrated watershed-based approaches to reducing stormwater quantity and improving water quality goals by mimicking the natural hydrology of the ecological system. These "nature-based practices" go by many names: green infrastructure, low impact development, stormwater best management practices, water sensitive urban design, and others. Although their definitions may differ slightly, they all refer to practices that reduce the amount of stormwater entering local waterbodies.[16] Green Infrastructure (GI) practices allow rainwater to soak into the ground closer to where it falls. GI includes rain gardens, porous pavement, green roofs, rain barrels and cisterns, underground bioretention facilities, linear bioswales, trees, and retention of natural areas. There is growing evidence to suggest that many of these GI practices can be cost effective for local municipalities.[17]

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[14] *Bolt*, 459 Mich at 162.

[15] *Jackson Co*, 835 NW2d 913-915.

[16] EE Nordman, E Isely, P Isely, & R Denning. *Benefit-cost analysis of stormwater green infrastructure practices for Grand Rapids, Michigan, USA.* 200 Journal of Cleaner Production 501 (2018).

[17] *Id.*; US Dep't of Agriculture, Rainwater Rewards Calculator: Green Infrastructure Makes (dollars and) Sense (accessed March 10, 2020).

Grand Rapids' Path to Better Stormwater Management

The City of Grand Rapids was an early adopter of new stormwater management practices. It voluntarily began the process of separating its storm sewers from its sanitary sewers system in 1988. It took more than 3 decades and $400 million, but the work was completed in July 2015.

In 2001, Grand Rapids adopted its first stormwater ordinance, focused on reducing polluted stormwater discharges to the Grand River, to meet the requirements of its federal NPDES permit. It also created the Stormwater Division of its Environmental Service Department to fulfill the ordinance and permit requirements. The City has since worked with numerous partners on coordinated permit compliance and the development and implementation of a model stormwater ordinance for the other MS4 communities in the Lower Grand River Watershed.

"GI practices are the 'default' practice for all streets construction projects in the City, to be used unless the engineering and costs make it impossible."

In 2002, the City installed its first GI practice, planting the River of Stars Rain Garden at the water treatment plant. Other significant GI installations include a rain garden and underground reservoir at Joe Taylor Park in 2010, the reconstruction of Plainfield Avenue to include 7 "water quality islands" in the boulevard in 2012, a massive underground storage facility at Mary Waters Park in 2015; and the "daylighting" of part of the Indian Mill Creek in Richmond Park in 2019. GI practices are the "default" practice for all streets construction projects in the City, to be used unless the engineering and costs make it impossible.

In 2006, Grand Rapids published its first Sustainability Plan, and in 2013 West Michigan Environmental Action Council (WMEAC) released the first Climate Resiliency Report for the City of Grand Rapids. In 2013–2014, the City completed its Stormwater Management Plan, Stormwater Asset Management and Capital Improvement Plan, and Technical Reference Manual for stormwater management practices. The latter was updated and renamed the Green Infrastructure Technical Specifications (i.e., "Green Book") in 2018. That same year, the City of Grand Rapids became the first (and only) municipality to have a Green Infrastructure Portfolio Standard which sets annual goals and tracking mechanisms for stormwater infiltration and water quality benefits.

In 2014, the City created 2 citizen-led oversight commissions: the Stormwater Oversight Commission (SOC) and the Vital Streets Oversight Commission (VSOC). The roles of both of these commissions is to be an advisory board to the City; track and review performance, expenditures, and capital investment strategies; make policy recommendations; and track achievement of outcomes. The innovative Vital Streets Plan, which incorporates stormwater goals and outcomes, was completed in 2018, and the SOC and VSOC continue to collaborate to help Grand Rapids achieve its goals.

Partnerships and Leadership

The City of Grand Rapids has invested significant time and resources in planning and implementation of GI practices and better stormwater management practices without the benefit of a stormwater utility. City leadership has committed to payment of stormwater management out of the City's General Fund and through state and federal grants. Grand Rapids is recognized throughout the Great Lakes basin and the U.S. as a national leader in sustainability and stormwater management, but the City did not do it all alone. Local businesses and nonprofit organizations have also implemented green practices which support the regional stormwater goals and best practices, including one of the first green roofs in the U.S. and a green zoo.[18]

In addition, the City has worked on grant funded projects and programming with nonprofit, university, and governmental partners to incentivize and implement GI programs and practices, demonstration projects, and wide-reaching educational efforts. This allows Grand Rapids to meet and, in some ways, exceed its stormwater permit requirements. Grand Rapids and its partners continue to provide leadership in the innovation and sharing of better policies and sustainable practices.

Conclusion

The culture in Grand Rapids and among its community partners is one of sustainability and conservation. Grand Rapids continues to strive for more and better stormwater management practices, which will be crucial as we see increasing frequency and intensity of rainstorms. Stormwater management will only become more challenging as we see and feel the effects of climate change. Many communities already lag in addressing their current stormwater burden. Change and innovation will be essential, and Grand Rapids provides a model of commitment and collaboration that is sought out by other communities.

[18] S Viars, *Green innovations in Grand Rapids*, 7 Worldwater Stormwater Management 13-15 (2019).

Current Court and other Legal Procedures related to COVID-19

SBM has provided a list of informational resources related to legal practice during shelter in place and state of emergency orders:

> Guidance from local courts—there's a lot of information coming at you from Michigan's trial courts, so we are helping keep it straight
>
> Text of documents related to COVID-19—because you need to know exactly what the law actually says
>
> Guidelines from our ethics department—while much has changed during the pandemic, the Michigan Rules of Professional Conduct are still in full effect
>
> Guidance on remote notarization and witnessing under EO 2020-41—this checklist includes everything you need to do before, during, and after a remote notarization or witnessing

The Board of Law Examiners anticipate a decision from the National Conference of Bar Examiners on or around May 5, 2020, regarding the administration of a July bar examination and the possibility of a fall bar examination. California has already decided to host their summer bar exam remotely.

The Michigan Supreme Court has issued several orders and guidance in light of COVID-19. Most can be found on the Court's website. A partsicularly helpful one that is updated regularly is the Frequently Asked Questions and General Guidance Regarding Emergency Court Response to COVID-19. The Court continues to hear oral arguments for pending cases virtually on its YouTube channel.

If you are curious whether your case may be moving forward anytime soon, see the judiciary's Process for Triaging Case Actions During the COVID-19 Crisis. Each list linked below helps courts identify cases most in need of processing, while identifying lower priority matters that can be addressed as courts return to full capacity. The lists below prioritize cases and hearings by case type and include the associated authority.

- Circuit
- District
- Probate

Contribute to the MELJ

- The next issue is in Summer 2020. Write on a difficulty you have encountered in your practice to help fellow practitioners OR write about a topical environmental event or issue that interests you.

- Email submissions or inquiries to Amanda Urban at ajurban@umich.edu
    - 2-10 pages, 12pt Times New Roman, Michigan Appellate Manual footnotes

Let us Know What you Want to See in the MELJ

- The MELJ is a publication intended to serve the members of the Environmental Law Section of the State Bar of Michigan. Do you have an event upcoming? Please let us know the details and we will be happy to feature it.

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