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# NATURAL RESOURCES DAMAGES ASSESSMENTS AND CLAIMS IN THE GREAT LAKES BASIN

## PART II ANALYSIS OF NRD SETTLEMENTS

by

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### INTRODUCTION

This is the second of a two-part article which reviews the law and practice of assessment, calculation and settlement of Natural Resources Damages (“NRD”) claims in Michigan. Part I of the article described how NRD claims have developed under Michigan State law and under Federal law (as applied in U.S. Environmental Protection Agency (“EPA”) Region V)<sup>1</sup>. Part II of this article reviews and comments on a number of the NRD settlements that have occurred in the Great Lakes Basin, and provides a digest of NRD settlements identified by the authors. Part II closes with a practical commentary on negotiating and resolving NRD disputes based on past settlements and the authors’ experiences in negotiating NRD settlements.

### I. ASSESSMENT OF NATURAL RESOURCES DAMAGES

#### A. General

Natural resources damages consist of the following: (1) restoration costs to rehabilitate the injury and restore the environment to the baseline condition prior to the injury; (2) compensation for the value lost by the reduction or elimination of the resource from the time of the injury until complete restoration; and (3) the cost of the NRD assessment itself. NRD assessments essentially determine the nature and extent of the injury, quantify the effects on the resource, and determine the monetary damages.<sup>2</sup>

Typically, the most controversial aspect of the NRD assessment is the compensation for the lost value of the services from the injured resource. Restoration of the natural resource is akin to remediation in many instances, *e.g.*, pump and treat systems for impacted groundwater avoid or mitigate NRD for permanent injury to groundwater. For the most

part, the NRD assessment costs are relatively straightforward professional fees and expenses. In comparison, the economic impact from the loss of use of the injured natural resource is not only financially significant, but is also the type of injury most distinct from ordinary environmental site response activities.<sup>3</sup>

While the concept is one of compensation, assigning monetary value to the benefits of the service provided by the injured natural resource is problematic when those services do not have a standardized or objective market value. In some instances, there are market values for the injured resource, such as drinking water or fish. However, there are also often services and benefits associated with natural resources that are not traded in the market, such as the enjoyment derived from recreational activities for which people do not pay out-of-pocket.<sup>4</sup>

Similarly, a natural resource may have both use and non-use values. Use value addresses direct uses of a resource, which can be consumptive (*e.g.*, drinking groundwater, hunting or fishing, mining) or non-consumptive (*e.g.*, swimming, hiking, camping), whereas non-use (or “passive” use) values are those that people assign to a resource without ever actually using or even intending to use that resource (think of residents of Omaha, Nebraska who make donations to “save the whales”). For instance, “existence value” is the value of knowing that a lake or sand dune exists, while “option value” is the value of knowing that the resource will be available if they ever choose to exercise the option to use it. There is also a “bequest” value which may be assigned to estimate ensuring that the resource is available for future generations (*e.g.*, the Grand Canyon).

A controversial aspect of both Federal Department of Interior (DOI) and National Oceanic and Atmospheric

Administration (NOAA) rules is the methodology used to calculate non-use or passive use losses. Because by definition there is no established market for the enjoyment of the knowledge of a resource, “contingent valuation” measures are used to estimate non-use value through the use of surveys of what individuals would pay to save or restore a particular resource or, alternatively, what they would be willing to accept as compensation for the loss of that natural resource. Although the concept of contingent valuation is accepted,<sup>5</sup> its application has been criticized as a highly subjective procedure resulting in estimates of unknown validity.

For the Cadillac Industrial Park contaminated groundwater in Wexford County, Michigan, the State contractor utilized contingent valuation methodology without a site-specific survey in the area, which was significantly criticized by the federal district court judge in his summary judgment rulings.<sup>6</sup> It is noteworthy, as discussed in Part I, that the 1995 amendments to Michigan’s NREPA Part 201 law *excluded* contingent valuation and non-use values as compensable under the State law until their validity is demonstrated and regulations are promulgated.<sup>7</sup>

The “travel-cost method” can also be used to estimate the value of recreational sites by calculating the amount of time and money that a person spends in order to travel to the site, multiplied by the frequency of use of the site, resulting in an estimate of the “price” that users are willing to pay to use that resource in the absence of a market value.<sup>8</sup> Another statistical approach is known as “hedonic valuation,” which requires significant data to apportion the value of various attributes of a transaction out of the overall price; for instance, housing purchases or employment location choices. This approach allows the economist to value the impact of an environmental change on the overall transaction to arrive at a valuation for the affected natural resource. Studies from comparable sites or regions are sometimes used to estimate NRD by using the “benefits transfer” approach, in lieu of or to supplement site-specific data. The benefits transfer approach which uses “secondary” data from one of these NRD estimation methods at a different site, although possibly resulting in cost savings for the Assessment itself, has been viewed as further compounding concerns with valuing NRD.

## B. Case Studies

### 1. Lower Fox River, Wisconsin

An example of how inexact an NRD assessment process can be is found at the Lower Fox River site in Wisconsin.

The Restoration and Compensation Determination Plans for the Lower Fox River by the Wisconsin DNR and the U.S. DOI Fish & Wildlife Service diverge dramatically in their dollar estimates.<sup>9</sup> The Wisconsin DNR proposal, released in October 2000, estimates the damages at between \$72 million and \$190 million, whereas the Federal estimate from the same time period is between \$200 million and \$300 million.<sup>10</sup>

Even overlooking the fact that the range of each estimate is at least \$100 million, the fact that the Federal NRD Assessment may be as much as four (4) times greater than the State estimate is shocking. According to the Wisconsin DNR criticisms, the difference in large part can be attributed to the Federal “value equivalency study” involving surveys of residents of the assessment area and available literature, which depended on input from non-users of the Lower Fox River resources and “stated preferences” of the respondents rather than actual action taken by the persons surveyed.<sup>11</sup> In essence, while there may not be much disagreement as to the nature of the injuries, translating those injuries into money damages proves problematic at best and speculative at worst.

### 2. Dober Mine, Michigan

The NRD Assessment prepared for the State of Michigan regarding the Dober Mine<sup>12</sup> addressed the recreational fishery, use of the surface waters impacted by releases of acid mine water, and biological injuries. The State’s contractor utilized the travel-cost model for lost use valuation to estimate the change in quality of the recreational fishing in the impacted rivers. This approach estimated the dollar amount that Michigan anglers would have spent to fish in other waters because of the degraded aquatic resources in the Iron River. This NRD assessment estimated the total current value of damages to the river’s fisheries at approximately \$2.1 million. The NRD assessment did not include other types of recreation, existence (passive use) values, or lost State income/revenue.

### 3. Verona Wellfield (Thomas Solvent) Site, Battle Creek, Michigan

At the Verona Wellfield, three source areas created a large contaminant plume (primarily chlorinated solvents) that threatened the Wellfield. The Wellfield is the source of drinking water for Battle Creek. An interim remedy was implemented in 1984, consisting of abandoning part of the well field and converting eight production wells into blocking wells (the “northern line”) to prevent the plume from entering the remaining part of the wellfield.<sup>13</sup> In addition,

the EPA constructed several replacement producer wells. Ultimately, the PRPs reimbursed the State and the EPA for almost all associated costs. The final remedy provided for a second southern line of blocking wells upgradient from the first line.<sup>14</sup> The objective of the second line is to provide additional protection and to make it possible to clean up the aquifer between the two blocking well lines over time. All of the groundwater is pumped to waste.

An NRD Assessment for the Verona Wellfield was performed for MDNR (now MDEQ) by a State sub-contractor.<sup>15</sup> The report identified the contaminated groundwater between the source areas and the northern line of blocking wells as the affected resource. Four components of the injury were identified: replacement of lost well field capacity (because of abandonment of part of the well field); the “averted” cost incurred as water users attempt to avoid water from a contaminated water supply; costs associated with the higher cost of water from municipal supply for residents whose wells were contaminated and who switched to city water;<sup>16</sup> and passive use losses associated with contaminated groundwater. The loss estimate for passive use losses was tempered by the acknowledgment that “it is very difficult to precisely estimate these damages without conducting original research.”<sup>17</sup>

MDNR evaluated the need for and cost-effectiveness of performing in-depth damage assessment research. In November 1994, relevant MDNR staff were surveyed to identify pertinent information about contaminated municipal well sites in Michigan as a basis for evaluating the cost-effectiveness of performing contingent valuation research to quantify passive losses associated with the contaminated aquifer.<sup>18</sup> It was concluded that, while replacement for lost municipal well field capacity and loss of private wells could be cost effectively estimated, losses associated with replacement water cost and passive losses could not.<sup>19</sup> The estimate for performing a contingent valuation study of passive losses was estimated at \$385,000 in 1994 dollars. It should be noted, however, that the preliminary assessment suggested that passive losses could be as much as \$3.6 to \$4.5 million and averted costs associated with use of bottled water could range from \$300,000 to \$3 million dollars. The final assessment claim was \$2.1 million for replacement of lost well field capacity and \$200,000 to replace private water supply. These estimates were based in large part on actual costs incurred. Thus, the total claim, expressed in 1994 dollars, was \$2.3 million. The State’s actual demand was over \$3.2 million because it included a claim for interest on the NRD costs.

The NRD calculations at the Verona Wellfield present several conundrums. First, a significant part of replacing lost well field capacity was paid by the PRPs because they reimbursed EPA for the cost of constructing two high-capacity production wells. Yet, the NRD assessment appeared to use these costs in estimating one component of NRD. This same issue applies to calculating NRD damages based on replacement water use for homeowners when the homeowners had settled all claims against one of the PRPs and thus, compensated for any affected costs associated with alternative water supply. Second, to the extent that the City of Battle Creek had incurred additional costs, it had never demanded reimbursement. The City would seem to be the only party affected by the need to replace well field capacity and hence the more appropriate party to seek compensation for same. Given CERCLA’s bar to double recovery,<sup>20</sup> would the State’s recovery of this cost as part of NRD bar an independent claim by the city? Third, the State’s calculation of its demand for interest may have been improper because it brought costs incurred in the late 1980s and early 1990s forward to 1999 dollars.

#### 4. Kalamazoo River, Michigan

The November 2000 Stage I Assessment Plan for the Kalamazoo River, Michigan site is also instructive.<sup>21</sup> The Kalamazoo River sediments are contaminated with PCBs. This NRD Assessment is being prepared for co-trustees MDEQ, Michigan Department of Attorney General, U.S. DOI Fish & Wildlife Service (“FWS”), and NOAA. This NRD Assessment is being carried out pursuant to the DOI’s Type B assessment regulations. This Stage I NRD Assessment follows a Pre-Assessment Screen conducted in May 2000.<sup>22</sup> The Pre-Assessment Screen determined that releases of hazardous substances have occurred, including PCBs, in sufficient quantity and concentration to have potentially caused injury to natural resources for which the trustees arguably have trusteeship jurisdiction. The Pre-Assessment Screen also identified sufficient data as readily available or likely to be cost-effectively obtained, including relevant information from the RI/FS activities and recommended that the NRD Assessment is to be coordinated with the RI/FS to facilitate cost-effective data collection. The Pre-Assessment Screen found that further action will be necessary to remedy the injury to natural resources beyond the remedial response actions implemented or planned.

The potential injuries to natural resources to be investigated for the Kalamazoo River Site consist of surface water (including sediments), groundwater resources, soils

and geologic resources, and biological resources (including fish, birds, and mammals). The injury assessment approach involves determining whether an injury to one or more of the natural resources has occurred as a result of releases of hazardous substances, and then quantifying that injury as compared with “base line” conditions (*i.e.*, conditions in the assessment area if the releases of hazardous substances had not occurred).<sup>23</sup> The Stage I NRD Assessment Plan will also approach money damages to be sought in compensation for the injuries to natural resources. Under the DOI regulations, the measure of damages consists of restoration costs plus compensable values for interim losses.<sup>24</sup> Restoration actions to be considered in the Stage I NRD Assessment for the Kalamazoo River are sediment/soil restoration and ecosystem-based restoration. It is acknowledged that there may be some overlap, such as removal or containment of contaminated sediments and soils between the RI/FS for remedial action and the NRDA for restoration of natural resources, but NRD restoration actions may also include habitat restoration, species management programs, and actions to increase human use or enjoyment of the resources.<sup>25</sup> Compensable values for NRD at the Kalamazoo River may address recreational fishing, wildlife viewing, and dredging or dam removal restrictions, and will be evaluated based on the “benefits transfer” approach. This approach utilizes already existing “secondary” data for similar areas and similar types of services and resource injuries, and appears similar to the Federal NRDA for the Lower Fox River Site which has been criticized by WDNR.<sup>26</sup> Site-specific information is available on fish consumption advisories and fishing activity by local anglers.<sup>27</sup>

#### 5. Willow Run Creek Area, Ypsilanti, Michigan

The Willow Run Creek Area involved PCB contamination in Tyler Pond and connecting waterways to Belleville Lake. A preliminary evaluation of NRD was performed by one of the PRPs, the University of Michigan, in 1995.<sup>28</sup> A consent judgment was entered in 1995 that incorporated an NRD settlement based on that preliminary evaluation.<sup>29</sup> The NRDA used the CVM with benefit transfer, market price methodology, and travel cost.

The types of values estimated included reduced value of fishing for Willow Run Creek based on number of lost fishing days, reduced recreational use of the Van Buren Township Park (1973-1997)<sup>30</sup> based on time, travel, and entrance fee for a similar facility, reduced commercial opportunities for mink trapping based on the assessment of mink affected and the average size of a litter, and non-use losses as a result of remediation activities in wetlands<sup>31</sup>

calculated using a CVM, based on a study of similar area in Western Kentucky where people were willing to pay to preserve wetlands at a rate of \$5-\$17 per acre.

The Willow Run Creek settlement of NRD claims included the costs of the NRD mitigation activities to be planned and carried out by the PRPs with a minimum present value in excess of \$840,000, reimbursement costs paid into the Michigan Environmental Response Fund in the amount of \$49,155.82 for response activity costs and NRD assessment costs incurred by the State, and reimbursement of all costs to the State for oversight of the NRDMA.

#### 6. Cadillac, Michigan

At least one court has expressed some reservation about the use of CVM to estimate damages associated with loss of use of CVM.<sup>32</sup> Judge Enslin of the U.S. District Court for the Western District of Michigan discussed NRD and the use of CVM in the Cadillac, Michigan Superfund litigation brought by the State. The State sought both use and non-use values for the contaminated groundwater as NRD. Costs of alternative supply were recoverable as either cleanup response costs or NRD. Although duplicative recoveries are prohibited, the court did not see any material difference which legal authority was used to recover those costs. The State's expert identified use values as drinking water and ability to develop the overlying land. Non-use values were classified as existence and bequest values, neither of which depends on an individual's use of the resources. A CVM survey as to consumers' willingness to pay for the affected resource from another geographic area was used by benefits transfer. The survey relied on by the experts asked respondents what they would pay if a landfill threatened the public water supply. The report cited other surveys which yielded higher values, thus, according to MDEQ, showing the reasonableness of the State's estimate and indicating that a site-specific survey could yield higher dollar amounts of NRD. The court agreed with defendants that this approach was speculative and the studies were imperfect, unreliable and imprecise:

The Court is of the view that the proposed method for calculating the value of the contaminated aquifer appears to be too speculative to provide a measure of damages acceptable in a court of law, based on the nature of the CVM method itself and on the fact that the benefit values calculated without reference to the values of the consumers in the Cadillac area are sought to be transferred or imputed

to them, as Cadillac may not have consumers with the same values as those in McClelland or other studies.<sup>33</sup>

The court, however, found that the CVM method could be utilized depending on factual issues and credibility of the expert witnesses, so that pre-trial summary judgment was not warranted.

## II. THE SPECIAL CASE OF SEDIMENTS

Many of the more significant NRD claims have arisen from contaminated sediments, and the Great Lakes Basin, with its huge surface water content and history of industrial operations, is, therefore, a likely region for more NRD activity.<sup>34</sup> <sup>35</sup> Sediments are frequently infiltrated by contamination, including polychlorinated biphenyls (“PCBs”), metals, pesticides, and other chemicals. Sources of sediment contamination include industrial discharges, sewage treatment facilities, fuel combustion, agricultural runoff, landfills, incineration facilities, and mining sites.<sup>36</sup> Certain contaminants found in sediments can bioaccumulate in higher trophic levels in the aquatic food chain, causing harm to humans and the environment, lost recreational opportunities, economic hardship, and other negative effects.<sup>37</sup>

The EPA has estimated that at least 10% of the nation’s lakes, rivers, and other bodies of water have sediment impacted by toxic chemicals that can harm or kill fish in these waters and impair the health of people consuming these fish.<sup>38</sup> This translates to approximately 1.2 billion cubic yards of contaminated sediment out of the approximately 12 billion cubic yards of total surface sediment where many organisms live.<sup>39</sup> Addressing contaminated assessments can involve significant tradeoffs. For instance, public interest environmental groups have released a study indicating that PCBs are elevated in anglers who eat Hudson River fish, while General Electric asserts that remedial dredging will actually raise the level of PCBs in the river through re-suspension, and, therefore, will not lower the level of PCBs in fish.<sup>40</sup> This sediment contamination can thus, result in losses of recreational and commercial fishing opportunities, and can increase the cost of disposing of sediment dredged to assist in navigation of these waters. The potential financial impact is in the billions of dollars.<sup>41</sup>

Because over ten federal statutes authorize different EPA divisions to address contaminated sediment issues, EPA has developed a Contaminated Sediments Management

Strategy.<sup>42</sup> This program is designed to “[s]treamline decision-making within and among the Agency’s program offices by promoting and ensuring consistent sediment assessment practices, consistent consideration of risks posed by contaminated sediment, the use of consistent management of contaminated sediment risks, and the wise use of scarce resources. . . .”<sup>43</sup> These principles have been refined and incorporated into an OSWER Directive released in February, 2002.<sup>44</sup>

On example of a complex sediment problem is the Manistique River, which runs through Michigan’s Upper Peninsula and discharges into Manistique Harbor in Northern Lake Michigan. Approximately 1.7 miles of the river are impacted by PCBs and heavy metals contamination.<sup>45</sup> The PCB-contaminated sediments were first identified in the 1970s and resulted in a fish consumption advisory. The site was then included on Michigan’s Act 307 list and involved EPA Superfund activity.<sup>46</sup> Beneficial use impairments claimed to exist at the Manistique River AOC included restrictions on fish and wildlife consumption, degradation of benthos, restrictions on dredging activities, beach closings, and loss of fish and wildlife habitat.<sup>47</sup> The EPA has utilized several “innovative dredging and treatment technologies” that it hopes will allow an “environmentally sound dredging project” to eliminate the PCB contamination from the area, and to have the beneficial use impairments restored.<sup>48</sup>

## III. DIGEST OF MICHIGAN AND REGION V NRD SETTLEMENTS

There have been numerous NRD settlements within EPA Region V, including many by MDEQ. See Appendix A. Appendix B, Digest of NRD Settlements, includes many of the settlements in Michigan based upon the administrative consent orders or judicial consent decrees entered to resolve the NRD claims by Federal, State, and/or tribal trustees. Fundamentally, it is significant that these are settlements and not judicial resolutions after trial. In general, NRD disputes are not litigated unless there is a dispositive legal issue such as the statute of limitations.<sup>49</sup>

There are other generalizations which can be concluded from a review of the NRD settlements in the Great Lakes region. Some NRD settlements are for all multi-million dollar figures.<sup>50</sup> While the Saginaw River & Bay and Lower Fox River NRD settlements are newsworthy because of their large dollar amount, many of the NRD settlements are much smaller in amount. As can be seen in Appendix B, there

have been numerous MDEQ settlements of non-CERCLA NRD claims related to surface water incidents in which the amounts involved were less than \$50,000. Generally, and not surprisingly, NRD claims by multiple trustees tend to result in higher dollar value settlements. Similarly, NRD injuries as a result of ongoing or long-term polluting activities, as compared to a single, discrete incident, tend to result in higher settlement amounts, perhaps because the extent and duration of injuries is greater.

The injuries and impact to natural resources addressed by these settlements run the gamut from commercial and recreational uses of surface waters, including boating and fishing, to contaminated groundwater and threatened drinking water supplies. Habitats for mammals and aquatic life, as well as migratory birds, have all allegedly been impacted by contamination and given rise to some of these NRD settlements. The sources causing or contributing to these natural resource injuries have ranged from manufacturing discharges and mining operations to oil spills. Some releases have been discrete and accidental, while others have extended over many years. The most active State for federal NRD settlements within EPA Region 5 appears to be Indiana with at least 10 federal consent decrees found on LEXIS as of September, 2001, although research of Michigan NRD settlements identified approximately twice as many NRD settlements when state consent orders were included. By comparison, no federal NRD settlements were found on LEXIS for Illinois.

The suits resulting in these NRD settlements have been civil judicial or administrative actions. Typically, the plaintiffs are the designated trustees pursuant to CERCLA. Sometimes, however, other agencies have joined, depending on the circumstances. For instance, in the Vessel Jupiter matter in Bay City, Michigan,<sup>51</sup> the State Police and Department of Public Health were additional plaintiffs asserting state law claims.

The NRD claims have usually been brought pursuant to CERCLA and/or NREPA Part 201 (or its predecessor, the Michigan Environmental Response Act). Depending upon the nature of the release or impacted resource, other claims have included the Oil Pollution Act, Clean Water Act, and Water Resources Commission Act (now NREPA Part 31). Similarly, the covenants not to sue ("CNTS") in the consent orders or consent decrees have also addressed the settling defendants' potential civil liabilities pursuant to the identified statutory authorities, along with providing "contribution protection" against third-party claims. Various

reservations of rights and "re-openers" are excepted from the typical CNTS, including NRD from releases of hazardous substances occurring after the effective date of the settlement. For example, a somewhat typical Consent Decree provides that the CNTS:

[D]oes not pertain to any matters other than those expressly specified in "Covered Matters" ... [and] Plaintiffs reserve, and this Decree is without prejudice to, all rights against Defendants with respect to all other matters, including but not limited to the following:

\* \* \*

Liability for damages for injury to, destruction of, or loss of natural resources arising from or related in any manner to the release, treatment, handling, or disposal of hazardous substances at the Facility after the filing of this Decree....<sup>52</sup>

Despite the typical "Superfund" CNTS reservations and reopener, there are examples of settlements which exclude seeking additional compensation or restoration actions for NRD.<sup>53</sup> In the Lakeway Chemicals/Bofors Nobel settlement from Muskegon, Michigan, the CNTS did not include any reservations of rights as to *de minimis* settling defendants or the owner/operator's foreign parent corporation.<sup>54</sup> In the Dober Mine/Iron River settlement, the settling defendant agreed to dismiss its third-party claims, based in part on the assertion that the State's NRD claim against the settling defendant had been reduced to account for hazardous substances generated and disposed of by certain third-party defendants.<sup>55</sup> At the Fort Wayne Reduction Site, *de minimis* PRPs who had previously settled with the principal defendants were also beneficiaries of the CNTS and contribution protection from the United States and State of Indiana.<sup>56</sup> In the Michigan NRD settlement at LDI, the CNTS and contribution protection provisions also benefitted any PRPs that *subsequently* settled with the settling defendants.

#### IV. NRD PRAGMATICS

While each NRD site and claim is somewhat unique, there are some pragmatic approaches and considerations which may be useful based on precedent and experience.

##### A. Multi-Disciplinary

NRD claims are often associated with environmental contamination projects. This, unfortunately, can result in

underestimating the professional disciplines needed to effectively address an NRD claim. Overlapping or related disciplines needed for an NRD matter may include toxicology and ecological risk assessments. Biological impacts to fish and wildlife are obviously critical at many sites, such as those involving surface water, sediments, and wetlands that constitute habitats. These areas may not be within the amount of the remediation consultants' expertise – yet relevant data for NRD can often be collected cost-effectively as part of an RI/FS.

Perhaps the disciplines most necessary for NRD matters, and yet most atypical of environmental contamination projects, are economics and its related social sciences. Recall that use and non-use values can be relevant in assessing damages to natural resources. Determining these types of damages is not necessarily an engineering calculation, but can involve CVM and other arcane approaches to determining how much an injured natural resource is worth. Issues such as willingness to pay involve social science studies, including demographics, surveys, and other tools. These approaches are typified by use values for surface waters, where fishing for recreational or subsistence purposes can be impacted, but calculating resultant money damages is not straightforward. An economist with experience in these social sciences is, therefore, an important member of the team.

An assessment of the natural resource damages caused to the Hudson River by PCB contamination has been ongoing since 1997, and is being conducted by New York State Department of Environmental Conservation (DEC), FWS, and NOAA, as co-trustees of the River. The trustees concluded that PCBs in the Hudson River have impacted the river's fishery resources sufficiently to constitute an "injury to natural resources under CERCLA."<sup>57</sup> The trustees' evidence for this conclusion was the advisories to limit fish consumption or to avoid eating fish caught from certain areas of the river.<sup>58</sup> If this approach is sufficient, then historic fish advisories in the Great Lakes basin and areas of concern could make the case of proving natural resources injuries less complicated, although calculating the extent of damages and proving causation will still be significant burdens.<sup>59</sup>

Keep in mind that it is not just the injuries to natural resources that must be addressed, but also the restoration of those resources. Restoration can involve activities other than or in addition to remediating the contamination, such as restocking a fishery or providing an alternative water supply.

## B. It's Never Too Early

At any site of significant environmental contamination, or where unique natural resources are impacted, the possibility for NRD claims should be assessed at the outset. Data and information relevant to natural resource injuries should be developed on a parallel track during the remedial investigation of the nature and extent of contamination. This is especially true as to the NRD disciplines that are closely related to environmental media, such as toxicology and ecological risk. This is probably less true as to economics and other social science tools, although the time necessary to conduct an independent willingness to pay or accept survey or develop similar information should be considered. Strategically, the PRPs may not want to establish damages calculations if there is any possibility of the numbers becoming public or known to the regulatory agencies. Similarly, the Trustees may be reluctant to complete a damages assessment since public expectations could be heightened and settlement could become more difficult.

Although not trustees *per se*, citizens and public interest groups should not be forgotten in the NRD process.<sup>60</sup> Legally, they may have citizens suit claims under various environmental statutes for pollution, but just as importantly for the NRD context, concerned citizens can influence the trustees' decision-making on restoration projects and related remedial action alternatives. For instance, the Hudson River cleanup decision by the U.S. EPA was reportedly delayed due to the thousands of public comments received in writing and by e-mail.<sup>61</sup> Technical Assistance Grants ("TAGs") under CERCLA<sup>62</sup> can facilitate public involvement in these processes. Depending upon the demographics and other attributes of the site, the possibility of "environmental justice" claims should not be forgotten either. All in all, public and media relations should be a priority at most sites where NRD claims are an issue.

## C. Who's in Charge?

With most environmental contamination projects, there is a federal or state agency with lead or primary jurisdiction,<sup>63</sup> and the PRPs can rely on coordinated regulation. Jurisdiction over the affected natural resources, however, may lie in Federal, State, and tribal trustees.<sup>64 65 66 67</sup> To complicate matters further, NRD jurisdiction and authority may not reside in the environmental regulatory agency responsible for the environmental contamination response activities, or there may be additional Federal or State agencies with authority over the particular natural resources. For instance,

Michigan's trustees, as appointed by the Governor, are MDEQ and the Attorney General.<sup>68</sup> Federal trustees will look for inter-state impacts, such as migratory birds, or other special considerations<sup>69</sup> to establish their interests.<sup>70</sup> Tribal trustees may also assert claims based on usufruct (temporary use) rights (*e.g.*, fishing) as well as land ownership.<sup>71</sup>

Identifying all potentially interested NRD trustees, therefore, can be a complex undertaking. Understandably, PRPs seldom want to “wake the sleeping dog” by inquiring of a potential trustee as to its interest in the site. On the other hand, addressing the interests of less than all of the NRD trustees at a site may not only be inefficient but could also subject the PRPs to multiple claims.<sup>72</sup>

#### D. PRPs Go on the Offensive!

As with any complex environmental matter, PRPs for NRD claims should search for other potentially responsible parties to “share the pain.” Of course, if another PRP happens to be a government agency, like Department of Defense (including Corps of Engineers), Department of Energy, Department of Transportation, *etc.*, asserting what is tantamount to a counter-claim can make negotiations not only more interesting but obviously awkward for the trustees, which may give some advantage to the PRPs.<sup>73</sup> That appears to be the context in which the **New Mexico** case evolved.<sup>74</sup>

If the site is a surface water body, historical wastewater dischargers and other riparian operations should be researched as potential PRPs. In the circumstance where contaminated sediments are the alleged source, historical dredging and redeposit of those potentially impacted sediments may have exacerbated the damages. For instance, navigational dredging and open water disposal may actually concentrate the contamination and increase the likely fish and wildlife exposure.<sup>75</sup> Depending on the source of historical discharges, there may also be a basis for a government contractor claim.<sup>76</sup>

#### E. Be Creative

Environmental remediation projects generally have become somewhat straightforward, subject to technological advances and modifications of cleanup criteria. In the NRD restoration area, however, there is no particular “cook book” approach dictated by regulation or precedent except, in theory, Type A assessments under DOI's regulations. Creativity is still rewarded in the NRD realm. Restoration

projects obviously need to have some correlation to the injured natural resources and impacted environment, but these limitations are not too constraining. For instance, in a partial settlement for the Bunker Hill Superfund facility in Idaho, between the Federal and Tribal trustees and certain defendants that had filed for bankruptcy protection, it was agreed that the defendants would impose conservation easements on timberlands, pay royalties from mining revenues, issue stock options, and perform cleanup work at a closed mill.<sup>77</sup>

In the course of negotiating, it is always helpful to identify any special interest or projects desired by the Trustees or local citizens groups. Subjects for discussion could be public outreach, preservation of unique real estate, or habitats for sensitive species, and high visibility projects. For example, in the Dow Chemical settlement near Zionsville, Indiana,<sup>78</sup> the defendant donated certain property of floodplain habitat along the Eagle Creek, to be preserved in perpetuity pursuant to a restrictive covenant enforceable by Indiana DNR (a/k/a “Conservation Easement”). For the Saginaw River & Bay NRD settlement, in addition to acquiring sensitive properties, the defendants agreed to construct boat launches and fund a fishery.

#### E. Global Settlement

If at all possible, negotiate settlements of the NRD claims as part of a comprehensive resolution of all environmental issues for the site. It is certainly logical to address response activities in conjunction with the NRD assessment, because natural resource damages may result from continuing or residual contamination not addressed by the remedial action plan. Alternatively, a comprehensive remedial action plan might well delimit the damages from injuries to natural resources once the source of injury is remediated. It is also quite possible that restoration and remediation projects will correlate with each other, such that they should be developed somewhat contemporaneously. An easy example would be an alternative water supply for contaminated groundwater, which could also resolve any lost use NRD claim.

Strategically, it may also be beneficial in negotiations to have remediation commitments on the table at the same time NRD claims are being settled.<sup>79</sup> The primary concern of the environmental agency is typically to accomplish cleanup of the contamination. If the PRPs have already obligated themselves to perform the site cleanup, then there is no leverage in negotiating the NRD portion of the site. Moreover, the NRD claims on a stand-alone basis tend to

have increased in importance and profile, but can lose relative importance when considered in conjunction with remedial activities. The PRPs may also have a better or longer standing relationship with the environmental response agency representatives than with the NRD Trustees, such that having all agency representatives at the negotiation table might improve the dynamics. Obviously, however, this negotiation of NRD and remediation claims simultaneously in a global settlement with response action agencies and NRD Trustees can be a monstrous undertaking and requires great caution and patience. For instance, the Saginaw River & Bay settlement was approved almost five years after the State complaint was filed, and there was little litigation during that intervening time period; *i.e.*, negotiation of this settlement consumed almost the entire five years!

### G. Alternative Dispute Resolution

Because of the amounts in controversy, the complexities, and the various stakeholders, NRD claims seem well suited for alternative dispute resolution procedures (“ADR”).<sup>80</sup> It certainly is true that the judicial process is not well equipped to handle these matters, unless there is a threshold liability issue such as statute of limitations or successor liability.<sup>81</sup> Furthermore, because of the factors identified above, involving a neutral third-party to facilitate, mediate, or even arbitrate an NRD dispute can be particularly beneficial to reaching an agreement sooner rather than later. The impediments to ADR would include obtaining agreements by all interested parties to submit the dispute to a form of ADR, and then agreeing on the ADR process.<sup>82</sup>

Potential NRD claims can also interfere with the ability to reach a settlement at certain sites because PRPs may want to resolve all environmental claims before committing to an expensive cleanup. However, there may not be all necessary decision-makers (*i.e.*, Trustees) at the negotiating table. Additionally, where NRD claims are threatened or potential, but have not yet matured to the point of being liquidated or able to be resolved, business transactions can be held up or even stymied because of the uncertainty posed by a potentially large NRD claim. In these circumstances, contractual indemnities and even environmental insurance can be alternative solutions to impasse. For instance, it may be that the major PRPs conducting the site remediation are willing to offer an NRD indemnity to *de minimis* contributors as part of a total “cash-out settlement,” and thereby improve the likelihood of settlement participation and obtaining additional funds earlier. Because of the complexities of NRD claims, the most logical role is that of

facilitation because the process involves complex problem-solving, which in turn involves technical issues to which there is no “right” answer that can be arbitrated or judicially determined.

### CONCLUSION

With all the sites of contamination and potentially impacted surface water in the Great Lakes Basin, and history of industrial, shipping and mining operations, why have there not been more NRD claims? It would also seem that, with so many water bodies within the Great Lakes Basin estimated to have contaminated sediments, or into which pollutants, oil or chemicals could be spilled, there should be more NRD claims in this region because these circumstances have resulted in many of the more significant NRD actions to date.

As reviewed above, it is obvious that there can be significant financial recoveries from pursuit of NRD claims benefiting Trustees; however, perhaps the “costs” of establishing and pursuing NRD claims are considered too burdensome at all but the most substantial sites. While actual out-of-pocket costs are typically recoverable by the Trustees (such as assessment fees), NRD Assessments generally must be subcontracted by the agencies rather than conducted with in-house staff. Trustees’ legal fees may not be recoverable, depending upon their legal authority. Furthermore, NRD Assessments are within the jurisdiction and responsibility of agencies or sections of governmental departments that are not typically involved with environmental contamination site cleanup, and their involvement, therefore, must be invited by the response action agencies or otherwise triggered by some impetus. In addition to the technical complexities, there certainly are legal issues of potential significance, such as statutes of limitations and recoverability of passive or non-use losses. From the PRP perspective, while resolving completely all potential liabilities at a site is generally desirable, the magnitude of NRD claims and their complexities has usually resulted in PRPs accepting the exclusion of NRD from the settlement covenant not to sue.

On the other hand, perhaps we are just beginning to see the trend of NRD claims now that the process is more well developed and understood by Trustees and PRPs. As sites mature in their stage of remedial response, and more information is developed about the nature and extent of injuries, NRD claims may just be becoming ripe.

## APPENDIX A LIST OF NRD SETTLEMENTS AND ASSESSMENTS

The following Natural Resources Damages (NRD) settlements and Assessments for sites within USEPA Region 5 were identified by the authors:

### NRD Settlements

#### Indiana

**United States of America v Midwest Solvent Recovery, Inc; American Can Company Inc, Third-Party Plaintiffs v Accutronics, Third-Party Defendants**, unpublished Consent Decree, slip opinion (no date in original) CA# H-79-556 (ND Ind) (MIDCO Superfund Site).

**United States of America v Weil McLain Inc**, unpublished Consent Decree, 2000 EPA Consent LEXIS 603, CA# 3:00CV0593RM (ND Ind, Sept 25, 2000).

**United States of America v the Sanitary District of Hammond, a municipal corporation, The City of Hammond, a municipal corporation, The Town of Munster, a municipal corporation, The Town of Griffith, a municipal corporation, American Chemical Service, Inc, American Maize Products Co, Ferro Corp, Lever Brothers Co, Packaging Corporation of America, and the State of Indiana**, unpublished Consent Decree, 1996 EPA Consent LEXIS 96, CA# 2:93 CV 225JM (ND Ind, Sept 9, 1996) (American Chemical Service Superfund Site).

**In Re: UE Systems, Inc Polycast Technology Corp, Uniroyal Adhesives & Sealants Co, Uniroyal Engineered Products, Inc, Ensolite, Inc**, unpublished Consent Decree, 1992 EPA Consent LEXIS 270, CA# 91-32791 (US Bankruptcy Court, ND Ind, Aug 10, 1992).

**United States of America v Midwest Solvent Recovery, Inc; American Can Company, Inc, Third Party Plaintiffs, v Accutronics, Third-Party Defendants**, unpublished Consent Decree, 1992 EPA Consent LEXIS 129, CA# H 79-556 (ND Ind, April 14, 1992) (MIDCO Superfund Site).

**United States of America & State of Indiana v The Dow Chemical Co**, unpublished Consent Decree, 2000 EPA Consent LEXIS 618, CA# IP-001841-C-T/G (SD Ind, Nov 27, 2000).

**United States of America & State of Indiana v American Chemical Service, Inc**, unpublished Consent Decree, 2000 EPA Consent LEXIS 219, CA# 2:00-CV-430-JM (ND Ind, July 12, 2000) (American Chemical Service Superfund Site).

**United States of America & State of Indiana v USX Corp**, unpublished Consent Decree, 1998 EPA Consent LEXIS 199, CA# 2:98CV 464RL (ND Ind, Aug 6, 1998).

**United States of America & State of Indiana v SC Holdings, Inc**, unpublished Consent Decree, 2000 EPA Consent LEXIS 33, CA# 1:00-CV-150 (ND Ind, April 11, 2000) (Fort Wayne Reduction Superfund Site).

**United States of America & State of Indiana v The Indiana Department of Correction; the Indiana Department of Natural Resources; The Waste Inc Remedial Design/Remedial Action Group and its members; Weil-McLain; Gardner Denver, Inc; Sundstrand Corp; Northern Indiana Public Service Co; Ingersoll-Rand Co; Sears Roebuck & Co; Kaiser Aluminum & Chemical Corp; Ameritech Corp; USX Corp; Echlin, Inc (formerly Sprague Devices, Inc); Acrometal Products, Inc; Lyon Metal Products, Inc; Dwyer Instruments, Inc; The Michigan City News Dispatch**, unpublished Consent Decree, 1999 EPA Consent LEXIS 135, CA# 3:99-CV-0336-RM (ND Ind, June 22, 1999) (Waste Inc. Landfill Superfund Site).

**United States of America v Guide Corp**, unpublished Consent Decree, CA# IP01-73-CR-01 (SD Ind, June 18, 2001) (White River).

#### Michigan

**United States of America v Akzo Nobel AB, American Cyanamid Co, Bissell, Inc, EI DuPont De Nemours & Co, Dow Agrosiences LLC, Eli Lilly & Co, General Electric Co, IBM Corp, Lomac, Inc, Mallinckrodt Inc, Monsanto Co, Shell Oil Co, SmithKline Beecham Corp, and Union Carbide Corp**, unpublished Consent Decree, 1999 EPA Consent LEXIS 204, CA# 1:99-CV-731 (WD Mich, Sept 22, 1999) (Lakeway Chemicals/Bofors Nobel, Muskegon, Michigan).

**United States of America v Bronson Plating Co, City of Bronson, ITT Automotive Inc, LA Darling Co, and Scott Fetzter Co**, unpublished Consent Decree, 1999 EPA Consent LEXIS 153, CA# 1:99-CV-490 (WD Mich, June 30, 1999).

United States of America, Plaintiff v Ford Motor Co; General Motors Corp; Chrysler Corp; Chrysler Pentastar Aviation, Inc; The Regents of the University of Michigan; Wayne County, Michigan; Ypsilanti Township, Michigan; and the Ypsilanti Community Utilities Authority, Defendants. Ford Motor Co; General Motors Corp; County of Wayne, Michigan; the Charter Township of Ypsilanti; Ypsilanti Community Utilities Authority and Regents of the University of Michigan v United States of America, unpublished Consent Decree, 1999 EPA Consent LEXIS 83, CA# 98-71305 (ED Mich, April 20, 1999) (Willow Run Creek Area, Washtenaw and Wayne Counties, Michigan).

Frank J Kelley, Attorney General of the State of Michigan, ex rel, Michigan Department of Environmental Quality, and Russell J Harding, Director of the Michigan Department of Environmental Quality, Plaintiffs, v General Motors Corp, a Delaware corporation, City of Bay City, a Michigan municipal corporation, and City of Saginaw, a Michigan municipal corporation, Defendants, and United States of America, Plaintiff, v General Motors Corp, a Delaware corporation, City of Bay City, a Michigan municipal corporation, City of Saginaw, a Michigan municipal corporation, and the Michigan Department of Transportation, a department of the State of Michigan, Defendants. Saginaw Chippewa Indian Tribe of Michigan, a federally-recognized tribe, Plaintiff v General Motors Corp, a Delaware corporation, City of Bay City, a Michigan municipal corporation, and City of Saginaw, a Michigan municipal corporation, Defendants, unpublished Consent Decree, 1998 EPA Consent LEXIS 315, CA# 98-CV-10368 BC (ED Mich, Nov 24, 1998) (Saginaw River & Bay Site).

United States of America v Thomas Solvent Co; Frank J Kelley, Attorney General of the State of Michigan, and the State of Michigan v Thomas Solvent Co, unpublished Consent Decree, 1989 EPA Consent LEXIS 601, CA# K86-167-CAB; K86-164-CAB; 84-3331, 88-660 NO, and 84-3081 (WD Mich, June 5, 1989) (Thomas Solvent/Verona Wellfield Superfund Site).

Frank J Kelley, Attorney General of the State of Michigan, ex rel, and Michigan Department of Environmental Quality v M A Hanna Co, unpublished Consent Decree, CA# 94-77813-CE (Ingham Co, Cir Ct, Oct 28, 1998) (Dober Mine/Iron River Site, Iron County, Michigan).

Frank J Kelley, Attorney General of the State of Michigan, ex rel, Michigan Department of Natural Resources v BASF Corp, unpublished Consent Decree, CA# 94-CV-72525-DT (ED Mich, Sept 8, 1994) (Liquid Disposal, Inc. ("LDI"), Shelby Township, Michigan).

Frank J Kelley, ex rel, State of Michigan and Michigan Department of Natural Resources, Plaintiffs v Kysor Industrial Corp; Four Winns, Inc; Jomarc Co; Leo Ingraham, Sr; Jean Ingraham; RW Meyer, Inc; Raymond A Weigel; Robert W Meyer, Jr; and Ben Kowalski Defendants and Ben Kowalski, Plaintiff v Henry Clink and Peter Lukes, Defendants, unpublished Consent Decree, CA# 5:91-CV-45 (WD Mich, Dec 28, 1994) (Cadillac Industrial Park, Wexford County, Michigan).

In Re: Cleveland Tankers Inc and Total Petroleum Inc, unpublished Consent Decree (July 13, 1993) (Vessel Jupiter (Cleveland Tankers/Total Petroleum), Bay City, Michigan).

Frank J. Kelley, Attorney General of the State of Michigan, ex rel, Michigan Department of Natural Resources v Ford Motor Co, unpublished Consent Decree, CA# 93-CV-74108-DT (ED Mich, Jan 20, 1994) (G & H Landfill, Shelby Township, Michigan).

In the Matter of Abatement of Water Pollution, Mr. Philip Gordon, 4690 Willow Road, Saline, Michigan, unpublished Administrative Consent Order, CA# ACO-SW96-01, MDEQ (Feb 1996) (Macon Creek, Washtenaw County, Michigan).

In the Matter of Abatement of Water Pollution, Brickel Pork Producers, 77350 Memphis Ridge Road, Richmond, Michigan, unpublished Administrative Consent Agreement, CA# ACO-SW94-003, MDNR (May 6, 1994) (Brickel Pork Producers, Memphis, Macomb County, Michigan).

In the Matter of Abatement of Water Pollution, Jerome B Pohl, Jer-Ann Dairy, 12575 Kinley Road, Fowler, Michigan, unpublished Administrative Consent Order, CA# ACO-SW92-014, MDNR (Sept 18, 1992) (Jer-Ann Dairy, Glosser Drain and Mitchell Creek, Fowler, Clinton County, Michigan).

**In the Matter of Abatement of Water Pollution, The City of Big Rapids, 226 North Michigan Avenue, Big Rapids, Michigan**, unpublished Final Order of Abatement, CA# DFO-SW91-008, MDNR (April 1991) (City of Big Rapids, Michigan, Swimming Pool).

**Frank J Kelley, Attorney General for the State of Michigan, ex rel, Michigan Natural Resources Commission, Michigan Water Resources Commission, and Michigan Department of Natural Resources v Mead Paper Co**, unpublished Consent Judgment, CA# 91-68945-CE (Ing Co, Cir Ct, May 14, 1991) (Mead Paper Company Pulp Mill, Escanaba, Delta County, Michigan).

**In the Matter of Abatement of Water Pollution, The Upjohn Co, 7171 Portage Road, Kalamazoo, Michigan**, unpublished Final Order of Abatement, CA# DFO-SW91-003, MDNR (March 13, 1991) (The Upjohn Company, Kalamazoo, Michigan).

**In the Matter of Abatement of Water Pollution, Associated Refrigeration Services, Inc, 2545 Batt Drive, Wyoming, Michigan**, unpublished Administrative Consent Order, CA# ACO-SW99-026, MDEQ (Dec 23, 1999) (Indian Mill Creek, Grand Rapids, Michigan).

**In the Matter of Abatement of Water Pollution, Wayne County Department of Environment, 615 Clifford, Detroit, Michigan**, unpublished Administrative Consent Order, CA# ACO-SW97-014, MDEQ (April 1, 1998) (Rouge River and Newburgh Lake, Wayne County, Michigan).

**In the Matter of Abatement of Water Pollution, Mr Clarend Methner, 4437 N Loomis Road, Mt Pleasant, Michigan**, unpublished Administrative Consent Order, CA# ACO-SW96-002, MDEQ (April 22, 1996) (Salt River, Midland County, Michigan).

**Jennifer M Granholm, Attorney General of the State of Michigan, and the Michigan Department of Environmental Quality v Akzo Nobel AB**, unpublished Consent Decree, CA# 1:99-CV-739 (WD Mich, Dec 14, 1999) (Lakeway Chemicals/Bofors Nobel, Muskegon, Michigan).

## Minnesota

**United States of America and the State of Minnesota, by its Attorney General Warren Spannaus, its Department of Health, and its Pollution Control Agency v Reilly Tar & Chemical Corp; Housing & Redevelopment Authority of St Louis Park; Oak Park Village Associates; Rustic Oaks Condominium, Inc, and Philips Investment Co**, unpublished Consent Decree, 1986 EPA Consent LEXIS 213, CA# 4-80-469 & 3, (MN, Sept 4, 1986).

**United States of America, Plaintiff and State of Minnesota, by its Attorney General Hubert H Humphrey, III, its Department of Health, and its Pollution Control Agency, Plaintiff-Intervenor, v Reilly Tar & Chemical Corp; Housing & Redevelopment Authority of St Louis Park; Oak Park Village Associates; Rustic Oaks Condominium Inc; and Philip's Investment Co, Defendants and City of St Louis Park, Plaintiff-Intervenor, v Reilly Tar & Chemical Corp, Defendant, and City of Hopkins, Plaintiff-Intervenor, v Reilly Tar & Chemical Corp, Defendant**, unpublished consent decree, 1986 EPA Consent Decree LEXIS 214, CA# 4-80-469 (MN, Sept 4, 1986).

**United States of America and State of Minnesota, Plaintiffs, v Arrowhead Refining Co, et al, Defendants, and Arrowhead Refining Co, et al, Third-Party Plaintiffs v Rodney A Anderson, et al, Third-Party Defendants**, unpublished Consent Decree, Slip Opinion (no date in original) CA# 5-89-CV-202 (MN).

## Ohio

**United States of America v Elsa Skinner-Morgan**, unpublished consent decree, 2000 EPA Consent LEXIS 194, CA# C-1-00-424 (SD OH, May 26, 2000).

**United States of America, Plaintiff v Gencorp, Inc, et al, Defendants and Third-Party Plaintiffs, v Detrex Corp, et al, Third-Party Defendants; Ohio v Gencorp, Inc**, unpublished Consent Decree, 1999 EPA Consent LEXIS 88, CA# 5:89-CV-1866 (ND OH, May 14, 1999).

**United States of America, Plaintiff v Gencorp, Inc et al, Defendants and Third-Party Plaintiffs, v Detrex Corporation, et al, Third-Party Defendants; Ohio v Gencorp, Inc**, unpublished Consent Decree, 1999 EPA Consent LEXIS 89, CA# 5:89-CV-1866 (ND OH, May 14, 1999).

**United States of America v Southern Ohio Coal Co**, unpublished Consent Decree, 1995 EPA Consent LEXIS 23, No Number in Original (SD OH, Oct 9, 1995).

**United States of America v Chem-Dyne Corp; Ohio ex rel Celebrezze v Rohm & Haas Co**, unpublished Consent Decree, 1985 EPA Consent LEXIS 309, CA# C-1-82-840, C-1-82-962) (Oct 9, 1995).

**In re: Eagle-Picher Industries, Inc**, unpublished Consent Decree, slip opinion, CA #1-91-00100 (US Bankruptcy Court, SD OH, (no date on original)).

**United States of America v Chrysler Corp; Ford Motor Co; Keweenaw Industries, Inc; Chevron USA, Inc; Minnesota Mining & Mfg Co; Waste Management of Ohio, Inc; and The Federal Metal Co**, unpublished Consent Decree, slip opinion, CA# 5:97 CV00894 (ND OH, (no date on original)).

#### **Wisconsin**

**United States of America v Lake Geneva Associates, Playboy Enterprises, and Marcus Geneva, Inc**, unpublished Consent Decree, 1998 EPA Consent LEXIS 221, CA# 98-C-0992 (ED WI, Sept 30, 1998).

**United States of America v Burlington Northern Railroad Co**, unpublished Consent Decree, slip opinion, CA# 94 C 0386C (WD WI, (no date on original)).

**United States and State of Wisconsin v Appleton Papers Inc and NCR Corp**, unpublished Consent Decree, CA# 01-CV-816 (ED Wis, Aug 14, 2001) (Lower Fox River),

**Wisconsin v Fort James Operating Co and Fort James Corp**, proposed Consent Decree, (ED Wis, Nov 2000) (Lower Fox River).

#### **NRD Assessments**

- Kalamazoo River, Kalamazoo County, Michigan (Assessment Plan)

- Cadillac Industrial Park, Wexford County, Michigan (State Contractor)

- Dober Mine/Iron River Site, Iron County, Michigan (State Contractor)

- G & H Landfill, Shelby Township, Michigan (PRP-Prepared)

- Indian Mill Creek, Grand Rapids, Michigan (State Benthic Evaluation and Fish Kill Estimate)

- Macon Creek, Unknown County, Michigan (Fish Kill Estimate)

- Saginaw River & Bay, Bay County, Michigan (State Confidential Draft)

- Salt River, Midland County, Michigan (Fish Count)

- Verona Wellfield, Battle Creek, Michigan (State Contractor)

- Willow Run Creek Area, Washtenaw and Wayne Counties, Michigan (PRP-Prepared)

- Lower Fox River, Green Bay, Wisconsin (Federal and Tribal Trustees; State DNR)

## APPENDIX B DIGEST OF NRD SETTLEMENTS

### Appleton Papers, Inc./NCR Corp. — Lower Fox River, Wisconsin

Settlement Document	Source	Injuries/Impacts	NRD Claims	NRD Consideration	CNTS
<p>Interim Agreement filed on August 14, 2001 in United States District Court for the Eastern District of Wisconsin.</p> <p>Plaintiffs: United States Environmental Protection Agency, State of Wisconsin, Wisconsin Department of Natural Resources, Wisconsin Department of Justice, United States Department of the Interior, United States Fish and Wildlife Service, United States Department of Commerce, National Oceanic and Atmospheric Administration, Menominee Indian Tribe of Wisconsin, and Oneida Tribe of Indians of Wisconsin.</p> <p>Defendants: Appleton Papers, Inc. and NCR Corporation.</p>	<p>Paper mill facilities at or near Fox River in Northeastern Wisconsin.</p>	<p>An estimated 691,370 lbs. of PCBs discharged into the Lower Fox River between 1954 and 1971, with 160,000 lbs. released into the Green Bay. Eleven million cubic yards of sediment contaminated by PCB discharge.</p>	<p>CERCLA</p>	<p>\$1.5 million into the United States Department of the Interior's Natural Resource Damage Assessment and Restoration Fund, as partial reimbursement of past NRD assessment costs. Additionally, Defendants will pay \$40 million over a four year period into an interest-bearing escrow account for response action and NRD restoration projects to be determined by Plaintiffs. Any counsel balance in the escrow after termination is to be refunded to Defendants. Defendants may perform some of the restoration projects and be paid for the costs of that work out of the escrow. All restoration work must relate to the Lower Fox River site.</p>	<p>During the four year period of the interim agreement, covenant not to sue by the United States, State of Wisconsin, and Tribes for existing PCB contamination under CERCLA, the Clean Water Act, the Rivers and Harbors Act of 1899, RCRA, and Wisconsin statutory and common law. The covenant terminates at the end of the four-year period. Additionally, Plaintiffs shall consider granting Defendants a covenant not to sue for projects funded entirely by Defendants that are designed to be a final response action for a particular area after the completion of the project. Plaintiffs reserve claim for NRD arising from violations of Federal or State law occurring after the effective date of the Consent Decree. Defendants receive full credit for payments and work contributions against any final settlement.</p>

### City of Big Rapids, Michigan Swimming Pool

Settlement Document	Source	Injuries/Michigan Impacts	NRD Claims	NRD Consideration
<p>Final Order of Abatement, In the Matter of Abatement of Water Pollution, City of Big Rapids, Final Order No. DFO-SW91-008.</p> <p>Plaintiff: Michigan Department of Natural Resources.</p> <p>Defendant: The City of Big Rapids.</p>	<p>Discharge of swimming pool water into Mitchell Creek in August, 1989.</p>	<p>Fish in Mitchell Creek. Small fish losses were documented.</p>	<p>WRCA</p>	<p>NRD damages of \$474.83 including fisheries loss and MDNR staff costs and additional penalty of \$500.00.</p>

### Brickel Pork Producers, Memphis, Macomb County

Settlement Document	Source	Injuries/Impacts	NRD Claims	NRD Consideration	CNTS
<p>Administrative Consent Agreement, In the matter of Abatement of Water Pollution, Brickel Pork Products, ACO-SW94-003.</p> <p>Plaintiff: Michigan Department of Natural Resources.</p> <p>Defendant: Brickel Pork Producers</p>	<p>In 1992, hog farming liquid wastes pumped onto agricultural lands, which drained into unidentified county drain, causing a fish kill in the Belle River in October, 1992.</p>	<p>Fish kill in the Belle River.</p>	<p>WRCA §§6(1), 7 (1) &amp; (2).</p>	<p>\$5,150 for compensation for fish losses, \$5,000 for enforcement costs, and a \$5,000 civil penalty</p>	<p>Settlement of all claims</p>

### Cadillac Industrial Park, Wexford County, Michigan

Settlement Document	Source	Injuries/Impacts	NRD Claims	NRD Consideration	CNTS	NRD Assessment
<p>Consent Decrees in United States District Court, Western District of Michigan, entered December 27, 1994, (Judge Richard A. Enslin).</p> <p>Plaintiffs: State of Michigan, Attorney General and DNR (now DEQ).</p> <p>Defendants: Kysor Industrial Corporation; Four Winns, Inc.; et al.</p>	<p>Various manufacturing plants, including Northernaire Plating, Kysor Industrial, and Four Winns.</p>	<p>Contaminated groundwater in industrial park, including use and non-use values; alleged threat to public drinking water supply and economic development.</p>	<p>MERA/Act 307; CERCLA; and Water Resources Commission Act (now NREPA Part 31).</p>	<p>The payment is \$590,000.</p>	<p>Natural resource damages, including assessment costs, subject to reservations except for passive migration or release of hazardous substances subsequent to filing. Potential reopener for substantial impairment of municipal well field; NRD reopener for unknown conditions other than groundwater aquifers and overlying land resources.</p>	<p>Performed by RCG Hagler Bailly, sub-contractor to CDM for State of Michigan; contingent valuation methodology utilized.</p>

### Dober Mine/Iron River Site, Iron County, Michigan

Settlement Document	Source	Injuries/Impacts	NRD Claims	NRD Consideration	CNTS	NRD Assessment
<p>Consent Decree in Ingham County, Michigan Circuit Court, entered October 28, 1998 (Judge William E. Collette).</p> <p>Plaintiffs: State of Michigan, Attorney General and DEQ.</p> <p>Defendant: M. A. Hanna Company</p>	<p>Iron River Dober Mine Complex, including shafts, pits, waste rock, contaminated water and treatment system, 7 miles of the Iron River and 10 ½ miles of the Brule River.</p>	<p>Recreational fishing lost use value.</p>	<p>NREPA Part 201 and CERCLA</p>	<p>\$312,000 into Natural Resource Damages Sub-Account, within MDEQ Cleanup and Redevelopment Fund, for dedicated purpose of NRD mitigation projects in Iron County, Michigan. Defendant assumed O&amp;M activities, responsibility, including NPDES Permit for discharge from existing remedial system.</p>	<p>CNTS and contribution protection for NRD which occurred or existed at the Facility prior to Consent Decree. State allegedly reduced NRD claim against Defendant to account for hazardous substances generated or disposed of by Third-Party Defendants. Defendant covenants to dismiss third-party action against 4 local municipalities. State reserves claim for NRD arising from release/disposal after Consent Decree, reopener for unknown conditions/new information.</p>	<p>Prepared by Public Sector Consultants as subcontractor to SEG for State, April 1994: Recreational fishery of Iron and Brule Rivers due to release of acid mine water from Dober Mine; biological injuries per MDNR; travel cost model (lost use value) to value change in quality of recreational fishing, estimates amount that Michigan anglers would have paid as compensation for degradation of aquatic resources; estimated total current value of damages to Iron and Brule Rivers' fisheries was \$2,092,474. Assessment did not include other types of recreation, existence (passive use) values, or lost state income/revenue.</p>

### Fort James Corp.—Lower Fox River, Wisconsin

Settlement Document	Source	Injuries/Impacts	NRD Claims	NRD Consideration	CNTS
<p>Consent Decree Agreement reached November 15, 2000 with the State of Wisconsin. The public comment period on the agreement was extended an additional 90 days to June 20, 2001, because of differences between the State, the U.S. Fish and Wildlife Service, and Oneida tribal leaders.</p> <p>Plaintiff: State of Wisconsin.</p> <p>Defendants: Fort James Corp. and Fort James Operating Co.</p>	<p>Paper mill facilities at or near Fox River in Northeastern Wisconsin.</p>	<p>An estimated 691,370 lbs. of PCBs discharged into the Lower Fox River between 1954 and 1971, with 160,000 lbs. released into the Green Bay. Eleven million cubic yards of sediment contaminated by PCB discharges.</p>	<p>CERCLA</p>	<p>Cost to Fort James is approximately \$7 million. Fort James will buy and transfer ownership to Wisconsin of approximately 700 acres of land adjacent to the Green Bay. The company will also fund projects designed to improve water quality in Lower Fox River and Green Bay, and recreational project for the same area. Additionally, the company will fund the design and construction of an island for Green Bay's Cat Island Chair. DOI values the projects at approximately \$55 million. Fifty Thousand Dollars (\$50,000.000) will be paid as reimbursement of past NRD assessment costs.</p>	<p>State will not take action under CERCLA, FWPCA, or any other federal, state, or common law for NRD claims relating to Lower Fox River, Green Bay, or Lake Michigan. The State reserves the right to action for releases to the Lower Fox River if the released substance was not identified in state-held Fort James documents; the release has caused damage; and the damage was unknown to the State at the time of entry of the Consent Decree. Fort James also receives contribution protection.</p>

### G & H Landfill, Shelby Township, Michigan

Settlement Document	Source	NRD Claims	NRD Consideration	CNTS	NRD Assessment
<p>Consent Decree in United States District Court, Eastern District of Michigan, entered January 20, 1994 (Judge Julian A. Cook, Jr.).</p> <p>Plaintiffs: Frank J. Kelley, Attorney General of the State of Michigan, and the Michigan Department of Natural Resources ("MDNR")</p> <p>Defendants: Ford Motor Company, et al.</p>	<p>G &amp; H Landfill areas and Automobile Salvage or Disposal Yard in Shelby Township; the Rochester-Utica State Recreation Area ("RUSRA") acres located north of the Clinton River, not including the Clinton River; subject of prior U.S. Consent Decree for remedial action June 30, 1993.</p>	<p>MERA/Act 307 and CERCLA</p>	<p>NRD claims- payment of \$3,000,000 to resolve damage for use and non-use value; payment of \$1,000 per acre for each acre not suited for use because of incomplete remedial tasks, for eight years; installation of purge wells. Payment of \$50,000 for NRD assessment. Specifies \$250,000 for NRDA and \$800,000 for activities in Clinton River watershed/ St. Clair Flats area.</p>	<p>CNTS, Contribution Protection for any liability to State under CERCLA, MERA or other state NRD law. Exceptions for violation of decree; future response activities; replacement of wetlands if not remediated consistent with U.S. Consent Decree; liability for release of hazardous substances not attributable to the facility; hazards taken from facility; NRD taking place after decree, damage caused by remedial actions required for U.S. Consent Decree; criminal acts; violations of law during or following decree; yet undiscovered damages beyond groundwater; use or non-use value; or small mammal damage. Decree includes contribution protection provided to PRPs who subsequently settle NRD contribution claim with Settling Defendants.</p>	<p>NRD Assessment performed: not explicit, only says that Defendants have been identified as PRPs, settlement designates funds "will be" used for conducting NRDA.</p>

### Indian Mill Creek, Grand Rapids, Michigan

Settlement Document	Source	NRD Claims	NRD Consideration	NRD Assessment
<p>Administrative Consent Order approved as to form by Jonathan Pierce, Assistant Attorney General for A. Michael Leffler, Assistant Attorney General in Charge, Natural Resources Division, Michigan Department of Attorney General, December 22, 1999.</p> <p>Plaintiff: State of Michigan Department of Environmental Quality.</p> <p>Defendant: Associated Refrigeration Services, Inc.</p>	<p>Independent refrigeration contractor Associated Refrigeration Services, Inc. discharged approximately ten (10) gallons of ammonia into a storm sewer catch basin on the property of Thorn Apple Valley, Inc. The storm sewer discharged the ammonia into Indian Mill Creek, a designated trout stream that runs across the Thorn Apple Valley, Inc. property, affecting a total fish kill for two miles downstream.</p>	<p>Section 3109 (1) of Part 31, Water Resources Protection, of NREPA</p>	<p>Associated Refrigeration Services, Inc. agreed to pay a civil penalty of \$5,000.00 to the general fund of the State of Michigan. In addition, they agreed to pay \$20,000.00 in restitution for the loss of fish to the Fish and Game Protection Fund of the State of Michigan.</p>	<p>Limited. The use or non-use values assigned is not explicit in assessment of damages in the settlement.</p> <p>The DNR estimated the value of 3,907 game fish and 3,062 non-game fish killed at \$40,269.</p>

### Jer-Ann Dairy, Glosser Drain and Mitchell Creek, Fowler, Clinton County

Settlement Document	Source	Injuries/Impacts	NRD Claims	NRD Consideration
<p>In re Abatement of Water Pollution, Administrative Order on Consent No. ACO-SW92-014, entered September 18, 1992.</p> <p>Plaintiff: Michigan Department of Natural Resources.</p> <p>Defendants: Jerome B. Pohl and Jer-Ann Dairy.</p>	<p>Dairy Farm discharged liquid animal waste into Glosser Drain which is a tributary to Sharps Drain and Peet Creek. Release resulted from failure of transfer operation of liquid wastes from one part of the dairy to another, resulting in a release of 10,000 to 15,0000 gallons of liquid industrial waste. The liquid waste was observed in Peet Creek where a fish kill was reported. Water from Peet Creek was tested and found to have high levels of various contaminants for at least five days after the release. Owner had no permit to discharge into the surface waters of the state.</p>	<p>Fish kill in Peet Creek.</p>	<p>WRCA</p>	<p>\$90 for fishery loss, \$800 for MDNR costs and a penalty of \$1,500. Funds were not earmarked.</p>

### Lakeway Chemicals/Bofors Nobel, Muskegon, Michigan

Settlement Document	Source	Injuries/Impacts	NRD Claims	NRD Consideration	CNTS
<p>Consent Decree in United States District Court, Western District of Michigan, entered December 13, 1999 (Judge Douglas W. Hillman).</p> <p>Plaintiffs: State of Michigan, Attorney General and DEQ.</p> <p>Defendants: Akzo Nobel, et al.</p>	<p>Lakeway Chemicals' production of chemicals, including liquid process wastes (discharged to 10 on-site lagoons), from 1960 to 1976 (when discharges to wastewater treatment plant commenced).</p>	<p>Contaminated groundwater and adjacent creek.</p>	<p>CERCLA and NREPA Part 201</p>	<p>\$500,000 to State of Michigan Clean-up and Redevelopment Fund; costs recovered to be deposited into sub-account specifically designated for NRD; payment contingent on funding of initial settlement trust under Federal Consent Decree. Cross-reference U.S. EPA Consent Decree and prior U.S. and State Agreement and CNTS with facility purchaser (Lomac), Performing Settling Defendants, and <u>De Minimis</u> Settling Defendants.</p>	<p>Payment of NRD occurring prior to Consent Decree, except Swedish parent corporation which received CNTS for all NRD claims and assessment costs at or in connection with the Facility without regard to time of occurrence. State reservation for NRD occurring after effective date of Consent Decree and criminal liability; reopener for unknown conditions and new information. No NRD reservation as to <u>De Minimis</u> Settling Defendants or Akzo Nobel.</p>

### Liquid Disposal, Inc. ("LDI"), Shelby Township, Michigan

Settlement Document	Source	Injuries/Impacts	NRD Claims	NRD Consideration	CNTS
<p>Consent Decree in U.S. District Court for Eastern District of Michigan, entered September 8, 1994 (Judge Patrick J. Duggan).</p> <p>Plaintiffs: State of Michigan, Attorney General and DNR (no DEQ).</p> <p>Defendants: BASF Corp., et al.</p> <p>Document cross-references to U.S. EPA Consent Decree for remedial action.</p>	<p>Superfund site; subject of prior U.S. EPA Consent Decree for remedial action; including off-site impacts to Rochester-Utica state recreation area, but not including any part of the adjacent Clinton River.</p>	<p>Recreational area use and enjoyment, wetlands impacts, use and non-use values.</p>	<p>MERA/Act 307 and CERCLA</p>	<p>\$425,000 payment, to be used in a manner consistent with CERCLA and MERA.</p>	<p>State CNTS and Contribution Protection for any liability to State under CERCLA, MERA, or other law for NRD, including assessment costs; except replacement of wetlands if not properly restored by remedial action, and liability for NRD from releases after Consent Decree unless due to passive migration or passive release of hazardous substances at the Facility as of the filing of the Decree; revegetation and restoration of Recreation Area if damaged by remedial action; criminal liability; unknown conditions or new information reopener except for damages prior to filing of Consent Decree, and not applicable to groundwater, Recreation Area value, use or enjoyment, wetlands remediated/restored under U.S. EPA Consent Decree, and small mammals in Recreation Area or Facility. State CNTS and contribution protection provided to PRPs who subsequently settle NRD contribution claim with Settling Defendants;</p>

### Macon Creek, Washtenaw County, Michigan

Settlement Document	Source	Injuries/Impacts	NRD Claims	NRD Consideration	NRD Assessment
<p>Administrative Consent Order, In the matter of Abatement of Water Pollution, Philip Gordon, ACO-SW96-01.</p> <p>Plaintiff: DEQ.</p> <p>Defendant: Mr. Philip Gordon.</p>	<p>In July 1994, an agricultural liquid waste transfer operation on the Gordon farm resulted in a liquid manure discharge into Macon Creek. Approximately 100,000 gallons reached the creek. Investigation revealed other similar spills although manure had not reached the creek as a result of those spills.</p>	<p>Aquatic life was killed along four miles of Macon Creek. Total loss of fish was estimated at 266 pounds of non-game fish.</p>	<p>WRCA</p>	<p>Restitution of \$1330; \$1630 for enforcement costs; and \$5,000 in civil penalties satisfied by a payment of \$1040 and in kind performance of public information activities in the dairy industry, plus a stipulated penalty if the foregoing were not timely completed.</p>	<p>Estimate was made of weight of fish killed by surveying a section of the creek.</p>

### Mead Paper Company Pulp Mill, Escanaba, Delta County, Michigan

Settlement Document	Source	Injuries/Impacts	NRD Claims	NRD Consideration	CNTS
<p>Consent Order and Stipulation, <b>Kelley v Mead Corp.</b>, Case No. 91-68945-CE (Ingham Co), May 14, 1991.</p> <p>Plaintiffs: Frank J. Kelley, Attorney General for State of Michigan, ex rel.; Michigan Natural Resources Commission; Michigan Water Resources Commission; and Michigan Department of Natural Resources.</p> <p>Defendant: Mead Paper Company.</p>	<p>Ongoing violations of NPDES Permit MI. 0000027</p>	<p>Fish losses in the Escanaba River.</p>	<p>WRCA, MEPA, and public nuisance</p>	<p>\$4,800, plus improvements to bring plant into permit compliance, a civil penalty of \$40,000 and stipulated penalties for future violations. The NRD funds and the civil penalty were earmarked for the MDEQ/MDNR Fisheries Division for rearing walleye fingerlings in the Upper Peninsula. Stipulated penalties as imposed will be used for the same purpose.</p>	<p>Final resolution of claims.</p>

### Rouge River and Newburgh Lake, Wayne County, Michigan

Settlement Document	Source	Injuries/Impacts	NRD Claims	NRD Consideration
<p>Administrative Consent Order Resolution by Commissioner Boike. February 23, 1998</p> <p>Plaintiff: Michigan Department of Environmental Quality.</p> <p>Defendant: Wayne County Department of Environment</p> <p>A consultant firm, Environment</p>	<p>Consulting and Technology, Inc., employed by Wayne County Department of the Environment applied rotenone for fish reclamation purposes as part of a sediment remediation project in the Rouge River and Newburgh Lake. The later attempt at detoxification was unsuccessful and the rotenone extended downstream beyond the Newburgh Dam six miles past the approved reach.</p>	<p>Fish kill in 6 miles of watercourse.</p>	<p>NREPA Part 31</p>	<p>Restocking of fish at \$25,000 within 30 days of the completion of the Newburgh Lake restoration project. Specified the minimum number, species and size to be placed in each location. A cash payment of \$3,000 to the Friends of the Rouge organization. There will be a penalty of \$10,000 per day of violation.</p>

### Saginaw River & Bay, Bay County, Michigan

Settlement Document	Source	Injuries/Impacts	NRD Claims	NRD Consideration	CNTS	NRD Assessment
<p>Consent Judgment in United States District Court, Eastern District of Michigan, entered January 4, 1999 (Judge Robert H. Cleland).</p> <p>Plaintiffs: MDEQ, State Attorney General, U.S. EPA/DOI, and Saginaw-Chippewa Indian Tribe.</p> <p>Defendants: General Motors, et al.</p>	<p>PCBs in sediments from various GM plants, Cities of Bay City and Saginaw POTWs, and land disposal areas adjacent to River, as well as Confined Disposal Facility in Bay (from Corps of Engineers' navigational dredging).</p>	<p>Contaminated sediments in Saginaw River &amp; Bay, affecting aquatic habitat, fishing (recreational and subsistence) and hunting, and migratory birds.</p>	<p>MERA/Act 307 and CERCLA</p>	<p>\$2 Million cost-recovery reimbursement, \$3 Million Trustee Council Restoration Account; 3 recreational/educational areas (e.g., boat launches); restoration of Tobico Marsh (pike and perch spawning habitat); Green Point Environmental Learning Center Facility funding; acquisition of islands, coastal wetlands and lakeplain prairie properties; and approximately \$10 Million for dredging and disposal of contaminated sediments by Corps of Engineers (estimated to remove 345,000 cubic yards or about 90% of the PCB mass in the Lower River).</p>	<p>CERCLA, NREPA Part 201, Clean Water Act, Oil Pollution Act, NREPA Part 111, RCRA, and any civil relief on behalf of Corps. of Engineers regarding sediment dredging and disposal costs. Separate CNTS from federal and tribal trustees, state, and U.S. response action agencies with contribution protection for coverage matters. Various reservations of rights and re-openers, subject to moratorium during following sediment dredging, limitation of previously known information and passive migration.</p>	<p>Confidential/preliminary State document not publicly available.</p>

### Salt River, Midland County

Settlement Document	Source	Injuries/Impacts	NRD Claims	NRD Consideration	NRD Assessment
<p>Administrative Consent Order, In the matter of Abatement of Water Pollution, Clarend Methner, Mt. Pleasant, April 22, 1996.</p> <p>Plaintiff: Michigan Department of Environmental Quality.</p> <p>Defendant: Mr. Clarend Methner.</p>	<p>Excess application of manure entered the Salt River and killed aquatic life due to oxygen depletion over a stretch of 12 miles.</p>	<p>Aquatic life. Fish kill involved 636 pounds of game fish and 4915 pounds of non-game fish.</p>	<p>WRCA</p>	<p>\$20,000 restitution for fish kill, \$2,500 civil penalty. Funds were not earmarked.</p>	<p>Fish count used to estimate total fish loss.</p>

### The Upjohn Company, Kalamazoo, Michigan

Settlement Document	Source	Injuries/Impacts	NRD Claims	NRD Consideration
<p>In the Matter of Abatement of Water Pollution, NPDES Permit # MI 0002941, Final Order DFO-SW91-003 and related AOC entered March 13, 1991.</p> <p>Plaintiff: Michigan Department of Natural Resources.</p> <p>Defendant: The Upjohn Company.</p>	<p>Discharge on March 6, 1991, of toluene into Portage Creek in violation of a NPDES permit.</p>	<p>Lost fisheries and recreational use</p>	<p>NREPA Part 31 245; MERA/Act 307.</p>	<p>Payment of \$38,000 to State general funds; restock impacted area of Portage Creek with 1,000 brown trout for three years.</p>

**Verona Wellfield, Battle Creek, Michigan**

Settlement Document	Source	Injuries/Impacts	NRD Claims	NRD Consideration	CNTS	NRD Assessment
<p>Settlement with State of Michigan is pending. Judicial consent decree in preparation, entry is expected Fall, 2001. The pending settlement involves numerous site PRPs including Grand Trunk, certain virgin solvent customers of Thomas Solvent and certain customers of Thomas Solvents' reclaiming services.</p> <p>Plaintiffs: United States of America, Frank J. Kelley, Attorney General of the State of Michigan; and the State of Michigan.</p> <p>Defendants: Site PRP Group</p>	<p>The plumes from three source areas entered the City of Battle Creek's well field, the Verona Wellfield, contaminating water supply throughout Battle Creek. The contamination was discovered in 1981 and a succession of remedial actions have cleaned up the well field and largely cleaned up source area soils. The ongoing remedy involves blocking wells upgradient of the well field and source area, groundwater containment and treatment.</p>	<p>The groundwater aquifer providing the public water supply.</p>	<p>CERCLA and MERA.</p>	<p>PRPs agreed to undertake source area remediation activities not required by the ROD or the § 106 orders. The work will be performed to a scope of work having an estimated cost of \$600,000 but the PRPs will be required to perform the work even if it exceeds the cost estimate. The scope of work does not require achievement of soil or groundwater cleanup goals.</p>	<p>PRPs will receive a CNTS upon performance of the source area enhancement work and construction and continued operation of improvements to the ROD-required blocking well remedy.</p>	<p>Final Report: NRDA at the Verona Well Field Site, prepared for DEQ and the Attorney General's Office by Industrial Economics, Incorporated, Cambridge, MA, May 1997. The assessment considered use losses based on replacement cost of lost production capacity and private costs associated with switching from private to public water supply. Passive use losses were estimated. The State elected to assert claims only for loss of use damages. The assessment report is one of the few released by MDEQ for outside review. NRDA was funded by an earlier settlement with Richard Thomas of Thomas Solvent Company.</p>

**Vessel Jupiter (Cleveland Tankers/Total Petroleum), Bay City, Michigan**

Settlement Document	Source	Injuries/Impacts	NRD Claims	NRD Consideration	CNTS
<p>Administrative Consent Order, entered by MDNR July 13, 1993.</p> <p>Plaintiffs: State of Michigan, Attorney General, DNR (now DEQ), State Police, and Department of Public Health.</p> <p>Defendants: Cleveland Tankers Incorporated and Total Petroleum Inc.</p>	<p>On September 16, 1990, the Vessel Jupiter was docked at the Total Petroleum facility in Bay City, Michigan; the Vessel Buffalo passed by and caused Jupiter to pull away from its mooring; there was a subsequent fire and explosion aboard the Jupiter and a fire on the dock at the Total Petroleum facility; during the accident, gasoline and other materials were released into the environment; the Saginaw River was closed as a result of the event until October 20, 1990.</p>	<p>Commercial and recreational uses, including boating and fishing.</p>	<p>OPA, MERA/Act 307), CERCLA, and Clean Water Act</p>	<p>\$639,693.46; including \$495,000 deposit into environmental response fund; \$120,000 for research in support of Saginaw Bay wetlands identification and restoration project; and \$24,693.46 to update and expand MDNR recreational fishing and boating model.</p>	<p>Liability Release of Respondents from all claims and causes of action arising out of the accident; Covenant Not to Sue and Contribution Protection for all claims arising out of the accident, except for criminal acts; subject to unknown conditions or new information, but additional compensation or remediation for NRD.</p>

### Willow Run Creek Area, Washtenaw and Wayne Counties, Michigan

Settlement Document	Source	Injuries/Impacts	NRD Claims	NRD Consideration	CNTS	NRD Assessment
<p>Consent Decree in Ingham County, Michigan Circuit Court for the 13th Judicial Circuit, March 24, 1995 (Honorable William E. Collette)</p> <p>Plaintiffs: Frank J. Kelley, Attorney General of the State of Michigan, ex rel Michigan Department of Natural Resources (MDNR) and Roland Harmes, Director, MDNR</p> <p>Defendants: General Motors Corp. (GM), Ford Motor Co. (Ford), County of Wayne, Michigan, Charter Township of Ypsilanti, Ypsilanti Community Utilities Authority (YCUA) and the Regents of the University of Michigan (UM)</p>	<p>Willow Run Creek Area, including the areas of Tyler Pond, the Willow Run Sludge Lagoon, Edison Pond and Ypsilanti Drain No. 8. Additional areas to be evaluated include portions of the South GM Pond, GM Assembly Plant and the Airport Landfill.</p>	<p>High levels of PCBs released into surface water causing injury to natural resources, especially aquatic biota. Wildlife is injured by increased reproductive failure.</p>	<p>MERA/Act 307</p>	<p>The NRDA used benefit transfer, market price methodology, travel cost methodology and the contingent valuation methodology. Total NRDA value: \$839,094.00. Defendants responsible for design, construction of RAP. NRDMA begins with final design report, includes remediation of Tyler Pond, remediation of Willow Run Sludge Lagoon, Wetland restoration, landfill construction, and beginning of operations.</p>	<p>CNTS and Contribution Protection for liability to State for covered matters. Exceptions for violation of decree; future response activities; liability for release of hazardous substances not attributable to the facility; hazards taken from facility; NRD taking place after decree; damage caused by remedial actions; criminal acts; violations of law during or following decree. State may seek reimbursement for additional response cost if undiscovered damages arise, or performance of further response activities is necessary prior to MDNR issuing a Certificate of Completion of Design and Construction. After issuance of the Certificate the State can pursue additional costs for newly discovered threats. Plaintiffs reserve the right to pursue reimbursement for any provision of the Decree not implemented in a timely matter.</p>	<p>NRD Assessment performed by private contractor of U of M. Further assessment is included as part of the settlement. Defendants are to draft a NRD Mitigation Plan (NRDMP) that evaluates the possible mitigation activities and to provide a cost benefit analysis for each alternative NRD Mitigation Activity (NRDMA).</p>

## ENDNOTES

<sup>1</sup> Denton, C M, Hupp, R C, *Natural Resources Damages Assessments and Claims in Michigan: The Law of Natural Resources Damages Assessments Part I*, 19 Mich Env L J, No 3, p 3 (2001) ("Part I").

<sup>2</sup> For instance, the Lower Fox River NRD Assessment Plan will arrive at a total damages figure by conducting restoration planning, determining interim loss compensation, and calculating any continuing compensable values in light of the selected restoration alternative, together with the NRDA costs. The result is an action to recover monetary damages and implementation of the final restoration plan. See US DOI Fish & Wildlife Service, *Lower Fox River/Green Bay NRDA: Initial Restoration and Compensation Determination Plan*, Figure 2-2 (September 14, 1998).

<sup>3</sup> See, generally, Kopp, RJ and Smith, VK, eds, *Valuing Natural Assets: The Economics of Natural Resource Damage Assessment*, Resources for the Future (1993).

<sup>4</sup> For an excellent overview of natural resource valuation complete with examples, the reader is directed to Northeast-Midwest Institute and NOAA, *Revealing the Economic Value of Protecting the Great Lakes* (2000).

<sup>5</sup> Kopp, RJ, Testimony, U.S. House Subcommittee on Water Resources and Environment, Committee on Transportation and Infrastructure (July 11, 1995), available at <<http://www.rff.org/testimony/remarks>>; see also, discussion of NOAA regulations at Section II.A.4, of Part I of this Article.

<sup>6</sup> Frank J Kelley, ex rel, *State of Michigan and Michigan Department of Natural Resources, v Kysor Industrial Corp*, CA# 5:91-CV-45 (WD Mich), discussed *infra* at I.B.6.

<sup>7</sup> MCL 324.20104(2).

<sup>8</sup> See, eg, the Dober Mine and Willow Run Creek NRDA discussions, *infra*, n 12.

<sup>9</sup> *Revealing the Economic Value*, *supra* at 8, provides a general conceptual review of a Lower Fox River NRD for PCB damages.

<sup>10</sup> *Daily Env't Rep (BNA) No 03*, at AA-1 (Jan 4, 2001).

<sup>11</sup> *Id.*

<sup>12</sup> Public Sector Consultants, Inc, *Natural Resource Damage Assessment for the Dober Mine/Iron River Site, Michigan* (MDNR MERA No. 360006) (April 1994).

<sup>13</sup> USEPA, *Record of Decision, Verona Wellfield Site* (1984).

<sup>14</sup> USEPA, *Record of Decision, Verona Wellfield Site* (1991).

<sup>15</sup> Industrial Economics, Inc, *Potential Natural Resource Damages at the Verona Wellfield Site, Battle Creek, Michigan* (August 16, 1994); issued in final form: Industrial Economics, Inc, *Final Report: Natural Resource Damages at the Verona Wellfield Site* (May 1997).

<sup>16</sup> In 1989, most of the residents with impacted private well water received a settlement and gave a full release for all of their claims against the largest PRP.

<sup>17</sup> *Final Report: National Resource Damages at the Verona Wellfield Site*, *supra* at 3-4.

<sup>18</sup> This information is summarized in Appendix C to the *Final Report: National Resource Damages at the Verona Wellfield Site*, *supra*.

<sup>19</sup> Appendices B, D & E to the *Final Report: National Resource Damages at the Verona Wellfield Site* set forth both procedures to estimate passive losses and averted bottled water use but also explain that further research in these areas was found to be not cost effective. Appendix E provides a summary by community of the survey results as to contaminated municipal sites and thus is a useful reference where information about impacts at other sites is of interest.

<sup>20</sup> 42 USC 9614(b) (1994).

<sup>21</sup> Stratus Consulting Inc, *Stage I Assessment Plan: Kalamazoo River Environment Site* (Nov 2000).

<sup>22</sup> Stratus Consulting Inc, *Preassessment Screen: Kalamazoo River Environment Site*, (May 30, 2000)

<sup>23</sup> 43 CFR 11.14(e) (2000).

<sup>24</sup> 43 CFR 11.80(b) (2000).

<sup>25</sup> *Kalamazoo River Stage I Assessment Plan*, *supra* at § 6.1.

<sup>26</sup> *Daily Env't Rep (BNA) No 03*, at AA-1 (Jan 4, 2001).

<sup>27</sup> *Kalamazoo River Stage I Assessment Plan*, *supra* at p 6-8.

<sup>28</sup> Camp, Dresser & McKee, *Natural Resource Injuries & Associated Damage Estimates for the Willow Run Site, Washtenaw and Wayne Counties, Michigan* (March 1995).

<sup>29</sup> *Kelley v General Motors Corp*, Case No 95-79987-CE (Ingham Co, Cir Ct, March 24, 1995).

<sup>30</sup> Park opened to the public after 1972.

<sup>31</sup> Generally, non-use values for this were low because the affected area was small and not unique.

<sup>32</sup> *Kelley*, *supra* at n 6, pp 37-40

<sup>33</sup> *Id.*

<sup>34</sup> *Draft Great Lakes Strategy of the Great Lakes Water Quality Agreement*, 66 Fed Reg 30187 (June 5, 2001).

<sup>35</sup> Rheaume, S J, Bulton, D T, Meyers, D N, and Hubbell, D L, *Areal Distribution and Concentrations In Surficial Steambed and Lakebed Sediments, Lake Erie-Lake St. Clair Drainages, 1990-97*, U S G S Water-Resource Investigations Report 00-4200 (2000)

<sup>36</sup> USEPA, *Contaminated Sediments: An Overview* (revised Oct 7, 1999), <<http://www.epa.gov/waterscience/cs/aboutcs/index.html>>.

<sup>37</sup> *Id.*

<sup>38</sup> USEPA, Office of Water, EPA's *Contaminated Sediment Management Strategy* (revised Sept 15, 1998), <<http://www.epa.gov/waterscience/cs/strategy.pdf>>.

<sup>39</sup> *Id.* at 1.3.1.

<sup>40</sup> *Daily Env't Rep (BNA) No 123, at A-9 (June 27, 2001).*

<sup>41</sup> USEPA, *Executive Summary: Contaminated Sediment Management Strategy* <<http://www.epa.gov/OST/cs/manage/execsum.html>>.

<sup>42A</sup> *Contaminated Sediment Management Strategy, supra, n 38.*

<sup>43</sup> *Id.* at ii.

<sup>44</sup> USEPA, OSWER Directive 9285.6-08, *Principles for Managing Contaminated Sediment Risks at Hazardous Waste Sites* (Feb 12, 2002)

<sup>45</sup> Michigan Department of Environmental Quality, *Manistique River Area of Concern – Remedial Action Plan Update* at 9 (Feb 23, 1997). The river's sediments have been classified as "heavily polluted" under dredge spoil disposal guidelines due to high levels of lead, zinc, cadmium, chromium, and copper, according to the MDNR's 1987 RAP.

<sup>46</sup> *Id.* See also, Notice of Proposed U S EPA Administrative Cost-Recovery Settlement for the Manistique River/Harbor Site in Schoolcraft County, Michigan, 61 Fed Reg 60281 (Nov 27, 1996).

<sup>47</sup> USEPA, *Manistique River Area of Concern*, <<http://www.epa.gov/grtlakes/laoc/mantique/index.html>>. There are fourteen possible beneficial use impairments under the Great Lakes Water Quality Agreement. These include fish and wildlife consumption restrictions, degradation of benthos, loss of fish and wildlife habitats, restricted dredging activities, restricted body contact, degradation of fish and wildlife populations, bird or animal reproductive problems or deformities, degradation of aesthetics, tainting of fish and wildlife flavor, fish tumors or other deformities, eutrophication or undesirable algae, restrictions on drinking water consumption or taste and odor problems, added costs to agriculture or industry, and degradation of phytoplankton and zooplankton populations. MDEQ, *Remedial Action Plan Update, supra, at 14-20.*

<sup>48</sup> *Manistique River Area of Concern, supra n 47.*

<sup>49</sup> See discussion in Part I, Section II.A.1.

<sup>50</sup> For example, settlements have reportedly netted over \$135 million in natural resources damages associated with the Palos Verdes Shelf in the Pacific Ocean off the coast of Los Angeles, where DDTs, PCBs and other chemicals from decades of discharges have contaminated the sediments. See *US v Montrose Chemical*, No. 90-3122 (CD Cal); *Daily Env't Rep (BNA) No. 245, at A-2 (Dec 21, 2000).* See also, NOAA, Notice of Intent to Prepare Restoration Plan and Environmental Impact Statement ("RP/ EIS") for "Montrose Settlements Restoration Program," 66 Fed Reg 51391 (Oct 9, 2001).

<sup>51</sup> Mich Dep't of Nat Res, Administrative Consent Order, *In re Vessel Jupiter (Michigan v Cleveland Tankers Inc)* (July 13, 1993).

<sup>52</sup> Frank J Kelley, Attorney General of the State of Michigan, *ex rel, Michigan Department of Natural Resources v BASF Corp*, unpublished Consent Decree, CA# 94-CV-72525-DT, (ED Mich 1994) (concerning Liquid Disposal, Inc. ("LDI"), Shelby Township, Michigan).

<sup>53</sup> See, eg, *Vessel Jupiter (Cleveland Tankers/Total Petroleum), Bay City, Michigan; Cadillac Industrial Park, Wexford County, Michigan (excludes groundwater aquifers and overlying land resources from NRD reopener for unknown conditions); LDI, Shelby Township, Michigan (reopener for additional NRD excludes damages originating prior to Consent Decree and not applicable to groundwater, recreation area, and wetlands to be remediated).* See also, *Saginaw River & Bay, Bay County, Michigan (reservations and reopeners subject to moratorium during and following sediment dredging work, and exclusion for passive migration).*

<sup>54</sup> Jennifer M Granholm, Attorney General of the State of Michigan, and the Michigan Department of Environmental Quality *v. Akzo Nobel AB, et al*, unpublished Consent Decree, CA # 1:99-CV-739 (WD Mich 1999) (concerning Lakeway Chemicals/Bofors Nobel, Muskegon, Michigan).

<sup>55</sup> Frank J Kelley, Attorney General of the State of Michigan, *ex rel, and Michigan Department of Environmental Quality v M A Hanna Co*, unpublished Consent Decree, CA# 94-77813-CE (Ingham Co Cir Ct, October 28, 1998) (concerning Dober Mine/Iron River Site, Iron County, Michigan).

<sup>56</sup> *US v SC Holdings, et al*, No. 1:00-CV-150 (ND Ind), 65 Fed Reg 24224 (Apr. 25, 2000).

<sup>57</sup> *Injuries to Hudson River Fishery Resources: Fishery Closures and Consumption*, quoted in *Daily Env't Rep (BNA) No 120, at A-6 (June 22, 2001).*

<sup>58</sup> *Id.*

<sup>59</sup> See, eg, US DOI Fish & Wildlife Service, *Lower Fox River/Green Bay NRDA: Initial Restoration and Compensation Determination Plan*, September 14, 1998, Table 5-1.

<sup>60</sup> See generally, Environmental Law Institute, *Opportunities for Public Involvement on NOAA's Natural Resource Damage Assessment and Restoration Efforts* (September 2000).

<sup>61</sup> USEPA received more than 70,000 public comments from a variety of interested parties regarding the proposed plan for dredging the Hudson River. See USEPA Headquarters Press Release, *Whitman Decides to Dredge Hudson River* (August 1, 2001).

<sup>62</sup> 42 USC 9601 *et seq.*

<sup>63</sup> See, *Trustees for Natural Resources* (2001), 40 CFR 300.600, Subpart G.

<sup>64</sup> For instance, the trustees for natural resources at the Lower Fox River/ Green Bay site include the USEPA Fish & Wildlife Service (FWS); National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce; the Wisconsin Department of Natural Resources (WDNR); the Menominee Indian Tribe of Wisconsin, and the Oneida Tribe of Indians of Wisconsin. The Federal and Tribal Trustees have cooperatively conducted an assessment, but the State of Wisconsin has refused to formally join with the Federal and Tribal Trustees. See US DOI Fish & Wildlife Service, *Lower Fox River/Green Bay NRDA: Initial Restoration and Compensation Determination Plan*, at 1 (September 14, 1998).

<sup>65</sup> USEPA, OSWER Directive 9200.4-22A, *CERCLA Coordination with Natural Resource Trustees* (July 1997).

<sup>66</sup> USEPA, *ECO Update, The Role of Natural Resource Trustees in the Superfund Process* (1992), <<http://www.epa.gov/superfund/programs/risk/tooleco.htm>>.

<sup>67</sup> USEPA, *OSWER Directive 9285.7-28 P, Ecological Risk Assessment and Risk Management Principles for Superfund Sites* (1999).

<sup>68</sup> Note: Trustees with authority in Michigan also include FWS, NOAA and Michigan's Indian tribes.

<sup>69</sup> For example, the \$11 Million NRD settlement fund for the Iron Mountain Mine Superfund Site in Northern California is to be administered by US FWS, NOAA, US Bureau of Reclamation, US Bureau of Land Management, National Park Service, and California Department of Fish & Game. See *US v Iron Mountain Mines, et al.*, No. CIV-S-91-0768 – DFL/JFM (ED Cal, 1997); 65 Fed Reg 63624 (Oct 24, 2000).

<sup>70</sup> See also *SWANCC v US Army Corps of Engineers*, 531 US 159, 121 S Ct 675, 148 L Ed 2d 576 (2001) (rejecting claimed Federal CWA jurisdiction over isolated, intra-state wetlands based on migrating birds habitat).

<sup>71</sup> For example, determining changes in tribal fishing, hunting and trapping uses due to PCB contamination in the Lower Fox River is part of the NRD Assessment Plan; even impact on Tribal cultural activities as a result of the PCB contamination is to be examined. US DOI Fish & Wildlife Service, *Assessment Plan Addendum: Lower Fox River/Green Bay NRDA*, at 6 (October 1997). See also *Wisconsin v EPA* No 99-2618 (CA 7, Sept 21, 2001) (Sokaogan Chippewa Community in northeastern Wisconsin has authority under CWA to regulate activities of non-Indians which threaten impairment of water quality, health and welfare on the Reservation).

<sup>72</sup> Although the CERCLA statutory provision barring double recovery, 42 USC 9607(f)(1), should provide a good defense in most circumstances.

<sup>73</sup> For instance, at the Saginaw River & Bay Site in Bay County, Michigan, there were allegations that the Michigan Department of Transportation was a potential contributor to the sediment contamination from its construction activities at a former landfill, and that the US Army Corps of Engineers navigational dredging disposal facility in the Bay was also a potential source.

<sup>74</sup> *New Mexico v General Electric Co*, No 99-1188 (D NM, April 6, 2000), as reported in 31 *Env't Rep* (BNA) 872 (May 5, 2000)

<sup>75</sup> The New York Department of Environmental Conservation (DEC) has determined that three sites in the Hudson River Basin contain significant levels of PCB contamination from navigational dredging of the River, which occurred until the late 1970's. *Daily Env't Rep* (BNA) No 134, at A-9 (July 13, 2001). Additionally, creation of a disposal facility in the watershed might attract migratory birds.

<sup>76</sup> The defendants in the Bunker Hill Superfund site litigation counterclaimed that the Federal government's active involvement in the mining operation during World War II required contribution by the United States to the Coeur d'Alene Basin cleanup. See *United States v Asarco*, No 96-CV-122 (D Idaho); *Daily Env't Rep* (BNA) No 149, at A-9 (Aug 3, 2001).

<sup>77</sup> *Consent Decree, United States v Asarco*, No 0122-N-EJL 66 Fed Reg 387 (Jan 3, 2001).

<sup>78</sup> *United States and State of Indiana v The Dow Chemical Co*, No IP-001841-C-T/G (SD Ind), 65 Fed Reg 77040 (Dec 8, 2000). See also, *United States v SC Holding, et al*, No 1-00-CV-150 (ND Ind.), 65 Fed Reg 24224 (Apr 25, 2000) (NRD settlement for Fort Wayne Reduction Site yielded acquisition of property adjacent to Maumee River, reforestation and restoration of property, and conveyance to IDNR with conservation easement).

<sup>79</sup> For example, the settlement for the Summitville Mine Superfund site near Del Norte, Colorado, was a comprehensive resolution of claims and counter-claims (brought in a separate action in Canada against the United States) for remedial response actions and NRD restoration. 65 Fed Reg 83084 (Dec 29, 2000); *United States and State of Colorado v Robert Friedland*, No. 96-N-1213 (Colo). See also, *Daily Env't Rep* (BNA) No 118, at A-13 (June 20, 2001).

<sup>80</sup> See generally, Bacow, LS, Wheeler, M, *Environmental Dispute Resolution* (Plenum Press, NY, 1984).

<sup>81</sup> For example, trial of the Coeur d'Alene Basin mining pollution claims for the Bunker Hill Superfund Site required 7 months, after approximately 5 years of pre-trial proceedings! *United States v Asarco*, No 96-CV-122 (D Idaho), as reported in *Daily Env't Rep* (BNA) No 49, at A-9 (Aug 3, 2001).

<sup>82</sup> For an excellent discussion of ADR in matters of environmental complexity, see Adler, P, et al, *Managing Scientific and Technical Information in Environmental Laws – Principles and Practices for Mediators and Facilitators*, sponsored jointly by RESOLVE, Inc, US Institute for Environmental Conflict Resolution, and Western Justice Center Foundation (2000).

## A FRESH LOOK AT THE ENVIRONMENTAL JUSTICE MOVEMENT

William T. Burton, Jr.\*

On December 17, 2001, the U.S. Court of Appeals for the Third Circuit held in **South Camden Citizens in Action v New Jersey Department of Environmental Protection**, 274 F3d771 (CA 3, 2001) that New Jersey citizens cannot use 42 USC1983 (Section 1983) to enforce U. S. Environmental Protection Agency's (EPA) disparate impact regulations in order to invalidate state air permits. Section 1983 provides a private remedy for any person deprived, under color of state law, of any rights secured by the Constitution and laws. At least 40 federal agencies, including EPA, have adopted regulations that prohibit disparate impact discrimination under section 602 of Title VI of the 1964 Civil Rights Act, 42 USC 2000d-1. Section 602 directs federal agencies to promulgate regulations implementing section 601's prohibition against intentional discrimination in programs that receive federal funds.

This case may have a significant impact on the environmental justice movement. If this case is upheld by the U.S. Supreme Court, then disparate impact regulations promulgated under section 602 are enforceable only by the federal agency that promulgated them, rather than by private citizens. Agency enforcement may culminate in the termination of federal funding to the recipient. The question remains, however, whether section 602 disparate impact regulations are legally valid, since they exceed an agency's section 601 authority by forbidding conduct (unintentional disparate impact discrimination) that section 601 permits. Nevertheless, if this case is upheld, then private remedies for civil rights violations would be limited strictly to victims of intentional discrimination.

### Factual Background

The St. Lawrence Cement Company sought to operate a \$50 million cement manufacturing facility in Camden, New Jersey. The South Camden neighborhood where the plant is located is near two Superfund cleanup sites, a power plant, and the county's trash incinerator and sewage plant. The neighborhood has 2,132 residents whose median household income is about \$15,000 and 91% of the residents are Hispanic and African-American.

On July 25, 2000, the New Jersey Department of Environmental Protection (DEP) issued draft air permits to the cement company allowing them to emit 60 tons of particulate matter per year. The DEP concluded that the air permits would meet all state and federal environmental standards

and would not have a "disproportionately adverse impact" on the health of residents. On February 13, 2001, a group of South Camden citizens filed a private Title VI action in federal court arguing that this cement plant would increase the health risks in their minority community. They claimed that the DEP, when evaluating the cement company's air permit applications, did not properly take into account the cumulative affects of other polluting entities, as well as the emissions from the estimated 77,000 trucks expected to visit the plant each year.

### Trial Court Proceedings

The trial court addressed two questions: (1) whether the standards used by the DEP to evaluate these air permit applications, particularly DEP's primary reliance on EPA emissions maximums for particulate matter, without considering the totality of the health and environmental circumstances of the South Camden community in which the cement manufacturing facility will be located, violates EPA regulations promulgated to implement section 602 of Title VI; and (2) whether the decision to grant the necessary air permits, so as to allow the cement manufacturing facility to operate, constituted disparate impact discrimination based on race and national origin in contravention of the EPA regulations promulgated to implement section 602 of Title VI.

The trial court concluded that on the facts of this case, the DEP had a legal obligation to consider, as a recipient of EPA funding, racially discriminatory disparate impacts when determining whether to issue these permits, in addition to compliance with applicable environmental standards, and failed to do so. As a result, the trial court granted the citizens' request for a preliminary injunction, and vacated the cement company's air permits.

### Appellate Court Proceedings

Five days after the trial court's decision, the U.S. Supreme Court held in **Alexander v Sandoval**, 532 US 275, —; 121 S Ct 1511, 1523 (2001) that "[n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under Sec. 602 [of Title VI]. We therefore hold that no such right of action exists." The **Sandoval** ruling made clear two important things. First, that section 601 of Title VI prohibits only "intentional discrimination," not unintentional discrimination reflected by disparate impacts. Second, though private individuals may sue to enforce section 601 of Title VI,

the Supreme Court concluded that there was no companion right of individuals to bring private suits to enforce section 602 of Title VI disparate impact regulations. The Supreme Court reasoned that section 602 disparate impact regulations do not implement section 601 because these regulations ban conduct that section 601 allows. Therefore, the Supreme Court concluded that the private right of action to enforce section 601 cannot include a private right to enforce these regulations.

Although the **Sandoval** decision took away the citizens' Title VI claim, the trial court did not reverse its prior decision and declared that the citizens had the right to enforce the disparate impact regulations under Section 1983.

On appeal of the trial court's decision, the U.S. Court of Appeals addressed whether the citizens can enforce disparate regulations under Section 1983. First, the citizens argued that the EPA Title VI disparate impact regulations created a "personal right" not to be subject to discrimination. Since a right has been arguably created by the regulations, then that right is enforceable under Section 1983. The citizens relied on the remaining portion of **Powell v Ridge**, 189 F3d 387 (CA 3, 1999), that had not been overturned by **Sandoval**, which stated that a private disparate impact claim could be maintained under Section 1983 for a violation of a section 602 regulation. Second, in response to the plaintiff's argument, the DEP argued that Section 1983 creates the remedy, but Congress must create the right. In section 602 of Title VI, Congress did not include language creating this right and, therefore, any regulation promulgated under it cannot create a "personal right." The U.S. Court of Appeals agreed with the DEP and ruled, by a 2-1 vote, that agency regulations can only protect rights created by Congress, not create new ones. As a result, the citizens could not use Section 1983 to enforce section 602 regulations.

### Impact in Michigan

The **South Camden Citizens** case will probably have little initial impact in Michigan. Our U.S. Court of Appeals for the Sixth Circuit has held that federal regulations may create enforceable rights under section 1983. See **Loschiavo v City of Dearborn**, 33 F3d 548, 551 (CA 6, 1994). Yet, a Florida federal court recently noted that the Sixth Circuit standard is more liberal than most for determining whether federal rights, enforceable under section 1983, can stem from regulations. See **Bonnie L ex rel Haddock v Bush**, 2001 WL 1580127 n 8, (No. 00-2116, SD Fla, Dec 4, 2001). In spite of that, a Michigan federal court followed **Loschiavo** in the recent environmental justice case of **Lucero v Detroit Public Schools**, 160 F Supp 2d 767 (ED Mich, 2001). In **Lucero**, the court allowed the plaintiffs to bring a Title VI disparate impact claim under section

1983 for violation of a Department of Education regulation promulgated under section 602 of Title VI. The **Lucero** case reflects a serious Circuit split on this issue, at least between the Third and Sixth Circuits. The U.S. Supreme Court usually grants certiorari to resolve Circuit splits on important issues like this. See, e.g., **Gutierrez v Ada**, 528 US 250, 254 (2000) (Court granted certiorari to resolve a split between the Ninth Circuit's interpretation of the Organic Act of Guam and the Third Circuit's reading of identical language in the Revised Organic Act of the Virgin Islands); **Richardson v United States**, 526 US 813, 817 (1999) (Recognizing a split in the Circuits on the matter, the Court granted certiorari regarding the proper interpretation of a criminal statute's "series of violations" requirement); **Wilson v Layne**, 526 US 603, 608 (1999) (Court granted certiorari to resolve a split among the Circuits as to whether police officers' actions in bringing members of the media to observe and record the attempted execution of the arrest warrant violate the Fourth Amendment). For that reason, I believe the **South Camden Citizens** case will likely be heard by the U.S. Supreme Court.

### Conclusion

Prior to the **Sandoval** decision, many federal courts found Title VI violations if the plaintiffs established that a government act impacted them disproportionately. If the U.S. Supreme Court does ultimately decide to grant certiorari and uphold the **South Camden Citizens** case, as the **Sandoval** decision portends, then private lawsuits relying on disparate impact evidence to establish Title VI violations will become a thing of the past. Unless Congress decides to pass legislation returning Title VI law to its pre-**Sandoval** days, it also may signal the beginning of the end of the environmental justice movement as we have come to know it.

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# COMMITTEE REPORTS

## PROGRAM COMMITTEE

The Program Committee held a meeting on Wednesday, December 12, 2001. Attendees included John Byl, Kurt Brauer, Joe Quandt, Bob Schroeder, John Tatum and Susan Topp.

**1. Committee Liaison Reports. No reports.**

**2. Planning Programs for 2002.**

**a. MDEQ Roundtable in Detroit concerning Transfer of Wayne County Air Program to the AQD.** Arthur Siegal is working with Kyle Jones and Ken Burgess regarding this roundtable. It will tentatively be held on January 22 at the offices of Jaffe Raitt at One Woodward Avenue in Detroit. Bill Burton has reported that Rick Johns and Lynn Buhl are available to speak at the roundtable.

**b. Joint Program with the Real Estate Section on February 22.** This program will be held at the Otsego Club in Gaylord on February 22. The co-chairs are Susan Topp and Bob Schroeder. We discussed tentative topics, including mold cases, the new Part 201 Rules, the BEA and due care process, negotiating a transaction involving contaminated property, and brownfield financial incentives. We also discussed possible speakers for most of these topics, including: Joe Quandt (mold), Kurt Brauer or another from his office (BEA and due care process), John Byl (brownfield financial incentives), Sue Topp and Bob Schroeder (negotiating a transaction involving contaminated property), Lynelle Marolf and a consultant (Part 201 Rules). We also discussed the possibility of Jim Olson speaking at lunch on the topic of land use planning/urban sprawl. Sue Topp will reserve a block of 20 rooms. The Section will not be obligated for the rooms. Rooms will be released at the time of any deadline if they have not been individually reserved by attendees.

**c. Annual Meeting Program.** Based on correspondence received from the State Bar, we are being encouraged to do a joint program with another section for the annual meeting, which will be in Grand Rapids in late September. John Byl will follow up with Pat Paruch and/or Gail Anderson of the Real Estate Section.

The Program Committee held a meeting on Tuesday, January 15, 2002. Attendees included Kurt Brauer, John Byl, Charles Denton, Beth Gotthelf, Joe Quandt, Arthur Siegal, Susan Topp, Tom Wilczak and Chris Dunsky.

**1. Committee Liaison Reports.**

**a. Superfund.** Chris Dunsky participated in the call. The Superfund Committee intends to have a discussion concerning the amendments to CERCLA during its meeting at 10:00 on February 9. The meeting will be held in Lansing, and there will be an opportunity to participate by telephone. Four practitioners (Chris Dunsky, Craig Hupp, Gene Smary, and John Tatum) will be discussing the amendments.

**2. Planning Programs for 2002.**

**a. Air Roundtable.** A roundtable with the MDEQ is scheduled at the offices of Jaffe Raitt at One Woodward Avenue in Detroit on January 22. The topic will be the transfer of the Wayne County Air Program to the Air Quality Division. Representatives from the AQD who will attend the roundtable include Rick Johns, Tim McGarry, Lynn Buhl and Bill Burton.

**b. Joint Program with Real Estate Section on February 22.** This program will be held at the Otsego Club in Gaylord on February 22. The co-chairs are Susan Topp and Bob Schroeder. The topics and speakers are as follows: mold issues (Joe Quandt and Deb Aldering); BEAs and due care (Kurt Brauer and Craig Hupp); negotiating contaminated property transfers (Bob Schroeder and Susan Topp); CERCLA amendments (Chris Dunsky and possibly another); Great Lakes water diversions (a representative from Malcolm Pirnie); brownfield financial incentives (John Byl); and urban sprawl/land use planning (Jim Olson). Final details are being worked out regarding the brochure and other issues. Bob and Susan hope to complete the brochure by early the week of January 21. Invitations will be mailed to the Environmental Section and Real Estate Section members. We will also send an announcement on the environmental listserv.

c. **Annual Program.** John Byl will follow up with Pat Paruch and/or Gail Anderson of the Real Estate Section regarding a possible joint program for the annual meeting.

The Program Committee held a meeting on Tuesday, February 20, 2002. Attendees included John Byl, Matt Eugster, Joe Quandt, Arthur Siegal, John Tatum and Susan Topp.

### 1. Committee Liaison Reports.

a. **Superfund.** The Superfund Committee held a successful program on the CERCLA amendments on February 9.

b. **Air.** A roundtable was held on January 22 at Jaffe Raitt in Detroit regarding the transfer of the Wayne County Air Program to the Air Quality Division. This program also went well.

### 2. Programs for 2002.

a. **Program in Gaylord on February 22.** Approximately 50 people have registered for the February 22 program. We expect a good turnout. Last minute details

are being worked out, primarily by Susan Topp. Bob Schroder will bring an LCD projector. Chris Dunsky, Joe Quandt and John Byl will bring laptops that have powerpoint software. John Byl will also bring a back-up LCD projector.

b. **Annual Program.** John Byl is waiting to hear from Patrick Karbowski regarding a joint program with the Real Estate Section at the annual meeting in late September. John also spoke with Karen Custer after the Program Committee meeting. Karen will represent the Real Estate Section in planning the annual program. Karen reported that the Real Estate Section council is having a meeting on March 7 and apparently wants to wait until after that meeting to plan the annual program. John will stay in touch with Karen. As a reminder, the annual meeting will be held in Grand Rapids, and the State Bar is strongly encouraging Sections to plan joint programs.

c. **Higgins Lake on June 21.** We discussed the possibility of an informal dialogue with Andy Hogarth and perhaps others from the MDEQ (e.g., Lynelle Marolf and/or Al Howard). John Byl will contact Andy Hogarth regarding his availability on the afternoon of June 21 for such a program.

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## MICHIGAN ENVIRONMENTAL CASENOTES

These casenotes include Michigan state and federal decisions rendered from September 1, 2001 through January 31, 2002.

### Wall v United States EPA, 265 F3d 426 (CA 6, 2001)

Petitioners sued to vacate the EPA's decision, changing the Cincinnati metropolitan area's designation from "nonattainment" to "attainment" under the 1970 Clean Air Act (CAA). The EPA had determined that the area qualified for the redesignation, despite maintenance deficiencies in both Ohio's and Kentucky's State Implementation Plans (SIP). The court vacated the EPA's action regarding attainment status. The court stated that the only basis for vacating the EPA's decision was Ohio's failure to adopt all reasonable available control technology (RACT) requirements for factories emitting volatile organic compounds. The court reasoned that, unlike the other statutes interpreted by the EPA in this case, the law regarding

RACT requirements was unambiguous, and it required full implementation before a redesignation was appropriate. The court rejected all other issues raised by the petitioners. The court specifically found that the method used by the EPA to measure compliance, an attainment-emissions inventory approach, was a permissible interpretation of the CAA and was not in conflict with a statutory mandate. For this reason, the EPA's compliance-measuring method was not a basis for vacating the EPA's decision. The court also found that the EPA's later rulemaking action, finding that the Cincinnati area was likely to require more emission reductions, was not a basis to vacate the redesignation decision. The court also held that, although the states' SIPs failed to commit resources for maintenance and failed to set out transportation-conformity procedures, neither of these failures was sufficient to vacate the EPA's decision regarding redesignation. The EPA's redesignation was vacated based solely on Ohio's failure to comply with RACT requirements, and the case was remanded for further proceedings.

**Ramik v Darling Intl, Inc, 161 F Supp 2d 772 (ED Mich, 2001)**

The defendant owned a rendering plant. In separate suits plaintiffs, Ramik and the City of Melvindale (City), claimed that they suffered damages because of noxious odors and pollutants that emanated from the plant. Subsequently, plaintiffs filed motions for summary judgment as to defendant's liability, and the City also filed a motion for injunctive relief. Ramik argued that the plant's odor constituted a nuisance per se under Michigan case law and the City's zoning ordinance. The court held that Michigan case law had not found that such an operation was a nuisance per se, and that there was no admissible evidence to show that a zoning ordinance was violated. The court also denied the City's motion for a preliminary injunction. The court reasoned that the City would not suffer any irreparable harm and had no strong likelihood of success on the merits. The court also determined that granting the injunction would cause harm to defendant, and the public interest in granting the injunction would be negligible.

**Michigan Dept of Environmental Quality v Environmental Protection Agency 268 F3d 1075 (CA DC, 2001)**

In this case, the Environmental Protection Agency (EPA) determined that it had authority to implement Clean Air Act (CAA) regulations for lands that it believed were Indian tribal lands, even if that designation was in question, through its own authority to protect air quality. The Court of Appeals held that this decision was beyond the scope of the EPA's authority. The court stated that although a tribe may be treated as a state under the CAA, and the EPA has the authority implement CAA regulations when a "state" fails to do so, the EPA's authority to do so on behalf of the tribe could only be derived from the authority that the tribe possessed to control these lands. Therefore, if there was no clear tribal authority over the land, the EPA could not just assume that authority and act in the tribe's place. It must, instead, follow notice and comment rule making procedures to determine the jurisdictional issue. The court remanded the case for agency proceedings consistent with its opinion.

**Thermofil, Inc v Haigh Indus, Inc, unpublished opinion per curium of the Court of Appeals decided Oct 19, 2001 (Docket No 224704)**

In 1987, hazardous substances, including trichloroethene and dichloroethene, were discovered on

plaintiff's property. In 1988, the Department of Environmental Quality (DEQ) ordered plaintiff to conduct a remedial investigation. Plaintiff conducted the remedial investigation and incurred over \$2,000,000 in costs. Plaintiff then demanded that defendant, who had operated a metal stamping business on the property until 1977, pay for these costs. Not surprisingly, defendant refused. In 1994, the DEQ approved a remedial action plan and determined that plaintiff was not responsible for the release of the hazardous substances; therefore, plaintiff did not proceed with the plan. In 1999, plaintiff filed suit against defendant for the costs it had incurred. The trial court held that the plaintiff's claims were time barred and dismissed them. Plaintiff appealed. On appeal, the court held that the Natural Resources and Environmental Protection Act (NREPA) did not bar plaintiff's claim because there were no response activity costs incurred before July 1, 1991, so the statutory time limit was six years, not three. The court also held that the trial court had properly dismissed plaintiff's common law claim as time barred because the action accrued on the date that defendant harmed the plaintiff, or in the alternative, when plaintiff discovered the damage. The court stated that because plaintiff knew that defendant was the likely source of the contamination in 1988, the three-year statute of limitation barred plaintiff's common law claim after 1991. The court refused to apply the continuing-wrongful-acts doctrine in this case. The court stated that this doctrine applied only to continuing acts, not to continuing harmful effects. The trial court's decision was affirmed in part and reversed in part.

**Attorney General v Richfield Iron Works, Inc, unpublished opinion per curium of the Court of Appeals, decided Oct 9, 2001 (Docket No 219654)**

This is a companion case to **Attorney General v Richfield Iron Works, Inc**, unpublished opinion per curium of the Court of Appeals, decided Oct 9, 2001 (Docket No 224318). In 1989, the Michigan Department of Natural Resources (DNR) ordered the removal of underground storage tanks from property in Genesee County because soil tests showed chlorinated solvents beneath the tanks. In 1994, the DNR sent letters to several persons, including Richfield Iron Works, Howard D. Campbell, and Wilma M. Campbell (RIW defendants), informing them of their responsibilities related to the contaminated property. Later, the DNR sued several defendants, including the RIW defendants, under the Michigan Environmental Response Act. After suit was filed, defendant Thompson Shopping Center filed a third-party complaint against former owners, operators, and lessees of the property (PERC defendants). The RIW defendants

then cross-claimed against the PERC defendants seeking contribution and recovery costs. Thereafter, the PERC defendants entered into a consent decree with the state, and over the RIW defendants' objection, the court approved the settlement. After the settlement was approved, the court granted the PERC defendants' motion to dismiss the RIW defendants' claim against them. The RIW defendants appealed. On appeal, the court held that the trial court erred in dismissing the RIW defendants' claim. The court reasoned that the PERC defendants' liability to the RIW defendants could only be settled by this consent decree if it was addressed in the consent decree. Here, because the consent decree only addressed costs incurred by the state for its past response activities, and the RIW defendants' claims were for costs that they had incurred in evaluating the contaminated site, the RIW defendants' claims against the PERC defendants were improperly dismissed.

**Attorney General v Richfield Iron Works, Inc,**  
**unpublished opinion per curium of the Court of**  
**Appeals, decided Oct 9, 2001 (Docket No 224318)**

This is a companion case to **Attorney General v Richfield Iron Works, Inc**, unpublished opinion per curium of the Court of Appeals, decided Oct 9, 2001 (Docket No. 219654). In 1989, the Michigan Department of Natural Resources (DNR) ordered the removal of underground storage tanks from property in Genesee County because soil tests showed chlorinated solvents beneath the tanks. In 1994, the DNR sent letters to several persons, including Richfield Iron Works, Howard D. Campbell, and Wilma M. Campbell (RIW defendants), informing them of their responsibilities related to the contaminated property. Later, the DNR sued several defendants, including the RIW defendants, in a cost recovery action under the Michigan Environmental Response Act (MERA). Marathon-Flint (Marathon) was not a named defendant in the suit, but was added by one of the named defendants. After it was added, the RIW defendants cross-claimed against Marathon seeking contribution and recovery. Thereafter, Marathon entered into a consent decree with the state, and over the RIW defendants' objection, the court approved the settlement. After the settlement was approved, the court granted Marathon's motion to dismiss the RIW defendants' claim against it. The RIW defendants appealed. On appeal, the court held that the trial court erred in dismissing the RIW defendants' claim. The court reasoned that Marathon's liability to the RIW defendants could only be settled by the consent decree if that liability was addressed in the consent decree. Here, because the consent decree only addressed costs incurred by the state for its past response

activities, and the RIW defendants' claims were for costs that they had incurred in evaluating the contaminated site, the RIW defendants' claims against Marathon were improperly dismissed.

**Olden v Lafarge Corp, 203 FRD 254 (2001)**

In this case, the defendant operated a cement manufacturing plant. The plaintiffs, property owners, sought class certification claiming that defendant was emitting air contaminants. The plaintiffs claimed that particulate matter entered their property causing injuries. Plaintiffs alleged trespass, nuisance, and negligence. The defendant moved to have all the claims dismissed. The court granted class certification, but dismissed the plaintiffs' claim for trespass.

The court reasoned that the trespass claim must be dismissed because Michigan law required that a tangible object be involved. Michigan law also required that any invasion of dust onto land be brought as a nuisance claim. Therefore, here, the trespass claim was improper and was dismissed. The court also found that it had jurisdiction over the claim and that the Buford doctrine did not require its abstention in this case. The defendant had argued that if this court did not abstain, it would be second guessing a prior agency decision because, in Michigan, air emission control was delegated to the Michigan Department of Environmental Quality, and a second amended consent judgment between the defendant and the state had already been entered by the Alpena County Circuit Court regarding defendant's air emissions. But the district court reasoned that abstention was only proper in rare cases, and it found that the Alpena County Circuit Court had no specialized knowledge in this area, so abstention was inappropriate. Also, the court found that, if the nuisance claim was proven, the plaintiffs had a common law right to injunctive relief, which this court could grant. Therefore, the court denied all of defendant's motions except the dismissal of the trespass claim.

**Steeltech, Ltd v Environmental Protection Agency, 273**  
**F3d 652 (CA 6, 2001)**

In this case, Steeltech failed to file reports of its use of toxic chemicals in 1988, 1989, 1990, 1992 and 1993. In 1992, the Environmental Protection Agency (EPA) inspected Steeltech's facility and discovered the failure to file the necessary reports. Steeltech filed the reports for 1988-1990 the day after the inspection. In 1994, the EPA sued Steeltech for the 1988-1990 violations. Steeltech told the EPA that it also failed to file in 1992 and 1993. The EPA then amended

the complaint to add these dates. During the administrative hearing, the administrative law judge (ALJ), applied the Environmental Response Policy (ERP) and fined Steeltech \$61,736 in civil penalties under the authority of the Emergency Planning and Community Right-to-Know Act (EPCRA). The Environmental Appeals Board and the district court both affirmed the ALJ's ruling. Steeltech appealed. The court held that the ALJ's ruling was not arbitrary, capricious, or an abuse of discretion and upheld the ALJ's decision. Steeltech had argued that the ALJ had applied the ERP as a rule, rather than a policy. The court stated that the ALJ's record showed that she knew that the ERP was a policy, but that she did not find any reason why the ERP should not be applied to Steeltech in this case. The court also reasoned that the facts developed on the record supported the ALJ's decision, despite Steeltech's argument that this was merely a failure to file forms violation. The ALJ had determined correctly that there was no intent requirement in the ERP, and that Steeltech's lack of intent did not warrant a mitigation of the penalties imposed for its failure to comply.

**Best Foods, f/k/a CPC International, Inc v Aerojet-General Corp, 173 F Supp 2d 729 (WD Mich, 2001)**

In a previous decision, this court had found under a derivative liability theory that CPC International (CPC), the parent corporation of a wholly owned subsidiary operating near Muskegon, Michigan, was liable as an operator of the facility, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Sixth Circuit substantially reversed that holding. The Supreme Court then granted cert, vacated the holding of the Sixth Circuit, and remanded the case. On remand, the district court held that CPC was not an operator liable under CERCLA. In its opinion, the Supreme Court had declined to decide if there was derivative liability in this case, but it did establish the standard to be used to determine if there was direct operator liability. The Court said that to have direct operator liability, the parent corporation must direct the facility, not the subsidiary. The Court said that an operator is one who is directly involved in operations related to the hazardous waste or directly involved in environmental compliance issues. The Court further stated that mere involvement in the normal parent-subsidiary business relationship was insufficient to give rise to direct liability of the parent corporation, but if there were actions of the parent corporation's officers or directors that departed from those that are normal in a parent-subsidiary corporation relationship, it may be sufficient to show direct liability. Here, although there was some evidence that a CPC executive was

involved with some of the subsidiary's environmental issues, there was also evidence that actions were taken without his input, his requests for information were ignored, and that his recommendations and advice had been rejected on several occasions. Further, the CPC executive had no authority to require that the subsidiary comply with his requests or recommendations. The district court determined that there was no evidence of any action by a CPC officer that was sufficient to prove anything more than that which is normal in parent-subsidiary corporate relationship. The district court also found that there was insufficient evidence to show that CPC actually used the Muskegon facility to manufacture its products, and found insufficient evidence of a defacto merger between CPC and the prior owner of the property. Because the court found no evidence of direct operator liability and no successor liability through a defacto merger, all claims against CPC were dismissed.

**Kalamazoo River Study Group v Rockwell Intl Corp, 274 F3d 1043 (CA 6, 2001)**

In this case, the Kalamazoo River Study Group (KRSG) sought contribution from defendant (Rockwell) for costs incurred to clean up polychlorinated biphenyl (PCB) contamination from the Kalamazoo River. In a bifurcated bench trial, the district court found that Rockwell was liable under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) because it had released PCBs, but the court declined to allocate any of the response costs to Rockwell. KRSG appealed. The appellate court found that the trial court was not required to assess costs against Rockwell, even though the trial court had previously found Rockwell liable under CERCLA. The appellate court found no error in the trial court's determination that KRSG was responsible for 99.9% of the PCBs released at the site, or in its determination that the PCBs released by Rockwell did not have any impact on the total cost of the site clean-up. Therefore, it upheld the trial court's ruling that Rockwell was not responsible for any of the clean-up costs incurred by KRSG.

**Aero-Motive Co v Becker, 2001 WL 1699194; 2001 US Dist LEXIS 20621 (WD Mich, Dec 6, 2001)**

Aero-Motive Co (AMC) filed for reconsideration of the court's previous order granting in part defendant's motion for summary judgment and denying plaintiff's motion for partial summary judgment. On reconsideration, the court found that it erred in its previous decision regarding owner liability and that the testimony of defendant's former

employee about the hazardous waste did raise a genuine issue of material fact, making summary judgment inappropriate. The court also reversed its decision to dismiss all of plaintiff's claims raised under the Resource Conservation and Recovery Act (RCRA). The court affirmed its decision dismissing plaintiff's claims for money damages, because they are not available under the RCRA, but it reversed its previous decision dismissing plaintiff's claims for injunctive relief and civil penalties, finding that those were available in a RCRA claim. Finally, the court addressed an issue raised by the defendant. The defendant claimed, relying on Fifth Circuit precedent, that the plaintiff's contribution claim against it should be dismissed because the plaintiff had voluntarily undertaken the clean-up, and the plaintiff had no §106 or §107 claim pending against it. The court rejected the Fifth Circuit's decision. It relied instead on earlier district court decisions cited by the Fifth Circuit, and the dissent in that case, and stated that the plaintiff did not have to be subject to a §106 or §107 claim before it sought contribution from the defendant.

**United States v Detroit, 2002 US App LEXIS 743; 2002 WL 478256 (CA 6, Jan 11, 2002)**

In 2000, the City of Detroit (City) and the State of Michigan (State) negotiated a consent judgment, which required the City to dredge and remove contaminated sediment from Conner Creek to bring the City into compliance with its National Pollutant Discharge Elimination System permit. Thereafter, the City asked the Army Corps of Engineers (Corps) to assist in the disposal of the sediment. The Corps obtained permission from the State to use the Pointe Mouillee confined disposal facility for the sediment. It also requested that the State agree to hold the federal government harmless for any liability that may result from the disposal of the sediment. The Corps also requested that the State seek approval from several federal agencies, which the State refused to do. The State and the City then filed a motion asking the court to order the Corps to accept the sediment. The trial court held that the Corps must accept the sediment without the requested approvals because the State had previously executed the liability release. The Corps appealed. The appellate court held that, although the Corps had no governmental immunity in this case, the lower court had no authority under the All Writs Act (Act), 28 USC 1651(a), to issue an order against the Corps, a non-party to the original consent judgment. The Act permits a court to enforce legal obligations. Here, the consent judgment was merely an agreement negotiated by the parties, without adjudication on the merits. Because the court had not found

a legal obligation of the Corps when the consent judgment was entered, the appellate court reasoned that the district court's attempt to order the Corps to accept the sediment now was beyond the scope of the Act. Consequently, the order of the district court was vacated.

**Tamaska v Bluff City, 2002 US App LEXIS 381; 2002 WL 22003 (CA 6, Jan 4, 2002)**

Plaintiffs sued Bluff City (City), under the Clean Water Act (CWA), for its discharge of sewage and waste water onto their property and into Boone Lake. The parties entered into a consent judgment, which required the City to stop the discharge of untreated sewage and waste water and to connect to a sewage trunk line by April 15, 1998. On April 16, 1998, raw and partially treated sewage again flowed onto plaintiffs' property. The City did not connect to the sewage trunk line until June 19, 1998. In September of 1998, the trial court assessed a civil penalty against the defendant for its failure to comply with the terms of the consent judgment, and it ordered defendant to pay penalties of \$4,900 to the United States Treasury. The court also awarded plaintiffs \$5,000 in attorney fees. Both sides appealed. On appeal, the court held that the trial court's imposition of civil penalties, payable to the United States Treasury, was proper. The court reasoned that the City's actions were not wholly in the past. Therefore, the violations of the consent judgment were not moot. It also reasoned that the penalties were true civil penalties, and not contempt fines. Thus, the penalties could only be paid to the United States Treasury, as permitted under the CWA. The court also held that the award of attorney fees to plaintiffs was proper. The court determined that reasonable attorney fees may be awarded to a prevailing party. The court further reasoned that plaintiffs had prevailed here because the City did not comply with the terms of the consent judgment until plaintiffs sought a court order to force the City's compliance. The court stated that this was sufficient to show that plaintiffs had prevailed, making the award of attorney fees proper.

**Travis v Preston, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2002) (on rehearing)**

Plaintiffs lived adjacent to the defendant's hog operation. Plaintiffs sued claiming that the odors from the hog operation decreased the market value of their home, interfered in the use and enjoyment of their property, and violated a township zoning ordinance. Before trial, the parties agreed that plaintiffs would not seek injunctive relief and that defendant would not expand its operation.

At trial, defendant argued that its hog operation was protected from nuisance actions by the Michigan Right to Farm Act (RTFA). The lower court held that, through ordinances, townships may restrict the RTFA. It also held that plaintiffs had standing to pursue this action and that the hog operation was a nuisance. The lower court's holding was based, in part, on five unannounced visits that the trial judge made to the site. On appeal, the court determined that an amendment to the RTFA, made after this suit began, should not be applied retroactively. The court reasoned that only clear legislative intent would make it apply retroactively, and that the required intent was not present. The court also held that the RTFA did not protect the defendant from claims of zoning ordinance violations. The court stated that the regulation of odors is within the authority of the township board, and the RTFA at the time the suit was filed did not

exempt farming operations from complying with all ordinances. The court also set out the possible remedies available to plaintiffs on remand. The court stated that no money damages were available. And, because plaintiffs entered into an agreement that they would not seek an injunction, the court could only impose nuisance abatement if it found a reason to set aside the prior agreement.

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

*Dirk Le Gate, Patricia Wilson, Rachel Whiting, Lina Farris, Tracey Lackman, and Judith Singleton*

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## MINUTES ENVIRONMENTAL LAW SECTION COUNCIL

### Saturday, October 20, 2001

**Call to Order at 10:05 a.m.**

**Secretary/Treasurer's Report**

**Present**

Todd Dickinson, Joe Quandt, Charlie Toy, Lee Johnson, Grant Trigger, Pat Paruch, Chris Dunsky, John Tatum, Tom Wilczak, Tom Phillips (in person); Beth Gotthelf, Chris Bzdok, Hilda Gurley-Highgate, John Byl, Susan Topp, Peter Holmes, Charlie Denton, Steve Huff (by phone).

The State Bar's preliminary report on the Section's finances for the 12-month period ending September 30, 2001 was previously distributed on the envirolaw-council listserv. Tatum observed that, while the Section's reserves were essentially depleted, it was still solvent, and an influx of funds from the annual section dues for the new year will be received soon. He noted that the most recent Section membership roster showed roughly 950 members, which — at \$20 per member — should yield about \$19,000 in revenue.

**Absent**

Sharon Feldman, Susan Johnson, Mike Leffler, Sharon Newlon, Bob Schroder, Chuck Barbieri, Saul Mikalonis, Mike Ortega, Paul Bohn, Jeff Magid, Rich Baron, Sally Churchill, Mike Robinson.

A question was raised as to whether certain expense items were in line with historical experience, such as seminar, newsletter and casenote expenses. It was pointed out that a more detailed presentation than the one page report distributed on the listserv has been provided by the State Bar in the past, and could provide information that would be helpful in understanding the amount of expenses incurred. Dickinson agreed to follow up in obtaining more detailed information for the past year, and for prior years for comparison.

**Minutes**

The minutes of the September 12, 2001 annual meeting were approved on the motion of Joe Quandt, seconded by Grant Trigger.

Trigger proposed establishing a budget for the upcoming year, and noted that with the depletion of reserves it would be necessary to ensure that expenses were kept in line with income. It was agreed that this would be discussed further after additional financial information is obtained by Dickinson.

### Program Committee Report

Quandt reported on the Fall Update program, indicating there were 35 paid attendees, which would net \$1,800 - \$2,000 for the Section. He said he thought the program topics and speakers were very good, and noted he received a number of positive comments from those in attendance. The Committee met last on October 17, 2001. Another Roundtable program is being planned for December or January in the Detroit area, focusing on the MDEQ Air Program. Quandt stated that a joint program with the Real Estate Section is being planned for either a half or a full day in late February. Topics being considered include the new Part 201 Rules, the BEA/Due Care process, Brownfield financial incentives, and other issues relating to property transfers. The location of the program is undetermined, but the possibility of a ski resort location is being discussed. Quandt noted that joint programs with other sections had achieved good turnout in the past, such as the one two years ago with the Oil & Gas Committee, and he recommended exploring future programs of this type.

Byl offered a reminder that the Program Committee has liaisons with each of the subject matter committees, and would be sending out letters to the committee chairs to invite input and coordination.

Paruch reported that the Real Estate Section was concerned that the timing of a program for late February would be bad, because that Section was planning an extended program on September 11 events in that same time frame, and felt that doing two major program in close proximity could overload that Section's resources. She stated that the Real Estate Section remained interested in doing a joint program, but summer or later would be better timing.

Trigger suggested that the ELS could do a program that targeted the Real Estate Section's membership list, but did not otherwise require their input or assistance. He further suggested that if an ELS membership survey went out in November, it might be possible to get feedback on the idea of a ski resort location. Trigger proposed seeking feedback on other possible locations, such as the Holiday Inn in Grayling, which offers cross-country skiing and is less distant.

Trigger also proposed that mold-related issues be considered as a topic, in light of emerging developments in that area.

### Journal Committee Report:

Linda Blais had previously distributed a report on the Council listserv, as follows:

In lieu of attendance at the meeting this Saturday, I offer you the following report on behalf of the Journal committee. Jeff Woolstrum did an excellent job in preparing the State of the Law article for our last issue (Issue 61). The deadline for Issue 62 is **November 1, 2001**. Currently, I have three articles submitted for publication in that issue. These include:

**The Persistence of Local Wetland Ordinances in Michigan** by Dave Dempsey (Policy Advisor, Michigan Environmental Council, M.A., Michigan State University) and Michael D. Kaplowitz (Assistant Professor, Dept. of Resource Development, Michigan State University)

**The Supreme Court Revisits The 'Takings' Question** by Mark A. Cooley, D. Haywood & Associates, P.C.

**Natural Resources Damages Assessments and Claims In The Great Lakes Basin** by Charles Denton and R. Craig Hupp

Charles and Craig are going to split this last article into two parts and the second half will be published in Issue 63.

I have also received an inquiry from Mike Perry who is preparing an article re: the constitutionality of the imposition of "Clean Michigan" liens upon property no longer owned by the party responsible for the contamination.

We are working with Peter Holmes in connection with a writing contest for Michigan law school students to obtain more publishable articles in the future. We also need more assistance from Committee Chairs in submitting committee reports. I will send around another reminder to all committee chairs concerning the deadline for Issue 62.

Linda Blais

Holmes proposed to Blais and Steve Chester conducting an essay contest, in coordination with law school classes on environmental law and related subjects, such as land use planning and insurance, as a way to increase participation by law students in preparation of MELJ articles. His proposal involved starting this Fall semester with mailings to law school professors, law reviews, and law school environmental organizations, with the contest entries to be submitted by June 2002, and the winner to be announced next Fall, and published in the MELJ, assuming acceptable quality. Holmes envisioned essays of 8-10 pages, including footnotes, on any topic of interest to environmental law practitioners. The essays would be submitted to Linda Blais in hard copy and \*.RTF format, and become the property of the State Bar. He proposed offering a prize of \$500 - \$1,000, with the winner to be selected by Linda and Steve, or by Tatum in the event of a tie.

Tatum noted that the amount of the prize to be offered would have to be determined in connection with budget planning.

Holmes stated that the Computer Law Section had done something similar, and that the New York State Bar Environmental Law Section had been doing an essay contest for a long time, offering a prize of \$1,000.

Dunsky requested clarification of what would be considered an "essay" for this purpose. Holmes indicated that he assumed that, in order to satisfy the requirement that it be of value to environmental law practitioners, the essay would need to involve some element of research. Wilczak recommended that the topic and format not be restricted so as to exclude law school seminar papers, which might be of greater length. Holmes replied that the length restriction was dictated by the MELJ format, and somebody would have to volunteer to edit any piece of greater length, if it was to serve the purpose of providing material for the MELJ.

Tatum invited support for a motion to authorize Holmes to proceed with his proposal, and Topp and Gotthelf supported the motion, which carried.

### **Technology Committee Report**

Tatum reported that outgoing Chair Charlie Toy's 2000-2001 Annual Report for the Section has been posted on the Section's Web site, but that we need to update the pages to reflect the new officers and committee chairs for 2001-2002.

There was also discussion of the Section's subscription to the WIMS E-Legis service, which has been providing all Section members with a weekly report on legislative developments pertinent to environmental law, at a cost to the Section of \$2,500 for the past year. That subscription will be expiring at the end of the calendar year, and a decision will need to be made on whether to renew it. It was suggested that the Membership Survey solicit feedback on whether Section members find this service sufficiently valuable to warrant renewal.

### **Membership Committee Report**

Trigger reported on the status of the impending Membership Survey. He said he had reviewed the Program Committee's draft of survey questions that would be useful to its work. He also reported that he had reviewed the Section's 1994 Membership Survey, and was impressed by the fact that it had elicited responses from roughly 600 members to what was a fairly lengthy and detailed list of survey questions. He said he assumed there was bound to be a trade-off between the length of the survey and the response rate, *i.e.*, the longer it takes to answer the questions, the fewer the people who will take the time to respond. Trigger indicated that he was well along in the process of preparing the survey, and could have it completed within a week. He posed the question: should it be sent out on the listserv, or wait to be included in the upcoming issue of the MELJ? Another possibility would be to post the survey on the Web site in an interactive format that could automate the process of tallying the result. After discussion of the different approaches, it was agreed that Trigger should: (1) distribute a draft of the survey questionnaire on the Council listserv (envirolaw-council); (2) send the draft to Karen Williams at the State Bar, and seek her input on both the format of questions, and the possibility of posting the survey as an interactive form on the Section's Web site; and (3) coordinate arrangements with Tim Groleau for printing the survey in the MELJ.

### **Publications Committee Report**

Jeff Haynes had previously distributed a committee report, as follows:

Neither Gene Smary nor I will be able to attend the 10/20 meeting. This report should serve in our stead.

**December 2001 Michigan Bar Journal:** The December 2001 bar journal will be an environmental law theme issue. There will be five articles published, in the following subject areas:

Brownfields financing,  
Richard Barr and John Byl;  
Criminal enforcement,  
Charles Toy and Mike Leffler;  
Environmental justice,  
Tom Stephens and Alma Lowry;  
Due care requirements,  
Chris Dunsky;  
Great Lakes water diversion,  
Jim Olson

Gene and I think there is a useful mix of informative and provocative articles. We thank the authors for their hard work and thank those who submitted article proposals that weren't chosen. We may see some of those articles in the MELJ.

**Michigan Environmental Law Deskbook, 2d Edition:** Pursuant to Council direction, Gene and I have talked recently with ICLE about the second edition to the Deskbook. Discussions are proceeding in three general areas:

1. Scope and organization, primarily concerning the tension between writing the Deskbook as a treatise or as a hyper-practical "how to" manual. Our preference is to have a mix of the two styles.
2. ICLE is interested in our concept of electronic supplementation.
3. ICLE is reviewing its income numbers to respond to our demand that the section be paid royalties.

We expect to continue the discussions in the next week or two and finalizing the publishing details so that authors can start writing (or rewriting, as the case may be).

There was discussion of the ongoing dialogue with ICLE about publishing the Deskbook, and their preference for a product that would target the market of practitioners seeking general information on broad topics of environmental law, as opposed to information primarily of value to lawyers

specializing in environmental law. This may be a factor in the choice of a publisher. Several people expressed the view that a dangerous trend toward simplistic "cookbook" approaches to environmental due care is evident in some quarters. It was agreed that this could be a good topic for a program.

Toy reported that work was complete on the December issue of the Michigan Bar Journal, which will feature articles on environmental law, and have Russell Cobane's painting on the cover.

### **Subject Matter Committee Reports:**

#### **(a) Air Committee**

Lee Johnson reported on the Clean Air Act satellite seminar, sponsored by the ABA and the Air & Waste Management Association, to be held beginning at 12:00 noon on October 30, 2001, and broadcast to over 75 locations nationwide, including Ann Arbor, Lansing, and Grand Rapids.

Tatum requested that committee co-chairs Kyle Jones and Ken Burgess get together with representative of the Program Committee to assist with work on the upcoming Roundtable.

#### **(b) Environmental Ethics**

Gurley-Highgate reported that the committee is planning for a program early next Spring, to be held in Detroit, focusing on Professional Conduct Rule 2.1, and is in the process of rounding up discussion panelists.

#### **(c) Environmental Litigation**

Huff reported that he was completing an article on mold-related toxic tort litigation, for publication in the MELJ, and that he and co-chair Jeff Magid were discussing this as a possible program topic as well.

Huff further inquired, with regard to the Fall Update program, whether it would be possible for those who were unable to attend to get a copy of the program materials, either free or for a modest charge. Others also expressed an interest in getting copies of the program materials. The Program Committee indicated it would explore the feasibility of this.

**(d) Natural Resources/Wetlands**

Bzdok reported on his efforts to resurrect this committee, which has lapsed into relative inactivity. He intends to send out a solicitation on the membership listserv for new committee members and ideas. Tatum said this approach has worked for other committees in the past. Wilczak volunteered to serve as the committee's liaison with the Program Committee. Trigger remarked that his firm had recently held a program on floodplain issues that drew over 100 attendees, and suggested that a program on this topic would be a good project for this committee.

**(e) Real Estate**

No report.

**(f) Solid and Hazardous Waste/Insurance**

Tatum reported on a conversation with committee chair Susan Johnson, who believes that the two prongs of this subject-matter committee do not belong together, but should be split into separate committees. Dunsy remarked that either subject matter area could fit under the Superfund Committee in some respects. Trigger observed that the ABA groups Insurance together with Brownfield transactions, and expressed the opinion that it belonged with the Real Estate Committee. Dunsy said Insurance fits with Environmental Litigation in some respects, and Byl agreed. Trigger expressed the further view that consolidation of subject matter areas into a smaller number of committees was a good idea in general. Tatum proposed that leading practitioners in the insurance area be asked for their views on this question, and Trigger indicated that could be addressed in the Survey questionnaire.

**(g) Superfund**

Dunsy reported that he and co-chair Hupp were working on a list of topics for upcoming meetings, that so far included: Institutional Controls; Liens under Part 201 and CERCLA; and the new Part 201 Rules. He stated that past programs have been enhanced with participation by representatives of the MDEQ and Attorney General's office, and the committee will seek to continue and increase that trend. He will also seek to increase interaction with the Program Committee.

**(h) Surface/Groundwater**

Lee Johnson related a report from Ken Gold on the exceptional eloquence of the presentation at the Fall Update program by an unidentified speaker from this committee. Others remarked that it sounded just like Ken Gold.

**Liaison Reports****(a) State Bar Michigan Board of Commissioners**

Toy reported that the Board of Commissioners is committed to the view that the strength of the State Bar as a whole lies in the work of its Sections.

**(b) Real Estate**

The report of Section Liaison Pat Paruch appears above, under the Program Committee Report.

**(c) Administrative Law Section:**

No report.

**(d) Oil and Gas Law Committee**

No report. See New Business, below.

**Chairperson's Report**

The Chairperson offered many cogent observations throughout the meeting, as noted elsewhere, but had no formal report *per se*.

**Vice Chairperson's Report**

The Vice Chairperson offered many cogent observations throughout the meeting, as noted elsewhere, but had no formal report *per se*.

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

Toy reported that the Section currently has: (1) the original oil painting by Russell Cobane, from which the prints were made; (2) 50 artists proofs; and (3) 350 regular prints, including 100 that have been designated as "conservation prints" for donation to conservation groups, and 40 that have been earmarked for donation to past and future Section chairs. Decisions remain to be made regarding the disposition of all of these, except for the 40 regular prints reserved for Section chairs.

Tatum observed that it would be nice to recover the investment made in commissioning Cobane to do the painting and make the prints, and possibly generate some additional income. He noted that inquiries from prospective purchasers have already been received, and that sales of the regular prints could be promoted by advertisement in the December issue of the MBJ. The regular prints cost the Section \$25 each. Motion made by Tatum, supported by

Trigger, to offer the regular prints for sale unframed, by advertisement in the December issue of the Michigan Bar Journal, with a suggested selling price of \$100, subject to revision at the Chair's discretion following inquiry into market value. Motion carried.

Toy volunteered to handle arrangements with the MBJ for the advertisement.

At Gotthelf's suggestion, it was unanimously agreed that the Section would donate one artist's proof to the Ralph A. MacMullan Conference Center at Higgins Lake, subject to discretion vested in Toy to formally denominate the donation as a permanent loan, if necessary to ensure that it would remain on display at the RAM Center.

It was agreed to reserve decision on the disposition of the original (\$5,000 estimated value), and the other proofs and prints, to a later date.

#### (b) MDEQ OAH PFD

Tatum reported substantial completion of the project to make Proposals for Decision, by the MDEQ Office of Administrative Hearings, available online. Only "tweak" changes remain to be done.

#### New Business:

There was discussion of Susan Topp's recent departure from her former law firm, to start a new firm, and many expressions of good wishes ensued. She now has a Web site at [www.topplaw.com](http://www.topplaw.com).

#### Next Meeting

January 19, 2002, at the State Bar of Michigan Building.

**Adjourned at 12:01 p.m.**

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## MINUTES ENVIRONMENTAL LAW SECTION COUNCIL MEETING

### Saturday, January 19, 2002

#### Call to Order at 10:05 a.m.

#### Present

Chuck Barbieri, Paul Bohn, Ken Burgess, John Byl\*, Charlie Denton\*, Todd Dickinson, Chris Dunsky\*, Sharon Feldman\*, Jeff Haynes\*, Peter Holmes\*, Steve Huff, Craig Hupp, Lee Johnson, Sharon Newlon, Pat Paruch, Joe Quandt\*, Claudia Rast, John Tatum, Susan Topp\*, Charlie Toy (\* by telephone)

#### Absent

Tom Wilczak, Chris Bzdok, Hilda Gurley-Highgate, Susan Johnson, Mike Leffler, Jeff Magid, Saul Mikalonis, Mike Ortega, Tom Phillips, Bob Schroder, Grant Trigger, Beth Gotthelf, Mike Robinson, Rich Baron, Sally Churchill

#### Minutes

The minutes of the October 20, 2001 annual meeting were approved on the motion of Toy, seconded by Bohn.

#### Secretary/Treasurer's Report

Dickinson reported on the Section's financial statements for the 3-month period ending December 31, 2001, reflecting net income YTD of \$16,037, and a fund balance of \$19,317. There was discussion of the plan for developing an annual budget for the Section, and Tatum reported that Wilczak had volunteered to compile a history of the Section's annual income and expenses for prior years, which will serve as a basis for projecting future income and expenses, and identifying significant deviations from historical patterns.

#### Program Committee Report

Byl reported on upcoming programs, including the MDEQ Roundtable on January 22, 2001, and a joint program with the Real Estate Section, planned for February 22, 2002, at the Otsego Club in Gaylord.

### Journal Committee Report

Hupp and Denton were recognized for their fine article on Natural Resource Damages. Holmes led a discussion of a proposed essay contest, to generate articles for the MELJ and stimulate interest in the Section among law students at area law schools. Barbieri moved, and Paruch supported, a motion to approve a proposal authorizing Holmes to proceed with arrangements for the contest, contemplating an essay submission deadline of June 30, 2002, with discretion to offer a cash prize in a reasonable amount, and to develop appropriate criteria for contestant eligibility. Motion carried.

### Technology Committee Report

Tatum reported that Rast had graciously volunteered to join the Committee. Discussion of renewing the Section's subscription to the WIMS Legislative Update Service was preemptively tabled, so that it could be discussed in conjunction with Trigger's report on the Membership Survey results. Tatum reported that the listserv has been updated with the new member email addresses provided by the State Bar, and now includes 899 members, although there appear to be some discrepancies in a few email addresses, probably due to typographical errors or problems with particular ISPs. There was discussion of a list of websites relating to Michigan environmental law, published by the ABA, including [www.EcoPort.biz](http://www.EcoPort.biz) and [www.EnviroPort.biz](http://www.EnviroPort.biz). Further discussion ensued regarding Section policy on permissible use of the Section's listserv, *e.g.*, for attorney recruitment. It was observed that historically the Section has adopted a *laissez faire* (or "Wild, Wild West") approach towards Section members' practices in this regard, and that reliance upon the discretion and good judgment of individual Section members had not resulted in any significant abuse to date.

### Membership Committee Report

No report. In Trigger's absence, it was noted that Trigger was compiling results of the new Membership Survey, and should have a report at the next Council meeting.

### Publications Committee Report

Haynes offered accolades to all the authors who contributed to the Environmental Law issue of the Michigan Bar Journal, characterizing their work as "substantive and provocative," and to past Section President Gene Smary for his fine editing work. Haynes reported that negotiations

with ICLE, on terms for publishing the next Environmental Law Deskbook, were ongoing, and that the Section was retaining the option of going to another publisher if necessary. Haynes said it was contemplated that the new Deskbook will be reduced to a single volume, partly by elimination of chapters, and promised to have more to report at the next Council meeting.

### Subject Matter Committee Reports

#### (a) Air Committee

Burgess reported that Kyle Jones and Art Siegel were planning a program for mid-March, with participation by MDEQ and perhaps a consulting firm, and including the MACT hammer as a topic.

#### (b) Environmental Ethics

Newlon reported that the Committee is working on a Brown Bag Lunch program, for April 5, 2002, in Detroit, with Leon Cohan and Alma Lowry as speakers.

#### (c) Environmental Litigation

Huff reported that Indoor Air Quality was a hot topic, that he was working on a MELJ article on mold issues, that the Committee was planning a meeting program on the topic, and that Quandt would be covering the topic at the upcoming joint program with the Real Estate Committee.

#### (d) Natural Resources/Wetlands

No report.

#### (e) Real Estate

No report.

#### (f) Solid and Hazardous Waste/Insurance

No report.

#### (g) Superfund

Dunsky reported that the Committee meeting scheduled for February 9, 2002, at the Honigman offices in Lansing, would feature a program devoted to the new Superfund statutory amendments, with Tatum, Hupp, Smary, and Dunsky as speakers, and that Frank Ruswick (MDEQ/Solid Waste) and AAG Kathy Kavanagh were expected to speak on the USEPA/MDEQ Memorandum of Understanding.

#### (h) Surface/Groundwater

No report.

## Liaison Reports

### (a) State Bar Michigan Board of Commissioners:

Toy reported that the Board of Commissioners is currently working on strategic planning, and is considering the elimination of several State Bar activities.

### (b) Real Estate

Paruch reported that the Real Estate Section's Homeward Bound program, scheduled for February 7, 2002, in Troy and at satellite locations, would address business-related post-9/11/01 issues, and that further details were available on their Web page.

### (c) Administrative Law Section

Feldman commended past Section President Bill Fulkerson for his fine article in the Michigan Bar Journal.

### (d) Oil and Gas Law Committee

Topp reported that the Committee had not met since the last Council meeting. Topp further noted that the State Bar Oil & Gas Law Section was being considered for elimination by the State Bar, and that the possibility existed that some of its members and activities could be absorbed by the Environmental Law Section.

## Chairperson's Report

Tatum reported that he had received from the ABA a current list of other state bar environmental law sections and chairs. Tatum further reported that the State Bar Representative Assembly was studying the issue of military tribunals and terrorism-related issues, as well as multi-disciplinary fee sharing issues.

## Vice Chairperson's Report

No report.

## Old Business

### (a) 20<sup>th</sup> Anniversary Celebration Print

Toy reported that the Section has prepared a framed print to be donated to the RAM Center, and is planning to present it to Jim Scott, the RAM Center manager, at the Spring meeting there on June 22. Toy further reported that the Section has sold 8 prints, and is pursuing the possibility of donating one for display in the Visitor Center at the new

Supreme Court Building. Dickinson moved to have the Section donate prints to the Directors of the MDNR and the MDEQ.

### (b) MDEQ OAH PFD

Tatum reported that the Office of Administrative Hearings (OAH) had received the last 50 of the ALJ opinions to be converted for online posting. There remain about 15 that have problems requiring a better copy or other minor fix. Installation of the additional opinions was being delayed by the DEQ move and also the re-launch of the [www.michigan.gov](http://www.michigan.gov) site. Melissa Hayes, a Cooley Law School intern, is assisting the OAH in converting the most recent opinions and launching the historical page.

## New Business

Hupp inquired into the feasibility of making Section program presentations available on the Section website, for the convenience of persons interested in the programs, but unwilling or unable to travel to distant program locations. Discussion ensued, with Tatum pointing out that readily available technology would permit audio recordings to be made and converted to digital form (*e.g.*, \*.MP3 files) for posting on the Section website, but that it would require somebody willing to invest the time and effort to prepare the recording and coordinate the web posting. Rast suggested that a number of more complete — but potentially high cost — options (*e.g.*, videoconferencing) were available through private vendors. The discussion was tabled with no action taken.

## Next Meeting

April 6, 2002, at 10:00 a.m., at the State Bar of Michigan Building, in Lansing.

Adjourned at 12:01 p.m.

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