



A portion of "The Traces Left Behind," a piece made of recycled silver in Maya Lin's Flow exhibit, which showcases her fascination with the natural environment and can be found at the Grand Rapids Art Museum.

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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've said it before and I'll say it again, the Environmental Law Section has the best members! Seriously, I am so happy to have the members of this Section as my colleagues and I am constantly impressed by the good work that all of you do. So far, 2019 has been a great year for the Section and I want to tell you about all of the value this Section has to offer its members.

First, the Environmental Law Section provides timely and informative webinars to our membership. Over the past year, the Section has hosted webinars to update members about legislative changes at the end of 2018 and on the effects of dynamic Great Lakes shorelines on zoning and planning in Michigan's coastal communities. Second, the Environmental Law Section continues to organize and host excellent conferences. In April, the Section held its annual Air Conference in collaboration with the Michigan Manufacturer's Association. The Section, in collaboration with the East and West Michigan Chapters of the Air and Waste Management Association, will also present the Fall Joint Conference again in November. The Conference includes numerous presentations by EGLE Program Directors and staff. Finally, the Environmental Law Section publishes the Michigan Environmental Law Journal (MELJ), which provides members with quality articles on various key topics pertinent to environmental professionals in Michigan. The MELJ is an important resource that is available to the current and future members of the Section.

As many of you know, the last several years have been some of the most challenging for environmental practitioners in recent memory. From interpreting and staying informed about updated vapor intrusion criteria and processes, to dealing with water quality issues related to lead and PFAS, the members of this Section have been on the front lines responding to these issues and working tirelessly to advise their clients and the community under circumstances that seem to be constantly changing. I believe that these challenges will lead to more young people becoming interested in environmental issues and the law. The next generation of environmental lawyers will draw on experiences and ideas that are different than those of previous generations. Never before have we had a generation that has had environmental issues discussed and presented to them from so many sources, with so much knowledge and understanding, and with so much frequency. Therefore, I believe this is the time for the Environmental Law Section to focus on reaching out to younger generations. The Section should continue to provide the valuable programs that I mentioned above, but it should also concentrate on developing new opportunities for young people to connect with seasoned lawyers. As my term as Chair comes to an end, I am committed to staying involved with the Section to foster these opportunities. I am handing the baton off to some of the very best lawyers and people that I know, who can definitely lead the Section forward toward these goals.

My sincere thanks and gratitude go out to each and every member of this Section for your ideas, hard work, and commitment. I also want to say a big thank you to Mary Anne Parks our Section Administrator. Without you, nothing would get done! I have enjoyed my time as Chair and look forward to many more years as a member of the Environmental Law Section.

Q & A: The Michigan Environmental Rules Review Committee

Jeremy Orr

Attorney

Safe Water Initiative

Natural Resources Defense Council



On April 5, 2019, Governor Gretchen Whitmer appointed me to serve on the state’s controversial Environmental Rules Review Committee (the ERRC).¹ My appointment, which satisfies the statutory mandate that the ERRC have a representative from an environmental organization,² came just two months after the state legislature overturned Governor Whitmer’s Executive Order,³ which attempted to abolish both the ERRC and the similarly situated Environmental Permit Review Commission (the EPRC).⁴ The creation, attempted abolishment, and preservation of the ERRC and the EPRC, which environmentalists and public health advocates nicknamed “Polluter Panels,” were quite contentious due to the placement of representatives from the exact industries that are meant to be regulated on both decision-making bodies. For some people, myself included, this was and still is a classic case of the fox guarding the henhouse.⁵ So why would I join a committee whose very existence I question? Simple: Because environmental advocates still need a voice at the table. But what exactly is this table and how does it function?

In this following Q & A I hope to provide some brief yet essential insight into the ERRC and how it plays a key role in shaping environmental law and policy in our state through the formal rule-making process.

What is the Environmental Rules Review Committee?

The Environmental Rules Review Committee is “an independent body within the Office of Performance and Transformation [that] oversee[s] all rule-making of the Michigan Department of [Environment, Great Lakes, Energy]” (formerly the Michigan Department of Environmental Quality).⁶

How long has the ERRC been in existence?

¹State of Michigan, *Gov. Whitmer Makes Appointments to Boards and Commissions* (April 5, 2019).

² MCL 24.265(2)(e).

³ Egan & Gray, *Legislature Votes to Reject Whitmer’s Environmental Executive Order*, Detroit Free Press (February 14, 2019).

⁴ Executive Order No. 2019-02.

⁵ Biolchini, *Lobbyists, Industry Reps Can Now Advise Michigan’s Environmental Rules* (June 29, 2018).

⁶ State of Michigan, *Environmental Rules Review Committee (ERRC)*.

Public Act 267 of 2018 was signed into law on June 29, 2018 by Governor Snyder and ordered to take immediate effect.⁷

Where is the law codified with the Michigan Compiled Laws?

The ERRC as created under the aforementioned Public Act is codified in Michigan law as sections titled “Environmental rules review committee; creation; members and meetings”⁸ and “Review by environmental rules review committee; procedure; approval or rejection of draft proposed rules”⁹ within Chapter 3 “Procedures for Processing and Publishing Rules” under the Michigan Administrative Procedures Act of 1969.

Who are the individuals that make up the ERRC?

As detailed on the State of Michigan’s website, “the Committee is comprised of 12 members appointed by the Governor and four nonvoting ex-officio members. Not more than six of the voting members may be members of the same political party. Appointed members serve four-year terms.”¹⁰ Yet to be more specific, the law states that

the environmental rules review committee consists of the director of the department of environmental quality, or his or her designee, the director of the department of health and human services, or his or her designee, the director of the department of agriculture and rural development, or his or her designee, and the director of the department of natural resources, or his or her designee, all of whom serve as nonvoting members, and the following voting members appointed by the governor by and with the advice and consent of the senate:

- (a) One individual who represents the solid waste management industry.
- (b) One individual who represents a statewide manufacturing organization.
- (c) One individual who represents a statewide organization that represents small businesses.
- (d) One individual who represents public utilities that engage in the generation, transmission, or distribution of electricity.
- (e) One individual who represents a statewide environmental organization.

⁷ 2018 PA 267.

⁸ MCL 24.265.

⁹ MCL 24.266.

¹⁰ *Supra* n 6, *Environmental Rules Review Committee*.

- (f) One individual who represents the oil and gas industry.
- (g) One individual who represents a statewide agricultural organization.
- (h) One individual who represents local governments.
- (i) One individual who represents a statewide land conservancy organization.
- (j) Two individuals who represent the general public.
- (k) One individual who is a public health professional.¹¹

How long are terms for ERRC members?

Terms are four years and each member can serve a maximum of three consecutive terms but can be appointed again after not serving for one full term.¹²

What are the requirements to serve on the ERRC?

While members are appointed by the Governor at the advice and consent of the State Senate, the law simply states that members must merely “possess knowledge, experience, or education that qualifies him or her to represent the represented constituency.”¹³

Can an individual be barred from serving on the ERRC?

While the criteria for serving on the ERRC are fairly subjective, there are people who are excluded from serving on the committee. The following individuals cannot serve on the ERRC as voting members:

- (a) The individual is an employee of any office, department, or agency of this state.
- (b) The individual is a party to 1 or more contracts with the department of environmental quality and the compensation paid under those contracts in any of the preceding 3 years represented more than 5% of the individual's annual gross income in that preceding year.
- (c) The individual is employed by a person that is a party to 1 or more contracts with the department of environmental quality and the compensation paid to the individual's employer under those contracts in any of the preceding 3 years

¹¹ MCL 24.265(2).

¹² MCL 24.265(7).

¹³ MCL 24.265(3).

represented more than 5% of the employer's annual gross revenue in that preceding year.

(d) The individual was employed by the department of environmental quality within the preceding 3 years.¹⁴

What role does the ERRC play in the rule-making process?

As a body that was intentionally set up to be independent of the Michigan Department of Environment, Great Lakes, and Energy (EGLE), the ERRC has a unique role in the otherwise standard rule-making process that has traditionally been subject to oversight from the agency itself and the state legislature's Joint Committee on Administrative Rule Making (JCAR). By default, the ERRC has review power over all rules proposed by EGLE and the opportunity for intervention occurs in three stages as detailed below.

Stage One: When an approved request for rule-making is made by EGLE, it must then be submitted to the ERRC.¹⁵ The Chair and Vice-Chair of the ERRC then has 14 days to determine whether a rule requires no further review from the ERRC.¹⁶ If the ERRC decides that a rule requires no further review from the committee, that rule then follows the standard rule-making process and the ERRC has no opportunity to review the rule later in the rule-making process.¹⁷ However, this determination by the Chair and Vice-Chair may be overridden by the whole committee vote if at least three members request a vote on the determination and at least seven members vote in favor of overriding it.¹⁸ If the ERRC chooses to maintain its review power over a proposed rule it, then prompts a second review opportunity at Stage Two.

Stage Two: The second opportunity for rule review comes once EGLE provides a draft rule to ERRC as required by Subsection (3) of the law.¹⁹ Subsection (4) of the law states that

after receiving draft proposed rules under subsection (3), the environmental rules review committee shall meet one or more times to consider whether the draft proposed rules meet all of the following criteria:

(a) The office has certified that the draft proposed rules do not exceed the rule-making delegation contained in the statute authorizing the rule-making.

¹⁴ MCL 24.265(4).

¹⁵ MCL 24.266(1),

¹⁶ MCL 24.266(2).

¹⁷ MCL 24.266(2).

¹⁸ MCL 24.266(2).

¹⁹ MCL 24.266(3).

(b) The draft proposed rules reasonably implement and apply the statute authorizing the rule-making and are consistent with all other applicable law.

“...an approved request for rule-making [] made by EGLE, [] must then be submitted to the ERRC...”

(c) The draft proposed rules are necessary and suitable to achieve their purposes in proportion to the burdens they place on individuals and businesses.

(d) The draft proposed rules are as clear and unambiguous as reasonably appropriate considering the subject matter of the proposed rules and the individuals and businesses that will be required to comply with the proposed rules.

(e) The draft proposed rules are based on sound and objective scientific reasoning.²⁰

Within 35 days after receiving draft proposed rules under subsection (3), the environmental rules review committee shall make 1 of the following determinations:

(a) By a vote of 9 voting members of the environmental rules review committee, a determination that the request for rule-making must not proceed any further under this section, but must proceed under the otherwise applicable sections of this act.

(b) By a majority vote of the voting members of the environmental rules review committee, a determination that the draft proposed rules meet the criteria in subsection (4) and may proceed to a public hearing...

(c) By a majority vote of the voting members of the environmental rules review committee, either a determination that the draft proposed rules do not meet the criteria in subsection (4) or that additional review is needed to determine whether the draft proposed rules meet the criteria in subsection (4). If the environmental rules review committee makes a determination under this subdivision, the draft proposed rules must not proceed to a public hearing²¹

If the ERRC determines that a rule does not meet the abovementioned criteria, the ERRC must inform EGLE and EGLE has 90 days to address the ERRC’s concerns.²² If EGLE is unsuccessful in addressing those concerns after 90 days, the criteria review process may be extended for two

²⁰ MCL 24.266(4).

²¹ MCL 24.266(5).

²² MCL 24.266(6), (7)(c).

additional 90-day periods—giving the ERRC the right to pause the rule-making process for up to 270 days before continuing to formal public hearings.²³

Stage 3: Following the public hearing, EGLE has 120 days to submit an Agency report to the ERRC.²⁴ Upon receiving that report, the ERRC has 120 days from receiving the report to meet and determine whether to approve, reject, or modify a draft rule.²⁵ If approved, a draft rule then proceeds onto the standard rule-making process with no further review from the ERRC. But if the ERRC rejects or proposes a modification a draft rule, it notifies the Director of EGLE and EGLE has 11 months from the date of the public hearing to resolve issues raised by the ERRC.²⁶ If resolved, the ERRC may approve a draft rule and it continues onto standard rulemaking and finalizations.²⁷ If EGLE cannot resolve the issues raised by the ERRC, the Director of EGLE submits their written findings to the Governor and the Governor decides whether to withdraw the rule or concur with EGLE and submits the rule to the state legislature’s Joint Committee on Administrative Rule Making for final approval, thus ending the ERRC’s oversight role of review in the rule-making process.²⁸

A flowchart of this entire process can be found on EGLE’s website.²⁹

What is the key takeaway about the ERRC?

The ERRC has significant oversight of the rule-making process. While it cannot directly approve or kill a rule, it can allow a rule to proceed in a more expeditious manner by deciding to relinquish its oversight early in the process, or it can significantly delay the promulgation for more than a year if it exercises its full rejection and inquiry authority at each stage causing the EGLE or the Governor to give meaningful consideration as to whether to proceed or withdraw a draft rule.

Where can I find information and to stay up-to-date on the ERRC?

You can find more information about the ERRC including the list of its current members, a schedule for upcoming public meetings, and past meeting minutes on EGLE’s website.³⁰

²³ MCL 24.266(7)(c).

²⁴ MCL 24.266(8).

²⁵ MCL 24.266(9).

²⁶ MCL 24.266(11).

²⁷ MCL 24.266(12).

²⁸ MCL 24.266(11).

²⁹ Michigan Department of Environment, Great Lakes, and Energy, *Environmental Rules Review Committee Process*.

³⁰ Michigan Department of Environment, Great Lakes, and Energy, *Environmental Rules Review Committee*.

What's Coming Up

Events of Interest to the Michigan Environmental Law Community

Environmental Law Section Annual Meeting

1:00-4:30 p.m., Sept. 18, 2019, State Bar of Michigan Office, Lansing

While the State Bar has discontinued the NEXT conference, ELS will still be around this fall for your environmental needs. Join us for the annual Section meeting for some great programming and fellowship to follow at [Lansing Brewing Company](#) from 5-7pm.

SBM Annual Meeting

Sept. 25-27, 2019, Novi

The State Bar of Michigan will host its [annual meeting](#) at the Suburban Collection Showplace. The 3-day meeting will include an inaugural and awards luncheon as well as a celebration of those practitioners who have been members of the bar for 50+ years.

Fall Joint Conference

November 14, 2019, Lansing

A cooperative effort of the Environmental Law Section and the East and West Michigan Chapters of the Air and Waste Management Association, the fall conference will be held at the Lansing Community College and will feature EGLE division chiefs.

ABA's Section of Environment, Energy, & Resources Law Spring Conference

April 20-24, 2020, Chicago

Save the date and watch for registration! The ABA's national environmental, energy, and resources law conference will be held here in the midwest this spring. Topics are sure to be relevant to the Great Lakes and Michigan practitioners.

What You Might Have Missed

Events of Interest to the Michigan Environmental Law Community

Webinar: The Challenging Effects of Dynamic Great Lakes Shorelines on Zoning & Planning in Coastal Communities

Aug. 6, 2019, Noon-1pm

The Great Lakes and Inland Waters Committee of the State Bar of Michigan Environmental Law Section hosted a webinar discussing the wide-ranging effects the at-or-above-record water levels of the Great Lakes have had on municipalities along the coast this year. University of Michigan Professor Dr. Richard Norton reviewed the coastal shoreline dynamics of the Great Lakes that make near-shore development, planning, and zoning so challenging. Professor Norton has conducted an extensive review of the zoning codes of coastal communities through the University of Michigan and the Michigan Coastal Zone Management Program. He presented the results of his survey as to how communities treat near-shore coastal areas, including land-use

restrictions that manage development along the coast and the potential for “armoring” coastal real estate.

**SBM ELS Summer Council Meeting
June 20, 2019, Grand Rapids**

The Section Council Members had their summer meeting at the offices of Barnes & Thornburg in Grand Rapids. The Council discussed plans for the upcoming annual Section meeting and was able to attend Environmental Tea hosted by Tammy Helminski and Suzanne Sutherland. Environmental Tea is a networking event for women in Michigan to share their passions for their careers in the environmental field.

**Clearing the Air Conference
April 11, 2019, Lansing**

Sponsored by the Air Committee of the Environmental Law Section, the Michigan Manufacturers Association hosted the annual Clearing the Air Conference at its Lansing headquarters. The Conference featured an address by Peter Manning of the Michigan Department of Attorney General (right) and an insightful update into the ongoings of now-EGLE by Aaron Keatley, then Chief Deputy Director at the Michigan Department of Environmental Quality. Program materials are available at michbar.org/environmental.



* 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 of the State Bar of Michigan,

[Join NOW](#)

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



Executive Order Reshapes Environmental Agency to Foster Engagement with Communities in Effort to Better Protect Michigan Residents

Governor Whitmer signed Executive Order 2019-06 on February 20, 2019, creating the Department of Environment, Great Lakes, and Energy. Coincidentally, the Executive Order took effect on Earth Day, April 22, 2019, sixty days after its submission to the Legislature. Under the Executive Order, the former Michigan Department of Environmental Quality was reorganized as EGLE, assumed many activities of the former Michigan Agency for Energy, and created the new Office of Climate and Energy within EGLE.

The Governor also issued Executive Directive 2019-12, which enters Michigan into the U.S. Climate Alliance, a bipartisan coalition of governors from 19 other states that have committed to reducing greenhouse gas emissions consistent with the goals of the Paris Agreement. Dr. Brandy Brown, the new climate and energy advisor for EGLE, will lead the State's efforts to mitigate the impacts of climate change, reduce greenhouse gas emissions, and embrace more sustainable energy solutions. Dr. Brown comes to the Department most recently from Clearesult, where her career has focused on strategic planning and program evaluation in the energy sector.

Other notable changes include the creation of an Environmental Justice Public Advocate position who will accept and investigate complaints and concerns related to environmental justice in Michigan. To lead that effort, the Director recruited Regina Strong. Strong is the former Michigan Director for the Sierra Club's Beyond Coal Campaign and brings an extensive background in advocacy and public affairs to her new role. She previously served in a variety of leadership roles, including as the executive director of Community Development Advocates of Detroit. She will help coordinate the creation of an Interagency Environmental Justice Response Team, which will assist in developing, implementing, and regularly updating a statewide environmental justice plan.

The Office of the Great Lakes also moves from the Department of Natural Resources into EGLE. Emily Finnell fills the role of Great Lakes Senior Advisor and will be assisting in the coordination of efforts with the other Great Lakes States and Provinces in areas such as water diversions, maritime-related issues, and invasive species. The office has also been very involved with the redevelopment of coastal communities and demonstrating the true value of Great Lakes restoration efforts.

Lastly, an Office of the Clean Water Public Advocate was also created to investigate complaints and concerns relating to drinking water quality. The office will help residents navigate concerns related to protecting drinking water for those residents served by public systems or on private wells in more rural areas of the state. The position will work closely with the staffs in the Drinking Water and Water Resources Divisions that are tasked with the critical job of protecting Michigan's water resources.

The intent of the focus on engagement and acting as advocates on behalf of Michigan residents is to help inform agency decision-making which hopefully better reflects the values of our residents,

but also to help ensure the regulatory programs are implemented in a manner that complies with both the letter, and spirit, of the laws of Michigan.

James Clift joined EGLE in late February 2019 and is a Deputy Director of EGLE, overseeing the engagement team. Prior to joining EGLE, Clift served for the past twenty years as the Policy Director of the Michigan Environmental Council. Prior to joining the Council, Clift served as an environmental policy analyst at the Michigan Senate.

He finds himself using the term “exciting” a fair amount when he tells people about his new position at EGLE. The excitement, he explains, comes from working with people that he trusts and admires, but also because of their commitment to engaging with people and communities across the state to make sure EGLE is doing the best job it can to protect Michigan’s most valuable resource, its people.

Viewpoint: Michigan’s New Lead and Copper Rules and the Dilemma for Municipal Water Suppliers

Steven Chester

Senior Counsel, Miller, Canfield, Paddock and Stone P.L.C.



On December 11, 2018, the Great Lakes Water Authority (“GLWA”), Detroit Water and Sewerage Department (“DWSD”), Oakland Water Resources Commissioner (“WRC”), and the City of Livonia (collectively referred to as the “Plaintiffs”) filed a Complaint for a Declaratory Judgment with the Michigan Court of Claims¹ seeking to invalidate the recently enacted state “Lead and Copper Rules” (the “Rules”).² The Complaint was filed against the Department of Environmental Quality (“DEQ”).³ Plaintiffs are municipal water suppliers who collectively provide drinking water to well over a million customers. As public health agencies, Plaintiffs have spent decades insuring their customers receive safe, clean drinking water.

So why did Plaintiffs feel compelled to challenge the validity of the new Rules which require the removal of all lead service lines statewide in twenty years? What obligations do the Rules impose on municipal water suppliers that the suppliers find problematic? To appreciate the dilemma the Rules create for water suppliers requires an understanding of how and why the Rules came to be.

Older housing stock commonly includes plumbing materials with lead and copper components. If not managed correctly, lead and copper can leach into drinking water and pose significant public health concerns. The most common sources of lead in drinking water are faucets, fixtures, solders, and the lead service lines that connect the home to the public water supply. With a few exceptions, most lead service lines are privately owned and located on the homeowner’s private property.

In 1991, pursuant to authority under the federal Safe Drinking Water Act,⁴ the United States Environmental Protection Agency (“EPA”) promulgated the federal lead and copper rule.⁵ The federal rule, which has been revised over the years, protects public health by setting lead and copper action levels and requiring water suppliers to apply corrosion control treatment to minimize

¹ State of Michigan Court of Claims, Case No. 2018-000259-MZ.

² Mich Admin Code, R 325.10102 *et seq.*

³ On February 20, 2019, Governor Whitmer signed Executive Order No. 2019-06 reorganizing DEQ, renaming it the Department of Environment, Great Lakes, and Energy. The Executive Order became effective on Monday, April 22, 2019. The department is referred to as “DEQ” throughout this article.

⁴ 42 USC 300f *et seq.*

⁵ 40 CFR Part 141, Subpart I.

lead and copper levels in drinking water systems. If an action level is exceeded in more than 10% of the customer taps sampled, a water supplier must undertake additional corrective measures to control corrosion within the water system.

In 1978, the EPA granted the State of Michigan initial primacy to administer the federal Safe Drinking Water Act, which was extended to include the federal lead and copper rule after its promulgation in 1991. The federal rule was re-promulgated as a state rule under the Michigan Safe Drinking Water Act,⁶ and over the years municipal water suppliers have successfully applied the rule and its treatment standards to their drinking water systems. In April 2014, this changed when the city of Flint switched its drinking water source from treated water received from Detroit and sourced from Lake Huron and the Detroit River to the Flint River. The city did not apply corrosion control treatment to the Flint River water resulting in lead exposures and a public health emergency.

A History of the new Lead & Copper Rules

In March 2017, in response to the Flint drinking water crisis, DEQ submitted a Request for Rulemaking to the Office of Regulatory Reform (“ORR”) to amend the federal rule. From the outset, the press reported DEQ’s additional requirements proposed in Michigan’s lead drinking water regulation to be the “toughest in the nation.”⁷ ORR authorized DEQ to proceed with rulemaking.

As a first step in the rulemaking process, DEQ formed a stakeholder group and held stakeholder meetings from July to December 2017. Plaintiffs, along with other municipal water suppliers and interested groups, participated in these meetings. It was during the stakeholder process that DEQ unveiled its intent to require municipal water suppliers to access private property and remove and replace all privately owned lead service lines at the municipality’s expense. The municipal stakeholders pointed out that this would impose a huge financial burden on the water suppliers without providing any source of funding.

In January 2018, despite the funding and other concerns expressed by the municipal water suppliers, DEQ published draft Rules. As required by the Michigan Administrative Procedures Act, DEQ also prepared a Regulatory Impact Statement and Cost-Benefit Analysis (“RIS”) for the Rules.⁸ As part of the RIS, DEQ was obliged to provide specific information in response to a long list of questions. This information included, among other things: 1) a comparison of the Rules to parallel federal and state regulations; 2) a determination as to whether the Rules conflict with existing law; 3) an identification of the behavior to be altered and the harm to be addressed by the Rules; 4) an analysis of the impacts of the Rules on businesses, groups and individuals; and 5) a

⁶ MCL 325.1001 *et seq.*

⁷ Smith, *Michigan Pushes To Have Nation's Toughest Lead Water Rules*, NPR, (Nov. 13, 2017); Moehlman, *Michigan moves toward the toughest lead in drinking water rule in the nation*, Michigan Radio, (Feb. 27, 2018).

⁸ MCL 24.245(3); Executive Order No. 2011-5.

discussion of possible alternatives to the Rules.⁹ Importantly, the RIS also obligated DEQ to include an estimate of the costs imposed by the Rules (i.e., a cost-benefit analysis).¹⁰

From February 8, 2018 through March 21, 2018, a public comment period was held on the proposed Rules and the accompanying RIS. Plaintiffs, along with other municipal water suppliers and associations, provided detailed comments challenging the legal, scientific, and technical foundation for the Rules and the adequacy of the RIS. Plaintiffs and other commenters pointedly remarked that, as expressed in the RIS, DEQ had grossly underestimated the cost to be imposed on municipal water suppliers by the Rules. DEQ did not respond to most of Plaintiffs' comments and offered no response whatsoever in the public record to address Plaintiffs' concerns over the cost of the Rules. In fact, DEQ did not change one word in their RIS cost summary for the Rules after reviewing Plaintiffs' comments. In May 2018, DEQ sent the Rules to the Joint Committee on Administrative Rules (JCAR) and, after several changes proposed by JCAR, the Rules became final on June 14, 2018.

As noted above, the most troublesome “new” requirement embedded in the Rules is the mandate requiring water suppliers to bear the cost of removing and replacing private lead service lines.¹¹ The Rules fail to identify any state funding source for this work. During both the stakeholder meetings and the public comment period, Plaintiffs presented evidence that the overall line replacement costs associated with the Rules would exceed \$2.5 Billion over 20 years. This estimate was based on the need to remove 500,000 lead service lines statewide, at an average cost of \$5,000 per line. DEQ accepted this estimate going so far as to prepare a draft RIS referencing the \$2.5 Billion cost; but the Agency changed course during the rulemaking phase suggesting line replacement under the Rules would cost only \$499 Million over 20 years. DEQ claimed only 99,733 lead lines would require replacement under the Rules. Detroit alone has over 125,000 lead service lines.

“[T]he mandate require[s] water suppliers to bear the cost of removing and replacing private lead service lines.”

Also of concern for municipal water suppliers is the schedule in the Rules for lead line replacement. By requiring that all lead lines be replaced in 20 years, municipal water suppliers may be compelled to ignore major public health issues like water main breaks, sewer backups, bacterial contamination, and sinkholes, in favor of prioritizing lead line removal and replacement. Plaintiffs argued strenuously that water suppliers should retain the flexibility and authority to set community priorities in Asset Management Programs (“AMP”) subject to DEQ review and approval. Each community AMP would identify the municipality’s commitment to rehabilitate, repair, and replace drinking water infrastructure, including lead service lines, in accordance with

⁹ *Id.*

¹⁰ *Id.*; Exec. Order, Art V.1 (p 5).

¹¹ Mich Admin Code R 325.10604f(5)(c); R 325.10604f(6)(e).

the specific public health needs and budgetary limitations of the community. Regrettably, the Rules as finalized greatly reduce the availability and diminish the importance of community-specific AMPs.

Another problematic assumption baked into the Rules is that property owners will readily grant water suppliers permission to access private property to remove lead service lines. The experience of many water suppliers, however, paints a more complicated picture with access frequently

“The experience of many water suppliers [is that] access [is] frequently denied, and/or unreasonable conditions [are] imposed on the water suppliers to gain access.”

denied, and/or unreasonable conditions imposed on the water suppliers to gain access. Lastly, the Rules invoke myriad constitutional and statutory questions, including potential *Headlee*¹² and *Bolt v. City of Lansing*¹³ issues. Although raised during the public comment period, responses to these concerns were not provided by DEQ as part of the rulemaking.

Based on the financial burden imposed by the Rules, and the perceived numerous legal and technical deficiencies embodied in the Rules, Plaintiffs filed their lawsuit with the Court of Claims. DEQ thereafter filed a motion for

summary disposition, and Plaintiffs asked to amend their complaint to add a *Headlee* count. On July 23, the court granted the Plaintiffs’ motion to add a *Headlee* count but expressed skepticism about its merits. On the same day the court held a hearing on the Defendants’ dispositive motion, and on July 26, the court granted the Defendant’s motion for summary disposition finding the Rules to be constitutionally, procedurally, and substantively valid.¹⁴ On the issue of cost, the court maintained that nothing prevents municipal water suppliers from spreading the cost of replacing the privately owned lead service lines system wide on all users of the system.¹⁵

Presently, the *Headlee* count remains before the Court of Claims, and Plaintiffs are considering their appellate opportunities regarding the rest of the litigation. In the meantime, the Rules remain in effect and municipal water suppliers are left with the thorny task of how best to protect the health of their customers, while complying with the Rules, and yet keeping within funding and budget limitations.

*For an earlier discussion the Lead & Copper Rule see [Viewpoint: Assessing Michigan’s Response to the Flint Water Crisis: The Lead and Copper Rule and Executive Directive 2018-3](#) by Nick Leonard in the MELJ’s fall 2018 issue.

¹² Const 1963 art 9, §§ 25 and 29.

¹³ *Bolt v. City of Lansing*, 459 Mich 152 (1998).

¹⁴ *Opinion Regarding Defendant’s February 1, 2019 Motion For Summary Disposition Pursuant To MCR 2.116(C)(8)*, State of Michigan Court of Claims, Case No. 2018-000259-MZ.

¹⁵ *Id.*, p 14.

Law Student Internships

- The summer 2020 law student internship application cycle is well underway for 1Ls and 2Ls. Current students consider applying at these great organizations who have expressed their interest in hosting students to the MELJ:



Host a Law Student Intern

- Could your environment, energy, or natural resources practice use an extra hand? Law students from Michigan State, Wayne State, Detroit Mercy, Michigan, and Cooley are looking to learn more about environmental law in Michigan. Think back to your early days diving into environmental law and how you could have benefited from a summer of practical experience.
- Your organization can offer an externship or internship for 1Ls or 2Ls, even if you are unsure about post-graduation employment opportunities.
- If you are interested in accepting student resumes for possible internship positions, fill out this

[CONTACT FORM.](#)

[Incinerator Shutdown]

On March 27th of this year, Detroit Renewable Energy suddenly announced that it was permanently closing its trash incinerator. Since its inception, the incinerator has been mired in controversy. Originally owned by the city of Detroit, the construction of the facility was the subject of litigation and protests. Since 1991, the incinerator has operated under a number of private owners. The facility's closure comes at a time when it was facing mounting legal pressure from both the Michigan Department of Environment, Great Lakes, and Energy, as well as private litigants regarding the facility's odors and several violations of emission limits for certain chemicals into the air. In November of 2018, the Department of Environment, Great Lakes, and Energy sent Detroit Renewable Power notice of the commencement of an escalated enforcement action. In January 2019, the Great Lakes Environmental Law Center sent the owner of the incinerator a notice of their intent to file a citizen suit under the Clean Air Act for hundreds of alleged violations of air-emission limits.

The closure of the incinerator has been a significant win for environmental justice advocates.

The Lake Erie Bill of Rights: Legal Challenges to Granting Rights to Nature



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On February 26, 2019 the citizens of Toledo, Ohio voted to amend their City Charter to include the Lake Erie Bill of Rights (“LEBOR”).¹ The LEBOR is the latest effort to develop rights of nature laws within the United States by granting rights to ecosystems themselves, like Lake Erie. Relying on the Ohio Constitution’s Article 1, Sections 1 and 2, the LEBOR is premised on declaring an immediate emergency within Lake Erie’s ecosystem caused by global climate change, industrial discharge, and agricultural runoff that is not adequately addressed by state and federal laws.² The irrevocable rights to be extended to Lake Erie include the Lake’s right to exist, flourish, and naturally evolve, and the right to a clean and healthy Lake Erie.³

The rights declared in the LEBOR are self-executing, and permit Toledo, its residents, or Lake Erie itself to enforce these rights by imposing strict liability upon any government or corporation that engages in activities in violation of the Lake’s rights.⁴ The LEBOR also provides that Toledo will refuse to honor any permit or license issued by a state or federal entity to a corporation that would result in a violation of Lake Erie’s rights, and that Toledo will refuse to “deem[] valid” any state laws or regulations that are inconsistent with Lake Erie’s rights.⁵

The efforts to enact the LEBOR were spurred by Toledo’s concern for its drinking water, which is drawn from Lake Erie.

¹ Toledo Charter, ch XVII, §§ 253-260.

² *Id.* at § 253.

³ *Id.* at § 254.

⁴ *Id.* at §§ 254-256.

⁵ *Id.* at § 255.

[Contd.]

According to the Environmental Protection Agency (EPA), 21,927 people lived within 1.5 miles of the incinerator: 76% of those individuals were people of color and 71% were low-income. For decades, this community had borne the brunt of the negative externalities associated with the facility. The incinerator was one of the largest emitters of air pollution in an area that has no shortage of them, which presented increased public health risks for nearby residents. Residents also frequently complained about prolonged periods of loud noises similar to that made from jet engines that resulted from the operation of the incinerator. Lastly, strong odors from the facility in the summer months had been a constant source of frustration for neighbors, as residents were often forced to retreat from their backyards into their homes. For the first summer in decades, residents will be able to enjoy their backyards in the summertime without the threat of trash odors looming down the street.

Of course, the closure of the incinerator does pose a number of challenges. One key issue is how local governments will manage the closure of a large solid waste disposal facility in both the short and long term. The facility was one of the largest municipal waste incinerators in the country,

Toledo grappled with emergency shutdowns of its water supply in 2014 due to harmful, toxic algae blooms in Lake Erie caused by extensive water pollution. The Community Environmental Legal Defense Fund (“CELDF”) assisted local Toledo rights group, Toledoans for Safe Water, in drafting the LEBOR. CELDF has led similar efforts in other states to recognize personhood rights for nature and ecosystems to address historical issues of standing in environmental litigation.⁶

While the LEBOR is being touted as one of the first, large scale successes of the rights of nature movement within the United States, it is not unique. Other countries, including Ecuador, Bolivia, Colombia, and India have recognized the rights of rivers and ecosystems to afford natural and national treasures additional protections under the law. Other communities in the United States, with the assistance of the CELDF, have also sought to enact ordinances or constitutional amendments to afford rights to natural environments to safeguard against fracking and industrial and agricultural pollution.⁷ The LEBOR has sparked fear in farming communities in Ohio as well as Michigan, since the LEBOR would permit Toledo or any of its citizens to initiate suit against farming operations with run-off or who discharge into Lake Erie pursuant to valid federal and state permits.⁸

The day after the LEBOR was approved by voters as an amendment to Toledo’s City Charter, an Ohio farm filed a federal lawsuit against Toledo in the United States District Court for the Northern District Court of Ohio challenging the LEBOR as unconstitutional and unlawful.⁹ The State of Ohio filed a Motion to Intervene in the lawsuit, which was granted

⁶ See generally Community Environmental Legal Defense Fund, *Press Release – Rights of Lake Erie: One Step Closer to the Ballot, One Step Closer to Recognition* (posted December 6, 2018) (accessed July 24, 2019).

⁷ *Id.*

⁸ This includes opposition to the LEBOR by the Michigan Farm Bureau, see generally Michigan Farm Bureau, *Lake Erie Bill of Rights* (accessed June 24, 2019).

⁹ *Drewes Farm Partnership of Ohio v. City of Toledo*, Complaint, filed February 27, 2019 (Case No. 3:19-cv-00434-JZ) (ND Ohio).

[Contd.]

and one of the largest solid waste facilities in the State. The closure has sent many local governments that were relying on the incinerator scrambling to find alternative disposal sites on short notice. These issues arise as many local governments are dealing with ongoing recycling issues, which were largely precipitated by China’s refusal to continue accepting America’s recyclables.

While the incinerator was also primarily responsible for generating steam that was distributed to dozens of customers on the Detroit steam loop for heating and cooling purposes, Detroit Thermal, another subsidiary of Detroit Renewable Energy, expects to continue to operate the loop with steam generated from its natural gas-fired plant.

In the end, the owners of the incinerator stated that they decided to close the facility because the costs to upgrade the facility to ensure it operated in compliance with the law were too great. However, it is important to note that while the owners have permanently closed the facility, much remains to be determined. The facility’s air quality permits are still effective, although the owners have stated that all trash burning has ceased. Additionally, while Detroit Renewable Energy owns the

on May 1, 2019.¹⁰ The State of Ohio filed its Complaint against Toledo on May 24, 2019, requesting declaratory judgment and injunctive relief based on the LEBOR being unconstitutional under the United States and Ohio Constitutions, as well as preempted by state and federal law.¹¹ The State of Ohio contends that the LEBOR “conflicts with the Ohio Enabling Act, years of legal precedent, and the Ohio Revised Code, which have long recognized that the State holds the waters of Lake Erie within the boundaries of Ohio as trustee for the people of the State and for the protection of public rights.”¹²

Lake Erie and Toledoans for Safe Water also filed a motion to intervene in the lawsuit, which was denied by Judge Jack Zouhary on May 7, 2019.¹³ Judge Zouhary held in part that the Lake Erie Ecosystem lacked capacity to intervene because the “rights of nature” legal concept is not recognized in the United States.¹⁴ An appeal to the Sixth Circuit Court of Appeals filed from the order denying intervention Lake Erie Ecosystem’s intervention in the lawsuit was dismissed by stipulation of the parties.¹⁵ Both the State of Ohio and the Ohio farm have filed motions for judgment on the pleadings, which will be decided in the coming months.¹⁶ In the meantime, the parties have agreed to a preliminary injunction precluding Toledo from administratively incorporating the LEBOR into its Charter, and forbidding any enforcement actions pursuant to the LEBOR until the lawsuit is resolved.¹⁷

[Contd.]

incinerator, the city of Detroit owns the land on which the incinerator sits. As such, the future use of the site is still an open question as well. While there are plenty of issues to be hashed out, for now, the incinerator’s smokestack is quiet for the first time in decades.



Director of the Great Lakes Environmental Law Center

(Sources for this article are available upon request)

¹⁰ *Drewes Farm Partnership*, unpublished order of the District Court, issued May 1, 2019 (Docket No. 21).

¹¹ *Drewes Farm Partnership*, Complaint, filed May 24, 2019 (Docket No. 31).

¹² *Id.* at p 2.

¹³ *Drewes Farm Partnership*, Order Dismissing Appeal pursuant to the stipulation of the parties, issued June 24, 2019 (Docket No. 40), Sixth Circuit Case No 19-03435.

¹⁴ *Id.* at p 4.

¹⁵ *Drewes Farm Partnership*, Notice of Appeal to the Sixth Circuit Court of Appeals, filed May 13, 2019 (Docket No. 26), Sixth Circuit Case No. 19-03435.

¹⁶ *Drewes Farm Partnership*, State of Ohio Motion for Judgment on the Pleadings, filed June 6, 2019 (Docket No. 34); *Drewes Farm Partnership*, *Drewes Farm Partnership* Motion for Judgment on the Pleadings, filed June 7, 2019 (Docket No. 35).

¹⁷ *Drewes Farm Partnership*, unpublished order of the District Court, issued March 18, 2019 (Docket No. 9).

This is not the first attempt to have the rights of nature recognized in the United States. The issue of whether nature or natural features should have rights, and therefore legal standing to enforce those rights, was considered by the United States Supreme Court in *Sierra Club v. Morton*.¹⁸ The United States Supreme Court held that environmental objects do not have legal standing to sue for their own preservation. Justice William O. Douglas penned the lone dissent, stating that “[c]ontemporary public concern for protecting nature’s ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.”¹⁹

Overall, the LEBOR has been hailed as a valiant effort to afford further protections to our valuable natural resources and nationally treasured natural features. While it is unlikely that the LEBOR will overcome the significant legal challenges raised to its constitutionality and validity, the LEBOR serves as a powerful symbol and signal of the continuing public call for heightened environmental protections.

¹⁸ *Sierra Club v. Morton*, 405 US 727; 92 S Ct 1361 (1972).

¹⁹ *Id.* at 741-42 (Douglas, J., dissenting).

The Role Model of Environmental Protection: Revisiting the Michigan Environmental Protection Act in Light of Per- and Polyfluoroalkyl Substances



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Thanks to scientific advancements, scientists can detect and track chemicals in the environment today that they could not before. For example, they have developed the ability to test for and identify chemicals in the parts per trillion range, allowing them to quantify substances previously understudied. When new evidence is published about these chemicals, one question always comes to mind: how are these chemicals going to be regulated? Sometimes, current statutes are already addressing these chemicals or have the means for doing so. Other times, statutes need to be amended to accommodate new scientific findings of toxicity. Especially at the federal level, this process can take years. If leaders and concerned citizens want a more expedited solution, they can turn to the statutes already enacted in their states. Many states have comprehensive environmental statutes that address issues of environmental pollution and human health.

This article explores one of those statutes, the Michigan Environmental Protection Act, in the context of new scientific studies regarding per- and polyfluoroalkyl chemical substances. The first part of this article examines Michigan's historical and current actions to address PFAS contamination.¹ Then the article analyzes the Michigan Environmental Protection Act, reviewing its statutory language and interpreting caselaw to make a case for how its remedies could be used to address PFAS contamination, such as placing conditions on the use of PFAS, requiring polluters to clean up PFAS contamination, and forcing the State government to establish new PFAS regulations.

PFAS in Michigan

PFAS have now been detected in the water systems in 49 states.² Michigan is one of these states experiencing a growing PFAS problem. This problem does not stop at Michigan's borders. The drinking water contamination detected in sites throughout the State also contain tributaries to larger rivers and the Great Lakes, sources of water for neighboring states, and even Canada.³

¹ This article is an excerpt of a longer Note in which the author provides a thorough background regarding studies on the health effects of PFAS as well as a discussion of possible methods of regulating PFAS under various federal statutes. For a copy of the full note, please contact the author.

² Environmental Working Group & Social Science Environmental Health Research Institute, *Mapping the PFAS Contamination Crisis: New Data Show 712 Sites in 49 States* (accessed Aug. 11, 2019).

³ *Id.*

Six years ago, Robert Delaney, an employee at the Michigan Department of Environment, Great Lakes, and Energy (EGLE) (formerly the Michigan Department of Environmental Quality)⁴ and Superfund specialist, wrote a report to the Michigan government warning of an impending environmental crisis.⁵ He specifically noted how high levels of PFAS documented in fish and pollution in the Great Lakes and other water bodies of the state would pose a “significant exposure” to Michigan residents.⁶ “Communities with fire training facilities, other Department of Defense (DOD) bases, metal platers, other major airports, major transportation corridors, and other industrialized areas all could have extensive contamination by (PFAS),” Delaney wrote.⁷ Not until November 2017 did Governor Rick Snyder’s Administration begin taking the threat posed by PFAS contamination seriously. He created the Michigan PFAS Action Response Team (“MPART”) to begin testing drinking water sources around the State for elevated PFAS levels.⁸ With the creation of MPART, Michigan became a national leader in the fight against PFAS.⁹

MPART is “the first multi-agency action team of its kind in the nation.”¹⁰ MPART brings together EGLE, the Michigan Department of Health and Human Services (“MDHHS”), and other agencies who work cooperatively to investigate sources of PFAS contamination in the State, identify areas with PFAS levels above the current standard set by the State, and keep the public informed about developments concerning PFAS research and monitoring.¹¹ To date, MPART has identified 34 contaminated sites in communities around the State.¹² Contaminated drinking water sources have been found in both the Upper and Lower Peninsulas; in rural communities, cities, and suburbs; and in poor and affluent areas.¹³ The sheer scale of this problem has people wondering if this is Michigan’s next water crisis or will rival the polybrominated biphenyl (“PBB”) crisis that affected

⁴ The Michigan Department of Environmental Quality’s (MDEQ) name changed to the Department of Environment, Great Lakes, and Energy before this article was published. Some sources may still contain MDEQ as they were published before the name change.

⁵ DEQ FOIA Response, DeGrandchamp & Delaney, *Michigan’s Contaminant Induced Human Health Crisis: Addressing Michigan’s future by facing the challenge of the evolving nature of environmental contamination* dated 2012, p 80 (Jan. 8, 2018);

See also Ellison, *Major Warning About Michigan PFAS Crisis Came 6 Years Ago*, MLive (July 10, 2018).

⁶ Delaney & DeGrandchamp, *Michigan’s Contaminant Induced Human Health Crisis* at p. 80.

⁷ *Id.*

⁸ State of Michigan, *About MPART* (accessed May 13, 2019).

⁹ State of Michigan, *MPART Home Page* (accessed May 13, 2019).

¹⁰ *Id.*

¹¹ State of Michigan, *supra* n 8.

¹² Michigan Department of Environment, Great Lakes, and Energy, *Michigan PFAS Sites Being Investigated* (accessed May 13, 2019).

¹³ *Id.*

nearly all of Michigan's nine million residents in the 1970s.¹⁴ Given the recent Flint Water Crisis, the State is likely desperately trying to prevent another public health crisis.

While Governor Snyder established MPART, a multi-agency taskforce, in 2017 to begin addressing the issue of PFAS contamination in Michigan,¹⁵ it was not until January 2018 that Michigan's EGLE set a Cleanup Criteria Requirement under Part 201 of the Michigan Natural Resources and Environmental Protection Act (NREPA) for PFOS and PFOA for ground water used as drinking water at 70 ppt (the same as EPA's draft health advisory).¹⁶ In EGLE's 2018-2019 Annual Regulatory Plan, EGLE listed comments and concerns it had received regarding its Cleanup Criteria Requirements.¹⁷ The criteria in Rules 299.44-299.49 are chemical-specific levels for groundwater and soil based on best available toxicology data to protect public health.¹⁸ EGLE noted in its summary that public comments were received that expressed concerns that "the criteria for PFOS/PFOA are not stringent enough."¹⁹ The same criteria were also criticized as being extremely complex for compliance purposes.²⁰ The Plan also notes that the criteria in these rules have not been significantly updated since 2001, noting that additional data may be available for 300 substances addressed by the criteria.²¹ Similarly, a December 2018 report commissioned by MPART and written by the Michigan PFAS Science Advisory Board concluded that the 70 ppt standard may not be "sufficiently protective."²² The criticisms in EGLE's Plan and MPART's report may have minimal impact given two bills former Governor Snyder signed into law before leaving office.

¹⁴ Gardner & Ellison, *Michigan's Next Water Crisis is PFAS- And You May Already Be Affected*, MLive (July 10, 2018).

¹⁵ State of Michigan, *supra* n 8.

¹⁶ MCL 324.20104 (allowing EGLE to promulgate rules necessary to implement the (NREPA); Mich Admin Code R 299.6(9) (authorizing EGLE to identify hazardous substances not listed by rule and set cleanup criterion); see also Ellison, *Michigan Abruptly Sets PFAS Cleanup Rules*, MLive (Jan. 9, 2018).

¹⁷ Michigan Department of Environment, Great Lakes, and Energy, *Department of Environmental Quality Annual Regulatory Plan* (accessed May 13, 2019). EGLE releases an Annual Regulatory Plan each year to address areas of regulation where lawmakers or the public have raised concerns, questions, or inadequacies. This report is where the comments and concerns were discussed.

¹⁸ Mich Admin Code, R 299.44-299.549.

¹⁹ Michigan Department of Environment, Great Lakes, and Energy, *supra* n 17.

²⁰ *Id.*

²¹ *Id.*

²² Michigan PFAS Science Advisory Panel, *Scientific Evidence and Recommendations for Managing PFAS Contamination in Michigan*, p 59 ("If one accepts the probable links between PFOA exposure and adverse health effects detected in the epidemiological literature as critical effects for health risk assessment, then 70 ppt in drinking water might not be sufficiently protective for PFOA.").

House Bill 4205, known as the No Stricter Than Federal Law, amends the Michigan Administrative Procedures Act of 1969 to prohibit the State’s agencies from adopting rules more stringent than federal law without a “clear and convincing need” to exceed the applicable federal standard.²³ Opponents of the bill were concerned it would be “nearly impossible for Michigan to set an enforceable drinking water standard for [PFAS] substances.”²⁴ In response, State Democrats presented a new bill in March of this year to repeal the No Stricter Than Federal Law.²⁵ As long as the law remains in place, EGLE will be limited in setting drinking water standards for PFAS unless the Agency can show a clear and convincing need to set a standard or the Legislature passes a law setting standards for PFAS.

Senate Bill 1244 amended the NREPA to require EGLE to promulgate future cleanup criteria through the rulemaking process as opposed to unilaterally setting a standard as it did when it set the 70 ppt cleanup criterion for PFAS.²⁶ EGLE has already started work under this process. Governor Gretchen Whitmer announced on March 26, 2019, that she directed EGLE to “begin the process to establish PFAS drinking water standards.”²⁷ She is pushing the Agency to expedite the development of the regulations so that draft rules are ready by fall of this year.²⁸ Gov. Whitmer has been applauded by both Democrats and environmentalists in the state, but State Republicans have been more cautious.²⁹

Republican Senate Majority Leader Mike Shirkey favored a full rulemaking to consider all

WHAT’S IN THE BRIEF IN BRIEF
ATTORNEY GENERAL NESSEL ISSUES HER
FIRST OPINION, STATING THAT THE MACKINAC
STRAITS CORRIDOR AUTHORITY LAW, WHICH
AUTHORIZED THE CONSTRUCTION OF A TUNNEL FOR
LINE 5, IS UNCONSTITUTIONAL—VIOLATING
ART. 4 SECTION 24 OF THE MICHIGAN CONSTITUTION:
“NO LAW SHALL EMBRACE MORE THAN ONE OBJECT, WHICH
SHALL BE EXPRESSED IN ITS TITLE. NO BILL SHALL BE ALTERED
OR AMENDED ON ITS PASSAGE THROUGH EITHER HOUSE SO
AS TO CHANGE ITS ORIGINAL PURPOSE AS DETERMINED
BY ITS TOTAL CONTENT AND NOT ALONE
BY ITS TITLE.”
March 28, 2019

²³ 2018 PA 602; MCL 24.232(8); see also LeBlanc, *Bill That Curbs Rules Stricter Than Fed Level Heads to Gov’s Desk*, The Detroit News (Dec. 13, 2018).

²⁴ Mikenzie Frost, *Efforts Underway to Repeal Michigan’s No Stricter Than Federal Law*, UpNorthLive (Mar. 20, 2019).

²⁵ *Id.*

²⁶ 2018 PA 581; MCL 324.20101 (see Section 20120a(17) requiring EGLE “shall promulgate all generic cleanup criteria and target detection limits as rules”).

²⁷ The Office of Governor Gretchen Whitmer, *Gov. Whitmer Directs MDEQ to File a Request for Rulemaking to Establish PFAS Drinking Water Standards* (March 26, 2019).

²⁸ *Id.*

²⁹ Ellison, *Michigan Will Draft PFAS Standards for Public Drinking Water*, MLive (Mar. 26, 2019).

scientific evidence available.³⁰ Bonnifer Ballard, the director of the American Water Works Association in Michigan, expressed concerns that “ill-informed decisions” may arise with such an “aggressive” timeline.³¹ The Michigan Chemistry Council is also pushing back, saying federal agencies are better suited to set standards for PFAS.³²

Gov. Whitmer signed Executive Order 2019-3 on February 4, 2019, cementing “MPART as an established, enduring body to address the threat of PFAS contamination in Michigan, protect public health, and ensure the safety of Michigan’s land, air, and water, while facilitating inter-agency coordination, increasing transparency, and requiring clear standards to ensure accountability.”³³ On April 11, 2019, MPART named three new environmental and health experts to a Science Advisory Work Group.³⁴ The Workgroup has been charged with reviewing existing and proposed health-based drinking water standards for PFAS to determine appropriate MCLs.³⁵ On June 27, 2019, the Workgroup delivered health-based values to EGLE to be used in the rulemaking process.³⁶

Meanwhile, the State of Michigan Attorney General’s Office is investigating theories of liability for the companies that have caused or contributed to PFAS contamination of drinking water resources in the state.³⁷ While not binding, the cases that are popping up in other jurisdictions may help to inform Michigan courts on PFAS legal issues.³⁸ For example, Kenneth and Shannon Wickenden are bringing suit in New York against Saint-Gobain Performance Plastics Corp. and Honeywell International Inc. for allegedly contaminating groundwater and ambient air with PFOA.³⁹ The plaintiffs are alleging strict products liability, and negligence claims, and are seeking costs for medical monitoring, property damage, and loss of consortium.⁴⁰ Taking a company to court for cleanup costs may be the best first step while waiting for legislators to write legislation. Michigan has a secret weapon in the fight to protect the environment: the Michigan Environmental Protection Act.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ State of Michigan, *supra* n 8.

³⁴ State of Michigan, *Science Advisory Workgroup*, (accessed July 14, 2019).

³⁵ *Id.*

³⁶ *Id.*

³⁷ Mack, *Michigan AG Seeks Legal Expertise on Suing 3M, Other PFAS Manufacturers, and Calls For Repealing Law Impeding Opioid Lawsuits*, MLive (May 13, 2019).

³⁸ See, e.g., *Brown v. Saint-Gobain Performance Plastics Corp.*, 2017 WL 6043956 *1 (D. NH 2017).

³⁹ *Wickenden v. Saint-Gobain Performance Plastics Corp.*, 2018 WL 3069193 *1 (NDNY 2018).

⁴⁰ *Id.*

An Introduction to the Michigan Environmental Protection Act

The Michigan Constitution explicitly incorporates environmental protection into its language. The Michigan Constitution reads in part

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.⁴¹

In accordance with this Constitutional foundation, the Michigan Legislature enacted the Michigan Environmental Protection Act (“MEPA”) on June 26, 1970.⁴² In *Ray v. Mason County Drain Commissioner*, one of the first cases brought under MEPA, the Michigan Supreme Court referred to the “world-famous” statute as the “response to our constitutional commitment to the ‘conservation and development of the natural resources of the state...’”⁴³ *Ray* noted MEPA was “the first legislation of its kind and has attracted worldwide attention” and has “served as a model for other states in formulating environmental legislation.”⁴⁴ The Court went further:

The enactment of the [M]EPA signals a dramatic change from the practice where the important task of environmental law enforcement was left to administrative agencies without the opportunity for participation by individuals or groups of citizens. Not every public agency proved to be diligent and dedicated defenders of the environment.⁴⁵

Ray noted the importance of MEPA in allowing the public to protect the environment.⁴⁶ Agencies were not always responsive to environmental issues, and the Michigan Legislature created the opportunity for the public to protect itself from environmental harms. MEPA is unique as it grants standing to everyone in the state to bring actions based on environmental harm, and it relies on the courts to protect the environment. It allows the courts to develop an environmental common law, and it “allows the courts to fashion standards in the context of actual problems as they arise in individual cases and to take into

⁴¹ Const 1963, art 4, § 52.

⁴² Wolfe, *A ‘History’ of the Michigan Environmental Protection Act of 1970 and A ‘History;’ of the Inland Lakes and Streams Act 346 of 1972* (accessed May 13, 2019).

⁴³ *Ray v. Mason Cty Drain Com’r*, 393 Mich 294, 304; 224 NW 2d 883 (1975) (quoting the State constitution).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

consideration changes in technology which the Legislature at the time of the Act's passage could not hope to foresee."⁴⁷

Standing Under MEPA

MEPA, incorporated into Part 17 of Michigan's Natural and Environmental Resources Protection Act (NREPA), gives broad standing to the public to allow it to protect the environment.⁴⁸ Section 324.1701(1) states

The attorney general or *any person* may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is *likely to occur* for declaratory and equitable relief *against any person* for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.⁴⁹

This language allows any person in the state to bring an action for environmental damage against any other person, even against a company. Standing under common law in Michigan has long held that individual persons could not sue on behalf of the public.⁵⁰ MEPA upends this notion, giving the public greater say in the protection of the State's natural resources: air, water, and other natural resources such as trees and wildlife,⁵¹ whether public or private.⁵² The issue of standing under MEPA has been hotly contested, flipping back and forth between a narrower interpretation and the broader interpretation currently in place.⁵³

MEPA Establishes a Private Cause of Action

For plaintiffs to bring a successful action under MEPA they must prove a prima facie case that "the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair,

⁴⁷ *Id.*

⁴⁸ MCL 324.1701(1). The statute was originally held unconstitutional in *Michigan Educ Ass'n v. Superintendent of Public Instruction*, 272 Mich App 1; 724 NW 2d 478 (2006) as conferring too broad of standing. This was later overturned in *Lansing Schools Educ Ass'n v. Lansing Bd of Educ*, 478 Mich 394; 792 NW 2d 686 (2010).

⁴⁹ MCL 324.1701(1) (emphasis added).

⁵⁰ See *Home Tel Co of Grass Lake v. Michigan RR Commission*, 174 Mich 219; 140 NW 496 (1913).

⁵¹ *Ray*, 393 Mich at 294 (discussing wildlife); *City of Portage v. Kalamazoo County Road Com'n*, 136 Mich App 276; 355 NW 2d 913 (1984) (discussing trees).

⁵² *Stevens v. Creek*, 121 Mich App 503, 507; 328 NW 2d 672 (1982).

⁵³ See *Nat'l Wildlife Fed'n v. Cleveland Cliffs Iron Co.*, 471 Mich 608, 684 NW 2d 800 (2004) (ruling such a broad grant of standing violates the separation of powers); *Michigan Citizens for Water Conservation v. Nestle Waters N Am Inc*, 479 Mich 280, 737 NW 2d 447 (2007). But see *Lansing Sch Educ Ass'n v. Lansing Bd of Educ*, 487 Mich 349, 792 NW 2d 686 (2010) (overruling *Cleveland Cliffs* and restoring standing to cases where a litigant has a legal cause of action). But see *Anglers of AuSable, Inc v. Dep't of Env't'l Quality*, 488 Mich 69; 793 NW 2d 596 (2010) (highlighting that the Attorney General admitted that "any person" can sue under MEPA).

or destroy the air, water, or other natural resources or the public trust in these resources....”⁵⁴ The first question determines whether there is a natural resource at issue.⁵⁵ The second question determines whether there is an impairment.⁵⁶ “Such a showing is not restricted to actual environmental degradation but also encompasses probable damage to the environment as well.”⁵⁷ The main question in these cases is “when does such impact rise to the level of impairment or destruction?”⁵⁸

The Michigan Supreme Court characterized a prima facie case “as that case sufficient to withstand a motion by the defendant that the judge direct a verdict in the defendant’s favor.”⁵⁹ The evidence needed to prove a prima facie case will vary with the type of environmental damage alleged.⁶⁰

If a plaintiff were to bring a cause of action for environmental pollution due to PFAS, she would need to present different evidence depending on the extent of the damage alleged, i.e. whether the plaintiff was bringing an action on environmental pollution of the State’s waters as a whole or whether the plaintiff was bringing the action for a specific source of water. Different claims of impairment will need different types of evidence to prove such an impairment. For example, claims of large impairment areas may require studies on possible environmental effects versus claims of small impairment areas may require direct testing. The evidence needs to be sufficient to withstand a defendant’s motion for directed verdict; in other words, if viewing all evidence and inferences in the light most favorable to the plaintiff, reasonable jurors could honestly reach different conclusions,⁶¹ the plaintiff has established a prime facie case. Evidence necessary to prove a prima facie case may include expert testimony, chemical or medical test results, analyses, studies,⁶² and other forms of evidence tending to show the waters at issue had levels of PFAS above EGLE’s set criteria. Plaintiffs need not show multiple resources have been impacted or that such resources are “scarce” or “unique.”⁶³

⁵⁴ MCL 324.1703.

⁵⁵ See, e.g., *Nemeth v. Abonmarche Development, Inc*, 457 Mich 16, 32; 576 NW 2d 641 (1998).

⁵⁶ See, e.g., *Michigan Citizens for Water Conservation v. Nestle Waters N Am Inc*, 479 Mich 280; 737 NW 2d 447 (2007); *Preserve the Dunes, Inc.*, 264 Mich App 257; 690 NW 2d 487 (2004); *City of Portage v. Kalamazoo County Road Com’n*, 136 Mich App 276; 355 NW 2d 913 (1984).

⁵⁷ *Ray*, 393 Mich at 309.

⁵⁸ *Nemeth*, 457 Mich at 32; (1998) (citing *West Michigan Environmental Action Council (WMEAC) v. Natural Resources Comm*, 405 Mich 741, 760; 275 NW2d 538 (1979)).

⁵⁹ *Ray*, 393 Mich at 309.

⁶⁰ *Id.* at 311.

⁶¹ See MCR 2.516 Direct Verdict; see also *Matras v. Amoco Oil Co*, 424 Mich 675, 681-82, 385 NW2d 586, 588 (1986) (explaining the standard for evaluating a motion for directed verdict).

⁶² *Ray*, 393 Mich at 311.

⁶³ *Nemeth*, 457 Mich at 34.

A prima facie case can also be proven through showing a violation of a pollution control or antipollution standard in an environmental statute.⁶⁴ “Where the purpose of the statute used as a pollution control standard is to protect our natural resources or to prevent pollution and environmental degradation, a violation of such a statute can establish a prima facie case under MEPA.”⁶⁵ A violation of a statute with no pollution control standard or antipollution standard cannot serve as evidence to prove a prima facie case.⁶⁶

In *Nemeth v. Abonmarche Development, Inc.*, the Michigan Supreme Court noted that a pollution control statute that did not contain a cause of action was not precluded from being used as an appropriate pollution control standard under MEPA.⁶⁷ In *Nemeth*, the plaintiffs relied on the defendant’s violation of the Soil Erosion and Sedimentation Act (SESCA) to establish a prima facie case under MEPA.⁶⁸ The fact that SESCOA did not contain provisions for a private cause of action did not preclude the plaintiffs from using the violation of the statute to establish a prima facie case of environmental impairment. MEPA requires only a showing of environmental harm, degradation, or impairment, or the likelihood thereof, based on the appropriate pollution control or antipollution standard. Extrapolating from this reasoning, other environmental statutes with pollution control or antipollution standards, but without a private right of action, could support a cause of action under MEPA.⁶⁹

After plaintiffs have established their prima facie case, “the defendant may elect to ‘rebut the prima facie showing by the submission of evidence to the contrary.’”⁷⁰ Again, the type and amount of evidence needed to rebut a plaintiff’s claim(s) will depend upon the type of environmental harm the plaintiff alleges.⁷¹ The defendant can produce evidence similar to that of the plaintiff to establish a rebuttal.

A defendant can also elect to raise an affirmative defense. In so doing, the defendant “may also show... that there is no feasible and prudent alternative to defendant’s conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state’s paramount concern for the protection of its natural resources from pollution, impairment or

⁶⁴ *Id.* at 36 (proof of violation of Soil Erosion and Sedimentation Control Act (SESCA) established prima facie case).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Nemeth*, 457 Mich at 31.

⁶⁸ *Id.* at 18.

⁶⁹ Jeffrey K. Haynes, *Environmental Law Deskbook: Ch. 14 Michigan Environmental Protection Act: Violations of Statutes, Rules or Permits* 14. (accessed Aug. 12, 2019).

⁷⁰ *Ray*, 393 Mich at 310 (quoting MCL 324.1703).

⁷¹ *Ray*, 393 Mich at 311.

destruction.”⁷² A defendant raising an affirmative defense must prove both of these elements.⁷³ Courts have balanced pollution and public health, “saying that some balance has to be maintained between absolutely no pollution and the carrying on of activities necessary to human existence.”⁷⁴ The court will balance interests on a case-by-case basis only where appropriate, “unless there are definite standards set.”⁷⁵

If a defendant offers a sufficient rebuttal, the plaintiff’s case is not dead. He may recover by proving an environmental impairment by a preponderance of the evidence.⁷⁶

MEPA Authorizes Judicial Review of Environmental Regulations

While MEPA gives a lot of power to citizens to bring suits against polluters, it also gives courts a lot of power in adjudicating environmental cases. Courts are to afford no deference to agency determinations in reviewing a claim under MEPA.⁷⁷ Deference to agency determinations is inappropriate because MEPA requires the court “to exercise its independent judgment as to whether the agency activity prevents the likelihood of pollution, impairment, or destruction claimed by the plaintiffs.”⁷⁸ The reasoning behind such authority is so “courts may inquire directly into the merits of environmental controversies, rather than concern themselves merely with reforming procedures or with invalidating arbitrary or capricious conduct.”⁷⁹ Courts can also direct the adoption of a new standard specified by the court if it finds a current standard to be deficient.⁸⁰ “[T]he MEPA specifically authorizes a court to determine the validity, reasonableness, and applicability of any standard for pollution or pollution control ‘and to specify

⁷² MCL 324.1703.

⁷³ *Ray*, 393 Mich at 312-13. See also *Dwyer v. City of Ann Arbor*, 79 Mich App 113; 261 NW2d 231 (1977) (reversed on other grounds).

⁷⁴ *Wayne County Dept of Health, Air Pollution Control Division v. Olsonite Corp*, 79 Mich App 668, 692; 263 NW 2d 778 (1977) (citing *Crandall v. Biergens*, Clinton County Circuit Court No 844, 3 ERC 1827, 1831 (1972).

⁷⁵ *Id.*

⁷⁶ *Ray*, 393 Mich at 311 (quoting *Douglas Shoe Co v. Pere Marquette R. Co.*, 241 Mich 297, 301; 217 NW 12, 13 (1928)).

⁷⁷ *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F2d 332, 338 (CA 6, 1989) (“It is error for the trial court to defer to the expertise of the agencies.”) (emphasis in the original).

⁷⁸ *Id.*; see also *WMEAC*, 405 Mich at 752 (“[T]he court has a responsibility to ‘adjudicate’ and ‘determine’ whether ‘adequate protection from pollution, impairment or destruction has been afforded.’ Courts can discharge their responsibility to make such determinations only if they make independent, [d]e novo judgments.”) (quoting MEPA at MCL 324.1704-1705).

⁷⁹ *WMEAC*, 405 Mich at 754.

⁸⁰ MCL 324.1701(2)(b).

a *new* or *different* pollution control standard if the agency’s standard falls short of the substantive requirements of MEPA.”⁸¹

Trial judges have been reluctant to substitute their independent judgment for that of an agency’s technical expertise.⁸² However, courts can remit the matter for administrative, licensing, or other proceedings while still maintaining original jurisdiction.⁸³ The court may grant a temporary injunction as necessary to protect natural resources and has the ultimate say in whether adequate protection from pollution has been afforded.⁸⁴

MEPA and the Common Law

MEPA is considered the “common law of environmental quality” for the State of Michigan.⁸⁵ The Michigan Court of Appeals described MEPA as “a legislative recognition of the ancient powers of a court to hear nuisance cases, balance equities and fashion suitable remedies.”⁸⁶ MEPA is based on notions of common law torts such as nuisance.⁸⁷

Some state statutes preclude bringing private actions under MEPA. Where a statute precludes action under MEPA, courts lack jurisdiction to apply MEPA.⁸⁸ If there is no explicit statutory preclusion, MEPA can be used to challenge conduct otherwise authorized by other statutes.⁸⁹ Other statutes expressly incorporate MEPA.⁹⁰ MEPA can also be used in conjunction with other federal environmental laws where not pre-empted.⁹¹ It “creates a state environmental common law that is

⁸¹ *Nemeth*, 457 Mich at 30 (emphasis in original).

⁸² *See WMEAC*, 405 Mich at 752.

⁸³ *Id.*

⁸⁴ *Id.* at 752-53

⁸⁵ *Ray*, 393 Mich at 306.

⁸⁶ *Opal Lake Ass’n v. Michaywe’ Ltd Partnership*, 47 Mich App 354, 364 n 3; 209 NW 2d 478 (1973).

⁸⁷ *Haynes*, supra n 69, at 14.48.

⁸⁸ *Genesco, Inc v. Michigan Department of Environmental Quality*, 250 Mich App 45; 645 NW 2d 319 (2002) (Part 201 precludes action under MEPA).

⁸⁹ *Oscoda Chapter of PBB Action Committee, Inc v. Department of Natural Resources*, 403 Mich 215; 268 NW 2d 240 (1978) (challenging PBB Act through MEPA).

⁹⁰ *Haynes*, supra n 69 at 14.42.

⁹¹ *Id.*

unaffected by federal law, and creates an independent state action that is unaffected by anything that happens in the federal sphere of government.”⁹²

MEPA and PFAS

MEPA authorizes a court to grant various forms of relief, such as declaratory and equitable relief;⁹³ adoption of a standard where a standard that is in place is found to be deficient;⁹⁴ imposition of conditions on a defendant to protect the air, water, and other natural resources;⁹⁵ and prevention of the authorization of conduct that will have the effect of polluting, impairing, or destroying the air, water, or other natural resources.⁹⁶ Other traditional remedies and forms of equitable relief available under common law claims are also available to MEPA plaintiffs.

MEPA as a Tool to Force Private PFAS Action

Under Mich Comp Laws 324.1704(1), courts “may grant temporary and permanent equitable relief or may impose conditions on the defendant that are required to protect the air, water, and other natural resources or the public trust in these resources from pollution, impairment, or destruction.”⁹⁷ For example, the trial court in *Nemeth* granted an injunction where the plaintiffs used the defendants’ violation of an environmental statute to establish that the defendants had violated MEPA.⁹⁸ *Nemeth* held that the plaintiffs’ prima facie case that the defendants’ had violated the Soil Erosion and Sedimentation Control Act was sufficient to show that the defendants’ actions were harming the environment and therefore justified an injunction under MEPA to prevent further harm.⁹⁹ As shown by *Nemeth*, a court can require a defendant to cease actions determined to be the cause of pollution and/or require him to clean up existing pollution upon a showing of a violation of a pollution control or antipollution standard in another environmental statute or regulation if that violation is likely to result in environmental impairment. Private plaintiffs do not have to wait for agencies or the government to bring a cause of action on behalf of the public or state; MEPA extends private rights of action to private plaintiffs.

Using the PFAS cleanup criteria standard as a pollution control standard under MEPA, a plaintiff could prove a prima facie case of a defendant’s MEPA violation by showing only that PFAS levels in specific waters are above the 70 ppt standard set by the State. Through this process a plaintiff

⁹² *Her Majesty*, 874 F 2d at 341.

⁹³ MCL 324.1701(1).

⁹⁴ MCL 324.1701(2)(b).

⁹⁵ MCL 324.1704(1).

⁹⁶ MCL 324.1705(2).

⁹⁷ MCL 324.1704(1).

⁹⁸ *Nemeth*, 457 Mich 16.

⁹⁹ *Id.*

could get injunctive relief for an active site, perhaps relief beyond that afforded to her under the State cleanup laws. Recall MEPA’s injunctive relief provisions are broad—the court “may impose conditions on the defendant that are required to protect the air, water, and other natural resources.”¹⁰⁰

For example, MEPA allows a court to impose additional monitoring obligations on a defendant so as to protect the environment.¹⁰¹ In *Wayne County Department of Health v. Olsonite Corp.*, the court required the defendant to explore other forms of odor control.¹⁰² In the case of PFAS, for example, a MEPA action brought against Wolverine World Wide (Wolverine) for PFAS pollution of nearby water sources and soil¹⁰³ could seek the imposition of a public outreach program.¹⁰⁴ Wolverine has been investigating and remediating PFAS since it was discovered in 2017 and has complied with requests from EGLE to conduct sampling and investigations.¹⁰⁵ Given that chemicals used by the former tannery are leaking into the Rouge River,¹⁰⁶ requiring the company to institute protective measures and complete the investigation into the release of PFAS into the environment¹⁰⁷ would help shift costs to the polluter as Wolverine would be in charge of funding the remediation of unpacked soils or water.

“Restoration of the natural habitat is a proper remedy under the [M]EPA.”¹⁰⁸ Where conduct of the defendant polluted, impaired, or destroyed the air, water, or natural resources of the state, the court can order restoration to undo environmental harm.¹⁰⁹ Again, in the example of Wolverine, a court could instruct Wolverine to restore the Rouge River and surrounding area near the factory to what it was like before the tannery dumped chemicals into the environment. This would require the tannery to perform cleanup efforts, and therefore shift the costs of remediation back to the polluter. Wolverine is already required to perform such cleanup under Part 201 of the Natural Resources and Environmental Protection Act, but MEPA, through injunctive relief, could impose further conditions that would require Wolverine to prevent future PFAS contamination. However,

¹⁰⁰ MCL 324.1704(1).

¹⁰¹ MCL 324.1701(1).

¹⁰² *Wayne County*, 79 Mich App at 668.

¹⁰³ Ellison, *Toxic Pollution at Wolverine Tannery is Extensive, New Report Shows*, MLive (Mar. 25, 2019).

¹⁰⁴ *Michigan Dep’t of Environmental Quality v. Wolverine World Wide, Inc.*, Case 1:18-cv-00039 (filed Jan. 10, 2018, W Dist Mich).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Stevens*, 121 Mich App at 508.

¹⁰⁹ Haynes, *supra* n 69 at 14.79.

any MEPA relief would need to comply with Part 201,¹¹⁰ as some cleanup response activities are exempt from MEPA under the Remediation Act.¹¹¹ For example, MCL 324.20142(1) states, “a person who has complied with the requirements of this part or is exempt from liability under this part is not subject to a claim in law or equity for performance of response activities under part 17 [MEPA]....”¹¹² As long as cleanup activities are being performed under the requirements of Part 201, a person could not raise a claim under MEPA for performance of response activities.¹¹³ Permitted releases do not fall under the exemption in MCL 324.20142(1), and a person can still seek recovery of costs or damages through other applicable law such as MEPA.¹¹⁴

Where a plaintiff fails to meet the requisite level of statutory impairment, an injunction will not be issued.¹¹⁵ Some defendants may be able to establish affirmative defenses to their PFAS contamination. Industry sectors that were required by law to use PFAS may be able to rebut a MEPA claim. For example, the EPA required plating companies to use PFOS-containing mist suppressants to reduce chromium air emissions.¹¹⁶ These were considered to be best available technology at the time.¹¹⁷ Given many of these industries have also begun cleanup of their PFAS releases, coupled with requirement by law to use these substances, a court could find an affirmative defense to a plaintiff’s claim.

Additionally, MEPA does not specifically provide an award for damages; the court, at its own discretion, can award costs under MEPA.¹¹⁸ For example, a court could award plaintiffs the reimbursement of monitoring and water testing costs upon proper showing of a prima facie case of environmental harm. Attorney’s fees cannot be awarded under MEPA.¹¹⁹

While the court’s injunctive relief authority under MEPA could prove to be a powerful tool to prevent future PFAS contamination, an injunction is not likely to help historically contaminated sites that are already being addressed by State cleanup laws. This is where MEPA’s provisions authorizing judicial review of environmental regulations may prove useful.

¹¹⁰ MCL324.20142.

¹¹¹ Haynes, supra n 69 at 14.43.

¹¹² MCL 324.20142(1).

¹¹³ Haynes, supra n 69 at 14.43.

¹¹⁴ MCL 324.20126a(5).

¹¹⁵ *Kimberly Hills Neighborhood Ass’n v. Dion*, 114 Mich App 495, 508; 320 NW 2d 668 (1982).

¹¹⁶ Gryczan, *Federal Regulations Required Some Companies to Use PFAS Chemicals For Safety. Now They’re Paying to Clean It Up*, MiBiz (Mar. 31, 2019).

¹¹⁷ *Id.*

¹¹⁸ Haynes, supra n 69 at 14.70.

¹¹⁹ *Nemeth*, 457 Mich at 43.

MEPA as a Tool to Force Government PFAS Action

Using MEPA, courts can adopt new pollution control standards where current standards are deficient.¹²⁰ In order to adopt new standards, the court must perform a de novo review of current agency standards.¹²¹ Where these standards are found to be deficient, the court can impose new or different standards.¹²²

Currently, the Cleanup Criteria Requirements for Response Activity for PFOA and PFOS in groundwater used for drinking water is set at 70 ppt.¹²³ While this standard is also the drinking water lifetime health advisory set by EPA,¹²⁴ it has been criticized as too high and unprotective of human health.¹²⁵ If a plaintiff were to bring an action under MEPA to impose a more stringent standard for PFAS, the cause of action would need to be worded carefully as the statute focuses on protection of the environment, not human health. As *Nemeth* explained, “Where the purpose of the statute used as a pollution control standard is to protect our natural resources or to prevent pollution and environmental degradation, a violation of such a statute can establish a prima facie case under MEPA.”¹²⁶ A plaintiff would need to show that the PFAS cleanup criteria was implemented to protect human health and the *environment*. Then, for a court to change the PFAS cleanup criteria standard, a plaintiff would need to provide evidence that the regulatory standard is improper for the health and protection of the *environment*, which may be done by producing evidence of the negative effects on wildlife that are in contact with the contaminated water. This may be enough to satisfy the statutory evidentiary requirement so that a court would impose its own standard that is stricter than the 70 ppt currently in force in Michigan.

Now that EGLE is initiating the process of creating further regulations for PFAS, once such regulations are approved, a plaintiff can bring a MEPA action where the court would need to review de novo whether EGLE’s new standards are sufficient to protect against pollution, impairment, or destruction. If these standards fall short, a court could establish new standards that it determines are more protective of Michigan’s natural resources. This method of review ensures that any agency standards meet the current expectations of environmental protection

Conclusion

¹²⁰ MCL 324.1701(2)(b). Surprisingly, the only section under MCL 324.1701 to be challenged as unconstitutional is the broad grant of standing to any citizen in the state. No constitutional challenges have been raised as to this section regarding a court’s authority to override or rewrite regulations.

¹²¹ *Wayne County*, 79 Mich App at 668.

¹²² *Nemeth*, 457 Mich at 35.

¹²³ EGLE, *State Takes Action to Strengthen Environmental Criteria in Response to PFAS Contamination* (Jan. 9, 2018).

¹²⁴ EPA, *Drinking Water Health Advisories for PFOA and PFOS* (accessed Aug. 12, 2019).

¹²⁵ Ellison, *supra* n 29.

¹²⁶ *Nemeth*, 457 Mich at 36.

The new horizon of PFAS regulation presents a unique opportunity for Michigan to become a leader in addressing contamination issues. The State already has a strong law on its books; it only needs to decide how it wants to use this law. Given the language of MEPA, Michigan lawmakers and courts could address PFAS contamination in a MEPA action. MEPA allows any person to bring a claim to protect Michigan's environment. This opens the door for entities to bring actions to obtain money for costs related to PFAS contamination damage, such as remediation research cleanup efforts, and monitoring efforts. Given the disaster that was the Flint Water Crisis, Michigan needs to step up its protection of state resources, especially in areas where funds are limited and local governments are unable to engage in monitoring and treating of PFAS contamination.

MEPA is famous for being a trailblazing statute in the environmental field. It is a legal course of action to address environmental harm that has already proved successful. While EGLE begins the process of determining new PFAS standards for drinking water, MEPA gives Michiganders the opportunity to bring actions to protect the environment against further contamination and address the contamination that has already occurred. In the meantime, courts could begin establishing standards beyond the 70 ppt currently set if they so find that such standards are warranted. Evidence of health impacts due to high levels of PFAS in drinking water would make a strong case for stricter standards. While the legislature is beginning its own process to set strict, enforceable standards for drinking water, the public can look to the courts for a timelier response to begin requiring cleanup of contaminated sites to current Cleanup Criteria Requirements for Response Activity criteria for groundwater and soil. It is time to hold the parties responsible for polluting drinking water sources with these chemicals accountable, and it is time to revisit MEPA to start that process. Hopefully, MEPA can again serve as a role model for other states to use in their fight against PFAS.

*For an earlier discussion PFAS see [The ABCs of Emerging Contaminants](#) by Charles M. Denton in the MELJ's spring 2018 issue and [Perfluoroalkyl Compounds: An Emerging Contaminant in Michigan](#) by Rachard Baron, Benjamin Fruchey, and Nicholas Andrew in the MELJ's fall 2017 issue.

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