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# STATE OF THE LAW

## 2001

### Recent Developments in Environmental Law

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## STATE OF THE LAW 2001

### INTRODUCTION

The following summarizes selected Michigan and federal environmental judicial decisions from May 2000 through May 2001, and statutory and regulatory developments from June 2000 through June 2001. While not encompassing every environmental decision, statute or rule during these periods, the intent was to include those developments having significant import to environmental law practitioners.

### I. JUDICIAL DEVELOPMENTS

#### A. Federal Developments

##### 1. Clean Air Act

###### a. *Michigan Mfrs Ass'n v EPA*, 230 F3d 181 (CA 6, 2000).

The United States Court of Appeals for the Sixth Circuit has denied a pair of petitions challenging the United States Environmental Protection Agency's ("EPA") rejection of Michigan's startup/shutdown/malfunction ("SSM") regulations for Michigan's State Implementation Plan ("SIP") prepared under the Clean Air Act ("CAA"), 42 USC 7401 *et seq.*

Under the CAA, each state is required to submit a SIP to implement the air quality objectives of the CAA within that state to EPA for approval. Most of the Michigan Department of Environmental Quality ("MDEQ") Air Quality Division ("AQD") regulations, along with a number of consent orders and other site-specific instruments that apply to specific emission sources, are included in Michigan's SIP. Once a state regulation or other provision has been approved by EPA for the SIP, that regulation or provision is enforceable by EPA and the public under the CAA.

In 1993, MDEQ adopted revisions to Rule 912 and adopted new Rules 913 and 914. These rules are often referred to as the SSM Rules. Collectively, these regulations provide that, if an emission source has complied with stringent requirements for preventing and minimizing emissions during SSM events, any emissions that occur as a result of an SSM event that exceed emission limits in a permit or a SIP Rule would not constitute a violation. To qualify for this protection, sources must develop and implement detailed written programs to prevent malfunctions and to minimize emissions that might occur during startup or shutdown of a source or a malfunction of equipment.

The SSM Rules were drafted in recognition that, at some sources, higher levels of emissions may inevitably occur during startup, shutdown and/or a malfunction of equipment. The SSM Rules were designed to provide a defense if emissions during an SSM event exceeded an emission limit even though the source had done everything within reason to plan for and prevent malfunctions and to minimize emissions during the SSM event. In these special circumstances, the SSM Rules provide that emissions in excess of an emission limit are not a violation.

MDEQ submitted the SSM Rules to EPA for approval as part of Michigan's SIP in 1996. In 1998, over objections from MDEQ and industry groups, including the Michigan Manufacturers Association ("MMA"), EPA rejected the SSM Rules for the SIP. EPA determined that any emissions that exceed any emission limit is a violation, regardless of mitigating circumstances, such as an SSM event that occurred despite preventative maintenance. EPA relied on several EPA guidance memoranda from 1982 and 1983 that indicated that SSM emissions should be evaluated on a case-by-case basis and EPA and state agencies should reserve the power to impose fines and penalties on sources that cause excess emissions during SSM events.

MDEQ and MMA filed separate petitions challenging EPA's decision in the Sixth Circuit, arguing that the CAA does not require all excess emissions during SSM events to be treated as violations and that the CAA provides states with discretion to adopt regulations such as the SSM Rules as part each state's strategy to achieve the air quality goals of the CAA.

MMA and MDEQ argued that the SSM Rules actually help reduce emissions to the air by providing an incentive for emission sources to develop detailed plans to prevent malfunctions and minimize emissions during SSM events that go beyond any plans that could be required by law. In addition, MDEQ and MMA argued that emissions to the air would not increase because of the SSM Rules because the only emissions that are covered by the rules are those that occur despite compliance with detailed and stringent requirements to take measures to prevent malfunctions and to minimize emissions when SSM events occur. In other words, MDEQ and MMA argued that the SSM Rules provide protection for emissions that are unavoidable through reasonable planning and remedial measures.

The court was not persuaded by these arguments and deferred to EPA's interpretation of the CAA:

EPA has . . . stated that it interprets the CAA as disallowing a broad exclusion from source compliance with emission limitations in SIPs during SSM periods. Under the EPA's statutory interpretation, such an exclusion is inconsistent with the purpose of the CAA's criteria pollutant provisions, which mandate that the [National Ambient Air Quality Standards] be achieved and maintained. . . .

Given the deference we owe to the EPA's decision, we cannot say that EPA's interpretation . . . of the CAA . . . is unreasonable. Under that interpretation, SIPs cannot provide broad exclusions from compliance with emission limitations during SSM periods. Michigan's proposed rules jeopardize ambient air quality, the EPA found, because the rules excuse compliance from applicable emission limits and provide no means for the state to enforce the [National Ambient Air Quality Standards ("NAAQS")]. 230 F3d at 185.

Thus the court found that EPA's interpretation of the CAA as prohibiting regulations, like the SSM Rules, that provide a defense to sources that exceed emission limits during startup, shutdown or malfunction was reasonable and, therefore, the court upheld EPA's rejection of the SSM Rules for Michigan's SIP.

**b. Appalachian Power Co v EPA, 208 F3d 1015 (CA DC, 2000).**

The United States Court of Appeals for the Federal Circuit has set aside the EPA's 1998 "Periodic Monitoring Guidance for Title V Operating Permits" (the "PM Guidance") because it improperly revised prior EPA regulations without following proper rulemaking procedures.

EPA regulations require CAA Title V Operating Permits (known as "Renewable Operating Permits" in Michigan) to include provisions for monitoring and testing to verify compliance with applicable air quality regulatory requirements. EPA issued the PM Guidance to instruct states regarding what types of periodically recurring monitoring in Renewable Operating Permits will be satisfactory. According to the PM Guidance, Renewable Operating Permits that do not contain satisfactory periodic monitoring for all applicable requirements may be "vetoed" by EPA under its authority to

reject Renewable Operating Permits and prevent them from taking effect.

Appalachian Power Company ("Appalachian") and other industry representatives filed a petition challenging the PM Guidance. Appalachian's main argument was that the PM Guidance improperly required states to modify monitoring requirements in existing air emission permits and state and federal air quality rules in order to comply with new requirements enunciated in the PM Guidance. Appalachian argued that this amounted to altering the emission limits previously established in permits and regulations - something that cannot be done without following formal rulemaking procedures.

EPA first argued that Appalachian had no right to challenge the PM Guidance in court because it did not represent "final" agency action and it was not binding. In fact, the PM Guidance contained the following statement verifying that it was not "final" agency action:

The policies set forth in this paper are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party.

The court dismissed this disclaimer as "boilerplate" that EPA has included in all guidance documents since 1991 and quoted a *Duke Law Journal* article that described this sentence as "a charade, intended to keep the proceduralizing courts at bay." Accordingly, the court examined the substance of the PM Guidance to determine whether it was, in fact, "final" agency action.

The court explained that there are two criteria for an agency action to be considered "final" and subject to judicial review. "First, the action must mark the 'consummation' of the agency's decisionmaking process" and "second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"

The court found that the first requirement was satisfied because the PM Guidance was preceded by two earlier "drafts" and expressed policies that the various states were required to follow. The fact that the PM Guidance may be subject to revision from time to time did not change the fact that it was final because, the court noted, laws and even the United States Constitution are amended from time to time, but that fact does not preclude courts from reviewing the validity of enacted laws.

Regarding the second requirement for “final” agency action - that rights or obligations are determined - the court found that the PM Guidance created binding obligations. The court found that the PM Guidance represented:

[T]he agency’s settled position, a position it plans to follow in reviewing State-issued permits, a position it will insist State and local authorities comply with in setting the terms and conditions of permits issued to [industry], a position EPA officials in the field are bound to apply. 208 F3d at 1022.

Although the court agreed that the PM Guidance did not seem to create any rights, it was undeniable that it created obligations on states and regulated industries:

[T]he entire [PM] Guidance, from beginning to end - except the last paragraph [which contained the “boilerplate” statement quoted above] - reads like a ukase [a Russian imperial decree]. It commands, it requires, it orders, it dictates. Through the [PM] Guidance, EPA has given the States their “marching orders” and EPA expects the States to fall in line . . . . 208 F3d at 1023.

Therefore, the court found that the PM Guidance was “final” agency action subject to judicial review because it reflected a settled agency position that had legal consequences for states and for industrial facilities required to obtain Renewable Operating Permits.

In its challenge, Appalachian contended that the PM Guidance improperly expanded the requirements contained in the underlying regulation. That regulation states that Renewable Operating Permits must include periodic monitoring requirements whenever “the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring.” Appalachian argued that this regulation meant that new periodic monitoring requirements had to be created for Renewable Operating Permits only when the underlying regulation or permit did not contain a requirements for recurring testing or monitoring. For example, periodic monitoring requirements would be created when the underlying standard did not include any sort of monitoring or testing method, required only a one-time startup test, or failed to specify the frequency of monitoring. Appalachian argued that if the underlying regulation or permit required recurring monitoring or testing - whether annual, monthly, weekly, daily, or hourly - no

further re-evaluation of the adequacy of the testing requirements was required by the rule.

The PM Guidance, in contrast, required states to evaluate the adequacy of all monitoring requirements, including pre-existing recurring monitoring requirements. According to the PM Guidance, additional monitoring may be required if the existing requirements did not provide the “necessary assurance of compliance.”

EPA argued that Appalachian misconstrued the regulation at issue and that the PM Guidance was consistent with EPA’s intention when it promulgated that rule: that pre-existing monitoring requirements would have to be supplemented if they were found to be inadequate to ensure compliance with the underlying requirements.

EPA pointed to several statements in the preamble to the Title V rules and in its responses to comments that had been submitted on the proposed Title V rules in support of its position. The court examined these statements and found that they did not suggest that the rule was intended to require states to revise existing monitoring requirements in addition to creating periodic monitoring requirements for standards that lacked recurring monitoring requirements.

Moreover, the court concluded that EPA’s current interpretation of the regulation was inconsistent with other statements EPA made at the time the Title V rules were promulgated. First, the court noted that EPA stated that if there is “any federally promulgated requirement with insufficient monitoring, EPA will issue a rulemaking to revise such requirement.” The court noted that, instead of promulgating a new rule as promised, EPA issued the PM Guidance without following the proper rulemaking procedures.

Second, the court noted that EPA stated that “Title V does not impose substantive new requirements.” The court found that:

Test methods and the frequency of testing for compliance with emission limitations are surely “substantive” requirements; they impose duties and obligations on those who are regulated . . . . We have recognized before that changing the method of measuring compliance with an emission limitation can affect the stringency of the limitation itself. 208 F3d at 1027 (citations omitted).

Accordingly, the court found that because it requires states to re-evaluate existing monitoring requirements, the PM Guidance created new substantive requirements contrary to EPA's prior interpretation of the requirements of Title V.

Thus, the court ruled that the PM Guidance improperly expanded the scope of the Title V regulations for Renewable Operating Permits by requiring states to re-evaluate pre-existing periodic testing requirements without following proper rulemaking procedures. Therefore, the court struck down the PM Guidance in its entirety:

State permitting authorities therefore may not, on the basis of [the PM Guidance or EPA's Title V rules], require in permits that the regulated source conduct more frequent monitoring of its emissions than that provided in the applicable State or federal standard, unless that standard requires no periodic testing, specifies no frequency, or requires only a one-time test. 208 F3d at 1028.

This ruling is significant because it clarifies the requirements for periodic monitoring set by the Title V rules and sets limits on EPA's power to modify its rules through guidance documents without following rulemaking procedures. This decision also sets a noteworthy precedent regarding when agency guidance documents may be considered "final" agency action subject to judicial review. This latter aspect of the court's decision may be a double-edged sword, however, because the CAA provides that legal challenges to "final" agency action under the CAA must be brought within 60 days after the action. It remains to be seen how the courts will apply this precedent to other cases that may involve EPA guidance documents that are more than 60 days old when challenged.

**c. *Texans United for a Safe Economy Educ Fund v Crown Cent Petroleum Corp*, 207 F3d 789 (CA 5, 2000).**

The United States Court of Appeals for the Fifth Circuit has decided that despite the fact that the state issued an administrative order and assessed penalties against a Texas oil refinery, a citizens group may still sue under the CAA's citizens suit provision.

For many years, Crown Central Petroleum Corporation ("Crown Central") regularly exceeded its sulfur dioxide and hydrogen sulfide permit emissions limits at its Pasadena, Texas refinery. In addition, the refinery allegedly failed to comply

with operating and recordkeeping requirements and air emissions permit limitations. In 1995, the Texas Natural Resources Conservation Commission ("TNRCC") took enforcement action against Crown Central, entering into an agreed order with the company. The order required Crown Central to comply with the CAA and pay a monetary penalty of \$110,000.

After the order was issued, members of the local community continued to complain about noxious odors emanating from the refinery. The facility repeatedly experienced process upsets that caused releases of hundreds of tons of sulfur dioxide into the atmosphere. In May, 1997, the citizens group Texans United for a Safe Economy Education Fund ("Texans United") notified Crown Central and the TNRCC that, because of Crown Central's continuing violations, the group planned to sue Crown Central under the CAA's citizens suit provisions.

In November, 1997, the TNRCC began an administrative enforcement action against Crown Central for its ongoing violations. In December 1997, Texans United sued the company, demanding that it pay penalties for its violations and install pollution controls. By August of 1998, the TNRCC's administrative action was resolved: Crown Central agreed to an administrative order requiring that Crown Central pay the state over \$1 million in penalties and hire two independent experts to help the company correct its emissions problems. Crown Central then filed a motion in district court to dismiss the citizens suit, arguing that Texans United did not meet the constitutional requirements for standing to sue, and that even if the citizens group met the lawsuit requirements under the constitution, the CAA does not permit a citizens group to sue once the state has taken enforcement action. The district court granted Crown Central's motion to dismiss based on the company's CAA argument and did not consider the standing issue.

Texans United appealed the dismissal to the Fifth Circuit, arguing that the group met all of the constitutional requirements for standing and that the TNRCC's administrative enforcement action did not justify imposing the CAA's limitation on citizens' rights to sue. The Fifth Circuit Agreed.

Assuming that a citizens group can legitimately claim that it represents the interests of its members in a lawsuit, the federal courts have established three requirements that must be met before a person has standing to sue: (1) the

plaintiff has suffered an actual or threatened injury; (2) the conduct of the defendant caused the plaintiff's injury; and (3) the plaintiff's injury can be redressed by the court.

The court considered Texans United's arguments that their members satisfied these requirements. As to the citizens' injuries, the court noted that members of Texans United had complained of repeated exposure to "overpowering" sulfurous odors in their homes and yards and while driving through the town. Therefore, argued Texans United, its members were injured due to their diminished enjoyment of their surroundings. Moreover, the group pointed out, other courts have held that breathing and smelling polluted air is considered an injury for purposes of the CAA's citizens suit provisions. The Fifth Circuit found these points compelling, and ruled that Texans United had a valid injury claim.

The court then turned to the issue of whether the injuries complained of by the community could be traced to Crown Central's emissions. Texans United produced eyewitnesses who could trace the sulfur pollution that they smelled to direct observations of smoke from the refinery. Also, Crown Central's own employees, having conducted surveys of sulfur odors in the community while the refinery was violating its emissions limits, confirmed the eyewitness accounts. Finally, Texans United presented results of air modeling by an air pollution expert that showed that some of the refinery's releases of sulfur dioxide could have harmed members of the community.

Finally, the court addressed Crown Central's argument that the citizens' alleged injuries would not be resolved as a result of the lawsuit. After all, argued the company, other polluters also contributed to pollution and odors in the community, so the pollution would not go away as a result of the lawsuit. Besides, the TNRCC had already assessed over \$1 million in fines against the refinery and ordered them to fix the odor/pollution problem. The TNRCC's actions were more than enough, argued Crown Central, to relieve the citizens of their injuries. The Fifth Circuit, however, disagreed.

Based on prior court decisions by the same court under the Clean Water Act ("CWA"), 33 USC 1251 *et seq.*, the court found that it was enough for Texans United to show that Crown Central *contributed* to the pollution in the community. Thus, it was not a necessary prerequisite to Texans United's complaint that the court be able to correct the entire pollution problem in the area. Moreover, Texans United showed that even the TNRCC's remedies would not

be able to resolve the refinery's emissions problem without additional pollution controls. Because the TNRCC had not required such controls as part of its enforcement order, Crown Central could not show that it could achieve compliance with the emissions standards. Thus, Texans United showed both that the TNRCC's actions did not make the citizens suit unnecessary and that it was likely Crown Central would continue causing the injuries despite the enforcement order.

Under the CAA's citizen suit provisions, a person cannot sue a polluter "if the Administrator [of the EPA] or a State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation or order." 42 USC 7604(b)(1)(B). In the district court, Texans United argued that the terms "civil action" and "court" did not include non-judicial proceedings. Thus, according to Texans United, the CAA required that the TNRCC or EPA sue Crown Central in a *court* before the citizens suit could be barred by the statute. Moreover, Texans United pointed out that two other circuit courts of appeal, the Second and Ninth Circuits, had found that a similar citizen suit provision in the CWA allowed only *court* actions (and not administrative actions) to preclude citizen suits. The Fifth Circuit agreed with the Second and Ninth Circuits in finding that CAA citizen suits can still proceed in the face of administrative actions by state agencies.

Because the constitutional standing requirements were met by the citizen group's complaint, the court concluded that, if the requirements under the CAA's citizen suit provision were met, Texans United was allowed to sue the refinery. The TNRCC, in electing to pursue an administrative action under the CAA against Crown Central rather than sue the refinery in court, left the door open to citizens groups to sue the refinery as well.

**d. Ormet Primary Aluminum Corp v Ohio Power Co, 207 F3d 687 (CA 4, 2000).**

The United States Court of Appeals for the Fourth Circuit held that an aluminum manufacturer is not entitled to a proportionate share of pollution emissions allowances allocated to an electric power plant under the CAA.

Ormet Corporation ("Ormet") manufactures primary aluminum at its plant near Hannibal, Ohio. Electricity is the greatest raw material cost in the production of aluminum, as the Ormet facility consumes as much electricity per day as does the entire city of Pittsburgh. In order to obtain electrical power for its Hannibal facility, Ormet entered into a series of agreements with Ohio Power in 1957. Under those

agreements, three power-generating units were constructed at the Kammer Generating Station (“Kammer Plant”) near Moundsville, West Virginia, with Ormet becoming the owner of two of the units and Ohio Power becoming the owner of the third unit. The parties agreed to an undivided ownership of the plant’s common areas in proportion to their ownership of the units.

Ormet’s power needs kept growing, and it sought assurance from Ohio Power that Ormet would be supplied with power even beyond the capacity of the Kammer Plant. Consequently, in 1966, Ormet and Ohio Power revised their arrangement and implemented a new contract, which they called a “Power Agreement.” Under the Power Agreement, Ohio Power acquired all of Ormet’s ownership interest in the Kammer Plant and agreed to supply Ormet’s power needs at contractually specified prices. The Power Agreement had a 25 year term, with an option for a 5-year extension, which Ormet exercised in 1991.

In 1990, Title IV of the CAA was enacted, creating the Acid Rain Program. This program created pollution emissions rights associated with specific fossil fuel-fired combustion plants in the United States, including the Kammer Plant. In 1994, Ormet filed suit under the CAA against Ohio Power in federal district court, seeking a declaratory judgment that, in light of its contractual relationship with Ohio Power, it was a joint owner of the Kammer Plant and therefore was entitled to 89% of the pollution emissions rights allocated to the Kammer Plant. Ormet also claimed that these rights were worth over \$40 million.

The district court held that, under the CAA, the contractual agreement between Ormet and Ohio Power did not make Ormet a joint owner of the Kammer Plant, and that Ormet was, therefore, not entitled to any proportionate share of the pollution rights allocated to the plant. Accordingly, the district court entered a summary judgment against Ormet. Ormet appealed.

Under Title IV of the CAA, limits are prescribed for emissions of sulfur dioxide and nitrogen oxides from specified electric utility plants in the contiguous 48 states. It requires that owners or operators of fossil fuel-fired electric generation devices, referred to as “units,” obtain emissions permits from the EPA for each location or “source” where units exist. Each permit allocates to each unit a number of emissions “allowances” authorized for each location, and each allowance authorizes the holder to emit one ton of sulfur dioxide. Title

IV also provides that that these emissions allowances may be bought and sold as any other commodity. This system established under Title IV is intended to harness the power of market forces so that emissions reductions may be attained efficiently. For example, the holder of allowances that reduces sulfur dioxide emissions below the level authorized at its unit may sell the excess allowances to the owner of some other unit which has a need for greater emissions authority.

In order to address the problem of joint ownership of a plant, Title IV provides that allowances allocated to a jointly-owned unit “will be deemed to be held or distributed in proportion to” each owner’s share of the unit. Joint ownership is defined under Section 7651g(i) of the CAA to include several types of relationships, including situations where “a utility or industrial customer purchases power from an affected unit (or units) under life-of-the-unit, firm power contractual arrangements.” Section 7651a(27) of the CAA defines the term “life-of-the-unit, firm power contractual arrangement.”

On appeal, Ormet claimed that under the Power Agreement, it was a joint owner of the Kammer units because it purchased power from the Kammer Plant under a “life-of-the-unit, firm power contractual arrangement.” Therefore, Ormet argued that it was entitled to the pollution allowances in proportion to its ownership interest under the multiple ownership provisions of Section 7651g(i) and the life-of-the-unit provisions of Section 7651a(27) of the CAA.

The Fourth Circuit held that in order for Ormet to be a joint owner of the Kammer Plant, the Power Agreement must satisfy the following four elements in order to constitute a “life-of-the-unit, firm power contractual arrangement”: (1) Ormet must have reserved or been entitled to receive a specified amount or percentage of capacity and associated energy; (2) the energy must be generated by a specified generating unit or units; (3) the agreement must require Ormet to pay “its proportional amount” of the total costs of the specified unit or units; and (4) the arrangement must be for a substantial length of time relative to the life of the unit, as specified in Title IV. Thus, the court stated that the CAA recognizes joint ownership only where a power sales agreement provides for both a firm reservation of electrical power from a specific unit and a proportionate division of the operating costs of that unit. The court further observed that joint ownership was not indicated when the agreement guarantees a customer’s power needs from any source and does not impose upon the customer the risk of the loss of power from a particular unit.

Applying the four elements to the Power Agreement, the Fourth Circuit found that Ormet was indeed entitled to receive a specified amount of capacity and associated energy, even though the specific amount of power reserved to Ormet under the Power Agreement ranged between 465,000 and 575,000 kilowatts. The Power Agreement, however, did not bind Ohio Powers' supply obligations to any specific generating unit. In fact, the Power Agreement clearly contemplated that the power delivered to Ormet could be generated anywhere in Ohio Power's system and, further, Ohio Power was obligated to seek power from other electric companies if it was unable to meet Ormet's needs.

Additionally, the Fourth Circuit found that the Power Agreement did not require Ormet to pay its proportional amount of the Kammer Plant's total costs. Ormet's share of the costs of operating the units at the plant did not fluctuate in proportion to its reservation of energy, and did not show a consistent relation to the total costs incurred by Ohio Power in operating the Kammer Plant units.

Therefore, the Fourth Circuit found that the Power Agreement was not a "life-of-the-unit, firm power contractual agreement," and affirmed the judgment of the district court - that Ormet was not entitled to a proportionate share of the pollution emissions allowances allocated to the Kammer Plant.

## 2. Clean Water Act

### a. *Solid Waste Agency of Northern Cook County v United States Army Corps of Eng'rs*, 531 US 159 (Jan 9, 2001).

The United State Supreme Court held that the CWA does not authorize the United States Army Corps of Engineers ("COE") to regulate the dredging and filling of non-navigable, intrastate ponds that provide habitat to federally-protected migratory birds. The decision is important because it demonstrates the Court's reluctance to interpret environmental statutes broadly, especially when it believes that a broad reading of the statute will unduly interfere with the traditional rights of state and local governments.

The case involved the efforts of twenty-three Chicago-area municipalities to turn a five-hundred acre former sand and gravel mine outside Chicago into a municipal landfill. The property included about seventeen acres of small ponds that were not connected to any body of water outside the property. After the mining ceased, blue herons and other migratory birds protected by federal law nested on the

property. The local governments acquired the property and invested approximately \$30 million in their successful efforts to obtain approvals for the project by Cook County, the Illinois Environmental Protection Agency, and the Illinois Department of Conservation. However, the project ground to a halt when the COE refused to issue a permit under Section 404 of the CWA to fill the ponds because filling them would adversely affect federally protected migratory birds.

The COE's refusal to grant the permit revitalized a controversy about the scope of federal authority under the CWA. Section 404 of CWA authorizes the COE to regulate the dredging and filling of "navigable waters," a term which Congress broadly defined as "waters of the United States." At first, the COE acted cautiously, and asserted authority only over waters that were navigable in fact. In 1975, environmental groups sued the COE, and the United States District Court for the District of Columbia ordered the COE to amend its regulations to assert authority to the maximum extent permitted by the Commerce Clause of the United States Constitution. In 1977 the COE adopted new regulations asserting authority over isolated ponds and wetlands. The 1977 regulations defined "waters of the United States" to include, among other things, intrastate lakes, rivers and streams, and ponds, the use or destruction of which "could affect interstate commerce." In 1986, the COE "clarified" in a regulatory preamble that waters of the United States include waters "which are or would be used as habitat by birds protected by Migratory Bird Treaties; or which are or would be used as habitat by other migratory birds which cross state lines . . ." 51 Fed Reg 41217. This "clarification" became known as the "Migratory Bird Rule."

The majority decision, written by Chief Justice Rehnquist, held that Congress had not clearly indicated that it intended federal authority to extend to isolated ponds that had no connection to navigable waters, and, therefore, struck down the COE's regulation on the grounds that it exceeded the authority granted by Congress. Justice Rehnquist relied heavily on the fact that Congress had used the term "navigable waters," and reasoned that Congress must have meant something by the word "navigable." The Court also placed significant weight on the fact that the COE's 1974 regulations, adopted only two years after the CWA had been enacted, defined "waters of the United States" to include only waterways which were either actually or potentially navigable. Somewhat surprisingly, the Court dismissed the fact that the Conference Report for the 1972 CWA included a statement that the House and Senate conferees "intend that the term

'navigable waters' be given the broadest constitutional interpretation," apparently because nothing in the Conference Report specifically referred to migratory birds or to isolated wetlands and ponds. The Court was also unpersuaded by the COE's argument that Congress had accepted the COE's broad interpretation by defeating legislative proposals that would have overturned it. Finally, the Court refused to give the COE's current regulatory definition the benefit of the doubt, which it normally does for regulations adopted by an administrative agency that has authority to administer a statute. The Court refused to give the deference it normally does to administrative interpretations because it considered the COE's interpretation to "invoke the outer limits of Congress' power" under the Commerce Clause of the Constitution.

The Court did not decide that Congress had no constitutional authority to authorize federal regulation of isolated wetlands; it simply said that the CWA, as now written, does not do so.

Although the Court limited its decision to a matter of statutory interpretation, it is very clear that it was heavily influenced by the Court's belief that the Commerce Clause does not authorize Congress to interfere with the powers of state and local governments to regulate matters that are not of federal concern. Justice Rehnquist explained in his majority opinion that it is appropriate to construe a statute narrowly if a broad interpretation would present serious questions about the constitutionality of the statute. He argued that allowing the COE to claim jurisdiction over isolated, non-navigable ponds based only on the Migratory Bird Rule "would result in a significant impingement of the States' traditional and plenary power over land and water use," and noted that Congress included language in the CWA that recognized "the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . ." The fact that the Court did not issue a definitive ruling on the constitutional question leaves open the possibility that Congress could amend the CWA to include isolated, non-navigable ponds.

**b. United States v Rapanos, 235 F3d 256 (CA 6, 2000), vacated sub nom, Rapanos v United States, 121 S Ct 2518 (2001).**

The United States Court of Appeals for the Sixth Circuit has reversed a district court's sentence in a criminal wetland case because that sentence did not conform to the federal Sentencing Guidelines. John A. Rapanos was convicted of discharging pollutants into wetlands in violation of the CWA

and sentenced by the district court to three years' probation and fined \$185,000.

The sentence imposed by the district court reflected several downward adjustments from the sentence recommended in the federal Sentencing Guidelines. First, the district court decreased Rapanos's sentence because he had only discharged soil and sand into wetland that he moved from another portion of his property. The district court judge reasoned that the Sentencing Guidelines "are geared toward the discharge of harmful pollutants that result in actual contamination" and, in Rapanos's case, there "was not any toxic discharge, there were no pesticides, no nuclear material, no sewage, no paint, lead or other harmful things, just sand and soil that was already on this private property."

Second, the district court judge indicated that he did not impose any jail time because he fundamentally disagreed with the Sentencing Guidelines' treatment of environmental crimes. The prosecutor had requested that Rapanos receive a sixty-three month jail sentence under the Sentencing Guidelines. The judge noted, however, that the recommended sentence for the last person to come before him, an illegal alien with a prior criminal record convicted of "selling dope on the streets of the United States," was only ten months. "Now, if that isn't our system gone crazy, I don't know what is. And I'm not going to do it," the judge stated.

Third, the district court judge reduced Rapanos's sentence because the judge found that Rapanos had accepted responsibility for his actions. The judge justified this decrease by stating that Rapanos did not deny the "factual element of his guilt, i.e., altering the land, but rather, he challenged whether the land qualifies as wetlands, i.e., the applicability of the statute to his conduct."

The United States appealed the downward adjustments to Rapanos's sentence and the Sixth Circuit agreed that the district court had abused its discretion under the Sentencing Guidelines. The Sixth Circuit first noted that "a sentencing court should impose a sentence prescribed in the guidelines unless the court finds that there are aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." The Sixth Circuit further noted that a sentencing court should not take into account factors already considered in the Sentencing Guidelines. The Sixth Circuit then held that the Sentencing Guidelines adequately addressed the district court's concerns about the nature of the pollution and the risk involved with Rapanos's activities.

Moreover, the Sixth Circuit held that the district court's "fundamental disagreement with the law and an inappropriate comparison to a wholly unrelated case are not permissible factors to consider" under the Sentencing Guidelines. Finally, the Sixth Circuit found that Rapanos's pre-trial activities did not demonstrate that he had accepted responsibility for his actions. The court noted that Rapanos had fired his wetland consultant, ignored cease and desist orders, never applied for a wetland permit, and refused to cooperate in the preparation of a pre-sentencing report. The Sixth Circuit, therefore, remanded the case back to the district court for resentencing. The Sixth Circuit also summarily affirmed Rapanos's conviction and the district court's denial of his motion for a new trial.

On June 18, 2001, the United States Supreme Court vacated the case and remanded to the Six Circuit for further consideration in light of the Court's December 15, 2001 decision in *Solid Waste Agency of Northern Cook County v United States Corps of Engineers*.

**c. Jones v City of Lakeland, 224 F3d 513 (CA 6, 2000).**

The United States Court of Appeals for the Sixth Circuit reversed its own earlier decision and reinstated a federal CWA citizen suit against a municipality for alleged illegal discharges. The district court had held that the citizen suit was barred under the CWA because the state was already diligently prosecuting a civil action against the municipality for the same alleged illegal discharges. In 1999, a panel of three Sixth Circuit judges upheld the district court's decision. A majority of Sixth Circuit judges subsequently agreed to rehear the case *en banc*, and reversed the panel's decision.

The City of Lakeland, Tennessee ("City") had a National Pollutant Discharge Elimination System ("NPDES") permit to discharge wastewater from its wastewater stabilization lagoon into Oliver Creek ("Creek") at a rate not to exceed 62,000 gallons a day. Prior to 1994, the Tennessee Department of Environment and Conservation ("TDEC") issued two orders against the City for exceeding the authorized amount of discharge. In 1994, in response to continued excessive discharges, the City and TDEC entered into a third order under the Tennessee Water Quality Control Act ("TWQCA") in which the City pledged to eliminate all discharge from its wastewater stabilization lagoon into the Creek by March 1, 1996. The City hoped that this third order would allow it enough time to construct a new stabilization basin that would allow it to better control its discharges.

Unforeseen problems, however, delayed construction of the new basin, and the deadline passed with the City still discharging from its stabilization lagoon. In August 1996, TDEC issued a fourth order requiring the City to cease all discharges by July 1, 1997 and fining the City \$4,000, with the possibility of additional fines totaling \$26,000.

In September 1996, three citizens ("Citizens") filed suit against the City under the CWA, alleging that the City was discharging pollution into state waterways in violation of its NPDES permit. The City moved to dismiss, arguing that the CWA does not allow citizen suits when a state is diligently prosecuting a parallel action. Citing Section 505(b) of the CWA, the Citizens responded that the limitation applies only when the government is "diligently prosecuting" a claim in a "court." They argued that TDEC's repeated orders did not constitute "diligent prosecution" and that any action by TDEC was not pursued in a court but consisted only of administrative sanctions. The district court dismissed the case, concluding that it lacked jurisdiction over the matter because TDEC was diligently pursuing the City and the Citizens had not alleged that TDEC was not a "court" within the meaning of CWA Section 505(b).

A three-judge panel of the Sixth Circuit affirmed. The Court first observed that citizen suits "are merely intended to supplement, but not supplant, enforcement by state and federal government agencies." It then examined whether TDEC's actions in the case were sufficient to preclude the Citizens' from bringing their citizen suit under the CWA. The panel agreed with the district court that TDEC's actions satisfied the requirement of "diligent prosecution" against the City. The Plaintiffs had argued that TDEC's "prosecution cannot be diligent if it continues to allow the [C]ity to dump impermissible amounts of waste into Oliver Creek and if its attempts to remedy the problem are limited to entering a series of ineffective administrative orders." 224 F3d at 525. The court rejected this argument. It noted that TDEC had issued four orders against the City, that the City had attempted to comply, and that TDEC's extensions of time to allow the City to comply were due to "practical difficulties" the City encountered in reaching full compliance. The court agreed with the district court's recognition "that an enforcing agency must be accorded the latitude to respond to circumstances that delay remedial projects and warrant reassessment of compliance target dates." *Id.*

The court agreed with the Plaintiffs that TDEC's administrative proceedings were not actions taken in a "court" under CWA Section 505(b). This holding did not end the

court's inquiry, however. The court merely held that Section 505(b) did not bar the Plaintiffs' citizen suit. The court observed, however, that another provision of the CWA, Section 309(g)(6)(A), bars citizen suits when a state "is diligently prosecuting an action under a state law comparable" to CWA Section 309(g), without requiring that the enforcement be undertaken in a court.

Having already decided that TDEC had "diligently prosecuted" its action against the City, the court turned its attention to "whether the requirements of [the] TWQCA are comparable to those found in [CWA] § 309(g)." The court first set forth the standard by which it would decide the question. It reiterated "the fundamental principle that citizen suits are 'meant to supplement rather than supplant governmental action.'" 224 F3d at 526. Therefore, "deference" to an agency's enforcement strategy should be favored because "a narrow, exacting interpretation of the word 'comparable' that requires one-for-one equivalency would be inappropriate when comparing [Section 309(g)] with a state counterpart." *Id.*

The court then reviewed the provisions of both CWA Section 309(g) and the TWQCA, and concluded "that the two are 'comparable' as the meaning of that term is contemplated in § 309(g)(6)." It noted that: the "overarching goals" of the CWA and the TWQCA are the same; both CWA Section 309(g) and the TWQCA proscribe "remarkably similar" conduct; and both provide similar procedures for punishment. The court also gave significant weight to the fact that both statutes provide interested citizens a "meaningful opportunity to participate" in the enforcement process and that both allow for the imposition of similar amounts of civil penalties for violations. Accordingly, the court held that, "[b]ecause the TWQCA is a state law comparable to § 309(g), and the state is diligently prosecuting an action against the [C]ity under this state law," the Citizens' suit against the City was not allowed under the CWA. 224 F3d at 528.

On rehearing *en banc*, the Sixth Circuit reversed the district court's ruling and the three-judge panel's affirmation of that ruling. The court first held that, under Section 505(b), TDEC clearly does not have the status of a "court" of the United States or a state. Therefore, that section did not bar the Citizens' action. The court then examined whether the Citizens' claim was barred by Section 309(g). The court stated that its inquiry would focus on whether "the overall State regulatory scheme affords interested and/or adversely

affected citizens the safeguard of a meaningful opportunity to participate in the administrative enforcement process."

The court initially acknowledged that the CWA and the TWQCA "are compatible in some respects." However, "[a]n examination of the TWQCA reflects that it requires no public notice of hearings, nor does it require the State to extend third parties an opportunity to initiate or join mandatory controversial issues seeking justifiable resolution such as enforcement proceedings and consent orders similar to those unilaterally considered and approved by the TDEC." Nor did the Tennessee Open Meetings Act require public participation in enforcement actions under the TWQCA by TDEC.

The court noted that, although the TWQCA did provide for an enforcement procedure in which meaningful public participation could occur, TDEC had not used that procedure in this case.

Thus, "the plaintiffs and other similarly affected citizens are, at the discretion of the TDEC, denied access to both the courts and to a meaningful opportunity to participate at significant stages of the administrative decision-making process, to adequately safeguard their legitimate interests as mandated by the Clean Water Act." Accordingly, the court held that "the TWQCA and related Tennessee statutes are not comparable to" CWA Sections 505(a)(1)(b) or 309(g)(6) and, therefore, CWA Section 309(g) did not bar the Citizens' action. The court remanded the case back to the district court "for further proceeding and disposition not inconsistent with this decision." 224 F3d at 524.

**d. Palm Beach Isles Assocs v United States, 208 F3d 1374 (CA DC, 2000), aff'd on reh'g 231 F3d 1354, reh'g en banc denied 231 F3d 1365 (CA DC, 2000).**

The United States Court of Appeals for the D.C. Circuit upheld the United States' right to assert a federal navigational servitude as a defense against a regulatory takings claim stemming from the denial of a dredge and fill permit, but only if the basis for the denial of the permit was to promote a navigational purpose (as opposed to an environmental purpose).

This case started as an inverse condemnation action brought by a developer in the Palm Beach, Florida area. The 312 acres in question were initially purchased in 1956. The property was later split into two parcels when part of the property was sold in 1968. The remaining 50.7 acres retained by the developer consists of 1.4 acres of shoreline wetlands

and 49.3 acres of submerged land adjacent to the wetlands. The submerged acreage lies below the ordinary high water mark of Lake Worth. Lake Worth contains only a narrow navigable section, which was created by dredging some years ago, as a segment of the Atlantic Intracoastal Waterway.

Under Section 10 of the River and Harbors Act of 1899, work that impacts the navigable waters of the United States must be preceded by permit from the COE (in addition to a state permit, in most jurisdictions). In 1957, the developer applied for and actually received the necessary permits to fill the 50.7 acres from the COE, but the work was never completed. In 1988-1990, the developer sought and was denied a permit by the State of Florida to fill these same bottomlands and wetlands on "environmental" grounds (e.g., impact on wildlife, erosion, biota, etc.). Eventually, following commencement of a suit by the developer, the State of Florida granted a dredge and fill permit for the full 50.7 acres. The COE again denied the developer's permit application despite the prior issuance of the State of Florida permit. In what became quite important later, the COE denial apparently was based on "environmental" issues.

The trial court, the federal Court of Claims, found that the submerged 49.3 acres were subject to the federal navigational servitude. The trial court further ruled that navigational servitude was a pre-existing limitation upon the developer's title; therefore, the developer never had a right to use the submerged land due to the servitude. In other words, the navigational servitude was a pre-existing limitation upon the developer's title and, as a result, no "takings" could occur.

One interesting threshold issue was whether the appropriate parcel for evaluation of inverse condemnation claim was the original 312 acres or only the smaller, currently owned parcel. The Court of Claims ruled that the two parcels in dispute should be considered part of the entire original parcel purchased in 1956. This reduced the proportion of the property allegedly "taken" and, consequently, diluted the developer's claim for compensation.

As additional grounds for denial of the developer's claim, the trial court also ruled that the developer was prevented from seeking compensation from the government because it knew when it bought the property that it would need permits to develop the land (as evidenced by its 1957 and 1960 permit applications). Finally, the Court found that the 1.4 acre parcel itself was of insufficient size on which to build homes and that the Developer had not established that other potential

land uses were foreclosed. The Government's motion for summary judgment, therefore, was granted.

On appeal, the D.C. Circuit tackled the proper denominator question first. The Court concluded that the larger 261-acre parcel which was developed two decades earlier was physically and temporally remote from, and legally unconnected to the 50.7 acres of wetlands and submerged lake bottom in question. Second, the D.C. Circuit ruled that because the relevant parcel only included the 50.7 acres, including the 1.4 acres of wetlands and the 49.3 acres of submerged land, the developer's inability to use those parcels for construction denied the developer all economically viable use of the property. Finally, in an issue of first impression, the D.C. Circuit ruled that the United States may assert a federal navigational servitude as a defense against a regulatory takings claim.

The D.C. Circuit ruled that the entire submerged 49.3 acres were subject to federal navigational servitude, derived from the Commerce Clause of the United States Constitution. This clause gives the United States Government a "dominant servitude," with the power to regulate and control the waters of the United States in the interest of commerce. Interestingly, the developer had argued that the water depth over the entire 49.3 acres of one to three feet was insufficient to support commercial navigation and could not trigger a judicial navigational servitude. The court rejected this claim and ruled that, because Lake Worth as a whole was navigable, the entire body of water up to the ordinary high water mark is subject to the federal navigational servitude, regardless of depth.

Despite this ruling enforcing the United States Government's navigational servitude rights as a defense to a private "takings" claim, the D.C. Circuit nevertheless remanded the case in order for the trial court to determine factually whether the denial of the developer's permit by the COE was based upon the navigational servitude or, instead, as the developer had asserted, was based upon "environmental issues." The D.C. Circuit ruled that "the Government must show that the regulatory imposition was for a purpose related to navigation; absent such a showing, it will have failed to 'identify background principles...that prohibit the uses [the landowner] now intends.'" 208 F3d at 1385.

### 3. Comprehensive Environmental Response, Compensation and Liability Act

#### a. Franklin County Convention Facilities Authority v American Premier Underwriters, 240 F3d 534 (CA 6, 2000).

The case concerned property in Columbus, Ohio, which a predecessor of the Penn Central Railway ("Penn Central") had used as a railroad depot from approximately 1864 to 1973, when the City of Columbus purchased the property from Penn Central for \$5.5 million. Penn Central agreed in the purchase agreement to remain responsible for "claims which may affect . . . any portion of the premises."

In 1989, the Franklin County Convention Facility Authority ("CFA") subleased the property from the city to build a convention center. While a contractor for the CFA was excavating a trench to install a sewer line in October, 1990, it struck a large buried wooden box containing a mixture of creosote and benzene. The box split open and spilled some of its contents onto the ground. The CFA immediately hired an environmental consultant to evaluate the situation, placed a dam of dirt and debris to reduce the flow of the contents from the box, and notified the Ohio Environmental Protection Agency ("OEPA") within several days. With OEPA's approval, the CFA decided to excavate and remove the box, its contents, and most of the contaminated soil. It sent a demand letter to American Premier Underwriters ("APU"), the successor to Penn Central, but APU declined to assist with or participate in the cleanup project.

In October, 1991, CFA's remediation contractor began the remediation project. It discovered that creosote had migrated 45 feet through the pea gravel surrounding a sewer line. The contractor removed the heavily contaminated soil and debris around the box, replaced the dam of soil and debris with an improved barrier to avoid further migration, and covered the remaining contamination with a combination of soil and concrete. CFA paid approximately \$240,000 to the remediation contractor.

In 1994, CFA sued APU under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 USC 9601 *et seq.*, to recover its costs. After a trial, the district court allowed CFA to recover all of its costs from APU. The court found that the box had contained creosote that had been thinned with benzene for the purpose of treating railroad ties, and rejected APU's argument that the contents of the box might have been petroleum, which is

not a hazardous substance under CERCLA. The district court held that CFA qualified for the innocent landowner defense under CERCLA. It also held that even if CFA did not qualify for the innocent landowner defense, it would be equitable for CFA to recover 100% of its costs from APU based on a contribution action under CERCLA.

APU appealed the district court's judgment on a wide variety of grounds. The Sixth Circuit rejected APU's arguments that: (1) the contents of the box were not a CERCLA hazardous substance because they were only petroleum; (2) CFA's cleanup activities were inconsistent with the National Contingency Plan ("NCP"); (3) there was insufficient evidence that the hazardous substances had been released while Penn Central owned the property; and (4) CFA was not entitled to recover \$10,000 of attorney fees incurred in searching for other liable parties. In addition, the Sixth Circuit devoted a significant portion of its opinion to a discussion and rejection of APU's argument that CERCLA is unconstitutional because it retroactively imposes liability on APU in violation of the Fifth Amendment to the United States Constitution, which prohibits the taking of private property without compensation. The Sixth Circuit upheld the district court's analysis of, and rejection of, each of these arguments.

The Sixth Circuit, however, disagreed with the district court's analysis whether CFA qualified for the innocent landowner defense under CERCLA. APU argued that CFA did not qualify for the innocent landowner defense because: (1) it was CFA's contractor that had broken open the box and released its contents into the environment; and (2) CFA's contractor did not exercise due care after breaking open the box because it did not effectively stop the contents from migrating. The Sixth Circuit disagreed with the district court's decision that CFA qualified for the innocent landowner defense. The Sixth Circuit held that the contractor's breaking the box and spilling the contents "was accidental and unavoidable, and cannot fairly be attributed to CFA." However, it agreed with APU's argument that CFA had failed to exercise due care after the box had been broken, because the temporary dam of dirt and debris which CFA left in place for more than a year after the box was discovered, was insufficient to prevent the creosote from migrating 45 feet through the pea gravel in which the sewer line had been placed. APU presented expert testimony that a dam of dirt and debris did not meet the standards of the environmental remediation industry. Based on the above, the Sixth Circuit concluded that the actions which CFA's contractor took to control the creosote after breaking open the box did not

constitute the “due care” required to qualify for the innocent landowner defense.

The Sixth Circuit held that because CFA did not qualify for the innocent landowner defense, it could not maintain a cost recovery action against APU, but could maintain only an action for contribution in which APU could be required to pay an equitable share of CFA’s cost. Nonetheless, the Sixth Circuit held that, considering all the circumstances, it was equitable to require APU to pay 100% of CFA’s costs as its equitable share. The district court had held that APU’s failure to assist with or participate in the cleanup was an equitable factor that supported allocating 100% of the costs to CFA. The Sixth Circuit noted that another factor supporting this result was a provision in the purchase agreement in which Penn Central had agreed to remain liable for claims relating to the property, even though the purchase agreement preceded the enactment of CERCLA by seven years.

**b. Kalamazoo River Study Group v Menasha Corp, 228 F3d 648 (CA 6, 2000).**

The United States Court of Appeals for the Sixth Circuit held that someone who releases even a miniscule amount of hazardous substances is liable in contribution to a private party who remediates a site under the CERCLA. In a 1998 decision involving this matter, the United States District Court for the Western District of Michigan granted summary judgment to defendant Menasha Corporation, even though the evidence showed that Menasha discharged wastewater to the Kalamazoo River that tested positive for PCBs on four occasions (at levels less than 1.0 parts per billion, or “ppb”). The district court held that evidence of PCB discharges at such low levels was insufficient to establish liability under CERCLA, because it did not meet the so-called “threshold of significance” test, under which a few district courts have refused to impose CERCLA liability on contribution defendants whose releases of hazardous substances to a site are so small, in comparison with hazardous substances released by plaintiffs, that the defendant’s releases did not realistically “cause” the incurrence of response costs. The district court also dismissed claims against Eaton Corporation based on low levels of PCBs released from Eaton’s plants in Marshall and Kalamazoo. Kalamazoo River Study Group (“KRSG”), the contribution plaintiff, appealed the judgments in favor of Menasha and Eaton.

On October 5, 2000, the Sixth Circuit reversed the district court’s judgments for Menasha and Eaton, and sent the case back to the district court for further action. The

Sixth Circuit held that the district court had applied an improper test to determine liability in a CERCLA contribution action. The court held that the test for determining liability in a contribution action is the same as the test for determining liability in a cost recovery action by the United States under CERCLA. In particular, the court held that, for purposes of determining liability, a claimant need not prove that there is any causal connection between a release of hazardous substances and the claimant’s incurrence of response costs. Nor does the claimant need to prove that there had been a release of any minimum threshold amount of hazardous substances in order to impose liability. The court went on to say that it is appropriate for a district court to consider whether or not a release caused the claimant to incur response costs “only in allocating response costs, not in determining liability.”

The Sixth Circuit went on to review the district court’s evaluation of the evidence relating to Menasha and Eaton. KRSG had presented evidence that, on four occasions, Menasha’s effluent to the Kalamazoo River tested positive for low levels of PCBs (less than 1.0 ppb). KRSG also presented evidence that Menasha’s finished paper products tested positive for PCBs on two occasions. Menasha presented evidence that the test results for its wastewater discharges were unreliable because laboratory technology available at the time of the test was not able to achieve detection limits below 1.0 ppb. Menasha also argued that any PCBs in its effluent might have been caused by PCBs in its raw intake water. The Sixth Circuit held that the conflicting evidence presented a genuine issue of material fact whether Menasha released any PCBs to the river, so that summary judgment for Menasha was improper.

The Sixth Circuit also reviewed the evidence regarding alleged PCB discharges from Eaton’s plants in Kalamazoo and Marshall, and held that it was sufficient to defeat Eaton’s motion for summary judgment. KRSG argued that PCBs were present in the process oils at Eaton’s Kalamazoo plant, based on testimony by Eaton’s former Director of Environmental Engineering. Eaton did not deny that its process oils were discharged into the Kalamazoo River, but argued that they did not contain PCBs. The district court gave little weight to the testimony of Eaton’s former employee because his testimony was based on his general knowledge that many oils used in the automotive industry were recycled and contaminated with PCBs, rather than on direct knowledge concerning the process oils used at Eaton’s Kalamazoo plant. The Sixth Circuit held that this testimony, although only circumstantial, was enough to survive a motion

for summary judgment. KRSG presented evidence that the Michigan Department of Natural Resources (“MDNR,” now the MDEQ) had performed a wastewater survey at the Marshall facility that detected PCBs in the effluent from the Marshall facility. The Sixth Circuit held that these test results were direct evidence that Eaton had discharged PCBs into the Kalamazoo River and were sufficient to withstand a motion for summary judgment, even though they were not supported by any other test results.

The Sixth Circuit sent the case back to the district court to hold a new trial and make new determinations of liability for Menasha and Eaton. The Sixth Circuit also stated that “after liability has been determined, the district court may properly consider the causal link between each defendant’s waste and the resulting environmental harm, along with other relevant equitable factors, in allocating response costs among the liable parties.”

**c. Kalamazoo River Study Group v Rockwell Int’l, Inc, 107 F Supp 2d 817 (WD Mich, 2000).**

The United States District Court for the Western District of Michigan has held that Rockwell International, Inc. (“Rockwell”) was not a significant contributor of PCB contamination to the Kalamazoo River’s sediments and, therefore, assessed no cleanup costs against Rockwell in a contribution action under the CERCLA brought by the Kalamazoo River Study Group (“KRSG”). KRSG is an unincorporated association of four paper companies identified as the principal sources of PCB contamination in the Kalamazoo River due to their past paper recycling and de-inking operations from the period of 1950 through 1975. The court ruled that KRSG presented little credible evidence on the quantity of PCBs released by Rockwell in its historical discharges of oils to the Kalamazoo River. The court held that the PCB releases by the KRSG members were more than sufficient to justify imposing the entire cost of the cleanup on them.

In 1990, a 35 mile stretch of the Kalamazoo River and a three-mile portion were listed on the National Priorities List (“NPL”) by the EPA due to PCB contamination. The MDNR identified three paper mills as the primary contributors to the PCB contamination. The three paper mills entered into an administrative order by consent (“AOC”) with MDNR in 1990 to fund and conduct a remedial investigation/feasibility study (“RI/FS”) of the NPL site, which was expanded to include 95 miles of the Kalamazoo River. Although it did not sign the AOC, a fourth paper

mill, also became a member of the KRSG and agreed to participate in the RI/FS.

In Phase I of the case, the court held that the contribution of PCB by the members of the KRSG to the NPL site, “individually and together, are in nature, quantity and durability sufficient to require imposing the costs of response activities for the NPL site on each of those four parties.” The court also held in Phase I that, in light of the concentration of PCBs at the outfall of Rockwell’s “Oil Flotation House” and the presence of PCBs in the oil handling areas of Rockwell’s property, “Rockwell’s release of PCBs to the river was more than incidental or sporadic.” Although the court observed that Rockwell’s release of PCBs appeared to be minimal in comparison to the release by KRSG’s members, it held that both KRSG’s members and Rockwell were liable under CERCLA for PCB contamination at the NPL site.

Through August 1999, KRSG had spent approximately \$21 million for work relating to the RI/FS, of which approximately \$8.6 million related to work downstream of Rockwell’s facility and for general investigation of the entire 95 miles of the NPL site. KRSG had also paid MDNR’s successor agency, the MDEQ, approximately \$3.1 million in oversight costs for the same period, of which approximately \$1.2 million were attributable to the investigation of the NPL site in general.

Section 113(f) of CERCLA, governing the allocation of response costs under a contribution action, provides: “[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate . . . .” The court recited the following nonexhaustive list of factors, known as the “Gore factors,” that courts have applied under Section 113(f):

- (1) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished;
- (2) the amount of the hazardous waste involved;
- (3) the degree of toxicity of the hazardous waste involved;
- (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
- (6) the degree of cooperation by the parties with the Federal,

State or local officials to prevent any harm to the public health or environment. 107 F Supp 2d at 822.

The court further stated that (i) “[c]ourts are not required to make meticulous findings as to the precise causative contribution each of the parties have made to a hazardous site,” (ii) a CERCLA claimant “has the burden of proving its case by a preponderance of the evidence,” and (iii) under “an appropriate set of circumstances, a [party’s] fair share of the response costs may be zero.” *Id.*

KRSG argued that Rockwell was responsible for contributing 20% of the estimated 50,000 pounds of PCBs in Lake Allegan on the Kalamazoo River, downstream of Rockwell’s plant. This was based upon KRSG’s assertion that PCB Arochlor 1254 discharged by Rockwell was 3 to 4 times more toxic than the PCB Arochlor 1242 discharged by KRSG’s members. KRSG further argued that Rockwell should be allocated a 13% share of the current and future general river investigation costs upstream of the Rockwell facility and a 40% share of the current and future costs of investigating downstream of the facility, plus prejudgment interest. Rockwell argued that, because its PCB releases were so small as to be negligible, its equitable share of the costs should be zero.

The court explained the distinctions important to the case between PCB Arochlor 1242 and 1254. PCB Arochlor 1242 was predominantly associated with paper recycling operations such as those performed by the members of KRSG. It was used as an ink carrier or solvent in carbonless copy paper from 1957 - 1971. It is also associated with hydraulic fluids and heat transfer fluids.

Rockwell discharged its industrial wastewater into the Kalamazoo River after treatment in an “Oil Flotation House” from 1945 until the early 1960s. Rockwell’s wastewater contained sludge, heavy metals, process wastes, oil, machine coolants, oily wastewater, and spent cutting oils. Rockwell had no records indicating that it had purchased quench oil, cutting oil, or hydraulic oil containing PCBs. Further, there was no evidence that Rockwell conducted any high-temperature operations that would have benefited from the fire-resistant qualities of PCB containing oils. Also, beginning in the early 1960s, Rockwell made increased use of water soluble oils in its processes, which were unlikely to have contained PCBs because PCBs do not readily mix with water. At that time, Rockwell discharged its waste into a soluble oil separation pond, the effluent of which was tested by MDNR

in 1976 and 1986 and shown to not contain PCBs. Rockwell’s property, however, is contaminated with PCBs, predominantly with Arochlor 1254, although Arochlors 1242 and 1260 are also present.

Rockwell, however, kept no records of its oil purchases from the 1940s to the 1970s, nor did it test its incoming oils or wastewater discharge for PCBs until after 1971. The court noted that, because of this lack of information, the parties were unable to precisely calculate Rockwell’s PCB discharge and its contribution of PCBs to the Kalamazoo River sediment. The court stated that some reasonable inference could still be drawn from the available evidence. Considering that PCB-containing oils cost more and were not needed in Rockwell’s operations and the relatively low levels of PCBs on Rockwell’s property, the court stated that it was unlikely that Rockwell intentionally purchased PCB-containing oil. Nevertheless, it was likely that Rockwell purchased oil containing PCBs because they were commonly contained in oil prior to 1970 and if Rockwell had purchased recycled oils, those oils very well could have contained PCBs. Further, Rockwell’s expert testified that non-PCB oils purchased by Rockwell could have been contaminated with traces of PCB from residues left in tankers that had also transported PCB-containing oils.

KRSG’s expert estimated that Rockwell discharged between 5,000 and 10,000 pounds of PCBs to the Kalamazoo River. This estimate was based upon data showing Rockwell’s oil discharges to the river in 1965 and Rockwell documents identifying the amount of hydraulic and cutting oils that Rockwell historically stored and reclaimed. KRSG’s expert extrapolated the data, which was collected on two days in 1965, to calculate that Rockwell discharged 520,695 gallons of oil over a 32-year period. KRSG’s expert then used the concentration of PCBs present in PCB hydraulic oils and PCB cutting oils manufactured by Monsanto to conclude that Rockwell was responsible for a discharge of a minimum of 5,000 to 10,000 pounds of PCBs.

The court characterized KRSG’s expert’s calculations as “highly speculative.” The court stated that it was not persuaded that the calculations were very probative because the 32-year estimate was an extrapolation from only one data point. The court stated that a single measurement should not be the basis for extrapolation to a multi-year period without sufficient corroborative evidence that the single point was representative of discharges over the period. The court further questioned KRSG’s expert’s reliance on the concentration of PCBs in oils that would have been purchased

from Monsanto for their PCB-containing quality when the evidence did not support the assumption that all of the hydraulic and cutting oils purchased by Rockwell were Monsanto PCB-containing oils.

In addition, the contamination present at Rockwell's property did not support KRSG's expert's assumptions. A layer of "light non-aqueous phase liquid" ("LNAPL") is floating on the groundwater beneath Rockwell's property, but no "dense non-aqueous phase liquid" ("DNAPL"), which would sink below the water table, is present. The court observed that if the oils purchased by Rockwell contained as much PCB in them as posited by KRSG's expert, the oils would have been found as a DNAPL on the Rockwell property. Further, the LNAPL present had only 9 parts per million ("ppm") of Arochlor 1254 present in it. The court stated that Rockwell's expert testified convincingly that it would have been impossible for the Monsanto cutting oil, with a PCB concentration of 50,000 ppm, or the Monsanto hydraulic oil, with a 500,000 ppm PCB concentration, to be reduced to the 9 ppm concentration found in the LNAPL on the Rockwell property. Rockwell's expert testified that the low level of PCBs found on Rockwell's property more likely resulted from oils that were incidentally contaminated with PCBs.

The court found the opinion of Rockwell's expert to be persuasive. The court concluded that there was no basis for finding that the oils used by Rockwell contained significantly greater amounts of PCBs than was found in the LNAPL on Rockwell's property, and the concentration of PCBs in the LNAPL was more characteristic of incidental PCB contamination of the oils used by Rockwell than a steady purchase of PCB-containing oils from Monsanto.

Relying on Rockwell's expert's testimony, the court stated further that, even if one were to adopt KRSG's expert's assumptions on the volume of oil discharged by Rockwell, applying the maximum concentration of PCB detected in the LNAPL of 9.2 ppm would yield a total release of approximately 8 pounds of PCB by Rockwell. The highest concentration of PCB associated with Rockwell's facility, 35 ppm, was found in the sediment by the outfall from the Oil Flotation House. Using this number, Rockwell's total PCB release to the river would be approximately 16 to 20 pounds. These amounts would yield a theoretical contribution by Rockwell of from 0.002 to 0.008 percent of the PCBs present in Lake Allegan downstream of Rockwell on the Kalamazoo River. Further, even if such a contribution occurred, it was negligible and did not rise above background PCB

concentration in the river. The court rejected KRSG's expert's opinion that Rockwell released from 5,000 to 10,000 pounds of PCBs to the river, finding more persuasive Rockwell's expert's estimate that the total amount of PCBs released by Rockwell did not likely exceed 20 pounds. KRSG, however, presented very little evidence on the amount of PCBs released by its members. Therefore, the court relied heavily upon Rockwell's evidence on the issue. After reviewing the available evidence, the court concluded that, although it could not "begin to arrive at a precise figure regarding the volume of PCBs contributed by KRSG members that are still in the river," KRSG's members were responsible for hundreds of thousands of pounds of PCBs in the river.

KRSG attempted to argue that, because the Arochlor 1254 (the type of PCB released by Rockwell) bioaccumulation rate in fish is three to four times the bioaccumulation rate of Arochlor 1242 (the type released by KRSG's members), Rockwell's PCB releases are three to four times more toxic than KRSG's releases. Rockwell's expert testified that fish studies did not indicate that there was any additional bioaccumulation of Arochlor 1254 in the area of Rockwell's plant than upstream of the plant, a conclusion with which KRSG's expert agreed. The court ruled that the fish evidence, therefore, did not provide evidence that Rockwell contributed significant or measurable amounts of PCBs to the river. The court also noted that MDEQ establishes regulatory criteria and issues fish consumption advisories on the basis of the presence of total PCBs, not on the presence of individual Arochlors. Accordingly, the court stated that it would follow the approach of MDEQ and treat all PCBs equally.

Next, the court observed that "[n]otwithstanding the overwhelming evidence of [KRSG's] members' contribution of large quantities of PCBs to the river, or perhaps because of that evidence, [KRSG] has attempted to shift this Court's focus from Arochlor 1242 to Arochlor 1254 and from the entire ninety-five mile length of the Kalamazoo River at issue in this case to Lake Allegan, at the most downstream end of the Site." The court observed that Rockwell was not the only potential source of Arochlor 1254 and that other potential sources included KRSG's members and publicly owned treatment works for three municipalities, all upstream of Rockwell. The ratio of Arochlor 1242 to 1254 is approximately the same in the river sediments both upstream and downstream of Rockwell. The court further observed that if Rockwell had released significant quantities of PCBs, the relative amount of Arochlor 1254 should have increased downstream of Rockwell's plant. Rockwell's expert had

collected and analyzed 300 samples of river sediment downstream of Rockwell. Very few of the samples had elevated levels of Arochlor 1254 and there was no increase in the levels of Arochlor 1254 near Rockwell's plant. The court held that the absence of an increase in Arochlor 1254 downstream of Rockwell constituted credible and persuasive evidence that Rockwell was, at best, an inconsequential source of PCBs to the river.

The last of the Gore factors considered by the court was the degree of cooperation by the parties with governmental officials to prevent harm to the public health or the environment. The court found that none of the parties had fully cooperated, and thus concluded that the cooperation factor did not weigh in favor of one party over the other.

The court reiterated that, although KRSG was not required to prove its case with direct evidence or with mathematical precision, it still had the burden of proving its right to contribution by a preponderance of the evidence. The court decided that the quantity of waste contributed was the most important of the Gore factors for allocation in this case and, therefore, it must begin its analysis with an estimate of the total quantity of waste at issue and then determine the parties' relative contribution to the total amount.

The court characterized the evidence produced by KRSG as not consistent or helpful to the court's analysis. The court said that it was left with little to begin its analysis other than the undisputed facts that the recycling and de-inking of paper by KRSG's members was the major cause of PCB contamination of the Kalamazoo River, that KRSG's members' landfills were continuing to release PCBs to the river, and that KRSG's members had released hundreds of thousands of pounds of PCBs to the river. The court then observed that although KRSG had presented detailed evidence on the amount of oil released by Rockwell, it had presented little credible evidence on the amount of PCBs contained in the oil. The court found that Rockwell's PCB concentration to the river was very minimal, particularly in contrast to the contribution by KRSG's members, when taking into account the low levels of PCB on Rockwell's property and that the river sediments and fish tend to show no significant contribution by Rockwell. The court further noted that Rockwell's PCB contribution did not exceed background levels and would not have in and of itself resulted in a need for remediation of the river. Therefore, the court held that the equities of the case justified imposing the entire

cost of response activities on KRSG's members and imposing none on Rockwell.

**d. American Special Risk Ins Co v City of Center Line, 2001 US Dist LEXIS 5393 (WD Mich, Mar 12, 2001).**

The United States District Court for the Western District of Michigan has rejected a claim that a settlement agreement that addressed the liability of a governmental authority protects the individual members of that authority from contribution under CERCLA.

The South Macomb Disposal Authority ("SMDA"), a governmental authority comprised of five member cities (Center Line, Eastpointe, Roseville, St. Clair Shores, and Warren (collectively, the "Cities")) owned and operated two landfills in Macomb Township, Michigan during the 1970s. In 1986, MDEQ ordered the SMDA to cleanup environmental contamination emanating from the landfills. In response to that order and a related lawsuit filed by Macomb Township residents against the SMDA, the authority sued its insurance carriers (collectively, the "Insurers") seeking coverage for the contamination under its various policies. The Insurers then brought a lawsuit "in the name of the SMDA" against the Cities for contribution under Section 113 of CERCLA, claiming that the Cities were potentially liable parties ("PRPs") under CERCLA as persons who generated, transported, and arranged for the disposal of the waste deposited at the landfills.

The Cities moved to dismiss the Insurers' lawsuit because, the Cities argued, a recent administrative settlement agreement between the SMDA, the Cities, and the State precluded the Insurers contribution claims against the Cities. The settlement agreement expressly provided that "pursuant to Section 20129(5) of the [Natural Resources and Environmental Protection Act] and Section 9613(f)(2) of [CERCLA], SMDA, and each of the member Cities shall not be liable for claims for contribution for the matters addressed in the Agreement . . . including but not limited to all past and future response costs incurred by SMDA with respect to [the landfills]."

Section 9613(f)(2) of CERCLA generally provides that "a PRP that has entered into a settlement with the United States or a State may not be held liable for contribution to another PRP who has elected not to settle its CERCLA liability." The court noted, however, that this contribution protection "does not provide a blanket exemption from further liability under CERCLA or state law." Rather, CERCLA's contribution protection extends only to

“administrative or judicially approved settlements” and then only to the “matters addressed” in those settlements. The court found that, in this case, the Cities’ liability as generators, transporters, and persons who arranged for the disposal of hazardous substances was *not* among the matters addressed in the settlement between the Cities and the State. Accordingly, the court denied the Cities’ motion to dismiss.

First, the court noted that courts typically look at the following four factors in order to determine what matters are addressed in a settlement document: (1) the particular hazardous substances at issue in the agreement; (2) the location of the site in question; (3) the time frame covered by the settlement; and (4) the cost of the cleanup. The court also noted, however, that these factors are not exhaustive and that the settlement agreement must be examined as a whole in order to determine its scope. Moreover, the court stated that “extremely broad contribution protection should not be automatically extended beyond the bounds of the underlying suit to absolve the defendants of all possible liability.” In this regard, the court found significant the fact that, at the time the Cities entered into the settlement agreement, the Cities had not faced any threat of individual liability as arrangers, generators or transporters of waste in the lawsuit initiated by the Macomb Township residents. Further, the court found that, under the terms of the settlement agreement, the Cities “gave up nothing beyond what was already required of them as constituent members of the SMDA.” As examples, the court noted that the Cities, “in their individual capacities, have assumed no cleanup responsibilities; nor . . . agreed to pay any monetary amount.” Thus, the court found that the matters addressed in the settlement agreement were strictly limited to the Cities’ obligations as constituent members of the SMDA and did not encompass the Cities’ individual liabilities under CERCLA. Therefore, the court held that the Insurers’ claims for contribution against the Cities were not barred by Section 9613(f)(2) of CERCLA.

The court also expressed skepticism regarding whether the broad contribution protection clause contained in the settlement agreement “constitutes the type of settlement contemplated by Section 9613(f)(2).” The Cities and the State had entered into the settlement agreement without any hearings or public comment, and without any notice to the Insurers whatsoever. The court noted that “some courts have intimated that broad contribution protection provisions should not be upheld when entered into under circumstances such as this” and that other courts have recognized that “due process concerns are magnified when a PRP seeks to use an

administrative settlement to extinguish another PRP’s contribution rights.” Because the court had determined that the settlement agreement did not bar the Insurers’ contribution claims, however, the court found it unnecessary to rule on this issue.

**e. Best Foods, Inc v Aerojet-General Corp, 2000 WL 1238910 (WD Mich, Aug 24, 2000).**

A number of companies manufactured chemicals at the site for over 40 years. From 1957 to 1972, the Ott Chemical Company (“Ott”), now defunct, owned and operated the site. In 1965, a subsidiary of CPC International, Inc. (“CPC”) owned and operated the site. (CPC later changed its name to Best Foods, Inc.) From 1972 to 1977, Story Chemical Co. (“Story”) owned and operated the site. Story filed for bankruptcy in 1976. From 1977 to the present, the site has been owned and operated by Cordova Chemical Company of California and Cordova Chemical Company of Michigan (collectively, “Cordova”), both of which are subsidiaries of Aerojet. To induce Aerojet and Cordova to take over operation of the site after Story Chemical filed for bankruptcy, the State of Michigan entered into an agreement under which Aerojet agreed to perform certain limited cleanup actions, and the State of Michigan agreed to operate purge wells to treat groundwater contamination, and to indemnify Aerojet against any further cleanup that might be required at the site. The EPA listed the site on the Superfund National Priorities List in 1983.

In previous trials, the district court found that the primary source of contamination at the site was a number of unlined lagoons that had been used for chemical waste disposal from 1959 through at least 1968, while the site was owned by the now defunct Ott and by a subsidiary of CPC. Additional substantial contamination also resulted from a number of chemical spills and the burial of chemical wastes during that time period. The court found that Story and Cordova did not dispose of any wastes in the lagoons, or bury any waste on the property, although some spills did occur while Story and Cordova owned the property.

In 1991, the district court held that both Aerojet and CPC were jointly and severally liable to the United States and to the State of Michigan for all response costs related to the site. Both Aerojet and CPC appealed. The Sixth Circuit reversed, holding that CPC and Aerojet, as parent corporations, could be held liable under CERCLA for the actions of their subsidiaries only if the United States and Michigan could prove that they were guilty of fraud or injustice as required under Michigan state law to pierce the

corporate veil. The Sixth Circuit also held that Aerojet and its subsidiaries were entitled to a new trial to determine whether they qualified for the third-party defense under 42 USC 9607(b)(3). The United States and Michigan appealed to the United States Supreme Court on the issue of whether Aerojet and CPC could be held liable as parent corporations, arguing that the Sixth Circuit had taken too narrow a view of this issue. The Supreme Court held that there are limited circumstances under which a parent corporation might be held liable under CERCLA for operating a facility owned by a subsidiary corporation, and remanded the case to the district court for further action.

Meanwhile, Aerojet's subsidiary, Cordova, successfully argued before the Michigan Court of Appeals that the State of Michigan has a binding obligation to protect Aerojet and its subsidiaries from any environmental liabilities at the site, and the Michigan Supreme Court declined to review the court of appeals decision.

After the Supreme Court decision, the United States, the State of Michigan, and Aerojet negotiated a consent decree which: (1) acknowledged that Aerojet had spent about \$2.6 million dollars remediating contaminated soil on two cleanup projects at the site; and (2) obligated Aerojet to pay approximately \$5.5 million dollars on a third cleanup project, for a total of approximately \$8.1 million dollars. EPA estimated that the total cleanup costs at the site would be about \$100 million dollars. Therefore, the total amount of Aerojet's responsibilities under the proposed consent decree was approximately 8%. However, the court noted that Aerojet would, in all likelihood, never have to pay any of the \$5.5 million dollars, because the Michigan Court of Appeals had held that the state had to fulfill its contractual obligation to protect Aerojet from these costs. The consent decree also gave Aerojet a complete release from all further liability to the United States and the State, protected it against any contribution claims by CPC, and preserved Aerojet's right to seek contribution from CPC or other parties for Aerojet's cleanup costs.

CPC objected to the proposed consent decree, apparently out of concern that approval of a consent decree would leave CPC as the only financially viable party from which the United States and the State could seek the remaining 92% of response costs. The district court held that in making its decision to approve or disapprove the consent decree, its only role was to decide whether the agreement was fair, reasonable, and consistent with the purposes of CERCLA, and stated that, in doing so, it would give deference to the

recommendations of the United States. The court found that the terms of the consent decree were fair because the 8% responsibility assigned to Aerojet was roughly comparable to the amount of environmental harm that Aerojet and its subsidiaries may have caused, considering they had engaged in no active dumping or burial of wastes. The district court noted that although there was a failure by either Aerojet or the State of Michigan to operate groundwater purge wells, a recent decision by the Sixth Circuit had held that CERCLA liability does not result from the passive migration of previously disposed hazardous substances, thus casting some doubt on whether failure by Aerojet or the State of Michigan to operate the purge wells could result in CERCLA liability. The district court also noted that another recent court of appeals decision had improved the chances that Aerojet might prevail on its innocent landowner defense. The court noted that the enhanced possibilities that Aerojet might prevail on the passive migration defense, and the innocent landowner defense, were legitimate litigation risks that justified approval of a consent decree that imposed only 8% liability on Aerojet. CPC argued that the United States had agreed to settle its claims against Aerojet for only 8% in order to protect the State, which was contractually obligated to indemnify Aerojet. The court rejected this argument because CPC had no evidence of collusion between the United States and the State, and because it believed that 8% was a rational estimate of the costs attributable to Aerojet. The court therefore approved the consent decree.

**f. Organic Chemicals Site PRP Group v CDU Holding, Inc Liquidating Trust, No. 1:96-CV-233 (WD Mich, Oct 30, 2000).**

The EPA placed the Organic Chemicals Superfund Site (the "Site"), located in Grandville, Michigan, on the National Priorities List ("NPL") in 1983. The Organic Chemicals Site PRP Group ("Group") was formed in 1991. Initially, the Group included some members who later were determined to have generated less than 1% each of the waste at the Site ("*de minimis* members"), and other members each of whom was determined to have generated more than 1% of the total waste sent to the Site ("non-*de minimis* members"). In January, 1992, EPA issued a Unilateral Administrative Order to 175 PRPs, including the members of the Group, which required them to remediate groundwater contamination. In September, 1992, 100 *de minimis* members entered into an Administrative Order on Consent with the EPA under which the *de minimis* parties paid cash into a trust fund administered by EPA for the purpose of paying some of the costs for groundwater remediation at the Site. These orders required the Group to take over

responsibility for remediating groundwater, but allowed it to receive partial reimbursement from the trust fund for some of the Group's expenses in doing so. Thus, funds in the trust were used to pay for response costs which the members of the Group would otherwise have had to pay.

In November, 1998, the *de minimis* members formally withdrew from membership in the Group so that they could pursue a second settlement with EPA concerning their liability for soil contamination at the Site.

In 1996, the Group, acting in its own name as an unincorporated voluntary association, sued Uniroyal Chemical Company, Inc. ("UCCI") contending that UCCI had disposed of substantial quantities of hazardous substances at the Site and should have joined the Group as a non-*de minimis* member. In 1999, the Group and UCCI entered into a settlement agreement providing that UCCI's percentage share of response costs would be determined by binding arbitration. The arbitrator issued his written decision in August, 1999, finding that UCCI should be responsible for 15% of the Group's costs.

Unfortunately, the arbitrator did not define in his decision exactly what he considered to constitute the Group's costs. The Group interpreted the arbitrator's decision to mean that UCCI owed approximately \$755,000, while UCCI interpreted it to mean that it owed the Group only about \$451,000. The principal reason for the discrepancy was that the Group believed that the costs should include the amounts which the PRP Group initially paid, but which were reimbursed to the Group from the trust fund which had been established by the *de minimis* PRPs under their settlement with EPA. In contrast, UCCI contended that the costs should include only the amounts that the Group assessed directly to its own members, and should not include amounts that were reimbursed from the trust fund.

This issue was presented to the district court for resolution because the court retained jurisdiction to enforce the settlement agreement between the Group and UCCI. The court held that the issue was essentially a matter of contract law, and depended on the correct interpretation of the settlement agreement between the Group and UCCI and the PRP Organization Agreement. The Group argued that the "Shared Costs" of which UCCI had to pay 15% should include reimbursements that the Group received from the trust, because UCCI had been released from all potential claims by all PRPs against UCCI, including all claims by *de minimis* PRPs who had funded the trust. In return, UCCI

argued that Group members that were in the same position as UCCI, that is, non-*de minimis* members, had not been required to pay toward the costs represented by payments from the trust fund. UCCI's strongest argument was that none of the costs paid by the trust fund had ever been assessed as costs to Group members. The settlement agreement between the Group and UCCI stated that UCCI was to "obtain and be bound by all of the rights, duties and obligations imposed on or accruing to the Members of the Group as set forth in the PRP Agreement . . . as if UCCI was a Member from the creation of the Group." The settlement agreement also provided that "the costs and fees which shall be the subject of the Arbitration Award shall be all Shared Costs which have been assessed against Members to date . . ." The PRP Agreement defined "Shared Costs" as costs for "activities authorized by the Steering Committee or the Group to be incurred on behalf of the Group."

The court concluded that the costs of which UCCI had to pay 15% could not include the costs for which the Group had been reimbursed by the trust. It reasoned that, under the settlement agreement, UCCI became a member of the Group and was to be put in a position equal to those members who had joined the Group at the start. The PRP Agreement provided that Group members were only required to pay amounts that had been specifically assessed against them by the Group, and noted that the Group had not shown that any of its original members had ever been "assessed" for costs that were reimbursed by the trust. The court determined that in the settlement agreement, UCCI had "clearly negotiated . . . the right to be treated as similarly situated members," and that because the original Group members had not been assessed for monies reimbursed from the trust, UCCI could not be assessed for them either.

The court also noted that on at least two occasions, representatives of the Group sent letters to UCCI summarizing the assessments that the Group had issued to members. Significantly, neither of these letters made any reference to the payments that had been reimbursed from the trust as being an "assessment." The court pointed out that these letters demonstrated, through the Group's own conduct, what the Group really considered to be its "Shared Costs."

**g. United States v Amoco Chem Co, 212 F3d 274 (CA 5, 2000).**

In 1991, BFI Waste Systems of North America ("BFI") and a number of other PRPs entered into a consent decree with the EPA requiring the PRPs to remediate the Brio

Superfund Site near Houston, Texas. The 1991 consent decree was based on a remedy that EPA had selected calling for the site to be remediated using either biological treatment or incineration. BFI and the other PRPs negotiated an allocation of costs based in part on the assumption that incineration would be the remedy. The allocation was expressed in a document known as the “Brio Site Trust Agreement.” According to BFI, it agreed to pay a higher percentage of costs than it normally would have because the tar that it sent to the site contained a contaminant that makes incineration more costly than normal.

After the 1991 consent decree was approved by the district court, the local community voiced opposition to the plan to incinerate wastes on site. The PRPs asked EPA to modify the remedy to delete the incineration requirement. In 1997, EPA agreed to modify the remedy to require that wastes be contained on site rather than incinerated. EPA and the PRPs then drafted an Amended Consent Decree, and the PRPs drafted an Amended Trust Agreement.

In March 1998, BFI informed the other PRPs that it was not willing to accept responsibility for the same share of costs which it had accepted in the original Brio Site Trust Agreement, because the only reason it had agreed to pay a higher percentage of costs was that its tar would have made the incineration remedy more costly, a factor that would not apply to the new containment remedy. BFI signed the Amended Consent Decree, but did not sign the Amended Trust Agreement. BFI advised the other PRPs, before any of them had signed the Amended Consent Decree, that it would not agree to pay the same share of costs as before. Under pressure from the government, the other parties signed the Amended Consent Decree and the Amended Trust Agreement. The court then entered the Amended Consent Decree.

In February 1999, the other PRPs filed a motion with the district court asking it to require BFI to sign the Amended Trust Agreement, and thereby accept responsibility for the same share of costs that it had accepted under the original Brio Site Trust Agreement. The district court granted the motion, and ordered BFI to sign the Amended Trust Agreement. BFI appealed to the Fifth Circuit.

The other PRPs argued that BFI agreed to accept the same allocated share when it signed the Amended Consent Decree, because the Amended Consent Decree contained a statement that required each settling defendant to “present to EPA for approval concurrent with this Amended Decree a

signed amended Brio Site Trust.” However, the court held that this part of the Amended Consent Decree did nothing more than obligate BFI to sign *some* trust agreement, but not necessarily one that included the same allocation as in the original Trust Agreement. The other PRPs also argued that the original Trust Agreement formed a part of the Amended Consent Decree, because the Amended Consent Decree defined “Settlers” as “those persons who are signatories to this Amended Decree . . . including the Brio Site Trust formed pursuant to . . . the original consent decree and continued under this Amended Decree.” However, the court held that this language simply provided that the members of the original Trust Agreement are included among the settling parties, and does not specify that the allocation agreement between the PRPs will necessarily remain unchanged.

The court placed great significance on the fact that BFI had informed the other PRPs, before any of them signed the Amended Consent Decree, that BFI would insist on reallocating its share. BFI did not raise the issue when the PRPs were negotiating the Amended Consent Decree with EPA and circulating a proposed Amended Trust Agreement. The court held that BFI’s silence during the early stages did not bind it to accept the Amended Trust Agreement later.

The court briefly discussed and distinguished **United States v Lightman**, a case in which the court allowed a PRP group to enforce a written agreement-in-principle on allocation against a member of the PRP group, even though the draft formal agreement (which was never executed) contained a provision stating that it would not be enforceable until it was signed by all PRPs, which never happened. In the **Lightman** case, the court held that the written agreement-in-principle was enforceable, partly because the conduct of the holdout PRP after entering into the agreement-in-principle led the other PRPs to believe that it had agreed to accept its allocated share.

The Fifth Circuit concluded that BFI was obligated to negotiate with the other PRPs “and agree to some system of allocation.” The court also held that if BFI and the other PRPs could not agree to a new allocation, then the district court was authorized to resolve the allocation dispute by the dispute resolution clause of the Amended Consent Decree.

**h. Carson Harbor Village, Ltd v Unocal Corp**, 227 F3d 1196 (CA 9, 2000), *reh’g en banc granted* 240 F3d 841 (2001).

The United States Court of Appeals for the Ninth Circuit held that the passive migration of hazardous substances

constitutes on-going “disposal” so that a former owner who acquired property after the hazardous substances had been dumped there, and later sold the property, is liable for remediation costs under the CERCLA. There is now a 3-2 split among five federal courts of appeals on this issue.

Between 1945 and 1983, Unocal Corporation leased certain property located in Carson, California, and operated a number of oil wells, pipelines, storage tanks, and oil production facilities on it. Unocal disposed of a large quantity of tar-like material in some wetlands on the property. In 1977, a partnership known as Carson Harbor Village Mobile Home Park (“Partnership”) acquired the property and operated a mobile home park on a portion of it. The Partnership did not generate or actively dispose of any hazardous substances on the property, nor did it disturb or physically handle any of the tar-like material which Unocal had disposed of in the wetlands. A corporation known as Carson Harbor Village, Ltd. (“Carson Harbor”) acquired the property some time after 1983.

When Carson Harbor sought to expand its mobile home park operations, it discovered the tar-like material that Unocal had placed in the wetlands. After discussing the situation with the California Regional Water Quality Control Board (“RWQCB”), Carson Harbor removed and disposed of over 1,000 tons of tar-like material, and obtained a “no further action letter” from RWQCB. Carson Harbor then sued Unocal, the Partnership, and several other parties under CERCLA to recover its cleanup costs.

Under CERCLA, a person who does not own the contaminated property at the time a cost recovery lawsuit was filed, is liable only if he owned it “at the time of disposal of any hazardous substance” on the property. 42 USC 9607(a)(2). Carson Harbor argued that the slow migration of hazardous substances from the tar into the surrounding soil constituted “disposal” during the Partnership’s period of ownership. The district court rejected this argument and dismissed the case against the Partnership on a motion for summary judgment, because Carson Harbor had failed to show that any “disposal” of hazardous substances had occurred on the property during the time that the Partnership owned it.

Carson Harbor appealed to the Ninth Circuit. In 1992, the Fourth Circuit had ruled that passive migration of hazardous substances constitutes “disposal.” Since then, the First Circuit, the Second Circuit, and the Sixth Circuit declined to adopt the Fourth Circuit’s reasoning and ruled

that such passive migration of hazardous substances does not constitute “disposal” under CERCLA. Surprisingly, the Ninth Circuit decided, by a two-to-one vote, to join the Fourth Circuit on this issue. The Ninth Circuit based its decision largely on grounds of public policy, contending that CERCLA liability should be construed broadly in order to achieve CERCLA’s remedial purposes. The Ninth Circuit held that imposing liability on interim owners for passive migration of hazardous substances does not mean that such owners cannot qualify for the innocent landowner defense, holding that “this defense applies even though wastes were passively migrating during a defendant’s ownership so long as he or she acquired the property after the hazardous wastes were first placed on the property.” 227 F3d at 1210.

**i. Concrete Sales & Servs, Inc v Blue Bird Body Co, 211 F3d 1333 (CA 11, 2000).**

The United States Court of Appeals for the Eleventh Circuit has affirmed a district court’s decision holding that two companies that contracted for a third company’s electroplating services did not “arrange for” the disposal of hazardous substances under the CERCLA.

Briggs & Stratton Corporation (“B&S”) filed a complaint in this action to recover costs incurred in the cleanup of hazardous waste at a closed electroplating facility (the “Site”). B&S sought contribution from several others connected to the Site, including several members of the McCord family, who had conveyed the property to a trust (the “McCord Trust”); Concrete Sales and Services, Inc. (“Concrete Sales”), a corporation owned by the McCord Trust that also held title to the Site; and Alvin E. DeGraw, Jr., the president of the company that ran the electroplating facility (“DeGraw”).

The McCords, in turn, sought contribution from Peach Metal Industries, Inc. (“PMI”), the company that did the electroplating, and customers of PMI, including Blue Bird Body Company (“Blue Bird”) and Simplex Nails (“Simplex”). From approximately 1971 to 1987, PMI operated an electroplating and galvanizing facility on the Site. PMI generated hazardous waste as a regular part of its electroplating process, and disposed of the waste by dumping it onto the ground and storing it in unlined lagoons and drums on the Site. PMI eventually sought bankruptcy protection.

Blue Bird, a bus and motor-home manufacturer, and Simplex, a nail manufacturer, both outsourced their electroplating to PMI. Both companies set certain electroplating standards. Blue Bird, PMI’s biggest customer, outsourced all of its electroplating to PMI. Blue Bird’s

blueprints and purchase orders were specific as to the type of electroplating necessary for its parts. Blue Bird required in its invoices that PMI comply with all federal, state and local laws, regulations and orders. Additionally, both Blue Bird and Simplex at one time or another provided financial support to PMI. Simplex once loaned money to PMI, and Blue Bird did so twice.

Both companies were aware of the possibility of a waste disposal problem at PMI. However, although both companies knew that the electroplating process produced hazardous waste, neither company ever inquired about PMI's waste disposal practices, despite Blue Bird's contractual authority to require compliance with environmental laws. The McCords maintained that the relationships between PMI and Simplex and between PMI and Blue Bird presented a question of material fact as to Simplex's and Blue Bird's liability for PMI's disposal of hazardous wastes.

The McCords based their claims against Simplex and Blue Bird on Sections 107(a) and 113(f) of CERCLA. Section 113(f) allows someone to seek contribution from anyone who is or may be liable under Section 107(a). Section 107(a)(3) imposes liability on:

any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged for a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.

The McCords asserted that Simplex and Blue Bird were liable under Section 107(a) because they "arranged for" the disposal of hazardous substances by PMI. The district court granted summary judgment to Blue Bird and Simplex, and the McCords appealed.

Because CERCLA does not define "arranged for," the Eleventh Circuit considered several factors in determining whether Simplex and Bluebird were responsible as "arrangers." These factors included:

(1) whether a sale involved the transfer of a "useful" [product] or [a] "waste" product; (2) whether the party intended to dispose of a substance at the time of the transaction; (3) whether the party made the "crucial decision" to place hazardous substances in

the hands of a particular facility; (4) whether the party had knowledge of the disposal; and (5) whether the party owned the hazardous substances. 211 F3d at 1336-37 (citations omitted).

Therefore, the McCords were required to present evidence that would allow a reasonable jury to conclude, based on all the facts, that Simplex or Blue Bird arranged for PMI's disposal of hazardous substances owned or possessed by Simplex or Blue Bird.

The McCords argued that Simplex's contracting with PMI amounted to "willful blindness," because Simplex controlled the parts that PMI electroplated for Simplex, knew that hazardous waste was a by-product of the electroplating process, and loaned money to PMI. In response, Simplex claimed that it never owned or possessed the hazardous substances which PMI disposed of, did not have any authority or obligation to control how the hazardous substances were disposed of, and was not aware that PMI disposed of the waste improperly. The Eleventh Circuit held that the McCords failed to show that Simplex arranged for the disposal of hazardous wastes at PMI. Though Simplex loaned money to PMI on one occasion, the McCord's presented no evidence that that money was to be used for a specified purpose, such as the disposal of hazardous waste. Additionally, even though Simplex knew that hazardous waste would be generated by PMI's electroplating, the court held that the McCords failed to show that Simplex's president either knew about or had the power to control PMI's disposal practices. Therefore, the court concluded that no reasonable person could find that Simplex arranged for the disposal of hazardous substances under CERCLA, and affirmed the district court's grant of summary judgment to Simplex.

The Eleventh Circuit considered the question of Blue Bird's liability to be a closer call. The McCords contended that Blue Bird had control over PMI and could have exercised control over PMI's hazardous waste disposal practices. The McCords argued that the following facts would permit a jury to conclude that Blue Bird controlled PMI. A former Blue Bird employee founded PMI. Blue Bird was PMI's biggest customer. Blue Bird kept PMI in business by loaning money to PMI to facilitate PMI's purchase of hazardous substances. Blue Bird's invoices required PMI to comply with all applicable laws, including one specific environmental law. Finally, Blue Bird dictated the electroplating services to be performed on its parts by PMI. For these reasons, the McCords argued that Blue Bird "arranged for" disposal of PMI's hazardous substances.

In response, Blue Bird argued that it neither controlled nor had any duty to control PMI. Blue Bird argued that even though PMI was founded by a former PMI employee, PMI was a separate and distinct corporate entity. Next, even if Blue Bird's loans somehow facilitated PMI's purchase of hazardous electroplating substances, the McCords did not show that Blue Bird owned or controlled these substances. In addition, although Blue Bird's purchase orders required PMI to comply with all applicable regulations, the McCords did not show that those requirements implied any duty to monitor PMI's compliance. And finally, Blue Bird argued that their electroplating instructions dictated the desired result, but not the process to be used.

The McCords responded that Blue Bird was aware that PMI was not properly disposing of its hazardous wastes because Blue Bird knew that hazardous waste was being generated in the electroplating process, because PMI's facilities were rundown, and because PMI was having financial problems. Blue Bird responded that it had no knowledge of PMI's disposal practices, and that just because PMI's facility was run down and PMI was experiencing financial difficulties does not indicate that Blue Bird should have known that PMI was not properly disposing of its wastes. Blue Bird also argued that requiring a vendor to comply with applicable laws does not imply a duty to police that vendor's compliance.

The Eleventh Circuit held that the McCords had not produced sufficient evidence to allow a jury to conclude that Blue Bird intended to dispose of hazardous substances through PMI. The majority of Blue Bird's interactions with PMI involved a simple contract for services. The court stated that even though Blue Bird's loans to PMI could have facilitated PMI's purchase of hazardous substances, the fact that Blue Bird loaned money to PMI did not show that Blue Bird owned, possessed or even had the ability to control the hazardous substances.

Therefore, the Eleventh Circuit held that even though "arranger liability should be liberally construed to promote CERCLA's remedial scheme," there was not enough evidence to create an issue of material fact as to whether Blue Bird used PMI to "arrange for" the disposal of Blue Bird's wastes, and affirmed the district court's decision to grant summary judgment in favor of Blue Bird. The court noted that its opinion is limited to the facts of this particular case, and that CERCLA liability might have been proper if the facts were different.

**j. *Advanced Tech Corp v Eliskim, Inc*, 96 F Supp 2d 715 (ND Ohio, 2000).**

On a motion for reconsideration of a prior ruling, the United States District Court for the Northern District of Ohio has held that: (1) a person who unknowingly exacerbates environmental contamination may qualify as an innocent landowner under the CERCLA; and (2) CERCLA's contribution protection does not cut off a claim for contribution by a prior settlor, unless the settlement agreement clearly indicates that it was the government's intention to provide such protection.

From 1902 until 1980, Eliskim, Inc. ("Eliskim") owned a parcel of land known as the "True Temper Site." During this period of ownership, Eliskim released hazardous materials, including lead, into the soil at the site. Advanced Technology Corporation ("ATC") subsequently acquired a portion of the True Temper Site and proceeded to demolish a structure that had been constructed there. Fearing that this demolition activity would cause the lead-contaminated soil to become airborne, the EPA entered into an administrative order of consent with ATC (the "ATC-AOC") which required ATC to remove any soil containing lead above a 300 parts per million from the property pursuant to CERCLA. Although ATC claimed that it was unaware of the lead contamination at the time it acquired the property and demolished the structure, ATC complied with the ATC-AOC and, in 1995, EPA notified ATC that the removal action had abated the inhalation risk associated with airborne soil. EPA's approval of ATC-AOC close-out report, however, stated that "the remaining contaminated soils would be addressed in a non-time critical removal action."

In 1997, EPA entered into a second administrative order of consent with Eliskim (the "Eliskim-AOC"), which required Eliskim to clean up the remaining contaminated soils on the True Temper Site, including the property owned by ATC. The Eliskim-AOC made no reference to the ATC-AOC or the soil removal action already conducted by ATC.

ATC subsequently sued Eliskim for cost recovery under CERCLA Section 107, and contribution under CERCLA Section 113 regarding the initial removal action conducted by ATC. Both parties moved for summary judgment regarding two issues of ATC's claim. The first issue was whether ATC was not a PRP under CERCLA because it was an "innocent landowner" and, therefore, could recover 100 percent of its costs from Eliskim under a cost recovery claim, rather than merely Eliskim's proportional share of responsibility under a contribution claim. The second issue

was whether ATC's claims were barred by the Eliskim-AOC. Following a hearing on the motions, the court held that there were disputed issues of fact regarding ATC's status as an innocent landowner and, therefore, denied both parties' motions for summary judgment on that issue. With respect to the Eliskim-AOC, the court held that this settlement agreement did not protect Eliskim from ATC's claims and, accordingly, granted ATC's motion to dismiss this defense. Eliskim then filed a motion for reconsideration of these rulings.

On reconsideration, the court first noted that ATC fit within CERCLA's definition of a "PRP" because it was a current owner of the True Temper Site. The court further noted that "[g]enerally one PRP may not sue another PRP for cost recovery under CERCLA Section 107(a); PRPs are instead limited to contribution claims under Section 113(f)(1)." The court recognized, however, that if a "PRP qualifies as an innocent landowner under Section 107(b), then that PRP may pursue a cost recovery action." The court set forth the following five factors that ATC was required to demonstrate in order to qualify as an "innocent landowner:"

1. A party other than ATC was the sole cause of the release of the hazardous substances;
2. Eliskim is a liable party under Section 107(a);
3. ATC did not actually know about the presence of the hazardous substance at the time of the acquisition;
4. ATC undertook appropriate inquiry when ATC acquired the property, in order to minimize its liability; and
5. ATC exercised due care once the hazardous substance was discovered. 96 F Supp 2d at 717.

In its initial ruling on the motions, the court found that ATC had met its burden of proof with respect to the first three factors, but that there were disputed issues of fact regarding the remaining requirements. Accordingly, the court denied both parties' motions on this issue. In its request for reconsideration, Eliskim argued that, because ATC had exposed contaminated soil to the air when it demolished the building on the site, the court should have ruled that ATC could not have been an innocent landowner because ATC could not demonstrate that all of the releases at the True Temper Site were caused by parties other than ATC.

The court disagreed with Eliskim's interpretation of the innocent landowner defense under CERCLA, noting that "Eliskim has not cited a single case to this Court wherein a court has held that a release occurs when [an innocent landowner] unknowingly commits an action which exposes hazardous substances that had previously been released onto the property by a third party." The court noted that the parties disputed whether ATC knew or should have known of the contamination prior to demolishing the structure on the property. For purposes of Eliskim's motion, however, the court assumed that "ATC had no reason to believe that its reasonable use of its property would expose hazardous materials" and, accordingly, held that ATC "is not precluded from asserting a cost recovery action via the innocent landowner defense." The court cautioned, however, that "ATC will be precluded from claiming status as an innocent landowner if, in light of all available evidence, ATC had reason to suspect that tearing down the [structure] might have adverse environmental effects."

With respect to the second issue regarding whether the Eliskim-AOC precluded ATC's claim for contribution, the court noted that CERCLA Section 113(f)(2) provides that a "person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement agreement shall not be liable for claims for contribution regarding matters addressed in the settlement." In its motion for reconsideration, Eliskim argued that the court had erred in holding that the contribution protection provided in the Eliskim-AOC was only "forward looking" and did provide contribution protection against prior settlers, such as ATC. The court, however, rejected this argument, stating that "an Administrative Consent Order will not provide contribution protection against a prior settlor, unless the Administrative Consent Order clearly indicates that it was the government's intention to provide such protection." In this case, the court held that ATC's cleanup costs were not clearly indicated as "matters addressed" in the Eliskim-AOC and, accordingly, denied Eliskim's motion for reconsideration of this issue. 96 F Supp 2d at 719-720.

#### 4. Resource Conservation and Recovery Act

##### a. *Fiore v White*, 531 US 225 (2001).

The United States Supreme Court has reversed a criminal conviction under Pennsylvania's hazardous waste statute because the Commonwealth had conceded that it failed to prove a basic element of the crime.

William Fiore had been convicted in a Pennsylvania court of violating Pennsylvania's hazardous waste statute, which prohibits "operat[ing] a hazardous waste" facility without a "permit." Although Fiore actually possessed such a permit, the Commonwealth successfully argued at Fiore's criminal trial that he "had deviated so dramatically from the permit's terms that he nonetheless had violated the statute." After Fiore's conviction became final, however, the Pennsylvania supreme court ruled in case involving Fiore's codefendant that such conduct did not violate the statute because "the statute meant what it said: The statute made it unlawful to operate a facility *without* a permit; one who deviated from his permit's terms was not a person *without* a permit; hence a person who deviated from his permit's terms did not violate the statute." In spite of this subsequent ruling, the Pennsylvania courts refused to overturn Fiore's conviction. Fiore then sought relief in federal court, arguing that his continued incarceration violated his right to due process under the Fourteenth Amendment to the United States Constitution.

Before ruling on Fiore's case, the United States Supreme Court first asked the Pennsylvania supreme court to clarify whether its interpretation of the hazardous waste statute announced a new rule of law, or merely stated the correct interpretation of the statute at the time of Fiore's conviction. The Pennsylvania supreme court responded by stating that it did *not* announce new rule of law, but rather furnished "the proper statement of law at the date Fiore's conviction became final." Based on this clarification, the United States Supreme Court held that Fiore's continued incarceration clearly violated due process.

The Court noted that "the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." 531 US at 229. A basic element of Fiore's alleged crime was the failure to possess a permit. During Fiore's criminal trial, however, the Commonwealth had conceded that Fiore *did* possess a permit. Therefore, the Court stated that the "simple, inevitable conclusion is that Fiore's conviction failed to satisfy the Federal Constitutional demands" and reversed his conviction.

**b. *Shillman v United States*, 221 F3d 1336 (CA 6, 2000), cert denied 1215 S Ct 760 (2001).**

In an opinion criticizing both the EPA and the owners and operators of a hazardous waste facility for needlessly dragging out an administrative enforcement action, the United States Court of Appeals for the Sixth Circuit has

upheld a \$23,500 fine for violations of Resource Conservation and Recovery Act ("RCRA"), 42 USC 6901 *et seq.*, that occurred almost 20 years ago.

In May of 1980, David Shillman ("Shillman") leased property in Middlefield Township, Ohio for the purpose of operating a hazardous waste storage and reclamation facility. The facility was operated by a partnership, J.V. Peters & Co. (the "Partnership"), formed by Shillman's wife and an acquaintance. The Ohio Environmental Protection Agency ("OEPA") inspected the facility in December, 1980 and identified eighteen RCRA violations related to the improper storage and handling of hazardous waste and the lack of a contingency plan for emergencies. Within two weeks after receiving the inspector's report, Shillman and his wife dissolved the Partnership and formed a new corporation with an identical name: J.V. Peters & Co., Inc. (the "Corporation"). Shillman and his wife transferred all of the Partnership's assets and liabilities to the new Corporation, and continued to operate the facility without change. According to the court, "If there was any reason for this transaction other than an attempt to evade liability for already-committed or ongoing violations of RCRA, the record fails to reveal it."

In April of 1981, the EPA filed an administrative complaint against the Corporation (not the Partnership) based on the violations identified in the OEPA inspector's report, assessing a \$25,000 civil penalty. The Corporation answered the complaint by simply denying "each and every allegation" in boilerplate fashion. Although the Corporation's defense was apparently based on the fact that it had not been incorporated at the time of the violations and that EPA should have pursued the now-dissolved Partnership, the Corporation's answer did not even "hint at its belief that EPA had sued the wrong entity."

The EPA administrative law judge ("ALJ") assigned to the matter held an evidentiary hearing in October 1984 at which both parties presented evidence. The Corporation's case consisted generally of Shillman testifying about the nature and extent of the RCRA violations, and about the relationship between the Corporation and the Partnership, and the people involved with each.

Following the 1984 hearing, EPA apparently realized that it had indeed sued the wrong party and, in April of 1985, filed a motion to "Conform The Pleadings To Evidence" in an attempt to add Shillman and the Partnership as respondents to the complaint. Although the ALJ did not

expressly rule on EPA's motion, he issued a decision in May of 1985 finding Shillman and the Partnership (but not the Corporation) liable for the violations, and assessed a \$25,000 civil penalty. EPA's Chief Judicial Officer ("CJO"), however, vacated the ALJ's decision because Shillman and the Partnership had neither received adequate notice of their potential liability nor an opportunity to present a defense at the 1984 hearing. The CJO then remanded the case to the ALJ with instructions to allow the EPA to amend its complaint to name any additional parties, and then provide those parties with a new hearing to present evidence on their behalf.

In November 1987 (seven years after the alleged RCRA violations) EPA filed an amended complaint naming the Corporation, the Partnership, Shillman, his wife, and her former partner. Once again, the Corporation's answer to the amended complaint consisted of boilerplate denials without explaining its theory that it did not exist when the violations occurred.

A second evidentiary hearing was held in October 1994 before a different ALJ. The ALJ in this second hearing determined that he would accept as evidence the testimony provided at the first hearing conducted over 10 years earlier. Accordingly, EPA did not present any new witnesses, but made the previous witnesses available for cross-examination. Shillman and the Partnership objected to this process, and refused to cross-examine EPA's witnesses or to present any defense. In July of 1995, after reviewing the 1984 transcript, the second ALJ issued his decision, again finding Shillman and the Partnership jointly and severally liable for the RCRA violations, this time assessing only \$23,500 in fines.

The respondents then filed a judicial appeal of the ALJ's decision, arguing that it violated their rights to due process because the decision was based solely upon evidence introduced in the 1984 hearing, which preceded EPA's amended complaint adding them as respondents. Further, the respondents argued that, because EPA did not file its amended complaint until 7 years after the alleged violations, EPA's claims were barred by RCRA's 5-year statute of limitations. The district court affirmed the ALJ's decision and the respondent's appealed to the Sixth Circuit, which also affirmed the ALJ's decision.

First, the Sixth Circuit dismissed the Corporation's claim that it was not responsible for violations that occurred prior to its incorporation. The court noted that the Corporation's deceptive litigation tactic of providing only boilerplate denials

to EPA's allegations was intended for the benefit of the Partnership as much as for the Corporation. The court held, however, that "a corporate defendant is not entitled to run interference for a related entity by interposing a boilerplate answer to a complaint and then participating extensively in the litigation, only to later spring the dual defenses that the plaintiff cannot proceed against the named defendant because it is the wrong party and also cannot proceed against the related entity because to statute of limitations has expired." Although the Sixth Circuit found it unnecessary to hold the Corporation liable in this matter, the court explained that it wanted to "refute the assertion of [the Partnership] that it was unfair to let the EPA decide so late in the litigation to proceed against it."

The Sixth Circuit next summarized the respondent's due process argument as follows: "Essentially, they assert that all of the evidence presented in the 1984 hearing pertained to the liability of [the Corporation], which at the time was hanging its hat on the theory that it could not be liable simply because it had not been formed when the violations occurred in December of 1980." The court, however, rejected any argument that the admission of the 1984 testimony violated the respondents' rights to a fair hearing in 1994, noting that the same attorney represented the Corporation in 1984 and Shillman and the Partnership in 1994. The court further noted that, in the 1994 hearing, both Shillman and the Partnership "were given the opportunity to cross-examine the EPA's witnesses, to present evidence that the violations did not occur, or to show that they should not be held responsible if they did occur. They did none of these things." Moreover, the court found that "had it not been for the unreasonable litigation tactics orchestrated by Shillman, there would have been no need for a 1994 hearing." Accordingly, the court held that the ALJ's decision to admit the 1984 testimony was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Finally, with respect to RCRA's 5-year statute of limitations period, the Sixth Circuit held that EPA's 1985 motion constituted a formal request to proceed against Shillman and the Partnership. "Although the EPA captioned the motion as one 'To Conform Pleadings To Evidence,' there can be little doubt that Shillman and [the Partnership] knew or should have known that the EPA was formally requesting leave to proceed against them." Because EPA brought its motion within the 5-year period following the violations, the court held that EPA's claims against both Shillman and the Partnership were not barred by the statute of limitations.

At the conclusion of its opinion, the Sixth Circuit expressed its annoyance with both EPA and the respondents regarding the 20-year history of this matter: “This case has dragged out appallingly. Part of the blame rests with the EPA, whose procedural ineptitude in this action leaves little to be proud of. But a greater portion of the blame for the delay rests with Shillman and the incorporated and unincorporated incarnations of J.V. Peters & Co. Fortunately, all litigation must eventually end. This case is no exception.” 2000 WL 923761, \*7. Accordingly, the court affirmed the ALJ’s decision holding Shillman and the Partnership liable for the RCRA violations that occurred 20 years earlier.

**c. Association of Battery Recyclers, Inc v EPA, 208 F3d 1047 (CA DC, 2000).**

The United States Court of Appeals for the District of Columbia Circuit has decided that materials that are reused within an ongoing manufacturing process are not solid wastes, even if they are first stored or treated prior to recycling. According to the court, new EPA rules that consider materials destined for reuse as part of a continuous industrial process to be solid wastes are against Congress’s intent under RCRA.

The Association of Battery Recyclers, Inc. and several other trade organizations (the “Petitioners”) asked the court to cancel new RCRA hazardous waste rules restricting management of certain mineral processing wastes and hazardous soils promulgated by EPA in 1998. **Land Disposal Restrictions Phase IV**, 63 Fed Reg 28556 (final rule, May 26, 1998). These rules changed EPA’s definition of solid waste so that recycling certain mineral processing wastes would require compliance with hazardous waste rules. In addition, the rules impose treatment standards that must be used before certain metal bearing wastes may be disposed of in the ground.

EPA’s RCRA rules describe how to determine whether a material is a solid waste or a hazardous waste. A waste cannot be a hazardous waste unless it is a solid waste as well. A solid waste is considered hazardous waste if it possess one of four characteristics (ignitability, corrosivity, reactivity, or toxicity), or if EPA lists the waste as a hazardous waste. But to determine whether a material is a hazardous waste subject to the hazardous waste rules, one must first determine that the material is a solid waste.

Under the RCRA rules, the definition of solid waste begins by stating that a “solid waste” is any “discarded material” unless certain exclusion apply. 40 CFR 261.2(a)(1).

The rules then go on to describe what EPA means by “discarded.” Certain “recycled” materials are considered to be discarded, and, thus, to fall within the category of solid wastes. Among the recycled materials considered to be solid wastes are materials that are processed to recover a usable product.

For example, a manufacturer may generate an off-specification product or byproduct that requires additional processing before it can be turned into finished product. The manufacturer may first put the byproduct into storage for later processing (“reclaiming”). Then, after the off-specification byproduct is reclaimed, the manufacturer recycles it to the original manufacturing process. Thus, the manufacturer has first stored, then reclaimed and finally recycled the byproduct or off-specification product into a final product. The new rule would consider such byproducts “solid wastes,” and therefore, potential hazardous wastes.

The definition of “solid waste” includes recycled materials among those materials termed “discarded.” The RCRA rules also exclude certain materials from being defined as solid wastes. Prior to the rule change, the RCRA rules did not exclude certain reclaimed metal-bearing sludges, byproducts, and spent materials generated from manufacturing processes (“secondary materials”) from the definition of solid waste. The new rule provided that such secondary materials were excluded only if they are stored in certain acceptable ways.

When EPA finalized the new rule, the agency explained that no matter how briefly the materials are stored - even if placed on the ground momentarily before being recycled to a manufacturing process - EPA considers those materials, because they are not stored in accordance with the rule, to be solid waste, and hence, potential hazardous wastes. In the rule, certain sludges or byproducts from minerals processes that are destined for recycling and are stored on the ground or in tanks, containers, or buildings that do meet the design requirements, are defined as solid waste. 40 CFR 261.4(a)(17).

The Petitioners argued that, if a material is being returned to a manufacturing process, even if there is an intermediate processing step or intermediate storage, that material cannot be considered “discarded” and should not be considered a solid waste. The D.C. Circuit agreed. Referring to a prior decision by the same court, **American Mining Congress v EPA**, 824 F2d 1177 (CA DC, 1987) (“AMC I”), the Petitioners argued that Congress intended that “solid waste” be limited to discarded materials that are “disposed of,

abandoned, or thrown away” and not to materials recycled to an ongoing industrial process.

EPA replied that **AMC I** only applies to materials that are recycled immediately or continuously, because the **AMC I** court used the term “immediate reuse” in reference to materials that are not discarded. The court strongly disagreed, accusing EPA of thoroughly ignoring the court’s words in **AMC I**, in which the court required that “material must be thrown away or abandoned before EPA may consider it a ‘waste.’” The court continued:

[T]he **AMC I** court stressed, again and again, that it was interpreting “discarded” to mean what it ordinarily means. To say that when something is saved [for recycling] it is thrown away is an extraordinary distortion of the English language. 208 F3d at 1053.

In addition, the court found that the term “immediate” reuse did not mean reuse “at once,” but, rather, it meant “direct” reuse. Thus, in the court’s view, Congress clearly intended “to extend EPA’s authority only to materials that are truly discarded, disposed of, thrown away, or abandoned . . . . We are persuaded that by regulating in-process secondary materials, EPA has acted in contravention of Congress’ intent.” The court was adamant that secondary materials that are treated first before recycling “cannot be considered discarded if they are ‘reused within an ongoing industrial process.’”

The court concluded that, as in **AMC I**, EPA’s new rule had ignored Congress’ intent in RCRA because EPA based its regulations on an improper interpretation of “discarded.” Thus, materials slated for recycling in a manufacturing process, even if subjected to storage and intermediate processing steps, are not to be considered part of the national waste disposal problem that RCRA was intended to address. Such materials are not considered “discarded” unless managed in certain ways that clearly cast doubt on the intent to recycle them, such as by “speculative accumulation” without a clear intent to recycle the materials soon. Materials cannot be considered solid wastes or hazardous wastes if they are still part of the manufacturing process. Consequently, the D.C. Circuit “set aside” the EPA rule defining certain recycled materials to be solid wastes.

The Petitioners also complained that the new rule established unfair hazardous waste treatment standards for contaminated soil. Under RCRA rules, a hazardous waste

may not be disposed of in the ground unless it is first treated to reduce the waste’s hazardous nature. Normally, EPA rules specify which hazardous waste treatment methods must be used.

The new rule announced alternative treatment standards for contaminated soils. Instead of requiring the use of a specified treatment technology before disposing of contaminated soils in the ground, the new rule accepts treatment to remove 90% of the soil’s hazardous constituents. But the rule restricts the use of this alternative to treated soils that will be landfilled. It makes no provision for recycling the contaminated soils into products such as asphalt, brick, or cement, which may be placed on the ground in construction projects. The Petitioners complained that the rule was unfair because EPA’s proposal would have allowed such recycling.

The court replied that just because EPA originally proposed a rule that the Petitioners wanted does not mean that EPA must finalize the rule. In the proposed rule, EPA had considered allowing a recycling method that had previously been prohibited. The public commented extensively on the proposal. Whether or not to promulgate the rule was up to EPA, according to the court, as long as notice and an opportunity to comment was given to the public. Therefore, the court concluded, the alternative soil treatment standard was properly promulgated by EPA.

**d. American Petroleum Inst v EPA, 216 F3d 50 (CA DC, 2000).**

The United States Court of Appeals for the District of Columbia Circuit has held that the EPA is not allowed to consider wastewaters from petroleum refining to be “solid wastes” because EPA did not show that those wastes were truly “discarded.” The court’s decision combined challenges to several of EPA’s regulatory decisions about the status of several petroleum-related wastes, and found that in most instances, EPA’s decisions were allowed. Where a waste is in a closed loop process to remove valuable product and return the product to a manufacturing process, however, EPA must fully justify its decision that the waste is still considered “discarded,” and thus, a “solid waste.” In a series of rulemakings regarding certain petroleum and petrochemical wastes, EPA considered whether certain wastes from those industries were to be considered solid wastes or hazardous wastes under RCRA. The rules addressed refinery wastewaters, petrochemical recovered oil, certain petroleum refining catalysts, unleaded gasoline tank sediment and certain coke processing wastes. A trade association for the petroleum

industry challenged EPA's decision to classify certain materials as "solid waste" or as hazardous wastes. Environmental groups challenged EPA's decision not to classify certain other wastes as hazardous wastes, and a decision to defer a rule to classify wind-blown petroleum coke fines as hazardous waste.

Petitioners from the petroleum industry complained that petroleum refinery wastewaters are normally treated to recover oil before they are discharged, and should not be considered solid wastes until they leave the production process. The court analyzed EPA's use of the term "discarded" with respect to wastewaters. Under the RCRA regulations, a "solid waste" is a "discarded" material, subject to certain exclusions. If a "solid waste" has certain hazardous characteristics, it may then be considered a "hazardous waste," subject to stringent treatment, storage, and disposal rules.

The court had, in previous decisions, decided that "discarded" means to be "disposed of, abandoned, or thrown away." Moreover, this same court had earlier decided that EPA was not allowed to consider certain mineral processing wastes destined for return to the manufacturing process to be "discarded" for purposes of RCRA regulation. **Association of Battery Recyclers, Inc v EPA**, 208 F 3d 1047 (CA DC, 2000). Thus, the court examined why, in this case, EPA believed that wastewaters should be considered "discarded," even before they are processed to remove valuable oil that is then returned to the oil refining process.

Industry petitioners argued that EPA had not given any reason for its finding that the main purpose of wastewater "primary treatment" is to clean the wastewater prior to discharge rather than to recover valuable oil. The petroleum industry insisted that the main reason for primary treatment was to recover the oil.

Although EPA is usually given deference in its findings, these findings must not be "arbitrary and capricious." According to the court, "the record must reflect that EPA engaged in reasoned decisionmaking to decide which characterization is appropriate." The court observed that "the record is deficient in that regard." After noting that there are two purposes for wastewater treatment - recovering a useful product and cleaning wastewater to comply with water pollution control laws - EPA simply concluded, "clearly wastewater treatment is the main purpose" without further explanation. As the court noted, "a conclusion is not 'clear' or 'obvious' merely because one says so."

The court concluded that it was not at all clear why wastewater should be considered "discarded" merely because the decision to treat the wastewater was influenced by water pollution regulations. EPA, according to the court, had failed to explain why it concluded that the compliance motivation should be assumed to predominate over the reclamation motivation. According to the petroleum industry, refiners recover up to 1,000 barrels of oil per day from wastewaters. The court failed to see why EPA believed this amount of recovered oil was not significant.

Thus, the court found EPA's finding "arbitrary and capricious" and sent the rule back to EPA to determine whether the intent of treating wastewater by the petroleum processors was primarily for pollution control or reclamation. The petrochemical processing industry generates "petrochemical recovered oil" that can be recycled into the petroleum refining process. EPA's new rules exclude from hazardous waste regulation petrochemical recovered oil only if it is hazardous as a result of being ignitable or containing benzene. Other contaminants in petrochemical recovered oil could cause the material to be a hazardous waste. The industry group complained to the court that EPA should not be allowed to treat petrochemical recovered oil as hazardous waste because it is not "discarded" if it is being sent to a refinery for processing.

But the court acknowledged EPA's concern that, if petrochemical recovered oil contains extra materials that are both hazardous and are not beneficial to the refining process, then industry could improperly dispose of wastes by "adulteration." Adding hazardous materials that do not benefit oil to the oil refining process, according to EPA, is "sham recycling." The court agreed with EPA that the agency can regulate materials discarded through "sham recycling" and upheld EPA's limited exclusion of petrochemical recovered oil from RCRA regulation.

The industry group complained that EPA was unreasonable in listing as hazardous waste spent petroleum catalyst wastes that would pose a significant health risk to exposed individuals but pose a negligible risk to the general public. Industry argued that, because of the locations and natures of most disposal sites containing the spent petroleum catalyst wastes considered in these rulemakings, very few people would be exposed to the wastes.

EPA hazardous waste rules set forth criteria that the agency must use to determine whether a waste should be considered hazardous waste. These rules consider, among

other things, “the nature and severity of the human health and environmental damage that has occurred from mismanagement of the waste.” 40 CFR 261.11(a)(3)(ix). However, EPA has not established a rigid rule requiring a showing that *both* population health risks and individual health risks must be significant before a waste is considered hazardous.

Some of the wastes considered by EPA in the challenged rulemaking were found by EPA to pose “near zero” population risk, mainly because very few individuals would likely be exposed to the wastes. Individuals exposed to the wastes could still be harmed, however. Industry challengers contended that EPA should be required to weigh the low population risk against individual health risks to decide whether the hazard from the petroleum catalyst wastes is substantial enough to justify a hazardous waste designation.

But the court disagreed, and decided that although EPA considers population risk to be “one of many factors to be considered,” EPA need not rely primarily on population risk. Thus, EPA was allowed to list materials as hazardous wastes “based primarily on the concern over risks to those individuals who are significantly exposed, even if there are relatively few of them.”

Several environmental groups challenged EPA’s decision not to list certain petroleum wastes as hazardous wastes. In particular, the groups complained that waste sediment from the bottoms of unleaded gasoline tanks should have been listed as hazardous waste. In addition, the groups wanted certain materials used to produce petroleum coke as well as coke product and coke fines, when they are released into the environment, to be listed as hazardous wastes. EPA had declined to list unleaded gasoline tank sediment as hazardous waste and decided to “defer” listing coke waste as hazardous waste.

Before the court would consider the environmentalists’ appeal, the court was required to determine whether the groups had standing to sue EPA. The court considered the environmental groups’ arguments that their members had been harmed by EPA’s rules. Several members of the environmental groups claimed to have been harmed by the types of wastes that EPA had declined to regulate. Among the petitioners claiming to be harmed by unleaded gasoline tank sediment:

- One member claimed that she lived near a landfill that had received petroleum wastes; however,

although she could show that many kinds of petroleum wastes are routinely shipped to landfills like the one near her home, she failed to show that the specific type of waste complained of, unleaded gasoline tank sediment, had been shipped to the landfill near her, or that such shipments had harmed her.

- A second member claimed to live near a contaminated landfill that had also received various petroleum wastes, and that the contamination caused him to stop canoeing in nearby waters because of his concerns about the pollution; however, although the nearby waters were contaminated by petroleum-derived chemicals, the canoeing enthusiast failed to show that the pollution was caused by unleaded gasoline tank sediment or that the landfill had actually received the waste.
- A third petitioner claimed that he owned land in two Texas counties where landfills accept industrial wastes. He complained that his property values would go down if these landfills continue to accept unleaded gasoline tank sediments; however, this petitioner failed to show that any unleaded gasoline tank sediment had ever harmed him or his property.

Other petitioners claimed to be harmed by coke fines blowing from coke storage sites near where they live. EPA had declared that certain ingredients in coke would not be considered hazardous wastes. The petitioners complained that they regularly witnessed finely powdered coke blowing from these sites and were concerned about being harmed by the dusty powder. These petitioners, however, did not know whether the allegedly harmful coke ingredients were used to produce the coke fines that the petitioners observed. The court observed that, at most, the petitioners were concerned that the use of the exempt ingredients could potentially be “unhealthy and environmentally unsound,” but could not show that the petitioners were likely to be harmed by the facilities that they complained about.

Finally, the court addressed the environmentalists’ complaint that EPA had decided to defer a decision to list coke product and fines released into the environment as hazardous waste. The court noted that only three types of lawsuits against EPA are allowed under RCRA: (1) lawsuits against final rules; (2) lawsuits against repeal of final rules; and (3) lawsuits against denials of petitions to issue, amend or repeal rules or requirements. RCRA has no provision for

lawsuits challenging a decision by EPA to defer, or essentially delay, issuing a new rule. Therefore, the environmentalists had no right to challenge EPA's decision to delay issuing a rule declaring coke fines to be hazardous waste.

In conclusion, the court ordered EPA to reexamine its rule labeling petroleum refining wastewaters as "solid waste," but found EPA's decision to limit the hazardous waste exclusion for petrochemical recovered oil lawful. EPA's approach in basing a decision to list certain refinery wastes as hazardous waste despite negligible risk posed by the wastes to the general population is allowed when an individual exposed to the waste would suffer significant health risk. The environmental petitioners' complaints that EPA should have listed certain petroleum derived wastes as hazardous wastes could not be heard by the court because the petitioners had not shown that they suffered any harm as a result of EPA's decisions. Finally, EPA cannot be sued under RCRA for delaying a decision to list materials as hazardous wastes.

**e. United States v Hines, No. 98-7097 (CA 10, Apr 5, 2000).**

The United States Court of Appeals for the Tenth Circuit has found that two individuals were properly convicted of violations of RCRA, as the government proved that both individuals "knowingly" committed the environmental violations. Carl Eugene Hines owned H&J Auto ("H&J") in Marshall County, Oklahoma. The Marshall County emergency manager director noticed numerous fifty-five gallon drums outside of H&J, and told Hines that the drums were a "danger" and that Hines "should get rid of them properly." A complaint about the barrels was later filed with the Oklahoma Department of Environmental Quality ("ODEQ"), stating that the barrels were leaking and that the owner would not remove them.

ODEQ investigator Kelly Davis ("Davis") visited H&J on February 4, 1997, and upon inspection found 34 barrels behind the building. Davis found the barrels to be old and rusty, and some were leaking or bulging, an indication that they contained hazardous waste. Some of the barrels were labeled "methylethyl ketone", and some emitted a strong odor similar to paint-thinner. At this time Hines told Davis that another business, Bullard Oil, was responsible for leaving the barrels, and that he had no idea how or why they were placed in H&J's yard. Davis warned Hines to stay away from the barrels pending further investigation. Upon further investigation, ODEQ determined that Bullard Oil had not placed the barrels at H&J, and notified Hines that he was responsible for the clean up of the barrels. Another ODEQ

inspector later returned to H&J to test the barrels but found them missing. Hines claimed that Bullard Oil had removed them.

Shortly after the ODEQ's first visit to H&J, Hines instructed his friend, Daniel Martin, and two other acquaintances, Victor Lucas and Billy Jack Orange, to remove the barrels from H&J's yard. Hines assisted them with loading the barrels onto a trailer and told them to try taking the barrels to the house of another acquaintance, Ronnie Hickman and, if he would not accept them, they were to take them to Martin's home and place them in his carport. Hickman took only a few of the barrels, so the rest of them were taken to Martin's carport. Martin later paid a neighbor \$80 to haul some of the barrels from his carport and dump them in a vacant lot. Hines instructed all involved parties to say nothing about moving the barrels.

When the ODEQ learned that the barrels had disappeared from H&J's yard, the EPA and the Federal Bureau of Investigation ("FBI") were brought in to investigate. The barrels in Martin's carport were eventually discovered, as well as the dumped barrels in the vacant lot. The barrels were tested and found to contain hazardous waste as defined under RCRA.

Besides being involved in the disposal of the barrels of waste, Hines was also the leader of a large methamphetamine ring. All of the individuals involved in moving the barrels were also involved in the drug ring with Hines. The local county Sheriff, Decco Baxter, himself a methamphetamine addict, agreed to protect Hines from the ODEQ, EPA and FBI investigation in exchange for methamphetamine and money. As a result, Hines, Martin and Sheriff Baxter invented a false story to divert suspicion away from Hines. The FBI did not believe the fabricated story to be plausible, and eventually Baxter was arrested and confessed to the false story. Hines, Martin and Orange were also charged. Baxter and Orange pled guilty and testified against Hines and Martin at trial.

Hines was convicted of several violations under RCRA, including illegally transporting hazardous waste, and sentenced to 420 months in prison. Martin was also convicted of RCRA violations and sentenced to 240 months in prison. They both appealed.

Upon appeal, both Hines and Martin challenged their RCRA convictions on the grounds that the government failed to prove that they "knowingly" committed the environmental

violations. Section 6928(d)(1) of RCRA prohibits “knowingly transport[ing] or caus[ing] to be transported any hazardous waste. . . to a facility which does not have a permit.” Hines contended that the government failed to prove that he knew the barrels stored in H&J’s yard contained hazardous waste, and that Martin lacked the required permit to store hazardous waste in his carport and vacant lot. Martin also argued that the government failed to prove that he was aware the barrels contained hazardous waste.

Upon review, the court found that Section 6928(d) of RCRA does not require proof that a person knew that materials at issue were in fact identified or listed as a hazardous material under RCRA; but only requires proof that a person knew that the material was hazardous in the sense of being harmful to people or the environment. In this case, the court found that there was sufficient evidence for a jury to conclude that both Hines and Martin knew the barrels contained materials which could be harmful to people or the environment. The barrels gave off noxious fumes and showed characteristics of hazardous materials, such as leaking and bulging, and some even displayed hazardous material labels. Hines had also been warned by the ODEQ to stay away from the barrels, as they could be dangerous. Hines had ordered his associates to dispose of the barrels secretly, after regular business hours, and had ordered them to tell no one what they were doing. He also lied to the ODEQ, saying that Bullard Oil had removed the barrels. The court considered this behavior “unusual, clandestine, and deceptive”, and concluded that a rational juror would infer that the barrels had not been transported under proper and legal conditions. Based on these findings, the court concluded that Hines and Martin were properly convicted, and affirmed the district court’s decision.

## 5. Emergency Planning and Community Right-to-Know Act

### a. *Steeltech, Ltd v EPA*, 105 F Supp 2d 760 (WD Mich, 2000).

The United States District Court for the Western District of Michigan has held that the EPA properly assessed a civil penalty against a castings manufacturer for failure to timely report toxic chemical releases under the Emergency Planning and Community Right-to-Know Act (“EPCRA”), 42 USC 11001 *et seq.*

Steeltech, Limited (“Steeltech”) is a castings manufacturer in Grand Rapids, Michigan. From 1989 through 1993, Steeltech manufactured and processed iron, nickel, chrome

and cobalt alloy castings. Nickel, chromium and cobalt are classified as toxic chemicals under Section 313 of EPCRA. Reporting of these toxic chemicals is required under EPCRA if the amount manufactured exceeds the threshold report limit specified by statute, which for the calendar years after July 1, 1989, was 25,000 pounds per year. Reporting is required on a yearly basis on or before July 1 of each year.

During 1989, Steeltech processed 351,625 pounds of nickel and 256,238 pounds of chromium. Steeltech did not report the processing of these chemicals until February 1992 when it submitted a report known as a Form R. During 1990, Steeltech processed 285,890 pounds of nickel and 208,335 pounds of chromium. Steeltech did not report the processing of these chemicals until the February 1992 Form R was submitted. During 1992, Steeltech processed 283,901 pounds of nickel and 189,268 pounds of chromium. These chemicals were not reported until November 1994 when it again filed a Form R. During 1993, Steeltech processed 347,933 pounds of nickel, 231,955 pounds of chromium and 162,369 pounds of cobalt. These chemicals were not reported until the November 1994 Form R was submitted.

On September 2, 1994, EPA filed an Administrative Complaint against Steeltech, alleging violations of Section 313 of EPCRA by failing to timely report the processing of toxic chemicals for the years of 1988 through 1990. EPA requested civil penalties for the violations. On March 14, 1995, EPA amended its Administrative Complaint, seeking additional penalties for reporting violations during the years of 1992 and 1993.

On September 23, 1997, a hearing was held before an Administrative Law Judge (“ALJ”) in Grand Rapids, Michigan. At the hearing, EPA withdrew its allegations as to the 1988 violations. Steeltech presented the testimony of Michael Farmer (“Farmer”), who was president of Steeltech from 1986 to 1990; Gary Salerno (“Salerno”), who was the majority shareholder and president of Steeltech starting in 1990; and James Pews, who was chief financial officer of Steeltech. Farmer and Salerno claimed that ignorance and a lack of knowledge of the regulatory requirements were the cause of Steeltech’s failure to report. Pews testified that Steeltech lacked notice because the company had been erroneously left off of the EPA’s mailing list for EPCRA forms. Pews claims that he learned of Steeltech’s failure to report in 1992 and 1993 when he received a phone call from Bob Allen of the EPA in October of 1994. Pews filed the proper forms in November of 1994.

Based on the evidence of record, Steeltech was fined \$61,736 by the ALJ under EPA's Environmental Response Policy ("ERP"). The ERP provides a system for assessing civil penalties based on the seriousness of the violations, and then allows adjustments to the penalties based on several factors. Steeltech's subsequent motion for rehearing on the penalty was denied. Steeltech then appealed the decision to the EPA's Environmental Appeals Board ("EAB"). The EAB issued a Final Decision affirming the penalty against Steeltech on August 26, 1999. Steeltech then appealed the Final Decision by filing its Notice of Appeal in district court.

Steeltech's first argument was that the EPA improperly treated the ERP as a rule of law. Contrary to a law, the ERP is a policy statement. The court agreed with Steeltech that the ERP is not binding. The district court stated that if the EPA's decision in assessing Steeltech a penalty was based on its belief that the ERP was binding, the case would have to be sent back to EPA for further proceedings. However, the district court found that both the decision of the ALJ and the decision of the Appeals Board clearly recognized that the ERP simply provides guidance for assessing penalties, and that departure from the ERP is appropriate in certain circumstances.

Steeltech next argued that the decision to apply the ERP was not supported by evidence, and was arbitrary and capricious. Steeltech believed that the EPA acted arbitrarily in failing to consider several mitigating factors that Steeltech believed should have been taken into account in EPA's penalty decision. Some of these factors were: (1) the fact that Steeltech's failure to report was unintentional; (2) Steeltech was under severe financial pressures (possible bankruptcy); and (3) EPA contributed to Steeltech's non-filing by not mailing them the proper forms or notices.

Contrary to Steeltech's argument, the district court found that both the ALJ and the EAB took all of these factors into consideration, and rejected them for legitimate reasons as stated in their decisions. The district court held that the EPA's decision not to reduce the penalty for Steeltech's unintentional violations was reasonable, as such a policy might encourage a lack of diligence on the part of regulated facilities under the ERP. Furthermore, the district court found that the EPA's decision not to reduce the penalty due to Steeltech's financial pressures was reasonable, given that reporting is a minimal, relatively inexpensive and important regulatory requirement. Finally, the district court found that EPA's decision not to further reduce Steeltech's penalty due to its failure to send the required forms was also reasonable,

as EPA had taken other steps, such as inspections and notices, which should have had the effect of notifying Steeltech of its reporting responsibilities.

Steeltech also argued that EPA misapplied the ERP in not giving Steeltech a 30% attitude reduction and a 25% voluntary disclosure reduction on its penalties. The district court found that Steeltech's request for both attitude and voluntary disclosure reductions was contrary to EPA's policy of treating those reductions as "mutually exclusive," and did not believe that the circumstances of Steeltech's case warranted a double reduction in penalties, as the EPA has discretion in setting the penalties under the ERP and determining the facility's level of cooperation and compliance. Therefore, the district court found that the EPA's decision was not arbitrary and capricious, and issued a judgment affirming the decision of the EAB.

## 6. Safe Drinking Water Act

### a. *United States v Jolly*, No. 99-5700, 51 ERC 2083 (CA 6, Nov 20, 2000).

The United States Court of Appeals for the Sixth Circuit has affirmed a district court's decision approving fines and injunctive relief against an oil company owner who violated a unilateral administrative order and failed to respond to the government's request for information under the Safe Drinking Water Act ("SDWA"), 42 USC 300f *et seq.*

JAF Oil Company, Inc. ("JAF") was founded by Peter E. Jolly ("Jolly") and others in California in 1977. JAF owned and operated eighty-nine injection wells on oil and mineral leases in Hancock County, Kentucky. These injection wells inject fluid underground under high pressure in order to force oil up through regular production wells. JAF's injection wells are regulated by the EPA and its Underground Injection Control ("UIC") Program, as prescribed by the SDWA.

By the mid-1980's, Jolly had become JAF's sole shareholder, officer, director and employee. The EPA notified JAF in 1985 that its injection wells were regulated under the SDWA and its UIC program, and that the wells were not being maintained as required by those regulations. Although JAF received protection under Chapter 11 of the Bankruptcy Code in 1988, JAF continued to operate the injection wells.

In July 1991, the EPA attempted to negotiate an Administrative Order of Consent with JAF to resolve its continuing SDWA violations, but was not successful. The EPA then notified JAF that it intended to issue a unilateral

Administrative Order (“AO”) to resolve the violations. As required by law, the EPA published a public notice of the AO and provided individual notices of the proposed AO to inform JAF of its violations. EPA also notified JAF of its right to request a hearing and submit written comments with thirty days.

JAF ignored EPA’s notice regarding the proposed AO and did not request a hearing. The final AO, issued in January 1992, informed JAF that the AO would become effective in thirty days if JAF did not appeal to the federal district court. The final AO required JAF and its successors to comply with provisions intended to bring JAF’s wells into compliance. The AO did not assess any civil penalties, and simply warned that failure to comply could subject JAF to penalties in a future action. After thirty days had passed with no appeal from JAF, the final AO became effective.

After the final AO went into effect, Jolly continued to operate the eighty-nine injection wells under the name of a new Nevada corporation, Strategic Investments, Inc. (“SI”). In September 1995, the United States sued JAF, SI and Jolly to enforce the final AO. The lawsuit sought an injunction and civil penalties against JAF, Jolly and SI for violating the UIC requirements. The United States claimed that: (1) JAF violated the AO by failing to meet deadlines for compliance with the AO; (2) Jolly was individually liable for violations committed by JAF and SI; and (3) JAF, SI and Jolly were all liable for failing to comply with various regulatory requirements. An additional claim was later added alleging that SI failed to answer a request for information from the EPA.

The government then filed a motion in district court for partial summary judgment that JAF, SI and Jolly were liable for all of the government’s claims. In March 1998 the district court granted the government’s motion for partial summary judgment, and held both JAF and SI liable for all violations of the AO and any underlying regulations alleged in the complaint. In addition, the district court found that, under Kentucky law, Jolly was individually liable for the violations by JAF and SI.

In December 1998, the government asked the district court to order JAF and SI to comply with the AO and pay civil penalties. The district court issued the order in April 1999 requiring SI to immediately terminate all injection well activities, unless authorized to continue by the EPA. The court also imposed a civil penalty of \$500,000 each for JAF, SI and Jolly individually. Jolly appealed.

On appeal, Jolly raised the following issues: (1) whether the EPA denied Jolly due process of law when it unilaterally issued the AO; (2) whether the government showed that there was an “underground source of drinking water” beneath Jolly’s wells; and (3) whether the court’s injunction and civil penalties were an “abuse of discretion.”

The Sixth Circuit first considered Jolly’s third claim - whether the court’s injunction and civil penalties were an “abuse of discretion.” Section 300h-2(6) of the SDWA allows persons to appeal administrative orders to a federal district court. Section 300h-2(6) states:

Any person against whom an order is issued or who commented on a proposed order pursuant to paragraph (3) may file an appeal of such order with the United States District Court for the District of Columbia or the district in which the violation is alleged to have occurred. Such an appeal may only be filed within the 30-day period beginning on the date the order is issued. Appellant shall simultaneously send a copy of the appeal by certified mail to the Administrator and to the Attorney General . . . Notwithstanding section 300j-7(a)(2) of this title, any order issued under paragraph (3) shall be subject to judicial review exclusively under this paragraph.

Thus, Jolly’s only recourse against the final AO was an appeal to the local federal district court within thirty days after the final AO was issued.

But because Jolly failed to appeal the final AO in federal district court within thirty days, he could not challenge the validity of the AO in the Sixth Circuit. Instead, the Sixth Circuit was only authorized to consider whether or not Jolly complied with the AO. The Sixth Circuit did not even consider Jolly’s argument that the EPA’s failure to hold an evidentiary hearing denied him due process. Accordingly, the Sixth Circuit affirmed the district court’s grant of partial summary judgment.

Jolly next argued that the government’s request for over \$1,500,000 in civil penalties was unwarranted because he had suffered financial hardship and health problems. In addition, he claimed that the injunction was improper because he did not violate the UIC regulations requiring him to respond to requests for information. But the government replied that the district court’s injunction and civil penalties were not an abuse of discretion in light of Jolly’s “history of uncooperative and deceptive behavior and continuous

noncompliance.” Also, the Sixth Circuit observed that Jolly offered no evidence of financial hardship in the district court, and only first mentioned his financial problems on appeal.

Under the SDWA, the court may enter judgment “as protection of public health may require.” It also provides for both civil and criminal penalties as follows:

Any person who violates any requirement of an applicable underground injection control program or an order requiring compliance . . . (1) shall be subject to a civil penalty of not more than \$25,000 for each day of such violation, and (2) if such violation is willful, such person may . . . be imprisoned for not more than 3 years, or fined in accordance with Title 18, or both.

The SDWA also provides that a violation of a request for information by a well operator may result in the immediate termination of the right to operate the wells.

Jolly argued that he did not violate the information request because he never received it. Accordingly, Jolly believed that he should not have been directed to stop the operation of the wells. But the Sixth Circuit found that there was sufficient evidence demonstrating that Jolly had received the request for information and just failed to reply. The letter requesting the information had been faxed to Jolly’s known fax number, and a fax delivery confirmation had been received. Therefore, the Sixth Circuit held that the injunction should be affirmed.

Lastly, Jolly disputed the monetary penalties assessed by the district court for \$500,000 against each defendant (Jolly, JAF, and SI). In deciding on the penalties, the district court considered the maximum penalty of \$25,000 per day for each violation over a seven-year period as authorized by the SDWA. The district court then considered several factors used by the EPA when calculating an appropriate penalty for violations assessed in an AO, which included the seriousness of the violations, any prior history of such violations, the economic impact the penalty would have on the violator, and other factors.

Because the district court considered all of the applicable penalty factors, including Jolly’s ability to pay, the Sixth Circuit affirmed the lower court’s penalty decision. In particular, the district court noted Jolly’s history of noncompliance, his refusal to accept service of notices and pleadings, and the seriousness of his offenses. Based on the

evidence of Jolly’s bad conduct, the Sixth Circuit found that the civil monetary penalty was not an abuse discretion by the district court, and affirmed the lower court’s grant of injunctive relief and imposition of civil penalties.

## 7. Miscellaneous

### a. Vermont Agency of Natural Resources v United States ex rel Stevens, 529 US 765 (2000).

The United States Supreme Court has decided that neither the United States nor an individual on behalf of the United States may sue a state agency for falsely obtaining federal grant money. Jonathan Stevens, a former employee of the Vermont Agency of Natural Resources (“VANR”) sued the agency for falsely claiming reimbursement from the EPA under several grant programs. Stevens sued the VANR under the False Claims Act (“FCA”), which allows individuals to sue on the federal government’s behalf. Under the FCA, a person who successfully sues on the government’s behalf is allowed to receive a “bounty” of up to 30% of the damages collected plus legal fees collected from a false claimant.

Stevens’ suit was of a type termed a *qui tam* action. The expression *qui tam* is short for a Latin expression meaning “who sues on behalf of the King as well as for himself.” The VANR asked the district court to dismiss the suit, contending that the state is not a “person” for purposes of the FCA. The FCA can be invoked against any “person” who “knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim.” Moreover, argued the state, the Eleventh Amendment to the United States Constitution accords states “sovereign immunity” and prohibits suits by individuals against a state unless that state consents to be sued.

The district court disagreed with VANR, and the agency appealed to the Second Circuit. In the appeal, the United States government entered the case in support of Stevens. The Second Circuit agreed with Stevens, and affirmed the district court’s refusal to dismiss the case. The state then appealed to the United States Supreme Court. The Supreme Court first addressed the threshold issue of whether Stevens had “standing” to sue in federal court. It was clear to the Supreme Court that if Stevens had actually been injured by the VANR, any penalty paid by the state would be linked with the state’s alleged fraud. Thus, the damages would remedy Stevens’ injury. But it was not at all clear to the Court whether Stevens had actually suffered an injury for which he would be allowed under the Constitution to sue in a federal court. The Court thus examined the history the FCA and of *qui tam* lawsuits.

The Court first considered whether Stevens had acted only on the United States' behalf. If so, Stevens was akin to an agent - the bounty would simply be a fee that Stevens stood to receive for successfully suing the state on the United States' behalf. If Stevens was not considered an agent, he would have been acting on his own behalf. The Court concluded that the lawsuit was for Stevens' benefit for the following reasons.

The FCA states that a person may sue for a violation of the FCA "for the person and for the United States Government." 31 USC 1370(b). In a *qui tam* suit, the person suing for the government is called the "relator." The statute further allows a person to remain a part of the suit even if the United States takes over the prosecution. Moreover, before the United States can settle the case, the relator is entitled to a hearing to ensure that the settlement is fair. Thus, a relator has an interest in the suit beyond simply seeing that the government is not defrauded.

Because Stevens had a personal interest in the lawsuit, and a judgment in Stevens favor would punish the state of Vermont for filing false claims, the Court found that Stevens had standing to sue. Stevens' position was similar to that of a person who has been assigned the rights to a legal claim. Thus, it was as if the federal government had assigned its claim under the FCA to Stevens, and Stevens held an ownership interest in the government's claim for damages. The Court referred this type of standing as "representational standing."

The Court then considered the issue of whether the FCA was intended to make a state subject to lawsuits for filing false claims. The Court began with the "long standing presumption that 'person' does not include the sovereign." The general rule is that this presumption will not be disregarded unless the statute clearly shows that Congress intended otherwise. The *qui tam* provision of the FCA does not contain a definition of "person" upon which the Court could rely. The history of the FCA revealed that the United States originally enacted the statute to protect the country from fraud by private contractors during the Civil War. The court found it unlikely that Congress, during the Civil War, considered states to fall into the category of defense contractors.

The Court observed that the original FCA subjected violators to criminal imprisonment, a penalty that could not possibly have applied to states. The current version of the FCA still retains penalties that are considered punitive. For example, violators can be required to pay treble damages.

The Court found no reason to ignore a long-standing presumption that punitive damages do not apply to governmental entities. The Court noted that, in comparison with the FCA provision authorizing actions for damages, another section of the FCA explicitly defines "persons" to include states for purposes of requiring those persons to cooperate in investigations of FCA violations.

Finally, the Court compared the FCA with another statute, the "Program Fraud Civil Remedies Act of 1986" ("PFCRA"), which provides for administrative actions with smaller potential damages against persons filing false claims. The PFCRA contains a definition of "person" that includes individuals, partnerships, corporations, associations, and private organizations, but not governmental entities. The Court found it unreasonable to conclude that the PFCRA provided for small civil damages against non-governmental entities while the FCA provided punitive damages against states.

Therefore, although Stevens was accorded "representational standing" because he had a financial interest in the damages caused by Vermont's alleged false claim, Stevens could not maintain his lawsuit against VANR because the FCA does not consider states to be "persons" that are potentially liable for damages. Because the Court was able to dismiss the case based on the "person" issue, it elected not to consider the Eleventh Amendment sovereign immunity issue.

**b. United States v Kelly, 238 F3d 425 (Table), 2000 WL 1909397 (CA 6, 2000).**

The United States Court of Appeals for the Sixth Circuit has reversed a criminal sentence handed down by a Tennessee district court because the sentence was too lenient under the federal Sentencing Guidelines. Robert E. Kelly was convicted of applying and selling a restricted-use pesticide in violation of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 USC 136 *et seq.* The district court sentenced Kelly to twenty months' imprisonment although the U.S. Sentencing Guidelines Manual recommended that he receive forty-one to fifty-one months.

Kelly operated a small pest-control business located in Memphis, Tennessee. As part of his Business, Kelly routinely applied a pesticide known as methyl parathion to his customers' homes, and also sold that pesticide to his customers for their own use. Methyl parathion is highly toxic chemical, which can cause nausea, vomiting, cramps, headaches, muscle spasms, and coma. It has been classified as a "restricted-use

pesticide” under FIFRA regulations and, accordingly, can only be purchased by qualified persons and used in uninhabited open fields for agricultural purposes. When Kelly first learned the pest-control trade, apprenticing at the age of ten with his father, FIFRA did not exist and the purchase and use of methyl parathion was essentially unregulated. Since the enactment of FIFRA, Kelly had obtained the necessary permit to purchase methyl parathion, but continued to apply the pesticide using the methods that he had learned as a boy.

Kelly was charged and ultimately convicted of twenty counts of misdemeanor violations of FIFRA. FIFRA makes it unlawful for anyone “to distribute, sell, or to make available for use, or to use, any registered pesticide classified for restricted use,” except in accordance with its intended purpose. A “knowing” violation of FIFRA is a criminal offense. Although the Sentencing Guidelines recommended that Kelly should serve between forty-one and fifty-one months in prison, the district court reduced Kelly’s sentence because the court found that he did not fully appreciate the harm caused by methyl parathion and that the misdemeanor nature of his crime did not warrant the recommended sentence. The Government appealed the district court’s downward departure from the Sentencing Guidelines and the Sixth Circuit reversed the decision.

First, the Sixth Circuit found that the misdemeanor nature of Kelly’s crimes did not warrant the district court’s deviation from the Sentencing Guidelines. The Sixth Circuit noted that the Sentencing Commission took this factor into consideration when drafting the Sentencing Guidelines. The Sentencing Guidelines “specifically contemplate the possibility of multiple misdemeanor convictions” and provide that the sentence imposed on each conviction should “run consecutively,” the Sixth Circuit found. Accordingly, the Sixth Circuit held that the district court abused its discretion in reducing Kelly’s sentence based on this factor.

Second, the Sixth Circuit found that Kelly’s lack of knowledge of the danger associated with methyl parathion also did not warrant any downward departure from the Sentencing Guidelines’ recommended sentence. The Sixth Circuit noted that, in order to be subject to criminal penalties under FIFRA, the person must commit a “knowing” violation of that statute. The Sixth Circuit held, however, that Kelly had committed such a “knowing” violation because he intentionally sprayed the pesticide, even though he may not have known that such spraying was against the law. Further, the Sixth Circuit held that FIFRA does not require that a person know the dangers associated with improper pesticide

application. Rather, FIFRA “requires only a knowing violation, not knowing endangerment.” Thus, the Sixth Circuit held that, because the statute and the Sentencing Guidelines contemplate Kelly’s lack of knowledge of serious harm, that factor was not an appropriate basis for the district court’s downward departure. Therefore, the Sixth Circuit reversed the district court and sent the case back for resentencing in accordance with the Sentencing Guidelines.

**c. *Huish Detergents, Inc v Warren County Kentucky*, 214 F3d 707 (CA 6, 2000).**

The United States Court of Appeals for the Sixth Circuit has held that a franchise agreement and ordinance providing for the exclusive right to collect and process solid waste violated the Commerce Clause of the United States Constitution because the agreement/ordinance required the use of a single in-state transfer facility and disposal at in-state landfills.

Warren County, Kentucky (the “County”) awarded a franchise agreement to Monarch Environmental, Inc. (“Monarch”) that granted it the exclusive right to collect and process municipal solid waste generated within Bowling Green, Kentucky (the “City”). The agreement (1) required Monarch to process all solid waste at the City’s solid waste transfer facility; (2) required that Monarch dispose of all solid waste at a landfill “approved and permitted by the State of Kentucky,” effectively prohibiting the use of out-of-state landfills; (3) required waste generators to employ Monarch as their sole solid waste hauler; and (4) prohibited waste generators from transporting their own waste or from hiring any other company to provide waste disposal services. The County also simultaneously adopted an ordinance that incorporated the terms of the franchise agreement, thus “transform[ing] the franchise agreement provisions into law.”

Huish Detergents, Inc. (“Huish”) operates a laundry detergent manufacturing facility in Bowling Green that generates “considerable solid waste” that was subject to the County’s ordinance and franchise agreement. Huish challenged the ordinance and agreement in federal court, arguing that they violate the “dormant Commerce Clause” of the United States Constitution. Huish argued that the following three aspects of the ordinance/franchise scheme violated the Commerce Clause: “(1) the designation of a single in-state processing station for municipal waste; (2) the prohibition on out-of-state waste disposal; and (3) the award of an ‘exclusive franchise’ to Monarch for waste collection and processing.” The district court dismissed Huish’s suit, holding that, because the County acted as a “market

participant” when it “purchased” waste removal and processing services from Monarch, the County’s activities were not subject to the constitutional limitations on the regulation of interstate commerce. The Sixth Circuit, however, reversed the district court, holding that “the County has used its regulatory power—not its proprietary purchasing power—to retain Monarch’s services” and, therefore, was not acting as a market participant.

The Commerce Clause grants Congress the power to regulate commerce among the states. Although the Commerce Clause is an affirmative grant of power to Congress and does not expressly govern the activities of states or local governments, federal courts have interpreted this constitutional provision to “prohibit[ ] States from ‘advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.’” This aspect of the Commerce Clause is often referred to as the “dormant Commerce Clause.” A state law or local ordinance that discriminates against interstate commerce by treating in-state and out-of-state interests differently is invalid under the “dormant Commerce Clause” unless the state or local government can show that “there is no other means to advance a legitimate local interest.” Courts have held that both solid waste, and the service of collecting, processing and disposing of solid waste, are articles of commerce subject to the Commerce Clause’s limitations.

The Commerce Clause is not implicated, however, when the state or local government acts as a “market participant,” rather than a market regulator. Courts have held that “there is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.” Thus, the Commerce Clause does not apply “in cases where the State was spending ‘its own funds,’ or selling a resource that it owned or produced.”

The County argued that it acted as a market participant when it entered into the franchise agreement with Monarch for solid waste services. The Sixth Circuit disagreed, stating that the “market participation exception does not come into play simply because a municipality labels its action as an ‘agreement.’ Rather, we must determine whether the municipality was acting in a proprietary capacity as a purchaser or seller with regard to the challenged action.” The court held that the County was neither purchasing nor selling disposal services and, therefore, was not acting in a proprietary capacity. “By effectively forcing all city residents to purchase the processing services directly from Monarch,” the court held, “the County’s action far exceeded that which a private

entity could accomplish on the free market.” Thus, the court held that the market participation exception “did not shield the County’s action from scrutiny under the Commerce Clause.” 214 F3d at 715-716. The court then examined each of Huish’s challenges to the County’s ordinance/agreement scheme.

First, the court held that the requirement under the ordinance and agreement that Monarch deliver all solid waste to the City’s transfer station—and nowhere else—discriminated against interstate commerce by benefitting a local interest at the expense of out-of-state transfer facilities. Accordingly, the court held that the ordinance and agreement constituted a violation of the Commerce Clause, which placed the burden on the County to demonstrate that there was no other means to advance its goals. The County argued that the exclusive use of the City’s transfer station was necessary in order “to assure the ‘safe and efficient’ collection and disposal of solid waste.” The court, however, rejected this argument, stating that the “County’s conclusory justification for its actions” did not satisfy the County’s burden of proof under the Commerce Clause and, in any case, the County offered “no explanation why these goals cannot be satisfied out-of-state.” Therefore, the court held that the required use of the City’s transfer station under the ordinance and agreement violated the Commerce Clause.

Second, the Sixth Circuit held that the requirement under the ordinance and agreement that solid waste be disposed of solely in Kentucky landfills also violated the Commerce Clause. The court held that “this prohibition facially discriminates against out-of-state disposal services which, again, constitutes a per se violation” of the Commerce Clause. The court further noted that, even if the County’s agreement with Monarch constituted market participation, “the market participation exception would not insulate the County’s regulation of the separate waste disposal market, which is downstream from the collection and processing.”

Third, the Sixth Circuit declined to rule on Huish’s argument that the County’s award of an exclusive franchise to Monarch also violated the Commerce Clause because that issue had not been addressed by the district court. A concurring opinion by one of the three judges on the court, however, stated that he would have invalidated the franchise agreement as well. The concurring opinion states:

Given the way in which vertical integration of the waste disposal services are provided by Monarch pursuant to its arrangement with the County for

waste collection, hauling, processing and disposal, and given the comprehensiveness of the contractual arrangement between the County and Monarch, I would hold that the County violated the Commerce Clause by designating Monarch as the exclusive waste hauler and processor for municipal waste notwithstanding the district court's inappropriate failure to address the issue. 214 F3d at 717-718.

Because the Sixth Circuit found that the County had violated the Commerce Clause with respect to at least two of Huish's three claims, the court reversed the district court's dismissal of Huish's suit and remanded the matter to the district court for further proceedings.

**d. Richardson v Township of Brady, 218 F3d 508 (CA 6, 2000).**

The United States Court of Appeal for the Sixth Circuit has held that a township zoning ordinance that controls odors by limiting the number of animals on agricultural land based on the relative odors of different animals does not violate the United States Constitution. In 1987, the Township of Brady, Michigan adopted a zoning ordinance amendment to control odors from farms in the township. The ordinance limits the number of farm animals on property zoned for agricultural use based on "relative differences in the odor-producing characteristics of animal wastes" of various farm animals.

According to the ordinance, odors from cattle, horses, and swine are twice as offensive as odors from sheep and goats, and ten times as offensive as odors from poultry. Thus, under the ordinance, a farm would be allowed to raise twice as many sheep as pigs. The ordinance assigns "animal unit" values to different farm animals. For example, swine, horses, and cattle have an "animal unit equivalence" of 1.00, while sheep and goats have an equivalency of 0.50. Farms are limited by the ordinance to no more than 300 "animal units." However, landowners may apply to the township for a "special exception use permit" to permit up to 1,999 animal units provided that the livestock operation is at least one-half mile from neighboring properties.

Robert Richardson owned 194 acres in the Township of Brady. Because Richardson believed that he must be able to raise at least 4200 pigs for an economical pig farm operation, Richardson proposed an amendment to the zoning ordinance that would create a new animal unit definition for "nursery swine." Under Richardson's proposed animal category pigs weighing less than 55 pounds would be defined as "nursery

swine." Richardson proposed that the "animal unit equivalence" for nursery swine be 0.50.

But the Brady Township Planning Commission was equally divided on the amendment, so the amendment failed. Members of the Township Board and the Township Planning Commission expressed confidence that the zoning ordinance would be amended at some point in the future. Relying on these assurances, Richardson applied for a special exception use permit to operate a nursery-swine operation involving no more than 1,999 animal units, and received the permit in February 1997.

In January 1998 the Township Planning Commission again considered a proposed amendment to the ordinance defining nursery swine as 0.50 animal units. The Planning Commission recommended approval of the ordinance change to the Township Board, but the Board sought further study. In February 1998, Richardson asked the Zoning Board of Appeals for an interpretation of the definition of animal unit with respect to nursery swine, and to change the definition accordingly. The Township Board Attorney found, however, that the Zoning Board of Appeals did not have the legal authority to make such changes.

In March, 1998, the township cited Richardson for a civil infraction for violating his special exception use permit by housing more than 1,999 pigs on his property. Richardson then sued the township in state court complaining that the zoning ordinance violated his rights under the United States and Michigan constitutions. The township removed the case to federal district court, which rejected Richardson's claims. The district court found that the ordinance did not violate Richardson's Fourteenth Amendment "substantive" and "procedural" due process rights. Richardson appealed to the Sixth Circuit, which affirmed the district court's decision.

The Sixth Circuit first analyzed whether the ordinance violated Richardson's "due process right not to be subjected to arbitrary or irrational zoning decisions." The court cited the general rule that a zoning ordinance satisfies *substantive* due process requirements if the ordinance is rationally related to a legitimate governmental purpose.

A zoning ordinance may violate substantive due process rights either as written ("on its face") or as applied to a particular parcel of land. A zoning ordinance violates substantive due process on its face when *any* application of the ordinance would violate due process. When a zoning ordinance violates substantive due process rights as applied,

only the decision made with respect to a *particular parcel* violates the constitution.

The Sixth Circuit found that the objective of the ordinance, “to reduce odor so that neighboring property owners will not be offended by the smell,” was “undoubtedly” a legitimate governmental purpose. But Richardson objected to the township’s irrational means to achieving this objective. The court found that, in fact, the Township Planning Commission had considered several approaches to categorizing animal odors, including evaluating relative waste produced by different animals, but ultimately concluded that different animals should be distinguished based on the “differences in the odor producing characteristics of animal waste.” Richardson failed to show that by basing animal units on the type of animal and not on the amount of waste, the township has acted irrationally. The Sixth Circuit concluded, therefore, that the ordinance did not violate due process on its face.

Richardson also contended that the ordinance was arbitrarily and irrationally applied to his farm because animal equivalency should be based upon the size of the animals. Thus, the township should have allowed Richardson to use a different equivalency unit for pigs limited to 55 pounds in weight. The Court invoked the rule from past precedents that “a legislative body need not even select the best or the least restrictive method of attaining its goals so long as the means selected are rationally related to those goals.” The court acknowledged that the township could have taken the weight of pigs into account, but that it did not have to.

In fact, the township had considered varying animal equivalencies based on animal weight, but rejected that approach, noting the administrative difficulty of deciding “who was going to go out and weigh the pigs. The court added that a municipality’s consideration of administrative concerns is “entirely rational,” and does not violate the constitution.

The court considered Richardson’s procedural due process claim that he had a right to an expeditious processing by the township of his request for a new animal category. But the court noted that the Planning Commission had considered Richardson’s request twice and approved it the second time.

The fact that the Township Board sent the ordinance change back to the Planning Commission for further study, and that the Zoning Board of Appeals failed to “reinterpret”

animal-unit provisions did not violate any “legitimate claim of entitlement.” Richardson could not show that he had a “property interest” in or “legitimate claim of entitlement to a discretionary decision” by a government body. The Sixth Circuit concluded that the township had not acted arbitrarily or irrationally in denying Richardson’s request to change a local zoning ordinance in a way that would benefit his farm operation. Thus, the Sixth Circuit affirmed the district court’s decision to dismiss Richardson’s complaint.

**e. United States v Michigan, 122 F Supp 2d 785 (ED Mich, 2000).**

The United States District Court for the Eastern District of Michigan has held that Pointe Mouillee Confined Disposal Facility (“Pointe Mouillee”) can receive Conner Creek environmental dredgings (“dredge spoils”) generated by the Detroit Water and Sewer Department (“DWSD”), because receiving “environmental” dredge spoils from Conner Creek is not a new use of the facility just because Pointe Mouillee was originally approved to receive “navigational” dredgings from the same creek.

In 1974, the State of Michigan and the United States entered into an agreement allowing the COE to dispose of dredgings from Conner Creek in the Pointe Mouillee facility. The agreement was created under the River and Harbor Act of 1970, which authorizes the COE to construct and operate disposal facilities for dredge spoils that it generates while maintaining navigational waterways. The River and Harbor Act requires state concurrence before the COE can build such a facility.

In 1997, the EPA found the DWSD in violation of the CWA. In settling its violation with EPA, the DWSD agreed to construct a new sewer overflow retention basin and to dredge and dispose of approximately 146,000 cubic yards of sediment from Conner Creek as part of the retention basin project. But the COE objected to allowing Pointe Mouillee to receive the DWSD dredgings. The City of Detroit sought a court order allowing the DWSD to dispose of its sediment in Pointe Mouillee.

The COE’s main objection to placing the new dredgings in Pointe Mouillee was that the disposal site was approved on the basis of receiving “navigational” dredgings only. The COE’s 1974 approval process involved preparing an Environmental Impact Statement (“EIS”) as required under the National Environmental Policy Act. The COE’s 1974 EIS for Pointe Mouillee was developed based on the disposal of dredge spoils to “enhance the navigability of the Detroit

and Rouge Rivers.” The COE contended that the EIS did not contemplate including dredgings removed from Conner Creek for the purpose of enhancing environmental quality.

In addition, the COE was concerned about its liability under CERCLA if the DWSD dredge spoils contaminated Pointe Mouillee with hazardous substances. But the original 1974 agreement between Michigan and the United States contained a provision in which Michigan agreed to hold the United States harmless from damages due to construction, operation, and maintenance of the Pointe Mouillee facility. The COE contended in its court argument that the agreement pre-dated CERCLA and did not protect the COE from liability.

The Court found that the River and Harbor Act was not specific as to whether a dredge spoils disposal facility is limited to navigational dredgings or whether other types of spoils could be placed there. The court examined the legislative history of the River and Harbor Act and found that, in addition to promoting navigation on the nation’s waterways, the Act was intended to improve water quality, an objective that could be attained by dredging Conner Creek.

In addition, the court found no language in the 1974 agreement between Michigan and the COE limiting Pointe Mouillee to receiving only navigational dredgings. Moreover, the COE’s EIS for Pointe Mouillee has no such limitation. The court noted that the EIS states Pointe Mouillee’s main environmental impact as “containment of polluted dredge spoil [which will] remove it as a source of pollution.” Therefore, neither the EIS nor the 1974 agreement preclude placing environmental dredge spoils in the Pointe Mouillee disposal facility.

Finally, the court disagreed with the COE’s concern that the 1974 agreement would not hold the COE harmless from CERCLA liability. In the 1974 agreement, the State of Michigan indemnified the COE from “damages due to construction, operation, and maintenance of the facility.” The court found that this language was sufficiently broad to hold the United States harmless if environmental liability for the facility arises under CERCLA.

The court concluded that the disposal of “environmental” dredgings from Conner Creek at Pointe Mouillee did not constitute a new use of the facility necessitating a new EIS. The 1974 Agreement protected the United States from CERCLA liability arising from disposal of the “environmental” dredgings. Therefore, the court ordered the

COE to accept the DWSD dredge spoils from Conner Creek at the Pointe Mouillee facility.

**f. Hirt v Richardson, 127 F Supp 2d 849 (WD Mich, 2001).**

The United States District Court for the Western District of Michigan has ruled that it has no authority, after a shipment of nuclear fuel rods derived from weapons grade plutonium from New Mexico to Canada through Michigan was delivered, to order the United States Department of Energy (“DOE”) to amend its finding that the shipment would cause no significant environmental impact.

As part of a strategy to reduce their stockpiles and dispose of surplus weapons-grade plutonium, the United States and Russia committed to programs to make peaceful use of portions of the stockpiles. In one pilot project called the “Parallax Project,” the two countries each agreed to convert approximately four ounces of the material into fuel rods and then ship them to an experimental nuclear reactor in Canada.

In early 1999, in conformance with the National Environmental Policy Act (“NEPA”), 42 USC 4321 *et seq.*, the DOE conducted an environmental assessment considering the environmental impact of fabricating the fuel rods and transporting them from Los Alamos, New Mexico to Canada by way of Michigan. In September of 1999, the DOE published a Finding of No Significant Environmental Impact in the Federal Register. In December of 1999, environmentalists sued the DOE in federal court seeking an order stopping the DOE from making the shipment.

In the 1999 case, the DOE argued that stopping the project could lead to a decision by Russia to halt further cooperation in the Parallax Project, and hinder efforts to help Russia find ways to dispose of its surplus weapons-grade plutonium. The Parallax Project was a direct result of negotiations between United States President Bill Clinton and Russian President Boris Yeltsin. According to the DOE, American credibility would be harmed by a decision to halt the shipment. Although the court in the 1999 decision found flaws in the DOE’s environmental assessment, the court agreed with the DOE’s position that stopping the shipments would harm the United States’ foreign policy, sending the world community the wrong message and casting doubts as to the United States’ seriousness about its international commitments. The court found in 1999 that United States foreign policy concerns outweighed the deficiencies in the DOE’s environmental assessment.

The DOE proceeded with its shipment in 2000. But even though the planned nuclear fuel shipment from New Mexico arrived in Canada in January 2000 and the shipment from Russia arrived in Canada in September 2000, the environmental groups asked the court to declare that the DOE's environmental assessment was inadequate and to order the DOE to produce an amended environmental assessment. The groups wanted the environmental assessment amended to show that it only applied to a single shipment from each superpower. After the 1999 court decision, the environmentalists feared more shipments of plutonium would be made in the future, and hoped to forestall further shipments.

The DOE asked the court to dismiss the environmentalists' case because the case was moot. The environmentalists, however, argued that in another case, **Columbia Basin Land Protection Ass'n v Schlesinger**, 643 F2d 585 (CA 9, 1981), a group of farmers was allowed to sue the DOE even after 191 powerline towers that the farmers opposed were built. The court in **Columbia Basin** allowed the farmers to sue because if the farmers could show that the DOE's environmental impact statement was inadequate, the court would be able to find a remedy - ordering the DOE to remove the towers. But the 1999 **Hirt** court pointed out that this case was different: Once the nuclear fuel was delivered to Canada, the deliveries could not be undone. Thus, the court could not provide a remedy for the completed fuel delivery.

The environmentalists also complained that the DOE regarded the 2000 fuel delivery as only a "test" of the Parallax Project, and that the United States was likely to ship more nuclear fuel through the United States to Canada. The court found, however, that the environmentalists failed to allege any facts showing that future shipments would cause any environmental harm. Therefore, the environmentalists could not show that ordering the DOE to amend its environmental assessment would prevent any future environmental harm.

The court also reiterated its point, made in its 1999 opinion, that foreign policy considerations, over which the court had no power to direct the executive branch of the United States government, still prevented the court from stopping the Parallax Project. Thus, because nothing that the environmentalists asked the court to do would undo the fuel shipments that had already taken place, the court had no authority to order the DOE to change its environmental assessment of the fuel shipments. Therefore, the court dismissed the environmentalists' case as moot.

## B. State Developments

### 1. Solid Waste

#### a. **South Macomb Disposal Auth v American Ins Co**, 243 Mich App 647 (2000).

The Michigan Court of Appeals has refused to reopen a judgment against a landfill operator in an insurance case based on evidence discovered after the judgment, when the landfill operator could have obtained the evidence earlier. South Macomb Disposal Authority ("SMDA") operates several municipal landfills in Macomb County, Michigan. In 1990, the MDNR informed SMDA that tests had revealed that two of SMDA's landfills had leaked leachate into the surrounding groundwater. SMDA's insurers, American Insurance Company and National Surety Corporation and Citizens Insurance Company of America (the "insurance companies"), denied coverage for any claims, arguing that the claims fell within the pollution exclusion clauses in the insurance policies. The pollution exclusions excluded coverage for pollution based claims unless the discharge or release was "sudden and accidental."

SMDA sued the insurance companies, seeking to compel them to pay the costs of remediating the contamination, and to defend it against any government enforcement actions. The insurance companies moved for summary disposition, arguing that the discharges from SMDA's two landfills were not sudden and accidental, and, therefore, not covered because of the pollution exclusions in the policies. SMDA claimed that, in the 1950's and 1960's, an adjoining parcel of land (the "Walker site") had been operated as a landfill, and argued that the groundwater contamination came from the Walker site. SMDA argued that because there was an off-site source of the contamination, the pollution exclusions do not apply. The trial court denied the insurance companies' motion.

The court of appeals reversed, stating that SMDA failed to present persuasive evidence that hazardous substances from the Walker site had caused the contamination problem, and that SMDA had failed "to set forth specific facts showing that there is a genuine issue for trial." The court of appeals also found that SMDA had failed to present evidence to demonstrate that the leakage from the two SMDA landfills was "sudden." The court of appeals, therefore, held that the trial court had erred in denying the insurance companies' motion for summary disposition, and sent the case back to the trial court for further action, and the trial court entered

judgment for the insurance companies.

SMDA directed its expert, Dr. Michael Sklash (“Sklash”), to conduct an investigation to uncover some new scientific evidence to determine whether or not the contaminated groundwater came from SMDA’s two landfill sites or another possible source. Sklash, relying on data gathered in a 1998 hydrogeological investigation of the landfill sites, concluded that the groundwater contamination had not come from the two SMDA landfills, but most likely had come from the “old Walker site.” He reported that the chemical composition of groundwater samples was dramatically different from the leachate from SMDA’s landfills, and concluded that the groundwater contamination had not come from the SMDA landfills.

Armed with Dr. Sklash’s report, SMDA asked the trial court to reverse its earlier judgment, claiming that the evidence upon which Sklash based his opinions constituted “[n]ewly discovered evidence which by due diligence could not have been discovered” in time for the trial court to consider it when it addressed the insurance companies’ motion. The insurance companies objected to this motion, arguing that the information upon which Sklash based his testimony was not “newly discovered evidence.”

The circuit court found that Dr. Sklash’s affidavit showed that the Walker site was leaking, and was, therefore, a contributor to the contamination at the two SMDA landfills. Accordingly, the court found that SMDA was partially entitled to relief from the earlier judgment with respect to its claim regarding the Walker site.

The insurance companies appealed the circuit court’s decision granting relief to SMDA, arguing that the circuit court had improperly reversed the original decision by the court of appeals. When an appellate court remands a matter to a trial court, the trial court is authorized to take any action that is not inconsistent with the appellate court’s decision. Therefore, the appeals court held that it was proper for the trial court to consider SMDA’s motion, which was based on newly discovered evidence.

The insurance companies next argued that the circuit court’s consideration of SMDA’s motion was precluded by the doctrine of “law of the case.” The appeals court found that that doctrine did not apply because the facts did not remain materially the same. SMDA provided new evidence to show that there exists a question of material fact whether off-site sources may have contributed to the contamination.

Therefore, the appeals court found that the circuit court did not fail to apply the “law of the case” doctrine.

The insurance companies next argued that the trial court abused its discretion in granting SMDA’s motion for relief. The Michigan court rules allow a court to grant a party relief from judgment if the party presents newly discovered evidence that it could not have discovered in time for the first trial. There are four requirements that must be met for newly discovered evidence to support a motion for post-judgment relief: (1) the evidence must be newly discovered; (2) the evidence must not be merely cumulative; (3) the newly discovered evidence must be likely to change the result; and (4) the party moving for relief from judgment must not have been able to produce the evidence with reasonable diligence.

Upon review, the court of appeals concluded that SMDA failed to demonstrate that, with due diligence, it would not have been able to produce the newly discovered evidence at an earlier time. The court noted that SMDA had been notified by MDNR as early as 1990 that SMDA was the suspected source of contamination, and SMDA began an investigation in 1994 or 1995 to look for other potential sources. The court of appeals found that SMDA had failed to demonstrate that it could not have found the financial means to complete the investigation begun in 1994 or 1995. Moreover, Sklash’s testimony did not show that the passage of time was necessary for the data to be collected. On the contrary, Sklash’s testimony indicated that contaminants had been migrating from the Walker Site since before 1979. Therefore, SMDA failed to establish that it would not have been able to discover the evidence earlier through due diligence. Thus, the appeals court held that the circuit court abused its discretion in granting SMDA’s motion for relief, and reversed the decision.

**b. Richfield Landfill, Inc v Michigan, 2001 WL 766122 (Mich Ct App, Jan 26, 2001).**

The Michigan Court of Appeals upheld a trial court’s ruling that the MDEQ arbitrarily withheld a landfill operating license, and remanded the case back to the trial court to determine whether the State must compensate the landfill owner for unconstitutionally taking its property because of such arbitrary action. Richfield Landfill, Inc. (“Richfield”) operated a sanitary landfill in Genesee County. In 1989, Richfield entered into a consent order with MDEQ that required Richfield to close its existing landfill cell (“Cell 1”) and construct a new landfill cell (“Cell 2”) immediately adjacent to Cell 1 in accordance with specific MDEQ-approved engineering plans identified in the order. The

consent order also provided that MDEQ would grant an operating license for Cell 2 when Richfield satisfied certain requirements for groundwater monitoring.

Two years later, after Richfield had constructed Cell 2 in accordance with the MDEQ-approved plans, MDEQ stated that it would not issue Richfield's operating license unless it substantially reconstructed Cell 2 with a "double liner" that would make it possible for Richfield to differentiate leakage from the new and old cells. With a "double liner" system, a leak through the first liner will be trapped by the second liner and can be detected and removed from the landfill before it reaches the ground below. A leak from a single-lined landfill can typically only be identified after the leak reaches the environment. The MDEQ-approved plans contained in the consent order only required a single liner in the bottom of Cell 2 with groundwater monitoring wells around the periphery of the cell. Thus, as constructed, Richfield was not able to conclusively determine, based on groundwater monitoring alone, whether any future contamination detected in a monitoring well came from Cell 1, or from the immediately adjacent Cell 2.

Richfield appealed MDEQ's decision to deny the operating license to the Ingham County Circuit Court. Richfield's suit also claimed that MDEQ had (1) unlawfully imposed the requirements of an unpromulgated rule; (2) breached the terms of the consent order; (3) deprived Richfield of its property without due process; and (4) unconstitutionally taken its property without just compensation. After five years of litigation, the trial court ruled that, because MDEQ approved the design that was incorporated into the consent and because that design complied with the rules for landfill construction that were in effect when Richfield submitted its operating license application, MDEQ's denial of Richfield's license was arbitrary and capricious. The trial court stated:

I believe the [MDEQ] must issue an operating license for this facility when and if the plan that the [MDEQ] approved is executed, and that execution includes monitoring wells on the periphery.

The alternative is to allow the State to keep this company dangling, twisting in the wind, bleeding money for years and years. The State has nothing to lose by doing that. The State is going to still be here, the State will have some kind of funding, but [Richfield] will eventually run out of money. 2001 WL 766122 at \*2-3.

The trial court went on, prohibiting MDEQ from imposing additional requirements on the location or number of monitoring wells beyond what was required in the approved plans:

I am not going to let the [MDEQ] take the position that the type or the location or number of monitoring wells is subject approval by the [MDEQ] with regard to something other than whether they are per . . . specifications . . . I am not going to let the [MDEQ] keep dangling unspecified requirements in front of them, and I agree with [Richfield] on that.

The trial court then issued an order directing MDEQ to issue an operating license to Richfield "based on the presently-established monitoring program consisting of the existing wells located at the perimeter" of the landfill, rather than the substantially more expensive double-liner system demanded by MDEQ. After ordering MDEQ to issue the license, the trial court dismissed Richfield's other claims as moot.

On appeal, MDEQ argued that, although the landfill design rules then in effect did not require the double-liner system, nothing prevented MDEQ from imposing such a system as a license condition. The appeals court, however, disagreed because Richfield had relied upon MDEQ's prior approval of the peripheral monitoring well system when it constructed the landfill. The court stated, "Although the [MDEQ] was authorized to require a reasonable system for monitoring groundwater, in this case the [MDEQ's] demands were unreasonable in light of [Richfield's] reliance on the [MDEQ]-approved construction plans. . . . Here, the [MDEQ's] action in approving the initial construction plans for Cell 2, but then insisting that [Richfield] substantially reconstruct the facility was arbitrary and capricious." The appeals court, therefore, affirmed the trial court's order to issue the license.

Richfield also appealed the trial court's dismissal of its claim that MDEQ's arbitrary action constituted an unconstitutional taking of its property. Both the Michigan and federal constitutions prohibit the taking of private property for public purposes without due process and just compensation. The trial court had dismissed Richfield's takings claim, holding that it had failed to state a valid cause of action under these constitutional provisions. The appeals court reversed this ruling, stating that the trial court's inquiry focused on the wrong issue. The trial court dismissed

Richfield's taking claim because Richfield did not have "the unfettered right to build and operate a sanitary landfill without the State's permission." The appeals court, however, articulated the proper test for a takings claim should be whether Richfield "had a piece of property of some value that became valueless as the result of arbitrary conduct that went beyond expressly prohibiting what was already legal." The appeals court noted that, "[i]n this case, when [Richfield] constructed Cell 2, neither the doctrine of nuisance nor any existing state property law forbade operation of that landfill as constructed. Although [the double liner system] might well have made it easier to detect and attend to any environmental damage leaks from the new facility, such leaks may not simply be presumed from the design, which, as we said, the [MDEQ] initially approved." Accordingly, the appeals court reversed the trial court's dismissal of Richfield's takings claim and sent the matter back to the trial court to gather evidence on that claim.

## 2. Wetlands

### a. *Hagen v Eyde Constr Co, No. 00-91779-CE (Cir Ct, Ingham County, Mich, June 2, 2000).*

An Ingham County Circuit Court judge has held that four local residents have standing to challenge a wetland, stream and floodplain permit for development of a commercial site. Eyde Construction Company ("Eyde") proposed to develop a site in Meridian Township for a Wal Mart store and other retail buildings. Eyde applied to the MDEQ for a permit to construct part of the project in wetlands, a drainage ditch, and a floodplain area. After MDEQ granted the permit, four local residents who objected to the project challenged the permit before MDEQ's Office of Administrative Hearings.

When Eyde began construction on the site before the MDEQ ALJ could hear the case, the residents filed an emergency lawsuit in Ingham County Circuit Court. The judge ordered construction halted until the administrative hearing was concluded, and also ordered the MDEQ ALJ to decide Eyde's motion to dismiss the residents' case because, Eyde argued, they had no legal standing to challenge the permit. MDEQ's ALJ granted the motion, holding that the residents had no standing because they could not show that MDEQ's issuance of the permit would harm them.

The residents appealed to the circuit court. In a ruling from the bench, Judge Lawrence Glazer held that the residents did have standing to challenge the permit. The judge

considered evidence presented by the residents that a stream ran through the construction site and, further downstream, through three local parks. In written statements, the residents claimed that they used the parks and stream for recreational purposes. The judge found that the planned wetland and floodplain construction could adversely affect the parks by causing flooding, erosion and water pollution.

Citing a recent decision by the United States Supreme Court, *Friends of the Earth, Inc v Laidlaw Environmental Services (TOC), Inc*, the judge held that recreational activities were a sufficient interest to confer standing to challenge a state-issued permit. The judge interpreted *Laidlaw* as meaning that "a plaintiff who lives in the area, who asserts past recreational use and the expectation of future recreational use, and who asserts that a negative impact upon the natural resources will deprive him or her of that future recreational use does have standing." Hearing Record at 48.

Eyde argued that *Laidlaw* was distinguishable because the environmental harm in that case was undisputed, whereas in the present case it was prospective and disputed. The judge rejected this as "not a legally significant distinction" because "in an analysis of standing, the focus is on the harm to the plaintiff, not the harm to the environment." Thus, "under the *Laidlaw* analysis," the residents "have asserted a sufficient interest to attain standing to challenge the permit."

### b. *Tip of the Thumb-Haven Lakeshore Co v MDEQ, No. 97-16554 (Cir Ct, Huron County, Mich, Aug 31, 2000).*

The Circuit Court for Huron County, Michigan has denied relief for a developer who failed to show that a drainage ditch on its wetland property is a private agricultural drain that is exempt from regulation under Michigan's wetlands laws. In 1955, Michael C. Marian acquired Tip of the Thumb-Haven Lakeshore Company ("TOT"), which owned Tip O Thumb Haven, an undeveloped, platted subdivision on the shores of Lake Huron in Port Austin Township, Huron County. Tip O Thumb Haven is mainly comprised of a "dune-swale complex," which is defined as intermittent, slightly elevated dune areas surrounded by seasonally flooded swales (marshy land depressions).

Approximately two-thirds of the Tip O Thumb Haven land area has been classified as wetlands by the MDEQ, subject to the former Goemaere-Anderson Wetlands Protection Act ("WPA") and the Inland Lakes and Streams Act ("ILSA"). Between the time he purchased TOT and 1990, Mr. Marian sold many of the Tip O Thumb Haven

lots. In 1990, Marian's Niece Lenore Wood inherited TOT. Few lots sold by TOT contain what MDEQ has classified as regulated wetlands. By 1992, all but one hundred forty-eight lots, most with road access and not requiring fill, were sold. Most of the unsold lots require road development and substantial fill to be marketable.

After 1980 (the effective date of the WPA), TOT developed many platted roads and road segments in Tip O Thumb Haven. The development activities included dredging and filling of wetlands, along with some excavation. In early 1990, after determining that TOT had excavated, dredged, and filled wetlands, the COE and the MDEQ each notified TOT by letter that regulated wetlands existed in the Tip O Thumb Haven, and that, any dredging, filling or excavating activities required permits from both the COE and MDEQ, and suggested that TOT apply for such permits. Despite these warnings, an MDEQ inspector discovered that Ms. Wood intended to excavate a drainage ditch along the eastern boundary of the subdivision, and to build a road to run parallel to the ditch.

TOT did not apply for a permit as instructed, and, in March 1992, the MDEQ formally notified TOT that the MDEQ had determined that construction of the ditch and roads constituted unauthorized dredge-and-fill activities in state-regulated wetlands. The MDEQ demanded that TOT "cease and desist all unauthorized activities immediately" and submit a restoration plan within 30 days. In April 1992, Ms. Woods met with an MDEQ representative and discussed development possibilities in Tip O Thumb Haven. The MDEQ advised Ms. Woods that any development in a state-regulated wetland would require a permit, and that she should retain a wetland consultant to map the existing wetlands.

But in April 1993, MDEQ representatives found that a ditch had been dug along a property boundary of the subdivision, leading to an existing drainage ditch. Although disputed by MDEQ, TOT argued that it had simply cleaned out a pre-existing drain for nearby farmland. However, because no permit had been applied for or issued for this activity, MDEQ issued a second "cease-and-desist" and restoration order in May, 1993.

Ms. Wood then inquired about obtaining an "after-the-fact" permit regarding excavation of the ditch. She was told that the MDEQ would not accept an after-the-fact permit application if, as in this case, the MDEQ believed that the work performed would not be permitted. In late summer, 1994, Ms. Wood's wetlands consultant mapped the

boundaries of the wetlands. When Woods requested that the MDEQ verify the wetland delineations much later in the year, the field conditions did not permit an MDEQ inspection.

TOT believed that its construction plans were effectively thwarted by the MDEQ's delays in verifying TOT's wetlands map and the agency's refusal to review a dredge-and-fill permit application.

TOT sued the MDEQ in Huron County Circuit Court seeking findings that:

1. the drain that TOT excavated along the eastern boundary of the Tip O Thumb Haven was a private agricultural drain, the cleaning, maintenance, and improvement of which is exempt from the permit requirements of the WPA and ILSA;
2. the roads of the subdivision are public roads and excavation and fill activities in conjunction with their maintenance and improvements are exempt from the permit requirements of the WPA;
3. the MDEQ should be prohibited from regulating TOT's development activities because the MDEQ had failed to perform its statutory duty to prepare an inventory of wetlands in the county; and
4. the MDEQ's failure to make a wetland determination or review the wetland delineation made by TOT's consultant has significantly delayed TOT's development of the roadways and sales of properties in Tip O Thumb Haven.

Additionally, TOT sued the MDEQ in the Court of Claims, alleging that MDEQ's action in issuing the cease and desist orders and seeking injunctive relief constituted an unlawful "taking" of TOT's property, because TOT was effectively prevented from engaging in "lawful business use" of its property. At trial, the "takings" suit was combined with the circuit court suit. MDEQ counter-sued, seeking a court order against TOT halting further dredging and filling of wetlands. The MDEQ also asked the court to impose fines and require TOT to restore the destroyed wetlands.

Both the WPA and ILSA require a permit for any construction in, filling, excavating or dredging in a designated wetland or in an inland lake or stream. In addition, the

WPA prohibits the draining of wetlands. However, the ILSA does not require a permit for construction or maintenance of a private agricultural drain. The WPA also does not require a permit for construction or maintenance of a private agricultural drain “*necessary for the production or harvesting of agricultural products.*”

Because the statutes do not define “private agricultural drain,” the court concluded from the WLA’s use of the word “necessary” that an agricultural drain is one that is “necessary” for, or at least enhances, agricultural production. The court found that much of the agricultural land supposedly benefiting from the disputed drain was lower in elevation than the disputed drain. Thus, the drain could not have actually drained the farmland. The court concluded that TOT’s excavation neither facilitated nor enhanced agricultural drainage, with the result that the agricultural drain exception to the permit requirements did not apply.

The WPA also exempts “maintenance or improvement of public streets, highways, or roads” from wetlands dredge and fill permits. In its lawsuit, TOT asserted that approximately seven miles of road right-of-way within the Tip O Thumb Haven are “public roads” because they were “accepted” by the local municipality. TOT argued that developing the seven miles of road right-of-way into usable roads should be exempt from the permit requirements under the WPA. But the court concluded that it did not matter whether the declared rights-of-way in question had been “accepted” as public roads by the local municipality; the roads must be “streets, highways or roads” to qualify for the exemption. Since some of the roads in question were completely undeveloped at the time of trial, the court found that only a limited amount of roadway in Tip O Thumb Haven was exempt from regulation.

TOT also claimed in its lawsuit that MDEQ’s failure to make an inventory of all wetlands in the county violated TOT’s due process rights, and argued that the MDEQ should, therefore, be barred from regulating TOT’s development activities. By law, the MDEQ must inventory all of the wetlands in the state. In addition, individuals may request the MDEQ to inspect particular parcels and make wetland determinations “within a reasonable time after the request.” MCL 324.30321(4). At trial, MDEQ established that completion of the required wetlands inventory was not financially possible, and that, because of “environmental dynamics,” any inventory would quickly become outdated. Also, the court found that, because TOT was notified in 1990 that wetlands existed on the property, there was no

violation of TOT’s due process rights. TOT had the opportunity to contest the MDEQ’s assertions that there were wetlands in Tip O Thumb Haven but did not.

Moreover, although TOT showed that a dredge-and-fill permit application for specific roads and the drain would have been futile, it did not show the court that no permits would have been issued for any development in Tip O Thumb Haven. Thus, TOT did not establish that its due process rights had been violated.

In its takings claim, TOT complained that by refusing to review a dredge-and-fill permit application, the MDEQ deprived TOT of all economic or productive use of the property. TOT asserted that if the MDEQ would not allow TOT to dredge, fill, and drain the wetlands in Tip O Thumb Haven, the MDEQ was liable to TOT for taking TOT’s property without just compensation.

But the MDEQ showed that TOT had never properly registered the subdivided property, as required under Michigan law. Michigan’s Land Sales Act requires registration of subdivided lands as a pre-condition to selling subdivision lots. The court found that nothing the MDEQ had done or failed to do had harmed TOT’s ability to sell its subdivided lots because the lots could not legally be sold until registered. Thus, the MDEQ was not liable for “taking” TOT’s property.

The MDEQ asked the court to find that TOT violated the WPA and the ILSA for illegally draining, dredging, and filling wetlands. The court found that the MDEQ’s allegations were true, noting that there was ample evidence showing a negative environmental impact from TOT’s activities. Therefore, the court ordered TOT not to do any further development in Tip O Thumb Haven until it received the proper permits.

Additionally, the court found that the MDEQ was entitled to an order of restoration, which should include re-filling the drainage ditch. The court ordered that a fine be imposed on TOT in the amount \$13,000, the cost to the MDEQ for its wetlands survey and for its trial preparation costs. Finally, the court imposed an additional fine of \$500 per day for each day after October 15, 2000 that the restoration is not completed.

### 3. Underground Storage Tanks

#### a. Ford Motor Co v MDEQ, No. 211307 (Mich Ct

App, May 9, 2000).

In an unpublished opinion addressing only procedural issues, the Michigan Court of Appeals reversed and remanded for further consideration the Ingham County Circuit Court's decision affirming the denial of several claims by Ford Motor Company ("Ford") for reimbursement from the Michigan Underground Storage Tank Financial Assurance ("MUSTFA") Fund for costs Ford incurred in cleaning up underground storage tank ("UST") release sites. The MUSTFA Fund was established for reimbursing UST owners and operators for certain expenditures incurred in cleaning up petroleum released from USTs. To obtain reimbursement, a UST owner or operator is required to submit a claim to the MUSTFA Fund Administrator (the "Administrator") of the MDEQ documenting the expenses and establishing that the claimant meets the eligibility requirements under the MUSTFA statute, Part 215 of the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.101 *et seq.* The MUSTFA Fund has not accepted new claims since June 29, 1995.

Once a claim for a particular site has been approved by the Administrator, additional invoices may be submitted for reimbursement in connection with the original claim. Part 215, however, sets no time limit for the submission of these additional invoices. Under the procedures followed by the Administrator, after a site was determined to be eligible for reimbursement, additional invoices were submitted for review to a private third-party administrator ("TPA") contracted by the Administrator to process MUSTFA Fund claims. After reviewing the invoices, the TPA would send a form entitled "Review of Claim for Payment" ("RCP") to the Administrator, who would then notify the claimant regarding payment. If a claimant wished to dispute the denial of a claim, Part 215 provides for an appeal to the MUSTFA Advisory Board that must be filed within fourteen days after the denial.

In its appeal of the circuit court's decision, Ford claimed that, since at least 1993, claimants whose reimbursement requests were denied by the TPA for inadequate documentation could submit a "request for reconsideration" to the TPA along with the appropriate documentation, and the claim would be reevaluated. Ford stated that it had submitted twenty-two such reconsideration requests and that other claimants followed the same procedure. Ford also claimed that the Administrator's procedure in such instances was to write letters directing the TPA to review the requests for reimbursement and to prepare a "reconsideration Review of Payment." Ford filed an affidavit and supporting

documentation in the circuit court action to establish the existence of this procedure.

Conversely, MDEQ contended that its Procedure No. MUSTFA-5 specifically informed claimants that "[t]he TPA provides an informal opportunity of 1 review period, 30-45 days, for claimant to resolve any documentation issues." MDEQ claimed that the fourteen day period for filing an appeal begins when the RCP is filed with the Administrator. Additionally, MDEQ claimed that there was never a reconsideration period as described by Ford, and that even if there was, it would not be without time limits. Five of Ford's requests for reconsideration in 1997 were rejected by the Administrator as untimely appeals.

Ford appealed the rejected requests for reconsideration to the Ingham County Circuit Court, as provided for under Part 215. The circuit court decided the matter on MDEQ's motion for summary disposition, and issued an opinion affirming MDEQ's denials. Ford argued in its appeal to the court of appeals that the circuit court failed to provide any meaningful analysis in its brief decision and did not apply the proper standard of review in reaching its decision.

Upon review, the court of appeals found that there were two relevant questions that presented factual issues that should have been decided by the circuit court. The first question was whether a long-standing practice of accepting requests for reconsideration existed apart from the statutorily-mandated appeals procedure, and if so, the second question was whether MDEQ provided adequate notice to claimants that this established practice was going to be eliminated. According to the court of appeals, the circuit court merely stated that it would not substitute its opinion for that of the MDEQ, rather than making any specific factual findings with respect to the issues raised by Ford. The court of appeals characterized the case as a dispute between a party and an agency over procedural issues - in contrast to, for example, a contested case proceeding in which the agency would have made factual findings, which would normally be entitled to deference by the trial court. Thus, there were no factual findings at the administrative level that would have been entitled to deference by the trial court.

Therefore, the Court of Appeals held that remand was necessary to allow the circuit court to conduct a hearing, consider the evidence, and issue the factual findings that were necessary before the court of appeals could review the case. The court of appeals noted that if the reconsideration procedure was indeed found to be an established practice,

MDEQ could not have eliminated it without providing adequate notice. The court also observed that the reconsideration procedure described by Ford would not have been inconsistent with Part 215, which specifically provides for the submission of additional work invoices and sets no time limits for their submission. Further, under Michigan case law, even if the reconsideration procedure was inconsistent with Part 215 or MDEQ's administrative rules, MDEQ was obligated to provide adequate notice before instituting changes to the procedure. The court of appeals also characterized as "somewhat disingenuous" MDEQ's argument that Ford had notice of the Administrator's intent to enforce the fourteen-day appeal time limit because the issue was not the enforcement of the time limit on formal appeals before the MUSTFA Advisory Board, but instead concerned the discontinuance of the alleged informal reconsideration procedure upon which Ford claimed it had relied. Accordingly, the court of appeals reversed the circuit court's decision, and remanded the case for further proceedings consistent with the court's opinion.

**b. Coca-Cola Enter, Inc v MDEQ, No. 214315 (Mich Ct App, Aug 1, 2000).**

In a brief, unpublished opinion addressing only procedural issues, the Michigan Court of Appeals reversed and sent back for further consideration the Wayne County Circuit Court's decision affirming the denial of a claim by Coca-Cola Enterprises, Inc. ("Coca-Cola") and Michigan Consulting & Environmental, Inc. ("MCE") for reimbursement from the Michigan Underground Storage Tank Financial Assurance ("MUSTFA") Fund for costs they incurred in cleaning up an underground storage tank ("UST") release site. Coca-Cola and MCE filed claims for reimbursement with the MUSTFA Fund. After the MUSTFA Fund administrator denied their claims, Coca-Cola and MCE filed an administrative appeal with the MUSTFA Fund Policy Board, which denied the appeal because it was not filed within the 14-day period mandated by Part 215. Coca-Cola and MCE subsequently brought an action in the Wayne County Circuit Court alleging multiple theories based upon the MUSTFA Fund's alleged arbitrary application and enforcement of the 14-day period for filing administrative appeals. The trial court held that the MUSTFA Fund had properly applied the 14-day rule and that Coca-Cola and MCE were on notice that their claims were required to be filed within the 14-day period.

The court of appeals initially dealt with the MUSTFA Fund's challenge to MCE's standing to be a party in the case. Part 215 of NREPA provides that an appeal may be filed by

the "owner or operator" who submitted the claim. Part 215 further provides that the terms "owner" and "operator" both include "a person to whom an approved claim has been assigned or transferred." The court observed that an appeal, therefore, could be brought by an environmental consultant to whom a claim had been transferred. The court rejected the MUSTFA Fund's challenge because the Fund had not shown that MCE was prohibited from filing an appeal.

The court next considered with the challenge to the MUSTFA Fund's application of the 14-day appeal period. Coca-Cola and MCE did not dispute that they failed to comply with the statutory time period. They contended, however, that the MUSTFA Fund had a longstanding practice of not enforcing the 14-day rule and that they relied on the MUSTFA Fund's practice of accepting late appeals. Coca-Cola and MCE presented factual evidence that the MUSTFA Fund had not enforced the 14-day appeals period in the past. The trial court held, however, that an August 10, 1995, letter sent by the MUSTFA Fund to "affected parties" provided fair warning that the 14-day period would be prospectively applied to Coca-Cola's and MCE's claims.

The court of appeals disagreed with the trial court's determination that the August 10, 1995, letter provided sufficient notice to claimants that the MUSTFA Fund was changing its policy regarding enforcement of the 14-day appeal period. The court opined that, although the letter referred to the statutory 14-day appeal period, nothing in the letter purported to advise recipients that the MUSTFA Fund intended to change its policy on enforcement of the requirement. The court, therefore, held that the letter did not constitute fair notice that the MUSTFA Fund would no longer adhere to its past practices and begin enforcing the 14-day appeal period. The court also rejected the MUSTFA Fund's argument that it had also provided fair notice of the change through the Fund's telephone information line and Internet site because the Fund did not disclose the contents of those notices to the court, thus rendering it impossible for the court to determine whether the notices provided fair notice of the policy change.

**c. Kalamazoo Oil Co v Boerman, 242 Mich App 75 (2000).**

The Michigan Court of Appeals has ruled that a trial court properly found a defendant liable for damages caused by the negligent removal of USTs, despite prohibiting him from presenting an affirmative defense of comparative negligence at the trial for damages. Kalamazoo Oil Company ("KOC") hired John Boerman ("Boerman"), an

environmental excavator, to remove several USTs from its property. Afterward, KOC claimed that Boerman had failed to remove or properly cap a fuel oil pipe attached to an active petroleum loading dock, causing fuel oil to flow through the pipe and into the soil and groundwater, causing environmental damage. KOC brought suit, alleging negligence, breach of contract, and violation of Michigan's Environmental Protection Act.

A default judgment was initially entered against Boerman for failure to file an answer to KOC's complaint in the lawsuit, but was later set aside by the trial court pursuant to both parties' stipulation. Later, the trial court entered another default judgment against Boerman because he refused to participate in discovery as required under the Michigan Court Rules and, specifically, because he refused to appear for a court-ordered deposition in response to KOC's motion for an order compelling discovery. The trial court then denied both Boerman's motion to set aside the default judgment and his motion for rehearing.

After entering the default judgment on Boerman's liability, a jury trial was held to decide the amount of damages for which he was liable. Boerman attempted to introduce at trial evidence that KOC had been comparatively negligent so that the jury could allocate the damages that Boerman owed in relation to his degree of fault. The trial court, however, did not allow Boerman to introduce any evidence of KOC's comparative negligence. The jury found Boerman liable to KOC for over \$337,000, plus interest and costs. Boerman appealed.

On appeal, Boerman argued that the trial court erred by prohibiting him from introducing evidence at trial of KOC's comparative negligence. The court of appeals initially observed that, under Michigan law, it is an established principle that where a trial court has entered a default judgment against a party, that party's liability is conceded and the party is estopped from litigating issues of liability. The appeals court further observed, however, that a default judgement is not an admission as to the amount of damages. The trial court entered a default against Boerman as punishment for discovery abuses, that is, because he failed to comply with the rules of discovery and because he failed to comply with court orders requiring him to submit to a deposition. Therefore, the court of appeals found that the default judgment settled the issue of Boerman's liability, but that the question of damages still remained, and the trial court correctly proceeded with a jury trial to determine the amount of damages for which Boerman was liable.

During the jury trial, Boerman tried to present evidence to the jury establishing that KOC was comparatively negligent and that the damages owed by Boerman to KOC should be reduced to the extent of KOC's negligence. Under Michigan Supreme Court precedent, a plaintiff's recovery of damages is reduced to the extent that the plaintiff's negligence contributed to the injury suffered by the plaintiff. If the trier of fact finds comparative negligence, then damages are allocated in proportion with the extent of each party's liability.

In the jury trial on damages, however, the court prevented Boerman from presenting evidence of KOC's comparative negligence, ruling that allowing Boerman to do so would effectively allow Boerman to relitigate his liability, which had already been decided by the default judgment, thus rendering the default sanction meaningless. Boerman argued that this ruling was in error and should be reversed.

The court of appeals reviewed the law of other states on this issue because it had not been considered by Michigan appellate courts, noting that some states have allowed comparative negligence to be raised during the damages phase of a trial where a party has been defaulted, while others have not. The trial court had relied upon a Pennsylvania case for its ruling that Boerman was precluded from raising the affirmative defense of comparative negligence during the damages phase of trial after having been defaulted as a sanction for his failure to comply with the discovery rules and the court's orders.

The court of appeals held that, as in the present case, where the entry of a default judgment is based on discovery abuses and the case proceeds to trial on damages only, the decisive factor in whether to admit evidence of comparative negligence is the extent of the sanction necessary, as decided by the sanctioning court. In other words, it is within the trial court's discretion to allow or prohibit the defaulted party from introducing evidence of a party's comparative negligence at the trial on damages. In this way, the trial court, which is in the best position to judge the severity of the discovery abuses, may conform the sanction of default to the severity of the party's discovery abuses in the damages phase of the trial. The appeals court stated further that, because default is such a severe sanction, it is imperative that the trial court balance the factors it considers and explain its reasons for imposing the default sanction in order that an appellate court may meaningfully review the trial court's decision.

In considering Boerman's appeal, the court of appeals found that the trial court had decided to prohibit Boerman from presenting evidence of comparative negligence at the damages phase of trial before the jury without even realizing that it had the discretion to allow the evidence. The court of appeals found, however, that the record clearly showed that even if the trial court had been aware of its discretion to allow the evidence, it would not have reached a different result, given Boerman's conduct during the proceedings showing his disdain for the court's authority and his total unwillingness to participate in the discovery process.

The court of appeals also found Boerman's other arguments to be without merit. Boerman argued that the trial court erred by entering the default judgment against him as a discovery sanction and by failing to set aside the default in response to his motions. The court of appeals found Boerman deserving of a severe sanction, such as being defaulted, because the record clearly revealed Boerman's deliberate noncompliance with court rules and a discovery order, as well as what the trial court viewed as an attempt to mislead the court and disrupt the progression of the lawsuit.

Boerman also argued that the trial court erred by prohibiting him from testifying, as well as calling other witnesses, during the trial before the jury on damages. The court of appeals observed that Boerman had failed to file a witness list, as required under the trial court's scheduling order, and did not disclose until the morning of trial that he wanted to testify and call an expert witness to testify on damages. The trial court explained it would not allow Boerman to testify because he had repeatedly refused to have his deposition taken. The trial court additionally noted that it would have been unfair to require KOC to prepare for Boerman's expert witness on such short notice and without any chance to have conducted any discovery on the witness. Therefore, the court of appeals agreed with the trial court that Boerman failed to show good cause to allow his and his expert's testimony, and found no abuse of discretion by the trial court. Accordingly, the Court of Appeals found no basis for reversing the jury's verdict and affirmed the trial court's decision.

#### 4. Part 201

##### a. *City of Port Huron v Amoco Oil Co*, 610 NW2d

548, order vacating grant of leave to appeal (Mich Sup Ct, May 9, 2000).

On May 9, 2000, the Michigan Supreme Court changed its mind and decided not to review a 1998 decision by the Michigan Court of Appeals in *City of Port Huron v Amoco Oil Co*, which held that a private party seeking to recover response costs under Part 201 of NREPA need not conduct a remedial investigation if MDEQ did not require one, and setting a relatively low threshold for determining when response costs were "necessary." Normally, a decision by the Michigan Supreme Court not to review a Court of Appeals decision is not especially noteworthy. However, as two dissenting Supreme Court Justices complained, the decision not to review in this case leaves unresolved important questions regarding what a private party must prove when it seeks to recover environmental cleanup costs from another responsible party under Part 201.

The City of Port Huron ("City") redeveloped industrial property formerly occupied by Amoco into a luxury condominium project. As part of the project, the City excavated and disposed of approximately 22,000 cubic yards of soil which it contended was contaminated, at a cost of approximately \$1.35 million. The City did not attempt to involve either the MDNR or Amoco (the former owner of the property) in the cleanup. The City did not conduct a remedial investigation ("RI"), a feasibility study ("FS"), or prepare a remedial action plan ("RAP") before excavating and disposing of the contaminated soil.

After completing the project, the City sued Amoco Oil Company under the former Michigan Environmental Response Act ("MERA," now Part 201 of NREPA) to recover the City's response costs. Amoco argued that the City could not recover because: (1) its costs were not "consistent with" the MERA rules because the City had not conducted an RI/FS; and (2) some or all of the City's costs were not "necessary."

The trial judge held that a private party does not always have to conduct an RI/FS, or prepare a RAP, in order to be "consistent with" the MERA rules. The rules merely state that MDEQ "may" require a party conducting a cleanup to perform an RI/FS, and prepare and obtain approval of a RAP. The Michigan Court of Appeals agreed, holding that MDEQ has discretion under the rules to require that a private party conduct an RI/FS, and prepare a RAP. The court of appeals held that the City "did not have to establish that it performed [an RI/FS] if the MDNR does not require them. Because the MDNR determined that plaintiff was not required to complete [an RI/FS] the trial court did not err in ruling that

plaintiff was entitled to recover its cleanup costs under the MERA.”

In response to Amoco’s argument that some of the City’s costs were not “necessary,” the trial court held that the City could not recover approximately \$100,000 of its costs because those costs were not related to remediation of the site, and thus were not “necessary costs of response activity.” The trial judge held that the balance of the City’s costs qualified as “necessary costs of response activity” because they were required to remediate the site, and because they were also reasonable costs.

On appeal, Amoco argued that the City had failed to prove that its costs were “necessary” because it had inadequate laboratory results to show that all 22,000 cubic yards of soil were in fact contaminated. The City had relied on sight and smell, and results of a photo-ionization detector (“PID”) as evidence of contamination for most of the soil which it removed, and obtained laboratory analysis only for soil at the edge of the excavation. The court of appeals upheld the trial court’s determination on this issue because the City had presented substantial evidence, and because the court of appeals felt that the trial court’s ruling was not “clearly erroneous.”

The court of appeals, however, held that the trial judge had imposed too stringent a standard on the City when it required that the City’s costs must be “reasonable.” The court of appeals held that a private party seeking to recover response costs incurred after the MERA rules were promulgated on July 12, 1990 need not prove that its response costs were “reasonably incurred,” but need only prove that its costs were “necessary” and “incurred consistent with” the MDNR rules. The court of appeals noted that Part 201 does not define “necessary,” and that the dictionary defines “necessary” in several different ways, one of which means no more than “convenient” or “appropriate.” The court held that for response costs incurred after July 12, 1990, the Michigan Legislature “relaxed the standards governing cost recovery actions after the promulgation of the rules,” so that a “private party must only show that its necessary costs of response activity were incurred consistent with the rules.” The court of appeals ruled that the trial court made a mistake by subjecting the City to a higher standard of proof regarding its costs, requiring that the City show that its costs were “reasonably incurred” rather than merely incurred consistent with the MDNR rules. However, the court held that this error did not make any practical difference because the trial court had excluded \$100,000 of the City’s costs which were

not truly related to environmental cleanup.

In September, 1999, the Michigan Supreme Court granted Amoco leave to appeal. On May 9, 2000, the Supreme Court changed its mind and denied leave to appeal, stating only that “the Court is no longer persuaded the questions presented should be reviewed by this Court.” Justices Marilyn Kelly and Stephen Markman took the unusual step of writing dissenting opinions stating that the court of appeals decision presents important issues that the supreme court should review. Both Justices seemed concerned that the City had performed its cleanup without involving either Amoco or MDEQ in the process. Justice Markman noted that, while an effort to redevelop a brownfield into a residential development is “highly commendable, it is entirely another question whether all the costs of such efforts are properly recoverable from the former owners of the contaminated site.” Without indicating how he might rule on the issue, Justice Markman expressed concern that the court of appeals decision might make it too easy for private parties to recover excessive costs resulting from overly zealous cleanups, perhaps making the statutory term “necessary” mean nothing at all. He also expressed concern that, under the court of appeals decision, a party might be able to act “consistent with” MDEQ rules simply by keeping MDEQ out of the process. He also posed the question of whether the determination of whether costs are “necessary” requires a balancing of the comparative costs of alternative remedial options. Justice Kelly also expressed interest in the issue of costs, asking whether “an expensive remediation effort like that performed by [the City]” might be unnecessary if a cheaper method would adequately clean up the property.

**b. *Shields v Shell Oil Co*, 621 NW2d 215 (Mich Sup Ct, Dec 27, 2000).**

On December 27, 2000, the Michigan Supreme Court issued an order reversing the Michigan Court of Appeals in *Shields v Shell Oil Co*, 237 Mich App 682 (1999), and holding that the July 1, 1994 deadline for beginning a cost recovery lawsuit under Part 201 of NREPA applies only to actions to recover response costs that were incurred before July 1, 1991. In October 1999, the Michigan Court of Appeals held that a provision in Part 201 of NREPA bars a private party from recovering any environmental response costs resulting from releases of hazardous substances that occurred before July 1, 1991, unless a court action to recover those costs was filed before July 1, 1994. Many Michigan environmental lawyers were surprised by the ruling, and believed that the statute barred only the recovery of response costs that had been incurred before July 1, 1991, but allowed

the recovery of response costs incurred after July 1, 1991, as long as the party seeking to recover response costs complied with the six year of statute of limitations contained in MCL 324.20140(1)(a).

At the request of the MDEQ, and with the support of the Michigan Attorney General, the Michigan Legislature amended Part 201 in June 2000, so that the relevant part of the statute now reads: “For recovery of response of activity costs that were incurred prior to July 1, 1991, the limitation period for filing actions under this part is July, 1994.” The bill enacted by the Legislature also states that the amendment “is curative and intended to clarify the original intent of the Legislature and applies retroactively.”

After Governor Engler signed the bill, the attorney for Mr. Shields, with support by the Michigan Attorney General, filed a motion with the Michigan Supreme Court asking it for a peremptory reversal of the court of appeals decision. On December 27, 2000, the Michigan Supreme Court issued a one-paragraph decision peremptorily reversing the court of appeals, and returning the case to the Oakland County Circuit Court so that Mr. Shields can proceed with his claim against Shell Oil Company. The order of the Supreme Court does not explain why it rejected the reasoning upon which the court of appeals based its decision. The following key sentence in the order indicates that the Supreme Court apparently would have reversed the court of appeals even if the Legislature had not amended the statute: “[u]nder either the former or amended version of MCL 324.20140; MSA 13A.20140, it is clear that only actions for recovery of response activity costs *incurred* before July 1, 1991 were subject to the July 1, 1994, limitation period.” (Emphasis in original.) The relevant portion of the statute actually referred to “recovery of response activity costs . . . that *accrued* prior to July 1, 1991,” rather than response costs “incurred” before July 1, 1991. The brief order doesn’t explain why the Supreme Court apparently thinks that the words “accrued” and “incurred” are synonymous. Most dictionaries indicate that those two words mean different things.

The Michigan Court Rules allow the Supreme Court to grant a peremptory reversal only if all seven members of the Michigan Supreme Court agree that the error by the lower court is so clear that an immediate reversal of its order should be granted without oral argument. Considering the requirement for unanimity, it is somewhat surprising that Justice Stephen Markman, who stated that he did “not necessarily disagree with the result” of the order, also wrote that he would have allowed the appeal to proceed further

because he believes the Supreme Court should have considered the following important questions:

- Does a subsequent legislature have the authority to declare what a law passed by a prior legislature means, or is that a function that belongs to the judicial branch?
- Did the fact that Shell Oil attempted to remediate the environmental contamination when it excavated and removed the old gasoline tanks have any effect on when the limitations period began to run?
- Assuming that Mr. Shields knew that the property was contaminated, is it proper to interpret a statute of limitations so that the party seeking to recover costs can control when the limitations period begins to run by deciding when, if ever, to perform response activity?
- Should a plaintiff have to incur response costs before recovering under Part 201, or is it sufficient if he simply reduces the selling price of his property to account for response costs that his buyer may incur?

This was the second time in eight months that Justice Markman has expressed his desire to review interesting legal issues related to the Part 201 cost recovery process, but has been unable to persuade a majority of justices to consider them.

**c. Attorney General v Oakland Disposal, Inc, No. 211591 (Mich Ct App, Sept 1, 2000).**

The Michigan Court of Appeals has held that even though contaminants did not leak from a landfill until after a prior owner or operator left the site, the prior owner/operator is still liable for clean up costs under MERA (now Part 201). Gene Hirs was a general partner in Waterford Sanitary Landfill, Ltd., which operated a property containing a solid waste landfill until 1986. In 1987, after Waterford Sanitary Landfill stopped owning the property, discharges of hazardous substances began to emanate from the landfill. The State of Michigan spent over \$16 million to stop the discharges and clean up the site. In 1991, the State sued Hirs and Waterford Sanitary Landfill to recover the cleanup costs. When the defendants failed to appear for trial, the court entered a default judgment against them.

Hirs and Waterford Sanitary Landfill appealed the trial court's judgment to the Michigan Court of Appeals, arguing that they were denied due process of law because they were not given notice of the trial date. The court of appeals then considered whether the lack of notice was sufficient cause to "set aside" the trial court's default judgment under the circumstances. In Michigan, a motion to set aside a default judgment may be granted only if (1) "good cause" is shown for failure to comply with court requirements; and (2) facts are provided to the court that show that the moving party has a "meritorious defense."

Examples of "good cause" are procedural defects or irregularities or a reasonable excuse for failing to comply with the court's requirements. One basis for "good cause" is failure to receive notice of the hearing. In this case, the court of appeals concluded that lack of notice was an acceptable excuse for Hirs' and Waterford Sanitary Landfill's failures to appear for trial. But the court of appeals refused to set aside the default judgment, concluding that defendants Hirs and Waterford Sanitary Landfill did not have a meritorious defense.

The defendants argued that they are not liable for cleaning up the landfill site because they did not own it when the illegal discharges from the landfill occurred. But the court of appeals rejected the defendant's argument because, under MERA, MCL 299.612(1)(b), cleanup liability depends on when the contaminants were disposed of in the landfill and not the timing of leaks or discharges from the landfill. Thus, as long as Hirs and Waterford Sanitary Landfill owned the landfill when hazardous substances were disposed of, said the court of appeals, the defendants are liable if the contaminants later leak from the landfill. Hirs and Waterford Sanitary Landfill did not deny they owned the landfill when wastes were disposed of there. The court of appeals concluded from this lack of a denial that the defendants could not show that they could present a meritorious defense. Therefore, the court of appeals denied the defendants' motion to set aside the default judgment.

## 5. Miscellaneous

### a. *Crumbaugh v Velsicol Chemical Corp*, No. 212295 (Mich Ct App, Aug 29, 2000).

The Michigan Court of Appeals has ruled that a trial court properly admitted oral evidence regarding the interpretation of a lease for a well for the disposal of waste materials by a chemical company and properly entered a judgment against the chemical company, voiding the existing

lease agreement. Michigan Chemical Corporation ("Michigan Chemical"), and later, its successor, Velsicol Chemical Corporation ("Velsicol"), operated a fifty-acre chemical manufacturing plant (the "Plant") along the banks of the Pine River in St. Louis, Michigan from 1936 until September 1978. Chemicals produced at the Plant included polybrominated biphenyl ("PBB").

Robert Crumbaugh ("Crumbaugh") was employed by Michigan Chemical from 1936 until the mid-1940's, working in the boiler room. Starting in 1944, Crumbaugh owned and farmed a number of acres of land several miles from the Michigan Chemical site. Crumbaugh died in 1997, several months before his wife, Marcelle Crumbaugh ("Mrs. Crumbaugh") brought the instant suit.

Until the mid-1960's, the Plant's wastewater discharges were pumped into the Pine River. At that time, Michigan Chemical drilled an underground injection well ("Well 1") less than one mile from the Crumbaugh's home to dispose of wastewaters. In 1966, Michigan Chemical secured an easement from the Crumbaughs for an underground pipeline leading from the Plant to Well 1, which would cross their property. The easement granted Michigan Chemical:

the right to lay, maintain, operate, replace, change and remove pipelines for the transportation of brine and other substances, together with such drips, valves, fittings, meters, and similar appurtenances as may be necessary or convenient to the operation of said lines . . . together with the right of ingress or egress for all purposes incident to said grant.

The said Owner(s), their heirs and assigns, hereby agree that no building or buildings shall be erected on or over the said pipelines, but are otherwise to fully use and enjoy said premises except for the purpose herein before granted to said Michigan Chemical Corporation who hereby agree [sic] to pay any damages which may arise to crops, fences, stock and land from the laying, maintaining, operating, and removing of said lines.

The route to be taken by the pipelines is to be restricted to an area within 33 feet of the centerline of the County Road . . . Michigan Chemical Corporation agrees to bury and maintain said pipelines so as not to unduly interfere with the cultivation or drainage of said land.

This agreement is binding to the heirs, representatives, successors and assigns of the respective parties hereto. Slip op. at 2.

Substances were channeled through the pipeline to Well 1 from late 1966 until 1980.

By a lease agreement executed on September 22, 1971, Michigan Chemical leased from the Crumbaugh's one acre of land for the purpose of drilling and operating a second disposal well ("Well 2") along the existing pipeline. This lease agreement was drafted by Michigan Chemical and provided a lease term of 99 years beginning September 15, 1971, with a rental payment of \$600.00 per year beginning September 15, 1971. It also provided numerous other details as to the use, termination and assignment of the lease.

The lease agreement was on letterhead of Michigan Chemical's Chicago, Illinois office, and was signed by the Crumbaugh's and a vice-president and secretary of Michigan Chemical. Later testimony revealed that the Crumbaugh's failed to read the lease agreement prior to signing. Soon after the lease was executed, Michigan Chemical drilled and put into operation Well 2, approximately two hundred yards from the Crumbaugh's residence, at a depth of roughly 3,750 feet. In approximately 1975, Michigan Chemical piped wastewaters containing trace amounts of PBB to Well 2. The Plant was shut down in 1978, and was later demolished and the site remediated. Well 1 was capped and plugged in 1980. The Plant site was subsequently placed on the EPA's National Priority List ("NPL"), and in 1982, various federal and state agencies and Velsicol entered into a consent judgment regarding contamination at the main plant site. The Crumbaugh's were not parties to the consent judgment.

The consent judgment required that Velsicol wall and cap the main plant site, install monitoring wells and a groundwater collection system, and maintain the water table elevation within the main plant site at no more than 724.13 feet. Accordingly, Velsicol built a soil bentonite containment wall encircling the fifty-acre perimeter of the plant site, filled with a mixture of soil, bentonite and water. A three-foot thick clay cap covered the site. These preparations were to prevent the leakage of hazardous substances. Additionally, an appendix to the consent judgment required Velsicol to immediately apply for a permit to allow it to dispose of decontamination and contaminated water collected from the main plant site in Well 2. Another attachment to the consent judgment required Velsicol to coordinate the Well 2 activities with the landowner "upon and adjacent to whose lands the

deep well is located."

From approximately 1982 to 1984, Velsicol pumped wastewaters from the plant site through the pipeline to Well 2, including leachate from a completely separate industrial disposal site that Velsicol had remediated. In June 1984, the Crumbaugh's received a letter from Velsicol's attorney stating that Velsicol would be installing spill control structures at the Well 2 site in accordance with the consent judgment, namely a "Truck Unloading Spill Containment Pad", which was installed in July 1984 while the well was still operational. For the next approximately twelve years Well 2 lay dormant. No maintenance or inspection of the pipeline between the plant site and Well 2 was performed after the mid 1980's. In the early 1990's, the water table level at the plant site began to rise above the level permitted by the consent judgment. By then, regulatory requirements for disposal wells had changed, and Well 2 did not meet these new requirements. Even though Velsicol was apparently aware of Well 2's non-compliance, it failed to explore alternative means of disposal until 1994, when it received a letter from the EPA reprimanding it for allowing the water table to exceed the required level, and urging it to seek alternative disposal methods.

In May 1996, Velsicol met with the Crumbaugh's to advise them that it intended to reactivate the well, to which the Crumbaugh's objected. A contractor began work on the well, and, subsequently, Mrs. Crumbaugh filed a complaint seeking to have the lease declared void in April 1997.

Mrs. Crumbaugh's first amended complaint alleged that Velsicol's facility was demolished and declared an EPA superfund site by virtue of PBB contamination, that the clay liner sealing the site had become permeable, that groundwater had leached into the superfund site, and that Velsicol intended to truck the leachate to the well on Mrs. Crumbaugh's property. The complaint also alleged that the original lease agreement provided that the substances for disposal in Well 2 be piped, not trucked, to the well, and that representations were made to the Crumbaugh's that Well 2 would only be used to dispose of a naturally occurring substance, brine. Additionally, the complaint alleged that Velsicol intended to erect structures on the Crumbaugh property that were not specifically permitted by the lease agreement. Mrs. Crumbaugh requested relief from the court on the basis that defendant's activities and proposed use of the well would result in irreparable harm by: (1) impeding the use and operation of farm equipment; (2) blocking the road and restricting access to Mrs. Crumbaugh's home; (3) damaging

field tile; (4) causing loss of acreage; and (5) impairing the ability of Mrs. Crumbaugh and her successors or assigns to encumber the premises by mortgage, among other things.

Attached to Mrs. Crumbaugh's original complaint was an affidavit of C.W. Dunbar ("Dunbar"), which stated that he was an employee of Michigan Chemical in 1971, and that he had requested permission from Crumbaugh to drill a well for the purpose of disposing of brine, and that the brine would be transported to Well 2 by pipeline only, and that the only purpose contemplated for Well 2 was for the disposal of brine.

Velsicol's answer denied that the original lease prohibited it from trucking in the waste or excess water to Well 2, even though it was generally agreed that the water would be transported by pipeline. Additionally, Velsicol claimed that its use of Well 2 would not cause the impediments that Mrs. Crumbaugh claimed, and counter-claimed that Mrs. Crumbaugh and her relatives were attempting to interfere with Velsicol's construction, even though it was permitted under the terms of the lease agreement.

In May 1997, the trial court granted Mrs. Crumbaugh's request for a preliminary injunction, and, following a bench trial in March and April of 1998, permanently enjoined Velsicol from disposing of any substance in Well 2, voided the original lease agreement, and ordered that Velsicol vacate the leased property within eighteen months. Velsicol appealed.

Upon appeal, Velsicol argued that the main discrepancy was whether the original lease limited Velsicol to the disposal of brine only, or allowed it to dispose of other substances at its discretion. Velsicol believed that the lease was clear on that question, and that the trial court erred in allowing parole evidence on that issue. Mrs. Crumbaugh argued that the trial court properly admitted the parole evidence, believing that it was necessary to determine whether the lease agreement fully incorporated the parties' agreement. Mrs. Crumbaugh also argued that the parole evidence was necessary to explain technical or trade terms in the lease agreement which would otherwise be susceptible to more than one definition. She used as an example the term "items" in the phrase stating the lessee "may thereafter pipe into said disposal well such items for disposal as the Lessee shall determine from time to time."

The appeals court found that, although parole evidence is not admissible to vary or change a contract that is clear and unambiguous, it may be admissible to prove the existence

of an ambiguity in a contract and to clarify the meaning of an unclear contract. The appeals court quoted **Raska v Farm Bureau Mut Ins Co**, 412 Mich 355, 362; 314 NW2d 440 (1982), stating that "a contract is ambiguous if 'its words may reasonably be understood in different ways.'" The trial court noted that an ambiguity existed regarding the intended use of the well, and found that Velsicol's proposed use was inconsistent with the lease as intended by both parties. The appeals court agreed with the trial court that parole evidence could be considered regarding the question of whether the lease agreement as written represented the complete agreement of the parties. Additionally, the appeals court found that, after receiving the affidavit and testimony of Dunbar, the trial court did not abuse its discretion in concluding that the written lease did not fully incorporate the parties' agreement.

The appeals court also agreed with the trial court's finding that additional ambiguity existed regarding the portion of the lease stating the defendant "may" pipe materials into Well 2, because the language could be interpreted as having more than one meaning. The phrase could be interpreted to mean that the lease granted Velsicol access to the well by pipeline or other mode, or that Velsicol was permitted only one method of access to the disposal well, through the pipeline. Similarly, as argued by Mrs. Crumbaugh, the word "items" in the phrase "may thereafter pipe into said disposal well such items for disposal as the Lessee shall determine from time to time," was subject to more than one interpretation. Therefore, the appeals court rejected Velsicol's argument that the trial court erred in allowing parole evidence at trial, and affirmed the trial court's ruling vacating the lease agreement.

**b. Reiss v MDEQ, No. 00-17799-CM (Mich Ct Claims, Apr 26, 2001).**

The Michigan Court of Claims has dismissed a negligence claim brought by homeowners against MDEQ and its Executive Director because those parties are immune from liability under Michigan law. The claim against MDEQ and Harding arose from their alleged inaction with respect to groundwater contamination beneath a Rochester Hills subdivision. Scott and Loriann Reiss, together with their two minor children, lived on residential property near School Road in Rochester Hills, Michigan. Contamination leaking from a nearby landfill had contaminated the groundwater in the area, causing spontaneous fires in the Reiss' basement, putrid smells, and indoor air contamination. Further, Reiss claimed that, as a direct result of the contamination, for years his family had suffered nausea, sleepiness, forgetfulness, and irritability, among other mental and physical ailments. The

concentration of the contamination near Reiss' house was so high that, in March 2000, explosive levels of contaminants collected in the basement drain of a neighboring house, causing that structure to "explode with catastrophic force, demolishing the house."

Reiss claimed that MDEQ and, in particular, its Executive Director, Russell J. Harding, had been aware of the "near fatal levels of contamination" since the 1980s, yet "sat silently for over ten years and failed to give a single, solitary bit of information to the residents that the soil under their feet, the groundwater, or the water they had previously been drinking was saturated with dangerous and toxic levels of hazardous substances." Accordingly, Reiss sued MDEQ and Harding, claiming that they were negligent by failing to properly carry out their responsibilities under NREPA.

MDEQ and Harding moved to have the lawsuit dismissed because they cannot be liable for negligence under the Governmental Immunity Act, and the court agreed. The Governmental Immunity Act provides that "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." The Michigan Supreme Court has held that, under the Governmental Immunity Act, governmental agencies are generally immune from all tort liability unless the government's activities falls within one of the narrowly defined exceptions to immunity created by the Legislature.

Reiss argued that MDEQ and Harding should not be immune from tort liability because Harding and other MDEQ employees "acted in a grossly negligent manner so

as to show deliberate indifference to the health and safety of the public." The court rejected this argument as to MDEQ because the "gross negligence exception" to governmental immunity applies only to officers, employees, members or volunteers of the agency, and not to the agency itself. Therefore, the court held that MDEQ could not be liable for Harding's or any other MDEQ employee's gross negligence.

The court also rejected Reiss' argument with respect to Harding because the court found that he had not acted with gross negligence. The court defined gross negligence as "conduct so reckless as to demonstrate a *substantial* lack of concern for whether an injury results." In this case, the court noted that, when MDEQ first became aware of the situation, it had quarantined the public well-water system and had bottled water brought in for area residents. Further, after the explosion, MDEQ temporarily removed the residents from their homes and installed a contamination collection system to reduce the potential for future explosions. Thus, the court held that, once Harding and other MDEQ employees became aware of the problem, they took prompt action. Accordingly, the court dismissed the lawsuit against MDEQ and Harding because they were immune from liability under the Governmental Immunity Act.

## II. STATE LEGISLATION

### Michigan Pub. Act And Effective Date

**2000 Public Acts**

	<b>Description</b>
PA 277 (HB 5690) July 10, 2000	
PA 278 (HB 5691) July 10, 2000	Adds MCL 324.32610 and 324.32611 to create the Submerged Log Recovery Fund and the Great Lakes Fund within the state treasury.
PA 280 (HB 5854) July 10, 2000	Adds Part 326 to NREPA (MCL 324.32601 et seq.) to provide for recovery of submerged logs from the Great Lakes and prohibits removal without a permit from MDEQ.
PA 286 (SB 1201) July 10, 2000	Amends MCL 21.143 and 21.147 to establish an emergency dredging loan program for marinas.
PA 287 (SB 1216) July 10, 2000	Amends MCL 324.3112a notification requirements by municipalities for discharge of untreated or partially treated sewage into waters of the state.
PA 337 (SB 1124) Dec 21, 2000	Adds MCL 324.3112c to require annual publication of a list of occurrences of sewage discharge and to require availability on MDEQ's website.
PA 347 (HB 5710) Dec 28, 2000	Repeals MCL 426.1 - .15 requiring a lien for labor and services on forest products.
PA 414 (HB 4388) Mar 28, 2001	Amends MCL 324.40102, .40117 and .40118 and repeals .40115 regarding violations for natural resource commission orders regarding crossbow hunting.
PA 441 (HB 5709) Jan 9, 2001	Amends MCL 324.1606 and repeals MCL 324.74124 regarding powers for park and recreation officers and arrests without warrants.
PA 474 (HB 5839) Jan 11, 2001	Amends MCL 324.61503b, .61603c and .76111 regarding certain oil and gas postproduction costs and allows the establishment of Great Lakes bottomlands preserves by rule.
PA 504 (SB 651) Jan 11, 2001	Amends MCL 324.5527 to add an affirmative defense for emissions exceeding those allowed under a permit to install under MCL 324.5505.

Amends Part 91 of NREPA, soil erosion and sedimentation control to allow a county board of commissioners to provide for control by ordinance; requires MDEQ to conduct reviews and approve or disapprove of county, municipality or public agency programs; establishes a municipal or state civil infraction fine for knowing violations of Part 91 or false statements in Part 91 applications; allows MDEQ to charge fees for administering a training program; creates a training fund; and exempts certain metallic mineral mining activity from permit requirements pertaining to earth changes.

**III. ADMINISTRATIVE RULEMAKINGS****A. EPA Final Rulemakings**

**Federal Register Notice**

## Safe Drinking Water

65 Fed Reg 25,982 (May 4, 2000)

## Clear Air Act, NESHAP

65 Fed Reg 26,491 (May 8, 2000)

## Clean Water Act, NPDES

65 Fed Reg 30,886 (May 15, 2000)

## Clean Air Act, Permits

65 Fed Reg 32,035 (May 22, 2000)

## Hazardous Waste Management

65 Fed Reg 32,214 (May 22, 2000)

## Clean Air Act, NESHAP

65 Fed Reg 34,010 (May 25, 2000)

## Safe Drinking Water

65 Fed Reg 34,404 (May 30, 2000)

## Clean Water Act, Great Lakes

65 Fed Reg 35,283 (June 2, 2000)

## CERCLA, Enforcement

65 Fed Reg 35,339 (June 2, 2000)

## Clean Water Act

65 Fed Reg 37,783 (June 16, 2000)

## Clean Air Act, NESHAP

65 Fed Reg 38,030 (June 19, 2000)

## Safe Drinking Water

65 Fed Reg 38,629 (June 21, 2000)

## Superfund, NPL

65 Fed Reg 38,774 (June 22, 2000)

## EPCRA, Right to Know

65 Fed Reg 39,552 (June 27, 2000)

**Description**

Amends 40 CFR Parts 9, 141, 142 and 143 national primary drinking water public notification requirements.

Amends 40 CFR Parts 9 and 63 NESHAPs for polyether polyols production, synthetic organic chemical manufacturing industry ("SOCMI"), epoxy resins production and non-nylon polyamides production; and petroleum refineries.

Amends 40 CFR Parts 22, 117, 122 – 125, 144, 270 and 271 to streamline the NPDES program requirements pursuant to a 1995 Presidential directive.

Amends 40 CFR Part 70 to extend all operating permit program interim approvals to Dec 1, 2001.

Amends 40 CFR Part 261 regulation of certain fossil fuel combustion wastes.

Amends 40 CFR Part 63 NESHAP for source categories to clarify the construction by EPA of the applicability of CAA §§ 112(g) and 112(j) for certain stationary combustion turbines.

Amends 40 CFR Part 141 to remove the zero maximum contaminant level goal ("MCLG") for chloroform.

Amends 40 CFR Part 132 to remove the criterion for selenium from the Great Lakes Water Quality Guidance.

Notice of EPA's guidance on exercising CERCLA enforcement discretion in anticipation of full cost accounting consistent with the "Statement of Federal Financial Accounting Standards No. 4."

Publication of EPA's Effluent Guidelines Plan required by CWA § 304(m).

Amends 40 CFR Part 63 NESHAP for Groups I and IV polymers and resins.

Corrections to 40 CFR Part 141 public notification requirements.

Notice of partial deletion of the Motor Wheel Disposal Superfund site, Lansing, Michigan, from the NPL.

Clean Air Act, NESHAP 65 Fed Reg 42,292 (July 10, 2000)	Amends 40 CFR Part 372 to delete phosphoric acid from the EPCRA § 313 list of chemicals subject to reporting.
Clean Water Act, NPDES 65 Fed Reg 43,586 (July 13, 2000)	Technical corrections to 40 CFR Parts 60, 63, 261 and 270 NESHAP for hazardous waste combustors to make final rule easier to understand and implement.
Clean Air Act / CERCLA 65 Fed Reg 47,342 (Aug 2, 2000)	Amends 40 CFR Parts 9, 122 – 124 and 130 water quality planning and management requirements with respect to the NPDES program.
Clean Water Act, Great Lakes 65 Fed Reg 47,864 (Aug 4, 2000)	Amends 40 CFR Parts 63 and 302 to remove surfactant alcohol ethoxylates and their derivatives from the glycol ethers category in the list of hazardous air pollutants under the CAA and CERCLA's hazardous substances list.
Clean Air Act, Release Prevention 65 Fed Reg 48,108 (Aug 4, 2000)	Amends 40 CFR Part 132 to approve and disapprove submissions from Michigan (and other states) with respect to water quality standards, antidegradation policies and implementation procedures consistent with the Great Lakes Water Quality Guidance.
Clean Air Act, Stationary Sources 65 Fed Reg 48,914 (Aug 10, 2000)	Adds 40 CFR Part 1400 under a new joint EPA and Department of Justice Chapter IV regarding CAA § 112(r)(7) risk management programs and distribution of off-site consequence analysis information.
Clean Water Act, Effluent Limitations 65 Fed Reg 49,666 (Aug 14, 2000)	Amends 40 CFR Part 60 monitoring requirements for continuous opacity monitoring systems.
Clean Air Act 65 Fed Reg 49,868 (Aug 15, 2000)	Adds 40 CFR Part 442 to establish technology-based effluent limitations and NSPS by existing and new facilities that perform transportation equipment cleaning operations.
Clean Air Act, NESHAP 65 Fed Reg 52,588 (Aug 29, 2000)	Amends 40 CFR Part 62 emission guidelines for certain existing hospital/medical/infectious waste incinerators.
Clean Air Act, Michigan SIP 65 Fed Reg 52,651 (Aug 30, 2000)	Amends 40 CFR Part 63 NESHAP for pharmaceuticals production.
Clean Water Act, Effluent Guidelines 65 Fed Reg 53,008 (Aug 31, 2000)	Amends 40 CFR Parts 52 and 81 to change Muskegon County to attainment for the 1-hour ozone national ambient air quality standard ("NAAQS").
Clean Air Act, NESHAP 65 Fed Reg 54,419 (Sept 8, 2000)	Publication of EPA's plan for development of new and revisions to existing effluent guidelines.
Clean Air Act, HAP 65 Fed Reg 55,810 (Sept 14, 2000)	Corrections and clarifications to 40 CFR Part 63 NESHAP for halogenated solvent cleaning.
Clean Air Act, SIP 65 Fed Reg 56,245 (Sept 18, 2000)	Amends 40 CFR Parts 9 and 63 to modify procedures for delegating HAP standards and other requirements to state, local and territorial agencies and Indian tribes.

Superfund, NPL  
65 Fed Reg 56,258 (Sept 18, 2000)

Amends 40 CFR Part 51 to stay the 8-hour portion of the NO<sub>x</sub> SIP call related to the 8-hour ozone NAAQS.

Superfund, NPL  
65 Fed Reg 57,810 (Sept 26, 2000)

Notice of deletion of Cliff/Dow Dump Superfund site, Marquette, Michigan, from the NPL.

Clear Air Act, Testing  
65 Fed Reg 61,744 (Oct 17, 2000)

Notice of policy change with respect to eligibility for the “construction completion” category of the NPL.

Hazardous Waste Management  
65 Fed Reg 67,068 (Nov 8, 2000)

Amends 40 CFR Parts 60, 61 and 63 stationary source testing and monitoring provisions.

Clean Water Act, Wetlands  
65 Fed Reg 66,914 (Nov 7, 2000)

Amends 40 CFR Parts 148, 261, 268, 271 and 302 requirements for management of chlorinated aliphatics industry wastes.

Clear Air Act, NSPS  
65 Fed Reg 67,357 (Nov 9, 2000)

Issuance of final policy guidance regarding the use of in-lieu-fee arrangements for compensatory mitigation under CWA § 404 and Section 10 of the Rivers and Harbors Act.

Clear Air Act, SIP  
65 Fed Reg 67,629 (Nov 13, 2000)

Revises schedule for promulgation of new source performance standards (“NSPS”) and emission guidelines for municipal waste combustors and certain solid waste incinerators.

Clean Water Act, Great Lakes  
65 Fed Reg 67,638 (Nov 13, 2000)

Amends 40 CFR Parts 52 and 81 to redesignate as attainment for the 1-hour ozone NAAQS in Genesee, Bay, Midland and Saginaw counties.

Clean Air Act, SIP  
65 Fed Reg 70,490 (Nov 24, 2000)

Amends 40 CFR Part 132 to prohibit mixing zones for bioaccumulative chemicals of concern under the Great Lakes Water Quality Guidance.

Clean Air Act, NSPS  
65 Fed Reg 75,338 (Dec 1, 2000)

Amends 40 CFR Parts 52 and 81 to redesignate as attainment for the 1-hour ozone NAAQS in Allegan county.

Clean Air Act, NSPS  
65 Fed Reg 76,378 (Dec 6, 2000)

Amends 40 CFR Part 60 to promulgate standards and emission guidelines for certain new and existing commercial and industrial solid waste incinerators.

Safe Drinking Water  
65 Fed Reg 76,708 (Dec 7, 2000)

Amends 40 CFR Part 60 to reestablish emission guidelines for certain existing small municipal waste combustion units.

Clean Air Act, NSPS and NESHAP  
65 Fed Reg 78,268 (Dec 14, 2000)

Amends 40 CFR Parts 9, 141 and 142 to finalize an MCLG, maximum contaminant level (“MCL”), monitoring, reporting and public notification requirements for certain radionuclides in community water supplies.

Clean Air Act, NESHAP  
65 Fed Reg 80,755 (Dec 22, 2000)

Amends 40 CFR Parts 60, 61, 63 and 65 to promulgate a consolidated federal air rule for the certain equipment within the SOCMCI.

Clean Air Act, NSPS  
65 Fed Reg 80,776 (Dec 22, 2000)

Amends 40 CFR Parts 9 and 63 NESHAP for the pulp and paper industry.

Clean Water Act, Effluent Limitations 65 Fed Reg 81,242 (Dec 22, 2000)	Amends 40 CFR Part 60 NAAQS with respect to particulate matter.
Clean Air Act, SIP 65 Fed Reg 81,366 (Dec 26, 2000)	Amends 40 CFR Parts 136 and 437 to establish effluent limitations guidelines and NSPS for the centralized waste treatment point source category.
Hazardous Waste Management 65 Fed Reg 81,373 (Dec 26, 2000)	Final rulemaking finding under 40 CFR Part 51 that Michigan (among other states) failed to make complete SIP submittals under the NO <sub>x</sub> SIP call.
Alternative Dispute Resolution 65 Fed Reg 81,858 (Dec 27, 2000)	Amends 40 CFR Part 268 to defer Phase IV land disposal restrictions with respect to certain PCBs in soil subject to treatment.
Clean Air Act, NESHAP 66 Fed Reg 1263 (Jan 8, 2001)	Publication of EPA's policy on the use of alternative dispute resolution techniques for internal and external disputes.
Safe Drinking Water 66 Fed Reg 2273 (Jan 11, 2001)	Technical corrections to 40 CFR Part 63 NESHAP for off-site waste and recovery operations.
EPCRA, Right to Know 66 Fed Reg 4500 (Jan 17, 2001)	Amends 40 CFR Part 141 to establish criteria to monitor unregulated contaminants for public water systems.
Clean Water Act, Dredged Material 66 Fed Reg 4550 (Jan 17, 2001)	Amends 40 CFR Part 372 to lower the reporting threshold for lead and lead compounds.
Clean Air Act, Motor Vehicles 66 Fed Reg 5002 (Jan 18, 2001)	Amends 33 CFR Part 323 and 40 CFR 232 definition of "discharge of dredged material."
Clean Water Act, Effluent Limitations 66 Fed Reg 6850 (Jan 22, 2001)	Amends 40 CFR Parts 69, 80 and 86 to control air pollution from certain heavy-duty engines and establishes requirements for diesel fuel sulfur control.
Clean Air Act, NESHAP 66 Fed Reg 6922 (Jan 22, 2001)	Amends 40 CFR Parts 9 and 435 to establish technology-based effluent limitation guidelines for the oil and gas extraction point source category.
Safe Drinking Water 66 Fed Reg 6976 (Jan 22, 2001)	Amends 40 CFR Part 63 NESHAP for the SOCFMI and other processes subject to the negotiated regulation for equipment leaks.
Clean Air Act, NESHAP 66 Fed Reg 8220 (Jan 30, 2001)	Amends 40 CFR Parts 9, 141 and 142 to establish a health-based, non-enforceable MCLG and an enforceable MCL for arsenic for non-transient non-community water systems.
Clean Air Act, NSPS 66 Fed Reg 9034 (Feb 6, 2001)	Revises source category list and schedule of standards under CAA § 112.
Clean Water Act, Dredged Material 66 Fed Reg 10,367 (Feb 15, 2001)	Delays effective date of Aug. 10, 2000 notice regarding monitoring requirements.
EPCRA, Right to Know 66 Fed Reg 10,585 (Feb 16, 2001)	Delays effective date of Jan. 24, 2001 definition of "discharge of dredged material."

Clean Water Act  
66 Fed Reg 11,202 (Feb 23, 2001)

Delays effective date of Jan. 24, 2001 reporting requirements for lead and lead compounds.

Clean Air Act, Permits  
66 Fed Reg 12,872 (Mar 1, 2001)

Notice of Memorandum of Agreement between EPA, Fish and Wildlife Service and National Marine Fisheries Service to enhance coordination under the CWA and Endangered Species Act.

Clean Air Act, NESHAP  
66 Fed Reg 16,007 (Mar 22, 2001)

Amends 40 CFR Parts 70 and 71 compliance certification requirements for state and federal operating permits programs.

Safe Drinking Water  
66 Fed Reg 16,134 (Mar 23, 2001)

Amends 40 CFR Part 63 NESHAP for production of certain ferroalloys.

Clean Air Act, NESHAP  
66 Fed Reg 16,140 (Mar 23, 2001)

Delay of effective date of Jan. 24, 2001 arsenic in drinking water rule.

Clean Air Act, NSPS  
66 Fed Reg 16,605 (Mar 27, 2001)

Corrections to 40 CFR Part 63 NESHAP for publicly owned treatment works.

Clean Air Act, HAP  
66 Fed Reg 17,230 (Mar 29, 2001)

Corrections to 40 CFR Part 60 NSPS for certain commercial and industrial solid waste incineration units.

Clean Air Act, NESHAP  
66 Fed Reg 19,006 (April 12, 2001)

Amends 40 CFR Parts 80 and 86 to control emissions of certain HAPs from mobile sources.

Clean Air Act, NESHAP  
66 Fed Reg 24,268 (May 14, 2001)

Amends 40 CFR Part 63 to establish a NESHAP for solvent extraction for vegetable oil production.

Clean Air Act, NESHAP  
66 Fed Reg 24,270 (May 14, 2001)

Corrections to 40 CFR Part 63 NESHAP for pulp and paper industry.

Clean Air Act, Permits  
66 Fed Reg 27,008 (May 15, 2001)

Amends 40 CFR Part 63 NESHAP for hazardous waste combustors to implement court order in **Chemical Mfrs Assoc v EPA**, 217 F3d 861 (CA DC, 2000).

Hazardous Waste Management  
66 Fed Reg 27,218 (May 16, 2001)

Amends 40 CFR Part 70 requirements for interim approvals of state and local operating permit programs.

Hazardous Waste Management  
66 Fed Reg 27,266 (May 16, 2001)

Amends 40 CFR Part 268 storage, treatment, transportation and disposal requirements for low-level mixed waste.

Safe Drinking Water  
66 Fed Reg 28,343 (May 22, 2001)

Amends 40 CFR Parts 261 and 268 mixture and derived-from rules.

Amends 40 CFR Parts 9, 141 and 142 to further delay the arsenic in drinking water effective date and to clarify compliance and monitoring requirements.

## B. State Final Rulemakings

### Michigan Register Notice

	<b>Description</b>
Land and Water Management 2000 MR 6 (June 2000), p. 68	
Land and Water Management 2000 MR 8 (July 2000), p. 11	Adds Mich Admin Code R 281.922a (wetland permit application review criteria) and amends R 281.925 (wetlands mitigation).
Storage Tank 2000 MR 10 (Aug 2000), p. 4	Amends Mich Admin Code R 281.814, .816 - .819, .832, .834, .835, .837 and .843 and rescinds R 281.833 (inland lakes and streams)
Water Quality 2000 MR 11 (Aug 2000), p. 23	Adds Mich Admin Code R 29.4001 - .4035 (storage and handling of liquefied petroleum gases) and rescinds therein Mich Admin Code R 29.3801 and 29.3819 - .3856.
Water Quality 2000 MR 12 (Sept 2000), p. 10	Adds Mich Admin Code R 324.8901 - .8920 to establish rules for the use of the Clean Water Fund established under MCL 324.8808.
Hazardous Waste Management 2000 MR 14 (Oct 2000), p. 2	Amends Mich Admin Code R 299.9001 - .9006 and adds R 299.9007 and .9008 regarding wastewater reporting requirements; rescinds R 299.9019; also rescinds therein R 323.1231 - .1236.
Drinking Water 2001 MR 2 (Feb 2001), p. 13	Amends numerous provisions of regulations pertaining to Part 111 of NREPA. The rules package was noticed in the Michigan Register, but not published by the Office of Regulatory Reform pursuant to MCL 24.257(l), with directions to obtain by downloading from the ORR website or contacting MDEQ.
Land and Water Management 2001 MR 2 (Feb 2001), p. 51	Amends numerous provisions regarding public swimming pools in Mich Admin Code R 325.2111 - .2199 and adds R 325.2113a, .2124, .2129a, .2135, .2143a, .2179, .2182 - .2184 and .2194a.
Geological Survey 2001 MR 2 (Feb 2001), p. 66	Amends Mich Admin Code R 560.401 - .405 and adds R 280.406 - .428 with respect to on-site water supply and sewage disposal for land divisions and subdivisions.
Water Quality 2001 MR 2 (Feb 2001), p. 79	Amends Mich Admin Code R 324.102, .416, .504, .1008, .1012, .1103, .1105, .1110, .1113, .1122, .1125 and .1129 and adds .1130 with respect to oil and gas operations.
Drinking Water 2001 MR 9 (June 2001), p. 2	Adds Mich Admin Code R 324.8915 with respect to use of the Clean Water Fund for conservation reserve enhancement programs.
	Adds Mich Admin Code R 325.10411 - .10420 to require annual consumer confidence reporting by community water suppliers.

## COMMITTEE REPORTS

### NOMINATING COMMITTEE

A nominating committee composed of Mike Leffler, John Tatum and Susan Topp was appointed by Charles Toy, Chair of the Section. The Committee presented its report to the Council at the meeting at Higgins Lake on June 9, 2001. The Committee was directed by the Council to consider the feedback and discussion at the meeting and to then present the slate of nominations to the membership at the annual meeting. The following candidates meet the criteria specified in the bylaws of the Section. They have all served on committees and made significant contributions to section activities. They are geographically diverse, and have diverse areas of practice.

Chairperson Elect - Tom Wilczak  
Secretary/Treasurer- Todd Dickinson

Council (6 positions)  
Second 3 year Term:  
Grant Trigger  
Paul Bohn

First 3 year term:  
Steve Huff  
Joe Quandt  
Jeff Magid  
Charlie Denton

#### ARTICLE IV

##### Nomination and Election of Officers

###### Section 1.

[a] Nomination On or before March 31 of each year, the Chairperson, with the advice of the Chairperson-Elect, shall appoint a Nominating Committee consisting of three (3) members of the Section.

[b] The Nominating Committee shall make and report nominations to the Section for the offices of Chairperson-Elect, Secretary-Treasurer and members of the Council, to succeed those whose terms will expire at the close of the next annual meeting and to fill vacancies then existing for unexpired terms.

[c] The Nominating Committee shall solicit suggestions for nominations for officers and Council members in the Michigan Environmental Law Journal.

[d] The Nominating Committee shall publish a written report of its proceedings, including without limitation the names, qualifications and addresses of all nominees selected by the committee, in the issue of the Michigan Environmental Law journal published immediately prior to the annual meeting.

[e] Other nominations for the same offices may be made from the floor at the annual meeting.

[f] A statement of the qualifications of the Nominating committee's selections for nominees shall be presented at the annual meeting.

[g] With respect to nominations made from the floor at the annual meeting, nominees, or those making the nominations, shall present a statement of the nominee's qualifications. amended 9/17/87, 9/13/90, 9/21/95]

###### Section 2.

[a] Qualifications In selecting nominees, the Nominating committee shall consider the need for representation on the council of members with differing responsible legal viewpoints and who reside in various geographic areas of the State.

[b] The Nominating Committee shall also consider the need for representation on the Council of women and racial/ethnic minority members.

[c] The Section has a tradition of recognizing the contributions of its members to the Section when nominating officers and Council members.

[d] The Nominating Committee shall also consider the prior contributions of a member to the work of the Section in areas such as publications, programs, committee activities and Council work.

[e] In addition to the above considerations, a nominee shall have the following qualifications:

(a) To be eligible for election to the Section Council, the member shall have served for no less than two years as an active member of a Section committee.

(b) To be eligible for election as an officer of the Section, a member shall have served not less than four full years as a voting member of the Section Council. [added 9/26/91; amended 9/21/95; amended 9/18/97]

Section 3. Elections. All elections shall be by written ballot at the annual meeting of the Section unless otherwise

ordered by resolution duly adopted by the Section at the annual meeting at which the election is held. [amended 9/13/90; renumbered 9/26/91]

## ARTICLE III

### Officers and Council Members

Section 2. The Nomination Committee shall consider the need for representation on the Council of women and racial/ethnic minority members. It shall also consider the need for representation on the Council of members with differing responsible legal viewpoints and who reside in various geographic areas of the State. [added 9/26/91]

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## PROGRAM COMMITTEE

The Program Committee held a meeting on Wednesday, July 18, 2001. Attendees included Kurt Brauer, John Byl, James O'Brien, Joe Quandt, Bob Schroeder, Marc Shay, Art Siegel, John Tatum, Susan Topp, and Tom Wilczak.

### 1. Committee Liaison Reports

No reports.

### 2. Planning Programs for 2001

a. **Program on Part 201 Rules.** The Part 201 Rules program will be held on August 23 at the University Club in East Lansing. It will be held in the fireplace room, which can accommodate up to 50 people. We have the room reserved from 11:00 a.m. to 5:30 p.m. The program will probably take place from 1:30 to 4:30, with a reception following the program. Jim O'Brien will select hors d'oeuvres for the reception. We will have a standard beverage service for a break in the afternoon. There will be a cash bar for alcoholic drinks and, if allowed by the University Club, free non-alcoholic drinks during the reception. The charge will probably be \$25. Lynelle Marolf will be speaking and Jim O'Brien and Chris Dunskey will line up additional speakers as well. Additional speakers will likely include an attorney from private practice and perhaps a consultant. Various suggestions were made regarding possible speakers.

b. **Fall Program.** Kurt Brauer and Joe Quandt are the co-chairs for this program. Kurt circulated a revised memorandum earlier in the day. The fall program will be

held on October 5 at the Michagaumee Room in the Kellogg Center at MSU in East Lansing. The Michagaumee Room holds up to 50 people, and is available from 8:00 a.m. to 4:00 p.m. at a rental charge of \$250.00. The program will probably run from 9:00 a.m. to 3:30 p.m. Kurt and Joe will make arrangements for the lunch, which will likely be a buffet lunch. Topics will likely include: environmental crimes, standing, alternate dispute resolution, brownfield financial incentives, and perhaps hot water and air topics and natural resources damages/cost recovery defense. Joe and Kurt will give their final recommendation for topics and speakers prior to our next meeting. Hopefully, most of the information needed for the brochure will be available by the time of our next meeting.

### 3. Higgins Lake, 2002

The participants generally concurred with the proposal that the Higgins Lake conference in 2002 be held on June 21 and 22 rather than June 7 and 8. This was also the view of those who attended the council meeting this past June at Higgins Lake. Accordingly, the conference center has been reserved for June 21 and 22 for Higgins Lake for 2002.

### 4. Next Meeting

The next meeting will be held on Wednesday, August 15, 2001 at 5:30 p.m. The call in number is 312-461-9197, code # 298963.

## MICHIGAN ENVIRONMENTAL CASENOTES

These casenotes include Michigan state and federal decisions rendered from March 1, 2001 through May 31, 2001.

### **Maharg Inc v Van Wert Solid Waste Management Dist, 249 F3d 544 (CA 6, 2001)**

In 1998, the Van Wert Solid Waste Management District (District) decided that waste generated in Van Wert County, Ohio, could only be disposed of in landfills that entered into a written agreement with the District. Under the agreement, the landfill would collect a \$5.30 per ton fee from waste haulers using the landfill. Maharg, Inc. (plaintiff) had used a landfill in Portland, Indiana, to dispose of the waste generated in Van Wert County. Although that landfill originally was approved by the District, when it refused to sign the agreement, the District withdrew its approval. Plaintiff then sued the District, claiming that the District's regulatory scheme violated its constitutional rights.

The court first held that the regulation did not violate the Dormant Commerce Clause because it found no discrimination against or burden on interstate commerce. Rather, the court found that all waste haulers were equally effected by the regulation and that the landfill used by plaintiff was originally approved, but was later excluded because it would not enter into the necessary agreement. Second, the court held that there was no evidence of facial discrimination against out-of-state disposal when the regulation was adopted. Third, the court held that there was no "practical effect" discrimination because there would be no strangling effect on interstate commerce if the regulation was replicated and there was no discrimination that would deprive plaintiff of a competitive advantage. Finally, the court found that there was no equal protection or due process violation.

### **Detroit v Simon Group, 247 F3d 619 (CA 6, 2001)**

The City of Detroit (City) sued Eaton Corp. (Eaton) and its subsidiary, the Simon Group (Simon), under CERCLA and NREPA, to recover clean-up costs of PCBs at an industrial site in Detroit, Michigan. Thereafter, the City and Eaton advised the trial court that they had reached a settlement. In open court, the City agreed to protect Eaton from any claim another party might raise against Eaton arising from the claim brought against Eaton by City. On the record, Eaton agreed to these terms, but later claimed that the

protection was not clarified in court. Thereafter, the trial court ruled that the City clarified the scope of the protection offered, that Eaton clearly agreed to the clarification on the record, but that Eaton's subsequent written agreement was inconsistent, so the court refused to enforce the settlement and it reset the case for trial. At trial, Eaton was found liable and the court entered a judgment, which included a percentage of future response costs. Simon was also found liable.

On appeal, the City claimed that the district court erred in refusing to enforce the settlement agreement and by limiting defendants' liability for future clean-up costs to those defined in NREPA. Simon also appealed, claiming that the City's failure to comply with notice provisions precluded recovery.

The Sixth Circuit held that Eaton was not entitled to statutory contribution protection from the City under CERCLA because an administrative settlement only protects the settling party against liability for contribution when the settlement is with a state or federal government, not a city. The court held that the parties had a meeting of the minds, and that the district court erred by allowing Eaton to repudiate that settlement. Finally, the court held that Simon could be held liable for PCB clean up costs under CERCLA and NREPA, as long as the costs were limited to those that were necessary, despite the City's failure to comply with the notice provisions.

### **Kalamazoo River Study Group v Eaton Corp, \_\_\_\_ F Supp 2d \_\_\_\_ (2001 WL 502983, May 9, 2001)**

The Kalamazoo River Study Group filed suit against the Eaton Corporation (Eaton) claiming that it had discharged PCBs into the Kalamazoo River. In 1998, the district court granted Eaton's motion for summary disposition, but it was reversed in 2000.

On remand, the district court heard testimony about three of Eaton's facilities: Battle Creek, Kalamazoo, and Marshall. Using the Sixth Circuit's liability test, the court found that Eaton was liable for discharging PCBs at the Battle Creek and Kalamazoo plants because multiple testings revealed PCBs in soil, water, and plant facilities, although the court found that the amounts that had reached the Kalamazoo River were very small. The court also found that

there was insufficient evidence to show that there had been a release of PCBs from the Marshall plant because plaintiff had presented only a single test result from 1980 that showed PCBs. Subsequent testing did not reveal any PCBs. Therefore, the court concluded that plaintiff failed to meet its burden of proof against Eaton at the Marshall plant.

**American Special Risk Ins Co v City of Center Line, unpublished opinion of the Eastern Michigan District Court, decided March 12, 2001, Docket No 97-CV-72874-DT (2001 US Dist LEXIS 5393)**

Plaintiffs filed suit under CERCLA seeking recovery from defendants as arrangers, generators and transporters of waste. Defendants moved for summary disposition, claiming that a prior settlement with the State of Michigan was an administrative settlement under CERCLA, and that the settlement barred plaintiffs' current claim.

The court denied defendants' motion. The court first looked to the general test applied in evaluating an administrative settlement and stated that the listed factors were not exhaustive. It reasoned that the settlement agreement as a whole must be examined. The court found that the prior agreement did not present the same claim against these defendants, as it did not raise any issues about their liability as arrangers, generators, and transporters and it did not settle a pending legal action against these defendants. Therefore, the prior agreement was limited in scope to the matters addressed in it specifically.

The court also discussed whether there were due process concerns raised here because plaintiffs had not been notified before the prior agreement was finalized. The court found it unnecessary to decide this because the matters in the settlement agreement were different from those raised in this case.

**Silver Creek Drain Dist v Extrusions Div, Inc., \_\_\_ Mich App \_\_\_, \_\_\_NW2d \_\_\_ (2001 WL 474880, May 4, 2001)**

In 1982, Extrusions Divisions, Inc. (Extrusions) acquired property adjacent to its North Complex in Grand Rapids, Michigan. In 1992, Extrusions applied for a building permit to erect a warehouse on the property, but it was denied. After the denial, Extrusions filed an inverse condemnation suit, claiming that the city's denial of the building permit and the drain commission's failure to pursue a purchase of the

property for a storm-water detention pond constituted a taking.

In 1994, the county filed a condemnation action, reserving its right to bring a federal or state cost recovery action under CERCLA or NREPA. In 1995, the court ordered Extrusions to convey the property for \$211,300. The drain commission requested that the funds be held in escrow against remediation costs, but the court ordered the funds released. In 1997, at a bench trial, the issue of evaluation of the property was examined, and the court determined that the value of the property, without clean-up costs, was \$278,800, and that the estimated clean-up costs were \$237,768, so the court determined that the net fair market value was \$41,032, the difference between the two.

On appeal, Extrusions raised three issues: the trial court improperly considered clean-up costs to set the fair market value; the trial court erred in determining the value of the property without clean-up costs; and the trial court failed to consider damages to the value of the North Complex property. The Court of Appeals held that the Uniform Condemnation Procedures Act (UCPA) did not give the court authority to consider remediation costs in determining the compensation due in an eminent domain proceeding. The court reasoned that § 8 of the UCPA required that the state pursue a separate action for remediation costs, and the set-off method would be contrary to that requirement. The court also held that there was no error when the trial court averaged the two property valuations, and that there was no error when it found that the taking caused no damage to the value of Extrusions' North Complex.

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The following Thomas M. Cooley Law School students were involved in preparing these Casenotes:

*Lina Farris, Yolanda Nowlin, Danielle Vaz and Pat Wilson*

## MINUTES ENVIRONMENTAL LAW SECTION COUNCIL MEETING

**Saturday, June 9, 2001**

**Call to Order at 10:03 a.m.**

Part 201 program is being planned for mid-August in Lansing at the State Bar or Cooley Law School.

**Present:**

Kenneth Burgess, John Byl, Todd Dickinson, Chris Dunskey, Peter Holmes, S. Lee Johnson, Jeffrey Magid, Michael Ortega, Patricia Paruch, Michael Robinson, Eugene Smary, John Tatum, Susan Topp, Charles Toy, Grant Trigger and David Tripp

**Journal Report:**

No report.

**Present via telephone:**

Tom Wilczak, Steven Huff, Ken Gold and Charles Barbieri

**Technology Committee Report:**

Todd Dickinson reported that there has been no meeting since the last report. The Section will need to re-examine at the end of the year whether we want to continue receiving the legislative update via listserv.

**Absent:**

Edward Reilly Wilson III, Robert Schroder, Mike Leffler, Tom Phillips, Paul Bohn.

**Membership Committee Report:**

Grant Trigger reported on the status of the print for the 20<sup>th</sup> anniversary celebration of the Section.

**Minutes:**

The minutes of the March 23, 2001 Council Meeting were approved on motion by John Tatum and seconded by John Byl.

**Publications:**

Gene Smary reported that he and Jeff Haynes and Charles Toy are working to develop a proposal for updating the Michigan Environmental Law Desk Book which will be one volume with more Michigan focus and less of a federal focus. Proposed chapters include Air, Part 201, Water, Solid Waste, Hazardous Waste, USTs, Transactions, Audits, Brownfields Finance, Wetlands, Common Law, Administrative Law, Criminal Law and Insurance. They are exploring publishing options, including ICLE and self-publishing.

**Secretary/Treasurer's Report:**

Tom Wilczak reported that the Section has a balance of \$30,121.28 as of May 31, 2001. As to telephone conference expenses, Wilczak noted that they appear to be in order, with no unusually large single charges. The one \$342.25 cost item noted at the March 24, 2001 meeting turned out to be a total for several calls billed on one day.

The recommendation is that the Section work with ICLE and have royalties be shared with the Section. ICLE has expressed a "strong interest", but no commitment has been made.

**Program Committee Report:**

John Byl reported that on June 6, 2001 the Program Committee hosted a DEQ roundtable at the Oakland County Bar that was attended by 42 people. The major topic was the Part 201 rules status that was addressed by Lynelle Marolf. John Byl further reported on the June 8, 2001 DEQ roundtable at Higgins lake, which was attended by approximately 20 people.

Goal is to try to publish early next year. Likely will require updates, as least annually (may be more frequently if also publish on CD Rom). They also will explore online publishing with the State Bar and others. The matter was left for the Leave this to Committee to explore the best deal for the Section.

Byl stated that the Committee is working on a fall program planned for early October. Joe Quandt and Kurt Brauer are working on developing topics and speakers. A

As to the December 2001 edition of the Michigan Bar Journal, proposals for articles are due by June 15, with articles by September 1, 2001.

**Subject Matter Committee Reports:**

- (a) **Air Committee:** No report.
- (b) **Environmental Ethics:** No report.

(c) **Environmental Litigation:** Steve Huff and Jeff Magid reported that they did not have a June 2 meeting on environmental crimes as previously planned, but that a program likely will be planned for the Fall Update Program.

- (d) **Natural Resources/Wetlands:** No report.
- (e) **Real Estate:** No report.
- (f) **Solid/Hazardous Waste:** No report.

(g) **Superfund:** Chris Dunsy reported that the Committee met on May 19, 2001 and that Bob Reichel discussed the new model Consent Decree drafted by ERD and with input from the Attorney General's Office. It was reported that the intent is to better delineate performance objectives and that the document is negotiable, it is not a "take it or leave it"

(h) **Surface/Groundwater:** Ken Gold reported that the Committee will meet this month or next to plan a program.

**Liaison Reports:**

(a) **State Bar Michigan Board of Commissioners:** Charles Toy stated that the June 15 meeting agenda with reports was available at the Council meeting.

(b) **Real Estate:** Pat Paruch reported that Section members raised money and are working with Habitat for Humanity on a house near Tiger Stadium.

- (c) **Administrative Law Section:** No report.
- (d) **Oil and Gas Law Committee:** No report.

**Nomination Committee Report:**

Charles Toy reported that the Nominating Committee, consisting of Michael Leffler, Susan Hlywa Topp, John Tatum and Charles Toy met to examine candidates and propose a slate. The terms of Todd Dickinson, Edward Reilly Wilson and John Dunn had expired and they were not eligible for another term.

The Committee nominated Todd Dickinson for Secretary/Treasurer, Tom Wilczak for Vice-Chair and John Tatum for Chair. The 3 year terms of Paul Bohn and Grant

Trigger expired and they are eligible for another term. Both were nominated for another 3 year term. Jeff Magid's one year term ended and he is eligible for a full 3 year term. He was nominated.

There was considerable discussion on the remaining 3 open council positions. Grant Trigger made and Mike Ortega seconded a motion that the slate be reviewed by the Committee based on the discussion and the Committee was given latitude to nominate any of the discussed candidates. The motion passed.

**Chairperson's Report:**

(a) **Access to Justice:** It was decided that the Section would not contribute, but that it would encourage individual members to do so.

**Vice Chairperson's Report:**

(a) **Initiatives:** John Tatum noted the need to encourage all Committee chairs to work to increase involvement in the Committees. Special attention will be to strive for greater diversity.

**Old Business:****(a) 20<sup>th</sup> Anniversary Celebration:**

(i) **Print:** Charles Toy reported that work on the print is on schedule.

(ii) **September 12, 2001 Dinner/Program:** Charles Toy discussed list of key invitees. He will circulate it on Council listserv for comment. As to the budget, with a menu for 80 folks there is an estimated \$4,419.00 less \$275.00 tax.

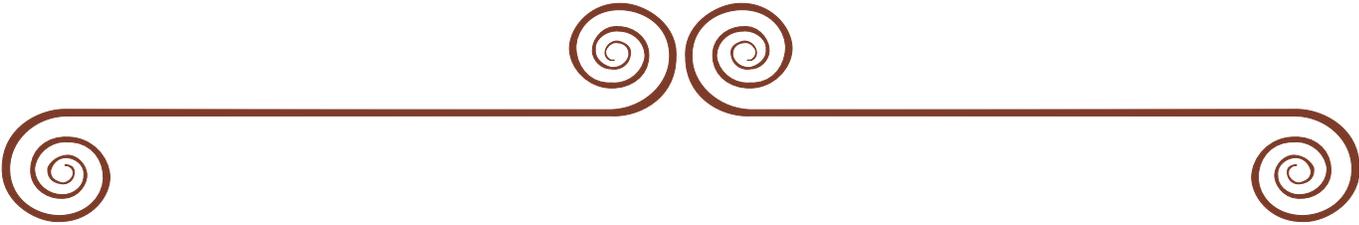
**New Business:**

There was discussion whether next year's Higgins Lake program should be at the same time or slightly later. Program Committee will discuss it.

**Next Meeting:**

September 12, 2001 at the Annual Meeting in Lansing.

Adjourned at 12:06 p.m.



## ENVIRONMENTAL LAW SECTION ANNUAL MEETING

Wednesday • September 12th • 2:00 p.m.  
Lansing Center, Banquet Rooms 1 & 3, First Floor

### CURRENT ENVIRONMENTAL ISSUES

**Speaker: Robert F. Kennedy, Jr.**

Chief Prosecuting Attorney for Hudson RiverKeeper  
Senior Attorney for the Natural Resources Defense Council  
Professor and Supervising Attorney at the  
Environmental Litigation Clinic at Pace University  
School of Law in New York

There will be a question & answer period if time permits.

*Business Meeting and Election Immediately Following*

Environmental Law Journal  
State Bar of Michigan  
Michael Franck Building  
306 Townsend Street  
Lansing, Michigan 48933-2083

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