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STATE OF THE LAW

2002

Recent Developments in Environmental Law

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STATE OF THE LAW 2002

INTRODUCTION

The following summarizes selected Michigan and federal environmental judicial decisions from May 2001 through May 2002, and statutory and regulatory developments from June 2001 through June 2002. While not encompassing every environmental decision, statute or rule during these periods, the intent was to include those developments having significant import to environmental law practitioners.

I. JUDICIAL DEVELOPMENTS

A. Federal Developments

1. Clean Air Act

a. *Michigan v EPA*, 268 F3d 1075 (CA DC, 2001).

The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) overturned a United States Environmental Protection Agency (EPA) regulation that gave EPA authority over air quality permits for facilities located in disputed Indian territory. Under the Clean Air Act (CAA), EPA is responsible for establishing National Ambient Air Quality Standards (NAAQS), but the primary responsibility for ensuring that the NAAQS are achieved and maintained falls with the individual states. Under the CAA, certain federally recognized Indian tribes are entitled to the same authorities and responsibilities as states.

One of the responsibilities of the states and Indian tribes under the CAA is to develop and implement a program for issuing and enforcing operating permits for certain sources of air emissions. In Michigan, this program is known as the renewable operating permit (ROP) program. Such programs must be submitted to EPA for approval. If a state or a tribe does not submit an operating permit program, or submits one that EPA finds does not meet all the requirements of the CAA, EPA must implement and enforce its own operating permit program within that state or tribal area. Because states and tribes have a degree of flexibility in creating an operating permit program to implement the requirements of the CAA, the federal and state operating permit programs are not identical. At the time of this decision, no tribe had submitted an operating permit program to EPA for approval.

In 1999, EPA issued regulations to establish an operating permit program for all Indian territory unless a tribal or state operating program had been approved by EPA for the area. EPA recognized, however, that the precise geographic scope of tribal lands is not always clear cut. As the D.C. Circuit observed, “Indian country” is defined by federal statute as “all land within the limits of any Indian reservation,” “all dependent Indian communities,” and “all Indian allotments.” Thus, the court noted, the limits of tribal jurisdiction must often be determined through judicial proceedings.

In response to the uncertainty of the geographic scope of “Indian country,” the EPA operating permit regulations provide that EPA will “treat areas for which EPA believes the Indian country status is in question as Indian country.” Thus, EPA created a presumption that disputed territory was under tribal jurisdiction and, if the relevant tribal authority had not received approval for an operating permit program, the EPA operating permit program would apply in the disputed region rather than a state operating permit program. In addition, EPA declined to initiate a rule making process for conclusively resolving issues concerning whether specific regions were part of Indian country. Instead EPA would determine, on a case-by-case basis, whether each facility in disputed territory would be subject to the federal operating permit program or the applicable state operating permit program.

Michigan, New Mexico and several trade organizations filed suit against EPA challenging the regulations for operating permits in tribal areas. The challengers argued that EPA exceeded its authority by creating a presumption that disputed territory fell within tribal jurisdiction and by making jurisdictional decisions on a case-by-case basis, rather than through general rulemaking. EPA argued that it was appropriate to apply the federal operating permit program to disputed areas and that each state has the burden of proof to demonstrate that any particular area is outside of tribal jurisdiction. The court disagreed, ruling that once EPA has approved a state operating permit program, EPA’s remaining authority within that state is limited to areas that are actually within Indian country and that EPA cannot extend the scope of its authority by merely determining that the status of a particular area is “in question”:

EPA claims in its brief that it will only assert authority if there is a “bona fide” question of an area’s status. However, in the Federal Register, EPA concluded that for the “purposes of this rule, there may be, but need not be, a formal dispute, such as active litigation or other form of public disagreement, for EPA to consider the Indian country status of the area to be in question.” 64 Fed. Reg. at 8254. Thus, at least in the Federal Register, EPA has set a low, indeed virtually undefined, threshold for deciding there is a dispute. In any event, the Clean Air Act does not provide for EPA to administer a federal program even if there is a bona fide question of the area’s status.

. . . .

As petitioners point out, there either is jurisdiction or there isn’t, but either way EPA must decide and not simply grab jurisdiction for itself on the ground that an area is “in question.” Jurisdiction as between states and tribes is binary, it must either lie with the state or with the tribe - one or the other - and EPA does not have a third option of not deciding.

Petitioners correctly fear that EPA is creating a situation in which it may assume jurisdiction for itself and perpetually keep it from the states (or the tribes) because of a lack of showing of jurisdiction, without ever deciding who has jurisdiction.

Because the court found that EPA must first determine whether a particular area is within state or tribal jurisdiction before imposing a federal operating permit program on that area, the court overturned the EPA regulation that extended the federal operating permit program to include areas where the status was merely “in question.”

Regarding EPA’s procedure of deciding whether facilities within disputed areas are under state or tribal jurisdiction on a case-by-case basis, the court ruled that this procedure violates the CAA. The court found that whether a state has adequate authority to enforce an operating permit program is one of the issues that must be addressed when EPA approves or disapproves a state operating permit program. Because program approvals

and disapprovals must be made after notice and an opportunity for public comment, the court ruled that EPA cannot make such jurisdictional decisions on a case-by-case basis, but instead EPA must follow the procedures for promulgating a rule, that is, to provide notice and an opportunity for public comment. Accordingly, the court overturned the portions of the federal operating permit program regulations authorizing EPA to treat lands for which the status is “in question” as being in Indian country, and sent the regulation back to EPA for further action consistent with the court’s opinion.

b. National Petrochemical & Refiners Ass’n v EPA, 287 F3d 1130 (CA DC, 2002).

The DC Circuit Court denied petitioners’ challenges to an EPA rule requiring drastic reductions in exhaust emissions from diesel trucks and buses beginning in 2007 and requiring the maximum sulfur content of diesel fuel to be reduced from 500 parts per million (ppm) to 15 ppm beginning in 2006. The court rejected claims that engine manufacturers will be unable to develop emissions-control systems satisfying the new rule. EPA predicts that two relatively new technologies will aid in achieving the 2007 reductions: the catalyzed diesel particulate filter and the nitrogen oxide (NOx) adsorber. EPA was not obligated to provide detailed solutions to every engineering problem, but had only to identify the major steps for improvement and give plausible reasons for its belief that the industry will be able to solve those problems in the time remaining. Also, since EPA is authorized to adopt technology-forcing regulations, a petitioner’s evidence that current technology is inadequate is not enough to show that EPA was arbitrary in predicting future success. Petitioners also unsuccessfully challenged the feasibility of a portion of the rule that eliminated a preexisting exemption for emissions from engine crankcases. The requisite filtration systems are already required in Europe and have been used on a manufacturer’s heavy-duty diesel engine in the United States since 1999. Similarly, the court rejected claims that the 15 ppm sulfur requirement is arbitrary, capricious, and contrary to law. EPA’s determination that NOx adsorption technology is viable and necessary justifies the 15 ppm sulfur diesel fuel standard. EPA has evidence that application of this technology is feasible, appears to have set forth an engineering path rather than mere optimism, and has given a reasoned explanation why it believes this path can be followed. The court also rejected claims that the 15 ppm

sulfur requirement would result in low supplies of diesel fuel. In addition, EPA's decision to phase-in ultra-low sulfur diesel does not undermine the fuel standard, its selection of the primary test method was not arbitrary and capricious, and it complied with the Regulatory Flexibility Act. The court also upheld changes the rule made to the Averaging, Banking, and Trading program, which allows engine manufacturers who produce engines cleaner than those required by the regulations to generate "credits" that they may then use to offset higher emitting engines, save for future use, or sell to other manufacturers. Other challenges were dismissed either because they were time-barred, the petitioners lacked standing, or the claims were unripe.

2. Clean Water Act

a. *Rapanos v United States*, 533 US 913 (2001).

The United States Supreme Court vacated a decision by the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) that upheld the conviction of a Michigan developer for discharging pollutants into wetlands without a permit in violation of the Clean Water Act (CWA). The Supreme Court's action was in response to a March 2001 petition by the developer asking the Supreme Court to overturn his December 2000 conviction. The developer argued that, under the Supreme Court's decision in *Solid Waste Agency of Northern Cook County (SWANCC) v Army Corp of Engineers*, 121 S Ct 675, the CWA does not provide jurisdiction to regulate wetlands such as his, that do not directly adjoin navigable waters. The developer also argued that under *SWANCC*, serious constitutional and federalism issues are raised by the jurisdictional reach of the act and that his conviction should be vacated. Without elaboration or discussion, the Supreme Court vacated the decision of the Sixth Circuit and remanded the case back for reconsideration in light of the decision in *SWANCC*.

b. *United States v Detroit*, 25 Fed Appx 385, reh'g en banc granted and judgment vacated, 36 Fed Appx 185 (CA 6, 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 (NPDES) permit. Thereafter, the City asked the United States Army Corps of Engineers (COE) to assist in the disposal of the sediment. The COE

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 COE 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 COE to accept the sediment. The trial court held that the COE must accept the sediment without the requested approvals because the State had previously executed the liability release. The COE appealed. The appellate court held that, although the COE had no governmental immunity in this case, the lower court had no authority under the All Writs Act, 28 USC 1651 (the Act), to issue an order against the COE, 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 COE when the consent judgment was entered, the appellate court reasoned that the district court's attempt to order the COE to accept the sediment now was beyond the scope of the Act. Consequently, the order of the district court was vacated. The decision was vacated pending a review by the full panel of the Sixth Circuit.

c. *Tamaska v Bluff City*, 26 Fed Appx 482 (CA 6, 2002).

The Sixth Circuit upheld a district court's imposition of civil penalties against a city that allowed sewage and wastewater to discharge over a property owner's land and into a lake. The court also rejected the landowner's claim that the civil penalty amount was too small and that the district court should have ordered the city to pay the penalty to the landowner instead of to the United States Treasury. Jean and Joe Tamaska brought a citizen suit under the federal CWA, alleging that the City of Bluff City, Tennessee (City) violated the CWA by allowing untreated or partially treated sewage and wastewater to discharge over their land and into a lake. Before trial, the court entered a consent judgment under which the City agreed to cease operating its wastewater treatment facility and to connect its wastewater collection system to another nearby city's sewage system. The consent judgment required these steps to be completed by April 15, 1998, or else the City would be required to show why civil penalties should not be imposed on it under the CWA.

The City continued to allow wastewater to flow over the Tamaskas' property after the deadline. The City filed a motion for an extension of time to perform under the consent judgment, and the Tamaskas filed a motion for a hearing requesting the City to show why civil penalties should not be imposed under the CWA. The district court granted a 14-day extension of time under the consent judgment, but the City did not fulfill its obligations until 49 days after the extension expired.

The district court entered a judgment assessing a penalty of \$100 per day against the City for each of the 49 days it failed to comply with the consent judgment, for a total penalty of \$4,900, to be paid to the United States Treasury. Shortly thereafter, the Tamaskas filed a motion for an award of \$19,241 to reimburse their attorneys' fees. The court awarded them \$5,000.

The parties then filed cross appeals. The City appealed the district court's assessment of a civil penalty against it. The City argued in part that imposition of a civil penalty was improper because, although violations continued after the suit was filed, the City had permanently ceased the offensive discharges before the court imposed the penalty. The City cited case law that held that the CWA does not permit citizen's suits for violations that are wholly in the past. The Sixth Circuit, however, held that "a defendant's voluntary cessation of a challenged practice after the filing of suit, but before entry of judgment, should not deprive the court of the ability to impose civil penalties for violations of the [CWA]. [T]o hold otherwise would encourage polluters to delay litigation as long as possible, knowing that they could escape all liability for even post-complaint violations by simply coming into compliance with the [CWA] before the suit comes to trial."

The Tamaskas appealed: (1) the amount of the civil penalty assessed; (2) the order that the civil penalty payment be made to the United States Treasury, arguing, instead, that the court should have ordered that the penalty be paid to them; and (3) the amount of the awarded attorneys' fees. The appeals court, however, disagreed, finding that (1) the district court did not abuse its discretion in assessing the penalty; (2) applicable precedent provides that civil penalties paid under the CWA must be paid to the United States Treasury; and (3) the district court also did not abuse its discretion in awarding only \$5,000 in attorneys' fees.

d. National Wildlife Fedn v EPA, 286 F3d 554 (CA DC, 2002).

The D.C. Circuit Court denied environmental and industry groups' claims that the EPA was arbitrary and capricious in its promulgation of pollutant discharge limitations for the bleached papergrade kraft and soda subcategory of the pulp and paper industry. Environmental groups claimed that EPA defined a technology option that it did not choose to implement as imposing in-plant limitations on regulated entities, thereby unlawfully inflating EPA's evaluation of the option's cost and invalidating EPA's cost-driven rejection of the option. The court disagreed, finding that there was nothing in the record to suggest that EPA defined the option in a way that would have imposed in-plant restrictions. Because EPA did not establish in-plant limitations, the court held that there is no occasion to reach the environmental groups' contention that EPA was without authority to impose in-plant technology limitations. Additionally, the court declined to examine the environmental groups' claim that EPA erred by including the cost of oxygen delignification in its determination of the capital costs of extended technology for the rejected option because the groups failed to raise the contention during the administrative phase of the rulemaking process. Further, EPA provided more than adequate explanation of its economic analysis for the rejected option and used an appropriate analysis to predict the likely incident of bankruptcies in the cost analysis of the rejected option. Moreover, EPA acted both reasonably and within its authority in adopting a case-by-case approach to color pollution instead of a nationwide standard. Similarly, the industry groups' challenge to EPA's decision to set limits on the discharge of a pollutant and to require daily monitoring of the pollutant failed because the court held that EPA was within its authority and not arbitrary or capricious. Finally, the court held that EPA did not err in setting the monthly maximum effluent limitation to the 95th percentile of the distribution of monthly measurements rather than the 99th percentile.

e. Brace v United States, 51 Fed Cl 649 (2002).

The Court of Federal Claims refused to dismiss a suit brought by a farmer (Brace) who alleged that the federal government's regulation of wetlands on his property constituted a taking from which he was owed compensation under the United States Constitution. The court found that Brace might be able to recover wetlands restoration costs if the government acted beyond its authority under the CWA. Also, questions of material fact remained

concerning whether wetlands on Brace's property had a sufficient connection with navigable waters of the United States to support a decision by the COE to regulate wetland drainage activity.

f. United States v Bay-Houston Towing Co, 197 F Supp 2d 788 (ED Mich, 2002).

The United States District Court for the Eastern District of Michigan declined to impose the \$300,000 civil fine requested by EPA for alleged violations of the CWA by defendant Bay-Houston, which mines peat under the name Michigan Peat. EPA claimed that Bay-Houston should be penalized based on its long-time failure to report its effluent discharges, and that the penalty was warranted based on the quantity of pollutants discharged by Bay-Houston. The court concluded that the record did not support a penalty of \$300,000 where the lack of a permit was not a serious violation, the activity was well known to the regulatory authorities, there was no economic advantage gained by the lack of a permit, no history of substantive violations, no bad faith, and Bay-Houston made a good-faith effort to comply with applicable requirements once it was advised of the need to obtain a permit.

g. United States v Kuhn, 165 F Supp 2d 639 (ED Mich, 2001).

The United States District Court for the Eastern District of Michigan vacated the conviction on one of four criminal counts brought against the former superintendent of a wastewater treatment plant because the conviction violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Michael Kuhn is the former superintendent of the Bay City Wastewater Treatment Plant where he directed the clean-out of a large cement tank used in the wastewater treatment process. During Kuhn's criminal trial, the government presented evidence that Kuhn had ordered plant workers to discharge the sludge and debris generated by the clean-out directly to the Saginaw River. In addition, the government presented evidence that on another occasion, Kuhn instructed a laboratory technician at the plant to falsify certain information in a Discharge Monitoring Report for the plant, which Kuhn subsequently certified as true and submitted to the Michigan Department of Environmental Quality (MDEQ).

Kuhn was charged with, and convicted of, the following four criminal violations of the CWA: (1) knowingly causing the disposal of sewage sludge without a permit; (2) knowingly discharging a pollutant from a point source without a permit; (3) knowingly causing a false statement in a report required to be maintained under the CWA; and (4) knowingly certifying a false statement in report required to be submitted under the CWA. Following his trial, Kuhn argued that these convictions violated the Double Jeopardy Clause.

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This clause protects individuals from successive trials and from multiple punishments for the same offense. The Supreme Court has held that the test for determining whether double jeopardy prohibits multiple punishments "focuses on the statutory elements of the two crimes with which the defendant has been charged, not on the proof that is offered or relied upon to secure a conviction. . . . If each [offense] requires proof of a fact that the other does not, the [test] is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes."

Kuhn argued that double jeopardy prohibited separate punishments for Counts 1 and 2 because they arose out of the same conduct - pumping the sewage sludge into the Saginaw River. The court reviewed the underlying statutory language for each count and determined that they both required proof of six elements. The court summarized the six elements of Count 1 as "(a) knowingly, (b) disposing, (c) of sewage sludge, (d) from a treatment works, (e) which would result in a pollutant from sewage sludge entering navigable waters, (f) without, or in violation of, an NPDES permit." The court summarized the six elements of Count 2 as "(1) knowingly, (2) discharge, (3) a pollutant, (4) from a point source, (5) into a navigable water of the United States, (6) without, or in violation of, an NPDES permit." Because the first and last elements of each count were the same, the court compared the remaining four elements in order to determine whether each count requires proof of a fact that the other does not.

First, the court determined that the terms "discharge" and "disposal" were the same for purposes of double jeopardy. The court based this determination on the definitions of those terms contained in the CWA and in other analogous federal environmental statutes. Second,

the court determined that the terms “sewage sludge” and “pollutant” were synonymous because the CWA’s definition of “pollutant” expressly includes “sewage sludge.” Third, the court determined that a “treatment works” was the same as a “point source” because the definitions of both terms include pumps, such as the one used by Kuhn to discharge sludge from the tank. Fourth, the court determined that a discharge “into a navigable water of the United States” requires the same proof of facts as a disposal that “would result in any pollutant from sewage sludge entering navigable waters.” Thus, the court held that Counts 1 and 2 required the same proof of facts and, accordingly, a conviction under both counts violates the Double Jeopardy Clause.

Kuhn further argued that his convictions on Counts 3 and 4 also violated the Double Jeopardy Clause. The court, however, distinguished Counts 3 and 4, noting that Count 3 charged that Kuhn “caused” an employee to falsify a Discharge Monitoring Report, while Count 4 charged that Kuhn, himself, knowingly certified that report as true. The court held that procuring a false report, and later certifying that same report as true, constituted two separate, punishable criminal acts consistent with the Double Jeopardy Clause. Accordingly, the court upheld Kuhn’s convictions on Counts 3 and 4.

h. United States v Rapanos, 190 F Supp 2d 1011 (ED Mich, 2002).

The United States District Court for the Eastern District of Michigan set aside the criminal conviction of a northern Michigan property owner because the wetlands on his property were not “directly adjacent” to “navigable waters” and, therefore, were not regulated under the CWA. The property owner, Mr. John Rapanos, had been convicted of filling those wetlands without a permit, in violation of Section 404 of the CWA. Mr. Rapanos owns a 175-acre parcel in Williams Township, Michigan. In order to make his property more attractive to potential developers, Mr. Rapanos cleared his heavily wooded land and filled wetlands—which were located entirely within his own property—with sand. Although the property was not physically contiguous to any navigable waters and, in fact, was “roughly 20 miles from where the Kawkawlin River—the nearest body of navigable water—becomes navigable,” Mr. Rapanos was convicted by a federal jury for knowingly discharging pollutants (i.e., sand) into the navigable waters of the United States without a permit issued under the CWA.

As Mr. Rapanos’s case wound through the federal appellate courts, the United States Supreme Court issued a decision in another case involving wetlands, **Solid Waste Agency of Northern Cook County v Army Corps of Engineers**, holding that the CWA does *not* regulate wetlands that are completely isolated from any navigable waters. In light of that decision, the Supreme Court directed the Sixth Circuit, which in turn directed the district court, to reconsider Mr. Rapanos’s conviction. Acting on this direction from the higher courts, the district court requested the parties to file briefs on the issue of whether the wetlands on Mr. Rapanos’s property were directly adjacent to navigable waters. This issue, which was critical to the court’s analysis, had not been resolved in Mr. Rapanos’s jury trial. Rather, the jury instructions allowed for a conviction if the wetlands on Mr. Rapanos’s property “were completely isolated, yet had some impact on interstate commerce.”

The United States argued that Mr. Rapanos’s former wetlands were both “hydrologically connected and directly adjacent to navigable waters.” As evidence of a direct connection, the United States pointed to a “ditch dubbed the Labozinski drain, which empties into Hollper Creek, which eventually winds its way into Kawkawlin River, which in turn flows into Saginaw Bay.” The court, however, found this connection too tenuous to justify regulation under the CWA, noting that the “nearest body of navigable water to [Mr. Rapanos’s property] is roughly twenty linear miles away.” The court distinguished other Supreme Court cases holding that wetlands that are *directly* adjacent to navigable waters are themselves part of the navigable waters of the United States. Despite the Supreme Court’s broad reading of the CWA in these other cases, the district court held that “the Supreme Court concluded in **Solid Waste Agency** that the CWA does have limits.” Reasoning that Congress did not intend for the term “navigable waters,” as used in the CWA, to be “devoid of any meaning,” the district court held that “the plain text of the statute mandates that navigable waters must be impacted by [Mr. Rapanos’s] activities.” The court found that in this case, there was no direct connection between Mr. Rapanos’s property and the Kawkawlin River, and “even if there is a hydrological [i.e., groundwater] connection, [Mr. Rapanos’s] wetlands may be considered ‘isolated’ for purposes of the CWA.” Accordingly, the district court set aside Mr. Rapanos’ conviction.

3. Comprehensive Environmental Response, Compensation and Liability Act

a. *Detroit v Simon*, 247 F3d 619 (CA 6, 2001), cert denied sub nom *Eaton Corp v Detroit*, 122 S Ct 615 (2001).

The Sixth Circuit held that a district court erred when it failed to order a corporation to adhere to the terms of a settlement agreement it reached with a city regarding the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and state-law cost recovery claims, but affirmed the district court's decision to limit cost recovery to the amount required to comply with cleanup levels for industrial property. For several decades, corporate predecessors of Eaton Corporation (Eaton) owned and occupied a piece of industrial property (the Property) located in the City of Detroit. There were various buildings on the Property, including a factory, a warehouse, a garage, a boiler house and some office buildings. Several companies occupied the Property before and after Eaton occupied it. Different occupants disposed of assorted hazardous wastes on the site, including polychlorinated biphenyl (PCBs), petroleum, and petroleum by-products such as ethyl benzene, toluene and xylene. During a period that ended in 1989, the Property was occupied by U.S. Equipment Co., a subsidiary of U.S. Group, Inc., which is related to various members of the Simon family. Collectively, these parties are referred to as the Simon Group. The City of Detroit (the City) acquired the Property by condemnation in 1989 to clear flight paths for Detroit City Airport. The City demolished the buildings on the Property, cleaned up the PCBs, and conducted an environmental assessment of the remaining contaminants.

The City then sued the Simon Group, Eaton and other past users of the Property, seeking to recover the environmental cleanup and investigation costs already incurred, and seeking entry of a declaratory judgment with respect to future remediation costs. The City's claims were based on CERCLA and the former Michigan Environmental Response Act (MERA), which has now been codified as Part 201 of the Natural Resources and Environmental Protection Act (NREPA).

The City moved for partial summary judgment on a claim that the Simon Group was responsible for all of the City's PCB cleanup costs. The district court awarded the City \$156,619.91 for reimbursement of these costs. In March 1995, the case went to trial on the remaining claims

against the Simon Group and Eaton. Shortly before the trial was to resume on the second day, the court was informed that Eaton and the City had reached a settlement. The terms of the settlement agreement were memorialized on the record at the court's request. The terms included a statement that the City would protect Eaton against any claim for contribution arising from a claim by the City against the party seeking contribution. The City's counsel stated that the City would not indemnify Eaton against claims by third parties that did not arise from claims asserted by the City. According to court records, Eaton's counsel agreed to these terms.

Almost two months after making the terms of the settlement agreement a part of the court record, however, Eaton's counsel sent a letter to the City's counsel claiming that "[t]he form of protection Eaton would receive was never clarified by the City" Along with the letter was a proposed settlement agreement containing a broad indemnity clause. After the City refused to sign the agreement, Eaton moved to have the case rescheduled for trial. The City moved for an entry of settlement judgment, which would have required the City to "defend and hold Eaton harmless from and against any and all claims or demands for contribution or lawsuits or other actions for contribution *brought against Eaton as a direct result of any claim, demand, lawsuit or other action brought by the City*" in connection with contamination of the Property.

Eaton opposed the City's motion in a brief accompanied by two affidavits from Eaton's lawyers. One affidavit stated that in the environmental legal community, "contribution protection" meant that the liability of the settling party for all claims would be extinguished upon settlement, and that "[s]ince it was clear to both counsel for Detroit and the Court that the settlement between Eaton and Detroit needed to be reduced to writing, [Eaton's counsel] did not regard the comments of counsel before the Court in open court to set forth the details of the parties' proposed settlement." After hearing motions by both sides, the district court granted Eaton's motion to set the case for trial, and denied the City's motion to enforce the settlement, as a result of "the inability of the Court to determine precisely what the parties came to agreement on March 7th, 1995." After trial, the district judge entered a final judgment, fixing Eaton's total liability at \$301,415, added interest to the Simon Group's previous judgment, and declared Eaton and the Simon Group liable for specified percentages of future recoverable response costs limited to those costs incurred to achieve an "industrial

clean up” as defined in NREPA. The City appealed to the Sixth Circuit.

The City raised two issues on appeal. The first was whether the district court erred in refusing to enforce the settlement agreement recorded in the March 7, 1995 proceedings, and the second was whether the district court erred in limiting the liability of Eaton and the Simon Group for future cleanup costs to those incurred to achieve an industrial cleanup as defined by NREPA. After a thorough review of the transcripts from March 7, 1995, the appeals court found that, whether or not there had been a meeting of the minds on the scope of contribution protection prior to the court proceedings conducted on March 7, the transcript clearly displayed a meeting of the minds on that particular day. The summary of the terms of the agreement stated on the record by the City’s counsel clearly showed that the City’s commitment to protect Eaton from contribution claims was limited to claims brought by parties as a result of claims asserted by the City itself. The appeals court found that, regardless of whether or not Eaton actually sought broader protection, it was clearly not offered by the City’s counsel.

The City’s counsel explained, in no uncertain terms, that the City would provide contribution protection “with respect to any claims brought . . . by the city of Detroit” - both the pending claims against the Simon Group and “any other claim that might be brought by the city of Detroit against other parties.” The City’s counsel clearly stated that such contribution protection would not extend to third-party claims not arising from demands by the City, as he stated on record that “there would not be any guarantee of indemnity as to third-party claims.” The appeals court explained that if Eaton was unwilling to accept this limitation, it had an obligation to say so while the agreement was being read into the court record. However, Eaton raised no objection on the record, and Eaton’s counsel clearly stated that Eaton agreed, “in principle,” with what the City’s counsel had said. Further, when the City’s counsel reiterated that the City’s contribution protection would not extend to third-party claims, Eaton’s counsel replied on the record, “That’s correct.” Therefore, the appeals court held that the district court erred when it failed to order Eaton to adhere to the terms of the settlement agreement read into the record on March 7, 1995.

With respect to the City’s allegation that the district court also erred in limiting Eaton’s and the Simon Group’s

liability for future cleanup costs to what would be necessary to reach the “industrial” cleanup level as defined by NREPA, the appeals court held that the district court had not erred. The City argued that there is no statutory authority for limiting liability for future cleanup costs, and that NREPA expressly provides that the person proposing to conduct a cleanup may select residential, commercial, industrial, or other cleanup levels.

According to the appeals court, the types of response costs recoverable under CERCLA are limited to those that are “necessary” in light of the nature and type of property to be cleaned up. Similarly, NREPA provides that the cleanup proposed should be “appropriate” taking into account the facility’s categorical criteria, and also provides that recoverable costs must be “necessary.” The court reasoned that because the Property had a long history of industrial use, and it would be unfair to require the former occupants of the Property to assume liability for cleanup costs beyond the level necessary to make the property safe for industrial use, and would provide an unwarranted windfall to the beneficiary of the cleanup. Thus, the appeals court affirmed the district court’s judgment in part and vacated it in part, and remanded the case for further proceedings.

b. Bob’s Beverage, Inc v Acme, Inc, 264 F 3d 692 (CA 6, 2001).

The Sixth Circuit indicated that to establish a defendant’s liability for contribution under CERCLA, a CERCLA contribution plaintiff must show that the defendant’s conduct caused the plaintiff to incur response costs. The case involves property located outside Cleveland, Ohio. In 1960, the owners of the property constructed a warehouse and a septic system to handle sanitary waste. From 1974 to about 1980, the owners leased the property to Acme, Inc. (Acme), which used the property to rebuild automobile air conditioner parts. Acme used chlorinated solvents to clean the old parts as the first step in rebuilding them. At first, Acme discharged its manufacturing wastes into the septic system at the property. Later, Acme discharged its untreated wastewater directly onto the surface of the property, and then through a pipe into a stream. Acme also stored spent solvents, waste oil, sludge, and spent caustics in 55-gallon drums outside the warehouse on the property. Some of the drums leaked wastes onto the property. As a result, chlorinated solvents contaminated the soil and groundwater. Acme abandoned a number of 55-gallon drums of waste on the property when it ceased operating in 1980. In 1982,

Benjamin Merkel and Henry Merkel (the Merckels) purchased the property and used it to store automobiles. They did not investigate the environmental condition of the property before purchasing it, perhaps because CERCLA had been enacted only two years before they purchased the property. Twenty-five 55-gallon drums of waste were on the property when they purchased it. In 1984, the Merckels upgraded the septic system by installing a leachfield through which sanitary wastes could percolate into the ground. While constructing the leachfield, the Merckels moved large quantities of soil in the area where Acme had stored the drums. The court's opinion suggests that the Merckels may have released some of the chlorinated solvents in the soil when they constructed the leachfield. In 1987, the Merckels removed and disposed of several drums of waste oil that Acme had left on the property. In 1988, the Merckels sold the property to Bob's Beverage, Inc. (Bob's). Bob's, like the Merckels before, did not investigate the environmental condition of the property before purchasing it. Shortly after purchasing the property, Bob's leased it to Ullman Oil, Inc. (Ullman), which used it for office space and to store petroleum products. Neither Bob's nor Ullman ever used or disposed of chlorinated solvents on the property.

In November, 1988, Bob's discovered that the drinking water on the property and on nearby properties had been contaminated with chlorinated solvents and heavy metals. Ullman notified the Ohio Environmental Protection Agency (OEPA) and arranged to provide alternative water supplies for itself and for its neighbors. Under a consent order with OEPA, Bob's conducted a Remedial Investigation/Feasibility Study (RI/FS) for the property. In 1997, Bob's and Ullman sued the Merckels and Acme under CERCLA to recover their response costs. The Merckels filed a cross-complaint against Acme, alleging that Acme was responsible for all the contamination. After a trial, the district court entered a judgment against Acme for \$411,467.00. The opinion does not indicate what percentage of the total response costs this figure represents. The trial court also held that the Merckels were not liable under CERCLA, on grounds that any release of hazardous substances that may have occurred during their ownership of the property had not caused Bob's and Ullman to incur any response costs.

On appeal, Bob's and Ullman argued that the trial court committed an error of law when it held that the Merckels were not liable because they did not cause Bob's or Ullman to incur response costs. Bob's and Ullman

supported their position by citing cases from the First, Second, Third, and Eighth Circuits, all holding that a party who seeks to recover environmental response costs under CERCLA does not need to prove that the hazardous substances released by the defendant caused harm to the environment, or caused environmental response costs to be greater than they would have otherwise been. The court began its analysis by stating that Bob's "is correct in recognizing that it does not need to establish that the [Merckels'] waste caused or contributed to the response costs." However, the court continued its discussion by quoting the following sentence from the Eighth Circuit's 1995 decision in **Control Data Corp v SCSC Corp**, 53 F3d at 935: "CERCLA focuses on whether the defendant's release or threatened release caused harm to the plaintiff in the form of response costs." The Sixth Circuit then noted that the trial court had found:

that there was no evidence that any release that occurred during the ownership of the [Merckels'] caused any increase in the response costs later incurred by [Bob's and Ullman]. In fact, with the release of [chlorinated solvents] from the soil resulting from the replacement of the septic system, the [Merckels'] may have reduced the response costs of [Bob's and Ullman], albeit infinitesimally.

The court concluded this portion of its opinion by stating that "because [Bob's and Ullman] have failed to demonstrate that a release by the [Merckels] affected the . . . response costs, [Bob's and Ullman] *have failed to prove their cost recovery cause of action.*" (Emphasis added.) The sentence quoted above appears to hold that a plaintiff must prove, as part of its CERCLA liability case, that a release of hazardous substances by the defendant somehow caused an increase in the plaintiff's response costs.

After its analysis of the causation issue, the court went on to address the second issue raised by Bob's and Ullman on appeal. Under CERCLA, a former owner of contaminated property is liable if it owned or operated the property at a time when hazardous substances were "disposed of" on it. Bob's and Ullman argued that hazardous substances were "disposed of" on the property during the time the Merckels owned it because: (1) hazardous substances were "disposed of" when the Merckels replaced the septic tank and disturbed substantial quantities of soil contaminated with chlorinated solvents; and (2) hazardous substances were "disposed of" when

the Merkels owned the property because chlorinated solvents were passively migrating through the soil and groundwater during that time, and because the Merkels had knowledge of that fact. The Sixth Circuit analyzed this argument in depth and recognized that it had ruled in *United States v 150 Acres of Land* last year that the passive migration of hazardous substances on a property does not constitute a “disposal.” Whether the disturbance of previously contaminated soil constitutes a new “disposal,” however, was a more difficult issue. The court decided that the facts in this case justified the trial court’s holding that there was no evidence of a “disposal,” because the chlorinated solvents were already present on the site, and because there was no evidence that the Merkels’ construction of the leachfield had caused any cross contamination.

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

The Sixth Circuit affirmed a ruling by the United States District Court for the Western District of Michigan that, although a company was liable under CERCLA for the release of PCBs into the Kalamazoo River, no cleanup costs should be allocated to that company because its contribution to the contamination was miniscule in comparison to that of the other liable companies. MDEQ completed an initial investigation in 1990 that concluded that a 35-mile stretch of the Kalamazoo River was contaminated with PCBs. Based on MDEQ’s findings, EPA listed this portion of the river, along with a three-mile section of Portage Creek, on the National Priorities List (NPL) as a Superfund Site (the Site) under CERCLA. MDEQ identified three paper mills as being potentially responsible for the PCB contamination. The companies that owned the paper mills entered into an Administrative Order by Consent (AOC) with MDEQ that required them to conduct an RI/FS of the Superfund Site and the surrounding area. A fourth paper company later agreed to share the costs of the RI/FS. The four paper companies joined together to form the Kalamazoo River Study Group (KRSG).

Under the AOC, the RI/FS covered a 95-mile stretch of the Kalamazoo River, a portion of which is adjacent to a former automotive parts manufacturing plant of Rockwell International Corp. (Rockwell) in Allegan, Michigan. Rockwell operated the plant from approximately 1910 to 1989. In 1995, KRSG brought a suit under CERCLA against Rockwell and several other companies seeking contribution from them for the costs of the RI/FS and for

a future cleanup of the Site. The CERCLA contribution claims against the other companies were eventually settled or otherwise resolved, leaving only the claims against Rockwell to be heard by the district court. The trial against Rockwell was split into two stages - the first limited to whether Rockwell was liable under CERCLA, and the second addressing the allocation of response costs between KRSG and Rockwell.

The district court initially applied a “threshold of significance” standard of liability to determine whether Rockwell was liable. Under that standard, the court considers whether a party’s release of hazardous substances was of sufficient significance to justify response costs. Applying this standard, the district court held that both the KRSG and Rockwell had released a sufficient amount of PCBs to be held liable under CERCLA. In another case, the Sixth Circuit later held that it was inappropriate to apply the “threshold of significance” standard to determine liability because it improperly imposed too high a standard for liability by requiring the party bringing the action to show that the other party’s release of hazardous substances caused response costs. Thus, a relaxed liability standard did not help Rockwell because the district court had already determined that Rockwell was liable under the stricter standard for determining liability.

After the liability stage, the district court considered the appropriate allocation of response costs between KRSG and Rockwell. The District Court identified three factors as generally relevant to the cost allocation: (1) the relative quantities of PCBs released by the parties; (2) the relative toxicity of the PCBs released by the parties; and (3) the cooperation of the parties with the regulatory agencies. The district court found that the last two factors did not favor any particular allocation between KRSG and Rockwell. With respect to the relative quantities released, the district court found that Rockwell likely released no more than 20 pounds of PCBs while, in contrast, the KRSG parties released hundreds of thousands of pounds of PCBs into the river. Based on those findings, the district court allocated no response costs to Rockwell.

KRSG appealed to the Sixth Circuit on three bases:

- The district court’s refusal to allocate response costs to Rockwell was inconsistent with the court’s holding that Rockwell was liable under CERCLA.

- The district court erred in holding that Rockwell released an inconsequential amount of PCBs.
- The district court erred in determining that the factors concerning the relative toxicity of the PCBs released by the parties and the cooperation of the parties with regulatory authorities did not favor any particular allocation of response costs.

KRSG argued that the district court's zero allocation of response costs to Rockwell was logically inconsistent with its holding that Rockwell was liable under CERCLA for releasing PCBs into the Kalamazoo River under the threshold of significance standard. The Sixth Circuit disagreed, explaining that in determining that Rockwell was faced with liability under CERCLA, the district court did not make specific findings as to the quantity of PCBs released by Rockwell to the river. The district court instead focused on whether Rockwell's discharges were "more than incidental or sporadic." The Sixth Circuit stated that the district court's finding that Rockwell released PCBs in "measurable or detectable quantities" did not obligate it to allocate response costs to Rockwell irrespective of the court's later analysis of the relative amounts of PCBs released by the parties.

The Sixth Circuit explained that where other responsible parties release vast quantities of a hazardous substance, another party's release which may be significant when considered in the abstract, may nevertheless have no impact on the total cost of cleaning up a site that has been contaminated by much larger releases. The Sixth Circuit cautioned, however, that a party cannot always avoid being allocated response costs by showing that its release does not significantly affect the total cleanup costs. For example, the case at hand could be distinguished from situations where multiple responsible parties have each released only a small quantity of hazardous substances that, in isolation, would have little impact on the overall costs of cleaning up a site. In such a situation a court could reasonably allocate a portion of the response costs to each of the parties. In this case, however, the Sixth Circuit observed that the companies comprising KRSG released exponentially more PCBs into the river than did Rockwell, such that Rockwell's release would have essentially no effect on the ultimate cleanup costs for the Superfund Site.

KRSG further argued that, even if Rockwell did not have to pay any future cleanup costs, it should nevertheless be allocated a portion of the RI/FS costs because "CERCLA

authorizes the allocation of investigation costs to any party that created a reasonable risk of contaminating a site." The Sixth Circuit distinguished the two cases that KRSG relied upon for this proposition, explaining that neither of the cases held that once a party is found to be subject to liability for investigation costs a share of those costs must necessarily be allocated to the party in a contribution action. The Sixth Circuit stated that a district court has broad discretion to allocate the costs of an RI/FS and that, in this case, the district court's determination to allocate none of the RI/FS costs to Rockwell was based on its finding that KRSG was responsible for more than 99.9% of the PCBs in the river.

KRSG finally argued that the failure to allocate costs to Rockwell after finding that it had released PCBs to the river defeated the central purpose of CERCLA - to encourage prompt cleanups - and would encourage parties to litigate in hope of achieving a zero allocation instead of voluntarily joining in the investigation or settling. The court disagreed, observing that the allocation of response costs is very fact-intensive; such that a zero-allocation in one case should not encourage parties to reject reasonable settlement offers or risk the inherent uncertainties of litigation in other cases. The decisive factor in the district court's allocation of response cost was the relative quantities of PCBs released by the parties. The district court found that Rockwell had likely released less than a total of 20 pounds of PCBs into the river, while, in contrast, the KRSG members had released several hundred thousand pounds of PCBs into the river. KRSG did not contest that its members released massive amounts of PCBs into the river; however, it contested the conclusion that Rockwell had only released a small amount.

The district court relied upon the testimony of Rockwell's expert witness in determining the amount of PCBs Rockwell released. Rockwell's expert estimated the concentration of PCBs in the oils released by Rockwell into the river by multiplying the volume of oils estimated by KRSG's expert witness to have been discharged by Rockwell into the river by the concentration of PCBs in the oils that remained in the groundwater at Rockwell's Allegan plant. Rockwell's expert determined that those remaining oils contained no more than 0.000035% PCB.

KRSG challenged Rockwell's expert's opinion on several bases. First, it contended that he could not accurately estimate the amount of PCBs released by Rockwell without having the expertise to predict how the

oils would react once discharged into the river. The Sixth Circuit found no merit in this argument because KRSG failed to explain why such expertise was needed - the mathematical method employed by Rockwell's expert required an assessment of only the amount of oil discharged and the amount of PCBs in that oil, it did not require an assessment of how the PCBs would travel or change once in the river.

KRSG next argued that the district court erred by accepting Rockwell's expert's estimate on the concentration of PCBs in the oil discharged by Rockwell and should have relied on KRSG's expert's estimate of either 5% or 50% PCB concentration, depending on the type of oil. The Sixth Circuit found that the district court reasonably rejected KRSG's expert's opinion on the basis of testimony from Rockwell's expert that it would be "physically impossible" for oils containing PCB at such a high concentration to be reduced to the concentration of only 0.000035% that was found in the groundwater at the Rockwell plant. In addition, KRSG's expert's estimate failed to take into account that Rockwell also used water-soluble oils that might not have even contained PCBs.

KRSG finally argued that the Rockwell expert's opinion was rebutted by other evidence that showed that Rockwell in fact released a large quantity of PCBs into the river. For this argument, KRSG relied on several sediment samples collected from the river that showed elevated levels of PCB "Aroclor 1254," the type of PCB in the oil used at Rockwell's Allegan plant. KRSG relied on a total of 7 such samples, one of which was collected 1.7 miles from Rockwell's plant. The Sixth Circuit found that the district court properly concluded that the seven samples were of limited probative value, given that they represented less than three percent of the approximately 300 samples collected by Rockwell's expert in "areas of the river in which oils would be expected to accumulate downstream of Rockwell."

KRSG also challenged the district court's determination that neither the relative toxicity of the PCBs released by the parties nor their cooperation with regulatory authorities offered any guidance as to the appropriate allocation of response costs between the parties. KRSG first contended that the district court erroneously found that the PCBs released by the KRSG members and Rockwell were of approximately the same toxicity. KRSG maintained that PCB Aroclor 1254, the type released by Rockwell, was more toxic than the PCB Aroclor 1242

released by the KRSG members because Aroclor 1254 bioaccumulates at a higher rate in fish. KRSG asserted that this fact was significant because concerns about PCB levels in fish were "driving" the cleanup. The Sixth Circuit stated, however, that the district court had a reasonable basis for treating both types of PCBs as equally toxic, given that MDEQ treats all types of PCB the same because they all contain toxins and also because MDEQ issues fish consumption advisories without distinguishing between the types of PCBs. The Sixth Circuit further stated that, in light of the huge disparity in the relative amounts of PCBs released by the parties, a determination that Aroclor 1254 was somewhat more toxic than Aroclor 1242 likely would not have altered the court's allocation.

KRSG finally argued that the district court's consideration of the cooperation factor was "deficient" because Rockwell did not fully cooperate with the regulatory authorities. The Sixth Circuit stated that district court, in fact, found "a lack of full cooperation by *both* parties" and observed that KRSG offered no rebuttal to the court's determination that it too did not fully cooperate with the regulatory agencies.

Consequently, the Sixth Circuit affirmed the district court's allocation of no response costs to Rockwell. It should be noted, however, that one of the three circuit court judges filed a concurring opinion in which he stated that, although he agreed with the judgment reached in the court's main opinion, he felt that the outcome of the case presented "a troubling anomaly." Although not directly acknowledging KRSG's argument that it was illogical for Rockwell to be liable under CERCLA yet allocated no costs, the concurring judge expressed concern that Rockwell, although acknowledged to have polluted, escaped with paying nothing because its PCB release was "sufficiently inconsequential." The concurring judge concluded:

Granted, Rockwell's PCB release was minimal. However, [CERCLA] imposes strict liability for *any* release that causes a plaintiff to incur response costs. Although the equitable analysis of [the contribution provision of CERCLA] provides for judicial discretion with regard to the cost apportionment among PRPs ["potentially responsible parties"], the statutory purposes of CERCLA and the principles of equity require that each PRP pay its fair share of response costs, no matter how large or small. Indeed, no PRP should

pay more than their fair share, but neither should any party pay less. Here, however, Rockwell pays nothing.

Accordingly, by not allocating any response costs to a known polluter, the outcome in this case contravenes the important remedial purposes of CERCLA. Nevertheless, because I believe that the discretion regarding allocation of costs should remain with the district court, I join in this court's conclusion despite a rather pinched view of the statute . . .

d. United States v Township of Brighton, 282 F3d 915 (CA 6, 2002).

For the second time, the Sixth Circuit reversed a district court's ruling regarding Brighton Township's potential liability for contamination from a closed municipal waste dump. Although the district court has twice held that the Township is liable as an "operator" of a portion of the dump and that there is no basis for dividing the environmental harm caused by the Township's operation and other harm, the Sixth Circuit reversed the district court both times. This most recent reversal is based on the district court's failure to follow the Sixth Circuit's directions in the last appellate decision.

From 1960 until 1973, Brighton Township contracted with Vaughan Collett, and his son Jack (collectively, Collett), to allow Township residents to dispose of waste at a dump operated by Collett on three acres in the southwest corner of Collett's property in exchange for a monthly fee paid by the Township. The Colletts also accepted waste from other commercial, industrial and non-residential sources; however, in 1967, the Township negotiated a new contract with Collett that provided for the exclusive use of the dump by Township residents. The contracts between Collett and the Township required that the dump "meet specifications of and be under the supervision of the [Township's] Board of Appeals." Further, the Township Board often made special appropriations for the dump, such as bulldozing and other maintenance activities, when Collett failed to perform those activities to the Township's satisfaction. The Township also took responsibility for correcting conditions at the dump when it came under the scrutiny of state regulators. The Township eventually paid for the final closure of the dump in 1973 under increasing pressure from state officials to bring the dump into compliance with applicable solid waste regulations.

In 1989, an EPA inspection team discovered a cluster of 200 deteriorating drums on the parcel that had released hazardous substances to the surrounding soil and groundwater. After spending over \$490,000 to clean up the dump, the United States sued Collett and the Township to recover those costs under Section 107 of CERCLA. In its first decision, the district court had held that the Township's level of participation in the dump made it an "operator" of the facility, as that term is defined under CERCLA, and that there was no reasonable basis to divide the environmental harm caused by the dump between the Township and Collett. Accordingly, the district court determined that the Township could be held liable for all of the cleanup costs. The Sixth Circuit, however, reversed this decision because the district court had not developed sufficient facts to determine whether the Township was an "operator" of the dump, and had applied the wrong standard for determining the divisibility of harm. With respect to the standard for divisibility, the Sixth Circuit stated that the "proper standards for divisibility come from the Restatement (Second) of Torts, which seeks a reasonable basis for determining the contribution of each cause to a single harm." The Sixth Circuit thus remanded the case back to the district court to consider whether the Township exercised "actual control" over the dump and, if the Township did exercise such control, whether the harm caused by the Township's operation was divisible based on the standard articulated by the court.

On remand, the district court reviewed the Township's participation in the establishment, design, operation and closing of the dump and concluded that the Township was an "operator" of the dump within the meaning of CERCLA. In particular, the district court noted that the Township regularly approved resolutions regarding the operation of the dump, paid for improvements to it, and met with State regulators regarding compliance issues. The district court then held that the Township exercised actual control over the operation of the dump. With respect to divisibility, the district court held that the Township had not demonstrated any geographic, volumetric, or temporal basis for dividing the damages among the liable parties. The district court's March 13, 2000 opinion, therefore, again imposed liability on the Township for the entire amount of the cleanup costs.

The Township appealed the district court's second opinion and the Sixth Circuit again reversed the lower court, this time because it had failed to address "either the letter or the spirit" of the Sixth Circuit's mandate from

the first appeal. With respect to the Township's status as an operator of the dump, the Sixth Circuit stated that the district court "merely stated a conclusion without any analysis whatsoever." The district court failed to explain "which of its forty findings of fact triggered this conclusion, or to what extent Brighton Township actually macromanaged the facility in question," the Sixth Circuit stated. With respect to the divisibility of harm, the Sixth Circuit held that the district court had failed to conduct the proper analysis of the facts in light of the applicable law, as explained in the first appellate decision.

The Sixth Circuit thus vacated the district court's judgment and, once again, remanded the case back to the district court for further proceedings. The Sixth Circuit also instructed the district court to hold an evidentiary hearing regarding the issue of divisibility, in part because a new district court judge had been assigned to the case.

e. Kalamazoo River Study Group v Eaton Corp, 142 F Supp 2d 831 (WD Mich, 2001).

An association of paper companies, the Kalamazoo River Study Group (KRS), that released PCBs into the Kalamazoo River, brought a contribution action under CERCLA against Eaton Corporation (Eaton), alleging that Eaton was liable for PCB contamination allegedly released into the Kalamazoo River from three Eaton automotive parts manufacturing plants. The United States District Court for the Western District of Michigan held that Eaton was liable for PCB contamination that more likely than not was released from two of the plants, but not the third. The Court had previously held that there was insufficient evidence to show that Eaton had released *significant* quantities of PCBs from any of the three plants and that Eaton was, therefore, not liable to the KRS. The Sixth Circuit subsequently held that the "threshold of significance" standard applied by the district court in the first case was an incorrect liability standard in a CERCLA contribution action.

Remanding the case back to the district court, the Sixth Circuit instructed the court that a person bringing a CERCLA contribution action is not required to show any direct causal link between the waste another person sent to a site and the environmental harm caused. The Sixth Circuit stated that consideration of equitable factors such as causation was proper only in allocating response costs, not in initially determining whether a person is liable under CERCLA. Thus, on remand, the district court's inquiry was to determine whether Eaton discharged *any*

PCBs to the Kalamazoo River site, regardless of the quantity of that discharge. The Sixth Circuit had stated "[O]ne discharge of [PCBs] is sufficient to support liability; there is no requirement that the generator typically discharge waste to the site."

On remand, the district court examined and discussed at length the extensive evidence provided by KRS and Eaton, finding that Eaton was liable for PCB discharges from its Battle Creek and Kalamazoo plants, but not its Marshall plant.

Battle Creek Plant. Eaton's Battle Creek plant was located approximately one-half mile from the Kalamazoo River and had been in operation from the early 1940s until 1983. Manufacturing processes at the plant included heat treating, forging, welding, and machining - processes which involved the use of quench oils, cutting or grinding oils, and hydraulic oils. Testimony described the use of the oils, how normally closed circuit hydraulic systems would leak from time to time, and how oils were routinely spilled and cleaned up, such that the plant purchased 2,000 to 4,000 pounds per month of dry absorbent to clean up spills and leaks. Testimony also described how, prior to the mid-1960s, the plant's storm and sanitary sewers discharged to a ditch that drained into the Kalamazoo River, with no wastewater treatment other than a settling weir to settle out grinding mud from water soluble oils. Scrap metal was stored in open bins outside the plant and resulted in some oil run-off that could have entered the storm drains.

In 1967, the Michigan Water Resources Commission (MWRC) determined that the plant was discharging 2220 pounds of oil a day to the Kalamazoo River. Although the oils discharged were mostly water-soluble, and thus unlikely to contain PCBs, some "straight" oils were also contained in the discharge. The court observed that, based upon the evidence, there was no question that Eaton discharged significant quantities of oil to the Kalamazoo River; however, that did not answer the question of whether PCBs were contained in the oil.

Eaton's employees recalled purchases of oil from Shell, Arco, Texaco, Mobil, Amoco, and Standard; but there was no evidence that any of those oils contained PCBs. Documentary evidence obtained from Monsanto, however, showed that in 1970 and 1971 Eaton purchased from Monsanto the equivalent of approximately 5 drums of hydraulic oil that was 100 percent PCB. In 1972, samples

collected by the MWRC from the joint outfall of Eaton's plant and another company's plant showed the presence of PCB at 1.4 parts per billion (ppb). Other samples collected from the storm sewer as it left Eaton's property contained 0.24 ppb and 0.12 ppb PCB. The Michigan Department of Natural Resources (MDNR) thus concluded that the presence of PCBs in the wastewater showed that Eaton's process wastes were entering the storm drain. The court noted, however, that because the sewer lines also served areas outside of Eaton's plant, the 1972 PCB detections could not be definitively attributed to Eaton. There was also some question as to the reliability of the test results because they were at the limits of detection for the analytical method used at the time the analyses were performed. The court observed that, notwithstanding these shortcomings, the evidence taken as a whole suggested that if PCBs were in the effluent, Eaton was the most likely source. When Eaton's wastewater discharge was monitored by MDNR in 1980 for a 24-hour period, no traces of PCBs were detected.

When the Battle Creek plant was demolished in 1983 - 1984, Eaton tested select areas of the wood block floor that covered the plant for PCB. PCBs were detected in all 55 samples, ranging from 3.1 ppm to 155 ppm. Eaton had selectively sampled in areas near electrical equipment that contained PCBs, in heat treating areas where quench oils were used, and areas to serve as "background" samples. An Eaton environmental scientist testified that he was unable to find any pattern to the locations of the PCB-contaminated floor blocks. He concluded that in all probability the PCBs must have come from hydraulic fluids used during the war years.

The court also reviewed the results of sediment samples from the drainage ditch and the Kalamazoo River that were collected and analyzed for PCBs by multiple parties. Although PCBs were detected in the ditch, the closest sample to the river was 1,500 to 1,600 feet from the river and KRSG's expert was unable to find where the ditch emptied into the river. Also, although PCBs were detected in samples of Kalamazoo River sediments, those samples were miles downstream of Eaton's Battle Creek plant. The court observed that the information gathered from the river sediments and water was of primary relevance to the issue of allocation and was of less importance to the issue the court was considering - whether any PCBs were released from Eaton's plant to the Kalamazoo River.

The court reviewed KRSG's arguments regarding the various types of PCBs that were detected at Eaton's plant and in environmental samples. The court held that, based upon that data, the evidence, including new evidence produced during the rehearing, did not support a finding that the PCBs detected at the Battle Creek plant were related to the cutting and quench oils used at the facility. KRSG had not shown that Eaton purchased such oils containing PCBs, that PCBs were necessary for Eaton's processes using those oils, or that PCB Aroclors were present in the river to indicate the use of PCBs in open systems. Because KRSG had the burden of proof and the presence of PCBs at Eaton's Battle Creek plant could all be explained by leaks from normally closed system hydraulic and electrical equipment, the court found that the PCBs at the plant were not attributable to use in the quench and cutting oils, but due to leaking electrical transformers and capacitors and leaking hydraulic systems.

The court further stated that because the electrical and hydraulic systems are closed or nominally closed systems, the quantity of PCBs released in the waste oils was probably minimal. The court held that, nevertheless, it was "fair to conclude that it is more likely than not that some very small quantity of PCBs probably found their way to the Kalamazoo River." The court further ruled:

[KRSG] has established by a preponderance of the evidence that some small quantity of PCBs probably went to the River. Based upon Eaton's purchase of PCB-containing hydraulic oil, the presence of PCBs in Eaton's effluent, and the detection of PCBs in the Eaton ditch, it appears to this Court that it is more likely than not that some of the PCBs from the Eaton plant found their way into the sewer system and into the ditch...

While the new evidence does not change this Court's previous conclusion that there is insufficient evidence of a detectable or measurable discharge of PCBs from Eaton's Battle Creek plant into the Kalamazoo River, under the liability standard articulated by the Sixth Circuit, this Court is constrained to find that Eaton is liable for some PCB releases from its Battle Creek facility to the Kalamazoo River.

Kalamazoo Plant. Eaton manufactured truck transmissions at the Kalamazoo plant from the mid-1950s until it closed the plant in 1984. The plant, which was

served by city sewer and water, was located approximately one-half mile from the Kalamazoo River. The plant used water soluble cutting oils, synthetic cutting compounds, and quench oils in its operations. The plant discharged both to the municipal wastewater treatment plant and to the Zantman drain via storm sewers and floor drains. A catch basin was designed to remove some oils before discharge to the drain, but there was no other treatment before the discharge and it did not prevent all oil from entering the drain.

In 1965 the MWRC tested the water in the Zantman drain and found oil at concentrations of 41 ppm and 51.2 ppm. The MWRC told Eaton that it was responsible for excessive oil in the drain and oil that was pooling in a swampy area. Eaton was also told that “[t]he amount of oil being lost to the drain would undoubtedly create oil pollution problems in the Kalamazoo River were this drain to be cleaned out to the river.” In a 1967 survey, the MWRC estimated that Eaton was releasing 1332 pounds of oil per day to the Zantman drain. The MWRC stated that the major source of the oil was parts washers in the heat treating department and was concerned about oil pooled around a scrap metal pile that could be washed overland into the drain during heavy precipitation. Eaton responded by making changes to its waste disposal system in the early and mid 1970s. The Kalamazoo County Drain Commissioner informed Eaton in 1973 that oil was discharging from the Zantman Drain to the Kalamazoo River.

The court pointed out, however, that the issue was whether PCBs were in the oils being discharged. The court stated that there was no evidence of any testing or testimony that would indicate that the process oils discharged contained PCBs. In 1973 and 1976 industrial wastewater survey by the MWRC, no PCBs were detected in Eaton’s discharge. When Eaton sold the plant in 1984, PCBs were found in the wood block flooring in levels ranging from non-detect to 743 ppm. Sixty-nine samples were collected, twenty-eight of which were non-detect, and four of which contained PCBs in excess of 20 ppm, all of which were located near transformers and capacitors. The court found that it was unlikely that Eaton used PCBs in its open processes at the Kalamazoo facility, but that it was more likely than not that PCBs were present in the electrical equipment and in some hydraulic fluid. The court next had to determine whether the preponderance of the evidence showed that any of those PCBs reached the Kalamazoo River.

Reviewing the evidence, the court noted that PCBs were found on the floors of the plant and that an Aroclor characteristic of PCB-containing hydraulic fluid was detected in one sample, which the court stated made it more likely than not that Eaton used PCB-containing hydraulic oil at some point. The court also stated that it was more likely than not that Eaton’s transformers and capacitors leaked PCB-containing oil at some time. Oil discharges from Eaton were reported numerous times throughout the length of the Zantman Drain. Therefore, the court held:

Based upon all the evidence and the Sixth Circuit’s direction that any release of PCBs is sufficient for a finding of liability, the Court finds it more probable than not that some of the PCBs from the floor of the Kalamazoo facility were washed down the drain and into the Kalamazoo River along with the other oily wastes from the facility. The Court accordingly concludes that Eaton’s Kalamazoo facility is liable for the release of some PCBs to the Kalamazoo River.

Marshall Plant. Eaton’s Marshall plant was located the farthest upstream of the three facilities and approximately one-quarter mile from the Kalamazoo River. Operation of the plant began in 1941 and it remains in operation. No evidence was presented of any use of PCB-containing process oils at the Marshall plant. No testing of the process oils had been performed showing the presence of PCBs in the oils and no Eaton employees testified that PCB-containing process oils had been used at the plant. Although some of the electrical equipment at the plant contained PCBs, KRSG did not present any evidence of leaks from the equipment. An Eaton employee who was an electrician and maintenance supervisor at the plant testified that there were trays under the electrical equipment to catch any leaks, but that he was unaware of any leaks ever occurring.

No PCBs were detected in the Marshall plant’s wastewater in tests performed by MDNR in 1973. MDNR performed more tests in 1980, at which time PCBs were detected in one sample at 0.82 ppb. MDNR suggested that the PCBs were associated with the process oils used by Eaton, but Eaton’s review of all incoming products was unable to identify any containing PCBs. The 1980 PCB detection had never been repeated in subsequent sampling. In 1993, Eaton retained an environmental consultant to conduct sediment sampling for PCBs in the

Kalamazoo River immediately downstream of the Marshall plant. PCBs were not detected in those samples.

The court stated that KRSG's entire case against the Marshall plant rested on the single detection of PCBs in the 1980 wastewater sampling; and explained that "[a]lthough one discharge may be sufficient to support a finding of liability, this Court looks for some corroborating evidence to insure that the one detection is liable." The court held:

Based upon all the evidence presented, the Court finds that the single admittedly low level detection of PCBs at the Marshall facility in 1980 is not reliable. There being no other evidence of PCBs discharged by the Marshall facility, the Court concludes that [KRSG] has not met its burden of demonstrating by a preponderance of the evidence that Eaton released PCBs from its Marshall facility to the Kalamazoo River. Accordingly, the Court finds that Eaton is not liable for the release of any PCBs from its Marshall facility.

f. American Special Risk Ins Co v City of Centerline, 2001 WL 1218551 (ED Mich, 2001).

The United States District Court for the Eastern District of Michigan held that household waste (also known as municipal solid waste) contains hazardous substances, and that municipalities that collect household waste from their residents and dispose of it in a landfill may incur liability under CERCLA as a result of such disposals.

Five cities in Macomb County, Michigan formed the South Macomb Disposal Authority (SMDA) to own and operate two landfills in Macomb Township. The cities collected municipal waste from their residents and disposed of it in the landfills during the early 1970s. In 1986, the State of Michigan ordered SMDA to remediate groundwater contamination associated with the landfills. SMDA sued its liability insurance carriers for reimbursement of its remediation costs. SMDA's insurers, in turn, sued the cities seeking contribution under CERCLA, arguing that each city had arranged to dispose of municipal wastes from its residents at the landfills, and that those wastes contained materials which are considered hazardous substances under CERCLA. The cities admitted that about 85% of the waste at the landfills was municipal solid waste generated by their residents; however, the cities

contended that the waste did not contain any hazardous substances.

The insurers undertook an extensive effort to prove that the wastes collected by the cities were indeed hazardous. The insurers took 136 depositions from residents and employees of the cities, plus 75 written statements from residents, employees, and elected officials, regarding the types of wastes which they had either deposited for collection, or observed in the collection system, during the years that the two landfills were operating. The insurers retained Rena M. Pomaville, Ph.D., as an expert witness. Dr. Pomaville reviewed all the depositions and written statements and evaluated whether any of the materials the residents had placed in the trash were known to contain CERCLA hazardous substances. Dr. Pomaville then organized and summarized the information contained in the depositions and statements of the residents. For example, Dr. Pomaville's summary showed that one resident had placed aluminum foil in her trash, and that aluminum foil contained the hazardous substance aluminum. Another resident had discarded "empty" laundry detergent boxes, which, according to government sources, contained the hazardous substances methylene chloride, tetrachloroethylene and sodium. Each of those hazardous substances had been discovered in leachate at the landfills. Dr. Pomaville also conducted a hands-on study of garbage generated in Palm Beach, Florida, during which she looked through garbage to determine how many discarded containers were truly empty. As the result of that study, she concluded that very few discarded containers were completely empty of product. Armed with the 136 depositions, the 75 written statements, and Dr. Pomaville's expert testimony, the insurers asked the court to rule before trial that each city was liable under CERCLA because it had arranged to dispose of hazardous substances at the landfills. The court noted that to prove liability under CERCLA, plaintiffs "need only prove that the Defendant Cities deposited only the slightest amount of hazardous material" in the landfills, and ruled that "Dr. Pomaville has more than satisfied this burden." The court bolstered its opinion by noting that counsel for the cities had acknowledged previously that each city was a "generator" of waste under CERCLA, and had admitted that once a party had been designated as a "generator" under CERCLA, then it "has no defenses." Counsel for the cities argued that the court took those statements out of context, but the court disagreed.

The cities attempted to refute Dr. Pomaville's testimony with testimony by Dr. James Dragun. He did not directly refute the information in the depositions or written statements, or Dr. Pomaville's analysis, but he testified that before drawing conclusions one needs to know the precise chemical composition of a product, how the product's container was treated before disposal, and how much time the product or container spent in the landfill. The court ruled that Dr. Dragun's testimony may be relevant to the amount of hazardous substances that each city deposited, and thus relevant to the question of how response costs should be allocated among all liable parties, but was not relevant to CERCLA liability. The court also note that in previous testimony, Dr. Dragun had confirmed that many household products like paint remover, degreasers, aerosols, soaps, scouring compounds, and pesticides contained hazardous substances. The court concluded that there was no genuine issue of fact as to whether any of the cities had deposited hazardous substances at the landfills, and therefore ruled that the cities are liable under CERCLA for the costs of remediating the landfills.

The court rejected a motion by the insurers to require the cities to pay the insurers' attorney fees and costs incurred in taking 136 depositions, 75 witness statements, and expert witness depositions. The insurers argued that the cities unreasonably refused to admit that the trash they had collected contained hazardous substances, and the costs of proving that point could have been avoided. The court denied the motion because the insurers failed to show that the cities' refusal to admit the point was not truthful based on the information available to them.

g. Bestfoods v Aerojet-General Corp, 173 F Supp 2d 729 (WD Mich, 2001).

From 1957 to 1965, the Ott Chemical Company (Ott I) operated a chemical manufacturing plant at the Ott-Story Superfund Site (the Site). From 1965 until 1972, the plant was owned and operated by a wholly owned subsidiary of CPC International, Inc. (CPC) known as Ott Chemical Company (Ott II). In 1972, Ott II sold the Site to Story Chemical Company (Story), which owned and operated the Site until Story went bankrupt in 1977. In 1977, the MDNR urged Aerojet General Corporation (Aerojet) to take over the Site and resume operation of the plant. MDNR negotiated a consent order with Aerojet and Aerojet's subsidiary, Cordova Chemical Company (Cordova), under which Cordova agreed to accept responsibility for a limited environmental cleanup at the

plant. After the consent order was in place, Cordova purchased the Site from Story's bankruptcy trustee. Cordova owned and operated the Site until 1986, when the plant ceased operation. In 1982, EPA placed the Site on the NPL, and later began extensive remedial action for contaminated soil, surface water and groundwater. In 1989, EPA and MDNR sued Aerojet and CPC and their subsidiaries for all response costs. In 1991, the district court ruled that CPC was liable under CERCLA as an "operator" of the plant owned by its subsidiary Ott II, because CPC actively participated in and exercised control over Ott II. It also held that Aerojet was similarly liable as an operator of the Site, because Aerojet had actively participated in and exercised control over its subsidiary Cordova.

In 1995, the Sixth Circuit reversed, holding that although a parent corporation can be liable for contaminated property owned by a subsidiary, the facts of this case did not justify such a holding for either Aerojet or CPC. EPA appealed to the United States Supreme Court, which decided that neither the court of appeals nor the district court had correctly analyzed the issue of parent corporation liability under CERCLA. The Supreme Court held that a parent corporation is liable under CERCLA for contaminated property owned and operated by its subsidiary only if the parent corporation actively participated in the operation of the facility itself, as opposed to actively participating in the overall management of the subsidiary. The Supreme Court asked the lower courts to decide the case again based on the Supreme Court's new rules for parent corporation liability.

After the Supreme Court decision, EPA and MDNR entered into settlements with Aerojet and Cordova. Thus, the district court had to resolve the issue of parent corporation liability only for CPC. The court based its decision on the testimony and documents concerning CPC and Ott II that had been presented during the 1991 trial, plus an additional fifty exhibits and new legal briefs that the parties submitted to address the standard established by the Supreme Court decision.

At the new hearing, EPA and MDNR argued that CPC, the parent corporation, should be held directly liable as an operator of the site because: (1) a CPC employee who coordinated environmental matters for CPC and its subsidiaries allegedly controlled the environmental affairs of Ott II in a way that exceeded normal oversight by a parent corporation over the activities of its subsidiaries;

and (2) CPC operated the chemical manufacturing portions of the plant along with its subsidiary in manufacturing certain chemicals intended for use by CPC. EPA and MDNR also argued that CPC was liable because the way in which CPC acquired the plant from Ott I constituted a *de facto* merger between the two corporations.

On their first point, EPA and MDNR argued that G.R.D. Williams, an in-house lawyer at CPC who coordinated CPC's environmental affairs, exerted excessive control over the pollution control decisions of Ott II. EPA and MDNR cited memos in which Williams had demanded that Ott II obtain his approval for all environmental decisions, and urged Ott II to delay installing pollution control devices. However, the court rejected this argument because the company records showed that "Ott II generally did not comply with such requests" by Williams. Therefore, the court concluded that Williams did not actually have authority to require Ott II to take any particular action with respect to environmental matters, and that Williams' actions did not show that CPC exerted excessive control over the environmental practices of Ott II.

EPA's and MDNR's second argument was that CPC had actually operated the plant, either on its own or in a joint venture with Ott II, because CPC lent money to Ott II to expand production facilities for a chemical that CPC needed; arranged for Ott II to manufacture a new chemical developed by CPC; and arranged for Ott II to manufacture a paper coating product for CPC. The court rejected all these arguments, because the evidence did not show that there was a joint venture between the two corporations, and because Ott II personnel denied that anyone outside Ott II had the authority to direct manufacturing at the facility. Therefore, the court concluded that EPA and MDNR had failed to show that CPC exerted sufficient actual control over the manufacturing operations of the facility to make CPC liable as an operator of the facility.

Finally, EPA and MDNR argued that CPC should be held liable under CERCLA as a successor corporation to Ott I, which had operated the plant from 1957 to 1965. The court held that EPA and MDNR had waived that legal theory because they had not notified CPC before the 1991 trial that they would make such an argument, and because neither of them had listed that argument as an issue to be briefed when the district judge asked the parties to identify issues remaining to be decided after the

Supreme Court's 1998 decision. Even though the district court held that EPA and MDNR had waived the issue, it went on to consider their arguments, and decided that CPC was not a successor to Ott I.

4. Resource Conservation and Recovery Act

a. *United States v Kyle*, 24 Fed Appx 447 (CA 6, 2001).

The Sixth Circuit upheld a sentence handed down by a Tennessee district court following a plea of guilty to storing hazardous waste without a permit in violation of the Resource Conservation and Recovery Act (RCRA). The Sixth Circuit held that the district court had properly applied the United States Sentencing Guidelines by declining to adjust the sentence downward based on the "relatively innocuous nature" of the offense, and by adjusting the sentence upward based on the defendant's past criminal conduct.

Michael Kyle and his partner, Edward Johnson, operated Custom Concepts, Inc. (CCI), a fiberglass automotive parts company located in Tennessee. CCI generated a variety of hazardous waste, including acetone, xylene, and toluene, and had a history of improperly storing, labeling, and disposing of that waste. In January 2000, after being evicted from the building in which it operated, CCI abandoned the premises and left behind seventy-two 55-gallon drums containing various liquid wastes and fiberglass resins. In February 2000, EPA initiated a criminal investigation into the abandoned drums and discovered that fourteen of those drums contained regulated hazardous waste. Kyle and Johnson were subsequently arrested and indicted on three separate counts of criminal RCRA violations. Both men ultimately plead guilty to Count One, which charged that "from on or about [the] 20th day of October, 1998, and continuing until on or about the 7th day of July 2000," the two men knowingly stored hazardous waste without a permit, and the other two counts were dismissed. In exchange for the dismissal of Counts Two and Three, the men agreed to admit to all of the facts alleged in the indictment and in the "agreed Factual Basis" of the crime, and waived all their rights except for the right to appeal their sentence.

The district court accepted Kyle's plea agreement and sentenced him to 5 months of imprisonment and three years of supervised release. The district court based this sentence, in part, on Kyle's criminal history of driving under the influence (DUI) and for committing the

environmental offense while on probation for that crime. Kyle appealed, claiming that the district court's sentence was excessive because it did not take into account the "relatively innocuous nature" of the hazardous waste involved and it improperly assumed that Kyle had committed the environmental offense while on probation for the unrelated DUI. The Sixth Circuit rejected both of Kyle's claims.

With respect to the "relatively innocuous nature" of the hazardous waste, Kyle argued on appeal that the district court failed to consider the nature, quantity and risk associated with the illegally abandoned waste. Kyle claimed that none of the fourteen abandoned drums had leaked and, in any case, "the quantity was so minimal that it did not present a threat." The Sixth Circuit noted that, although Kyle had raised these claims at his sentencing hearing, he provided no supporting evidence whatsoever during the hearing or on appeal. "Rather, he merely reiterated his view that in relation to other environmental offenses (and compared to the really reprehensible actions he could have undertaken with regard to the hazardous waste that he illegally stored), this offense was innocuous." The Sixth Circuit found that the district court properly determined that, although it *could* have reduced Kyle's sentence, the facts presented by Kyle at the sentencing hearing did not justify a downward departure from the sentence recommended in the Sentencing Guidelines. Accordingly, the Sixth Circuit rejected Kyle's claims.

With respect to Kyle's prior criminal history, the district court had increased Kyle's sentence in accordance with the Sentencing Guidelines because the court found that he was on probation for a prior DUI conviction at the time he committed the environmental offense. The district court found that Kyle was placed on probation for his DUI convictions on June 1, 2000, more than a month before CCI's former landlord disposed of the hazardous waste that CCI had abandoned. On appeal, Kyle argued that the illegal storage of hazardous waste ended in February 2000 when EPA began its criminal investigation, long before Kyle's DUI probationary period had started. Although it is not clear why Kyle believed that the environmental offense ended in February 2000, the Sixth Circuit found that it "need not address this issue-or Kyle's related claim that the district court failed to make specific factual findings with regard to the date the offense terminated-*because Kyle plead guilty to this offense.*" (Emphasis added.) Kyle's guilty plea expressly admitted that the beginning and ending dates of his offense were

October 20, 1999 and July 7, 2000, respectively. The Sixth Circuit noted that "when a defendant voluntarily and knowingly enters into a guilty plea, that individual admits all [claims] of fact in the indictment." Accordingly, the Sixth Circuit held that the district court properly increased Kyle's sentence because he was on probation for at least a portion of the time period of the environmental offense.

b. Aero-Motive Co v Becker, 2001 WL 1698998 (WD Mich, 2001).

Aero-Motive Co. (AMC) filed for reconsideration of the court's previous order granting defendant Becker's motion for summary judgment in part, and denying Aero-Motive's motion for partial summary judgment. Upon reconsideration, the court found that it had 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 RCRA. The court affirmed its decision dismissing plaintiff's claims for money damages, because they are not available under RCRA, but 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, who claimed, relying on Fifth Circuit precedent, that the plaintiff's CERCLA contribution claim against it should be dismissed because the plaintiff had voluntarily undertaken the clean-up, and the plaintiff had no CERCLA §106 or §107 claim pending against it. The court rejected the Fifth Circuit's decision, relying instead on earlier district court decisions cited by the Fifth Circuit, and stated that the plaintiff did not have to be subject to a §106 or §107 claim before it sought contribution from the defendant.

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

a. Steeltech, Ltd v EPA, 273 F3d 652 (CA 6, 2001).

The Sixth Circuit upheld the assessment of a \$61,736 penalty imposed upon a Michigan company for failure to file reports required under the Emergency Planning and Community Right to Know Act (EPCRA) in a timely manner. Steeltech, Ltd. (Steeltech) manufactures iron, nickel, chromium and cobalt-based alloy castings at a facility in Grand Rapids. When produced in sufficient quantities, nickel, chromium and cobalt are considered

“toxic” chemicals subject to annual reporting requirements known as “Form R” reports under EPCRA. Steeltech’s failure to submit Form R reports for these chemicals first came to light during a consensual inspection of Steeltech’s facility by EPA in February 1992. During that inspection, Steeltech was informed by EPA that the necessary Form R reports for 1988-1990 had not been submitted. Steeltech submitted Form R reports for 1988-1990 the day after the inspection.

In September 1994, EPA filed an administrative complaint against Steeltech for failure to file timely Form R reports for 1988-1990. Shortly thereafter, in October 1994, a Steeltech official notified EPA that the company had failed to file additional Form R reports in 1992 and 1993. In response, EPA amended its administrative complaint to include additional counts for the failure to submit the 1992 and 1993 Form R reports. After a hearing, the administrative law judge (ALJ) dismissed all counts relating to the 1988 Form R reporting because the five-year statute of limitations had expired on those counts, but found Steeltech liable for a total of nine violations in 1989, 1990, 1992 and 1993. Although a maximum penalty of \$225,000 was permissible under EPCRA for nine violations, EPA had proposed a penalty amount of \$74,390 based on its “Enforcement Response Policy” (ERP). The stated purposes of the ERP are to: “ensure that enforcement actions for violations of EPCRA . . . are arrived at in a fair, uniform and consistent manner; that the enforcement response is appropriate for the violation committed; and that persons will be deterred from committing EPCRA . . . violations.” The ERP establishes an elaborate methodology for assessing civil penalties for EPCRA violations. Based on the ERP, the ALJ reduced the assessed penalty to \$61,736. This assessment was upheld by the Environmental Appeals Board and the United States District Court for the Western District of Michigan.

On appeal to the Sixth Circuit, Steeltech did not deny that it was liable for violations of EPCRA. Instead, Steeltech argued that the penalty imposed was excessive and that a penalty of \$10,000 would have been fair and appropriate under the facts of the case. In support of its appeal, Steeltech argued: (1) that the ALJ and EPA had inappropriately applied the ERP as if it were a regulation, rather than a policy; and (2) that the facts developed in the administrative hearing support the conclusion that the ERP should not have been applied in this case. The facts that Steeltech cited in support of its argument

included: (1) its lack of knowledge of its reporting responsibilities under EPCRA prior to 1992; (2) its poor financial condition for much of the period at issue, which required its principal officers to concern themselves solely with keeping the company in business; and (3) the failure of EPA to demonstrate any harm to the environment or any adverse effect on the public’s right to know under the statute.

The Sixth Circuit concluded that the ALJ’s opinion clearly indicated that the ERP was only a policy, not a rule, and that the ALJ had discretion to depart from the ERP if there was reason for doing so. In particular, the ALJ concluded that it is appropriate to apply the ERP to a violator, such as Steeltech, that had not intentionally violated EPCRA because EPCRA imposes strict liability for even unintentional violations and Steeltech’s case did not present any extraordinary circumstances that required deviation from the ERP. Regarding the calculation of the \$61,736 penalty, Steeltech argued that there was “substantial evidence” established during the hearing before the ALJ to support its position that the ERP should not have been applied to it at all. The Sixth Circuit held, however, that the relevant question was whether there was “substantial evidence” to support the ALJ’s conclusion that the ERP should be applied to Steeltech, not whether there was substantial evidence to support Steeltech’s position. The Sixth Circuit concluded that there was adequate evidence to support the ALJ’s decision and, therefore, it affirmed the decision to assess a civil penalty of \$61,736 against Steeltech.

6. Safe Drinking Water Act

a. *WR Grace & Co v EPA*, 261 F3d 330 (CA 3, 2001).

The United States Court of Appeals for the Third Circuit vacated an emergency order issued by the EPA, Region 5 under the Safe Drinking Water Act (SDWA) that would have required W.R. Grace & Co. (Grace) to remove ammonia from the aquifer that provides drinking water for the City of Lansing, Michigan. The decision is unusual because EPA relied on a rarely used statute, the case was decided by the Third Circuit instead of the Sixth Circuit, and the result was an unusual defeat for EPA.

Grace disposed of ammonia-containing wastes from fertilizer manufacturing at the Motor Wheel Disposal Site located near Lansing, Michigan. Other companies disposed of various other wastes at the site, including

volatile organic compounds (VOCs) and metals. In 1986, EPA listed the site on the NPL maintained under CERCLA. In 1991, EPA selected a CERCLA cleanup plan for the site that included capping the landfill and pumping and treating groundwater from the contaminated upper aquifer below the site. EPA's Superfund program considered VOCs to be the principal groundwater contaminants, although the Record of Decision (ROD) established groundwater cleanup criteria for a number of other hazardous substances in the upper aquifer, including a cleanup criterion for ammonia of 34 milligrams per liter (mg/l). The Superfund program did not require any remediation at the lower aquifer, also known as the Saginaw Aquifer, which is a source of drinking water for the City of Lansing. In 1994, EPA entered into a consent decree with a group of potentially responsible parties (PRPs), including Grace, under which the PRP group agreed to implement the Superfund cleanup plan.

In 1997, the Lansing Board of Water & Light (Lansing) became concerned that the lower aquifer was becoming contaminated with ammonia. In 1998, MDEQ became concerned that the 34 mg/l cleanup criterion for ammonia in the Superfund consent decree was not stringent enough to protect the lower aquifer. Lansing and MDEQ were concerned that even low levels of ammonia in the lower aquifer might cause a problem known as "nitrification" at the drinking water supply plant, and might promote the growth of microbes that could cause the drinking water plant to violate federal and state drinking water regulations. MDEQ asked the Safe Drinking Water Branch at EPA Region 5 to address the problem. In October, 1998, EPA's Safe Drinking Water Branch concluded that 1.75 mg/l would be an appropriate cleanup criterion for ammonia to protect the Lansing water supply. After reviewing a report prepared by a consultant hired by Lansing, the Safe Drinking Water Branch decided that an even more stringent standard of 0.5 mg/l would be appropriate. Background levels of ammonia in the lower aquifer are approximately 0.1 to 0.5 mg/l.

In February, 1999, EPA issued an emergency order under Section 1431 of the SDWA requiring Grace to reduce the level of ammonia in the lower aquifer to 0.5 mg/l. In response, Grace asked EPA to form a technical committee to consider various options for dealing with ammonia in the lower aquifer. EPA withdrew its order, established the Saginaw Aquifer Technical Evaluation Team (SATET), and announced that it would issue a new order based on the findings and recommendations of SATET. SATET

included representatives from Grace, EPA, Lansing, and MDEQ. SATET considered a variety of options, including a pump and treat remedy for the lower aquifer, blending contaminated water with uncontaminated water, and treating contaminated water at the wellhead to remove ammonia. In May, 1999, SATET issued a final report recommending that ammonia be removed from the lower aquifer by a pump-and-treat system as a long term remedy, and that other options be used in the short term to prevent ammonia-related problems at the drinking water plant. EPA and Grace disagree on whether Grace concurred with or objected to SATET's final report.

In July 1999, EPA issued a second emergency order under Section 1431 of the SWDA, based on the findings and recommendations in SATET's final report. The order required Grace to reduce the level of ammonia in the lower aquifer to 1.2 mg/l by installing and operating a pump-and-treat system, and to take several interim actions to ensure that ammonia in the raw water taken in by the plant does not exceed 1.2 mg/l. Grace asked the United States Court of Appeals for the Third Circuit, located in Philadelphia, Pennsylvania, to review EPA's emergency order. The SDWA allows a party that receives an EPA emergency order to seek judicial review by the United States court of appeals for the circuit in which the party resides or transacts business. This explains why the Third Circuit in Philadelphia, rather than the Sixth Circuit in Cincinnati, reviewed the EPA order in this case.

The Third Circuit overturned EPA's order for two reasons. First, the court held that EPA had failed to provide a rational basis for the 1.2 mg/l cleanup criterion for ammonia. EPA stated in the order that it based the 1.2 mg/l cleanup criterion on a conclusion in the SATET final report that 1.2 mg/l is the maximum amount of ammonia that the Lansing water treatment plant can handle. The court concluded that EPA's statement "mischaracterizes the record," because the SATET final report shows that SATET had, in fact, conducted no technical study to determine the maximum level of ammonia that the plant could handle without jeopardizing public health. The court concluded that SATET apparently treated the 1.2 mg/l criterion "as an unquestioned baseline in SATET's mission statement." EPA pointed to two sections of the SATET final report to support its contention that SATET had conducted a technical study to support the 1.2 mg/l criterion. The court concluded that neither section of the report showed that SATET had done so. Therefore, the court concluded that the 1.2 mg/l criterion was not

supported by any technical study, and that EPA's order selecting that criterion was therefore arbitrary and capricious. The court noted that EPA and SATET had reviewed a study by a consultant hired by Lansing that had concluded that any ammonia exceeding 0.5 mg/l would adversely affect the water treatment plant. However, the court held that EPA could not use the consultant's report to support its order because the order did not cite that report, and because that report called for a cleanup criterion different from the criterion included in the order.

The court then considered whether there was a rational basis to support EPA's conclusion that removal of ammonia from the lower aquifer by a pump-and-treat system was necessary to protect public health. EPA stated in the order that SATET had concluded "that the only way to avoid this risk was through the removal of excess ammonia from the Saginaw aquifer." The court found, on the contrary, "that there was sharp disagreement among the members of SATET as to whether this form of remediation would be necessary." To support its position, EPA relied on a statement in the SATET report that "the ultimate resolution of the [ammonia problem] lies in remediation of the Saginaw Aquifer." The court found that that statement by SATET does not mean that a pump and treat remedy is the only way to protect public health, as EPA had stated in its order. The court further explained that EPA should have provided "more than a conclusory statement from SATET" to support EPA's selection of a pump and treat remedy. The court was also critical of the lack of reasoning in the SATET final report on this issue, noting that final report deleted, without explanation, a discussion in SATET's draft report that had stated that public health could be adequately protected by either turning off selected wells or by replacing contaminated wells. The court noted that the SATET final report provided no rational explanation for recommending pump and treat remediation of the aquifer when the draft report had previously concluded that other strategies would also be effective. The only apparent explanation for the difference between the discussion in the draft report and the discussion in the final report was that the Lansing representative on SATET strongly opposed anything other than the pump and treat remedy. The court held that a decision based on the opposition of one technical representative is not rationally based on the facts concerning ammonia contamination and the availability of various remedies to protect public health. The court therefore overturned the order because it failed to provide

a rational explanation for requiring pump and treat remediation.

This case is significant because it demonstrates a willingness by the court to make a thorough and critical examination of the factual support for an EPA administrative order issued to address an "emergency." Few courts in the past have engaged in such a critical analysis of an "emergency" order. This case is unusual because EPA chose to issue an emergency administrative order under Section 1431 of the SDWA rather than an order under Section 106 of CERCLA. If it had issued an order under CERCLA, Grace would not have been entitled to judicial review of the order until after it had fully complied with it.

7. Miscellaneous

a. *Palazzolo v Rhode Island*, 533 US 606 (2001).

The United States Supreme Court held that the acquisition of land with notice of a prior regulation does not, in itself, bar the buyer from claiming that the regulation constitutes a taking. The Court also reversed the Rhode Island Supreme Court's holding that a landowner's takings claim, arising from the state coastal protection agency's denial of the landowner's permit to develop coastal wetlands, was not ripe, but it affirmed the Rhode Island Supreme Court's holding that the landowner failed to establish the deprivation of all economic value of his wetlands property.

In 1959, Anthony Palazzolo (Palazzolo) and several associates formed Shore Gardens, Inc. (SGI) to purchase an 18-acre waterfront parcel of land (Property) in Westerly, Rhode Island. Most of the Property was salt marsh designated as coastal wetlands under Rhode Island law. Over the next seven years, SGI made several attempts to develop the Property and submitted intermittent applications to state agencies to fill extensive portions of the Property. All applications were denied.

In 1978, ownership of the Property passed from SGI to Palazzolo, who continued efforts to develop the Property. In 1983, Palazzolo submitted a new application to develop the Property as a beach club, which included a request for permission to fill the entire marsh area on the Property. The Rhode Island Coastal Resources Management Council (Council) rejected the application, citing concerns about the waters and wetlands of the area. In 1985, Palazzolo submitted a more limited beach club proposal, which

included a request for permission to fill 11 acres of the Property.

The Council also denied this request, stating that, under its regulations, a landowner wishing to fill salt marsh in the affected area needed a “special exception” from the Council. The Council determined that the beach club proposal conflicted with the regulatory standard for a special exception. To secure a special exception under the Council’s regulations, the proposed activity must serve a “compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests.” Palazzolo sued in state court, asserting that the Council’s application of its wetlands regulations constituted a regulatory taking without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. He alleged that the Council’s action deprived him of “all economically beneficial use” of his property, resulting in a complete taking of his property requiring compensation, and sought damages in the amount of \$3,150,000.

After an adverse ruling by the lower court, the Rhode Island Supreme Court affirmed. The state supreme court held that Palazzolo’s takings claim was not ripe for a review by a court; that Palazzolo had no right to challenge regulations predating 1978, when he became the owner of the Property; and that his claim of deprivation of all economically beneficial use of the Property was contradicted by evidence that \$200,000 in development value remained on an upland (non-wetland) parcel of the Property. Palazzolo appealed to the United States Supreme Court. The Court reversed the state supreme court’s holding that Palazzolo’s takings claim was premature and its holding that Palazzolo was barred from challenging regulations that predated his ownership of the Property, but affirmed the state supreme court’s holding that Palazzolo failed to establish a deprivation of all economic value of the Property.

The state supreme court had held that Palazzolo’s takings claim was premature because he had not received a final decision from the Council. The state supreme court reasoned that, although the Council had rejected Palazzolo’s effort to fill in all of the wetlands, and then rejected his proposal to fill 11 of the wetland acres, perhaps an application to fill (for example) five acres would have been approved. Thus, the court reasoned, doubt remained as to the extent of development the Council would allow on the Property due to Palazzolo’s failure to explore other

uses for the Property that would involve filling substantially less wetlands. According to the state supreme court’s ruling, it apparently was Palazzolo’s duty to keep applying until he either found that point or exhausted all possibilities.

The Court, however, noted that “the unequivocal nature of the wetland regulations at issue” and “the Council’s application of the regulations to the subject property” precluded permission to fill any wetlands on the Property. The Court observed that the Council’s regulations allow for a special exception to fill wetlands only when a compelling public purpose is served. However, the Council had concluded that Palazzolo’s proposals did not meet the compelling public purpose standard and did not indicate that it would have allowed filling of a smaller area. Thus, the Council’s decisions “make plain that the agency interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands Further permit applications were not necessary to establish this point.”

The state supreme court had found Palazzolo’s claim to be premature also because he had failed to seek permission for a use of the Property that would involve development only of its upland, non-wetlands portion. The Court responded that, in determining the question of ripeness, “it is important to bear in mind the purpose that the final decision requirement serves. Our ripeness jurisprudence imposes obligations on landowners because ‘[a] court cannot determine whether a regulation goes “too far” unless it knows how far the regulation goes.’ Ripeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land’s permitted use.” The Court found that the record revealed no real dispute as to the extent of development that the state would have permitted on Palazzolo’s upland parcel. Further, Palazzolo’s failure to apply for permission to develop the subdivision that was the basis for the damages sought in his inverse condemnation suit did not render his claim unripe. By virtue of the Council informing Palazzolo that he could not fill the wetlands, it logically follows that they would not allow him to fill and then build a subdivision on the Property.

The state asserted yet a third ripeness issue. The state claimed that, because Palazzolo had never applied for permission to develop the 74-lot subdivision that was the

basis for the damages claimed in his takings suit, he could not now be heard to claim that permission for such a use had been denied. The state argued that the subdivision proposal may have been unapprovable by other agencies for reasons other than wetlands, such as zoning or sewage disposal considerations. The state accused Palazzolo of a hide-the-ball strategy of submitting applications for more modest uses to the Council, only to assert later a takings action based on the purported inability to build a much larger project. The Court rejected the state's argument, reasoning that its inquiry was limited to whether the challenged agency action makes clear the extent of development permitted. In such a case, it held, "federal ripeness rules do not require the submission of further and futile applications with other agencies."

The Court then turned its attention to the state supreme court's holding that Palazzolo could not claim to be deprived of all economic use of the Property because the wetlands regulations were in force when he took title to the Property. The state supreme court had reasoned, in part, that Palazzolo had no reasonable investment-backed expectation to develop the whole Property because a purchaser is deemed to have notice of an existing restriction and, therefore, is barred from claiming that it effects a taking. The Court disagreed, holding that if the Court accepted the state's argument, the transfer of title after enactment of a law affecting property would absolve the state of its obligation to defend its action and would, in effect, put an expiration date on the Constitution's prohibition against the taking of private property by government without just compensation.

Having held that the case is ripe and that the date of transfer of title did not bar Palazzolo's takings claim, the Court then turned to the merits of the takings claim. The state supreme court had held that, even if Palazzolo's claim was ripe and allowable, he did not have a meritorious takings claim because a taking requires that the government action has taken essentially all economically beneficial use of the land. The Court agreed. The Court noted that even Palazzolo agreed that the Property retained \$200,000 in development value under the state's wetland regulations. The Court acknowledged that a state may not evade a takings claim on the premise that the landowner was left with a token interest. That was not the case here, however: "A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the land 'economically idle.'"

Palazzolo pressed his argument further, arguing for the first time in the case that "the upland parcel is distinct from the wetlands portions, so he should be permitted to assert a deprivation limited to the latter." The Court noted that "[t]his contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. . . . Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole . . . , but we have at times expressed discomfort with the logic of this rule." However, the Court found a basis on which to decline to review the issue, because Palazzolo "did not press the argument in the state courts, and the issue was not presented in the petition" to the Court. Therefore, the Court sent the case back to the Rhode Island court for further proceedings.

b. Maharg, Inc v Van Wert Solid Waste Mgt Dist, 249 F3d 544 (CA 6, 2001), cert. denied, 122 S Ct 810 (2002).

The Sixth Circuit held that an Ohio county's regulatory scheme restricting the disposal of county waste to landfills that agreed to pay the county disposal tax did not violate the Commerce Clause of the United States Constitution. The challenged regulatory scheme was adopted by the Van Wert Solid Waste Management District (the District), a public entity created under Ohio law to plan for the management of solid waste generated within Van Wert County, Ohio. Maharg, Inc., a solid waste hauling company doing business within the county, challenged the scheme as unconstitutional.

Ohio's solid waste laws authorized the District to designate in the county's solid waste management plan specific disposal facilities to accept the county's solid waste. Facilities that are not designated in the plan are not authorized to receive the county's waste and a person delivering waste to an undesignated facility could be fined up to \$5,000 per day. In August of 1998, the District adopted a resolution stating that the District would begin the disposal facility designation process and requesting that operators of solid waste disposal facilities submit proposals to provide disposal services to the county. The resolution explained that "each successful designee would be required to execute a 'designation agreement' obligating the designee to collect a 'contract fee' of \$5.30 for each ton of solid waste generated within the District and delivered to the designated facility." The District sent copies of the request for proposals to thirteen disposal facilities located in Ohio and Indiana, including Jay County

Landfill, Inc., a landfill located in Indiana with which Maharg regularly did business.

Although the District initially included the Jay County landfill in Van Wert's list of designated facilities, the District later rescinded that designation because the landfill's owner refused to enter into the designation agreement. Ultimately, the District designated eight disposal facilities in the county's plan. Seven of those facilities were located in Ohio and the eighth was located in Indiana; however, the Jay County landfill was not included in the plan. Maharg sued the District in federal court, arguing that, by including only one out-of-state disposal facility in the county plan, the District had imposed an impermissible restriction on interstate commerce in violation of the Commerce Clause. The Commerce Clause generally prohibits state and local governments from discriminating against, or unreasonably burdening, commerce among the states or foreign countries. The United States Supreme Court has held that solid waste disposal services and solid waste, itself, are articles of commerce protected by the Commerce Clause.

Maharg first argued that the plan's effect on interstate commerce was "direct" rather than merely "incidental," and that the Commerce Clause prohibited such direct regulation regardless of any beneficent purpose that may underlie the regulation. Maharg argued that "Van Wert County's scheme constitutes a 'direct regulation' of interstate commerce . . . because it expressly bans interstate trade with *any* of the thousands of undesignated landfills nationwide." The court, however, rejected Maharg's formal distinction between direct and indirect regulation of interstate commerce, stating that "what is important is the 'practical effect' of the challenged tax." Looking at the practicalities of the case, the court found that "there is no reason to suppose that Maharg has the slightest interest in disposing of Van Wert County waste at any undesignated landfill other than the one it formerly patronized in nearby Jay County." The practical effect of the District's plan, the court held, was that "the Jay County landfill has been put off limits for Van Wert County waste because of the refusal of the operator of the Jay County landfill to enter into a designation agreement obligating it to collect a \$5.30 per ton contract fee (a tax, in economic effect) on behalf of Van Wert County." The federal constitutionality of that tax, the court held, hinged on whether it discriminated against interstate commerce or otherwise imposed a burden on interstate commerce that

was "clearly excessive in relation to the putative local benefits" and not whether the tax directly or indirectly effected interstate commerce.

Maharg next argued that the District's scheme discriminated on its face against interstate commerce because it "restrict[s] solid waste exports to but one out-of-state landfill." The court, however, found that Maharg was not being prohibited from disposing of Van Wert County waste at the Jay County landfill because of its out-of-state location. To the contrary, the court found that the District ignored state lines when it initially requested bids from nearby landfills. The court held that the sole reason the Jay County landfill was excluded from the final list of designated facilities was its refusal to enter into the designation agreement and pay the \$5.30 per ton tax on Van Wert County waste. Thus, the court concluded that the District's scheme treated Ohio and out-of-state landfills evenhandedly.

Maharg also argued that, even if the District's scheme did not overtly discriminate against interstate commerce, it nonetheless had the "practical effect" of such discrimination because: (1) interstate commerce would be effectively strangled if other states or counties adopted a similar scheme; and (2) the District's scheme "deprived Maharg of the competitive advantage it had gained by utilizing the interstate market." The court rejected this argument as well. The court found that, even if "every county in both Indiana and Ohio were to adopt a regulatory scheme identical to Van Wert County's," there was "no reason to suppose that the movement of waste between the two states would be eliminated or severely impaired." The court also found that the Commerce Clause did not prohibit the District from impacting any competitive advantage that Maharg may have formerly enjoyed. The court stated that "Maharg's investment in the trucks and people that have allegedly enabled it to enjoy economies of scale in hauling waste to Jay County would not appear to have been jeopardized by the surcharge as such. The surcharge may be an annoyance, but it is an equal-opportunity annoyance. It is not a protectionist measure burdening only the operators of foreign facilities." Accordingly, the court held that the District's regulatory scheme did not have the practical effect of discriminating against interstate commerce.

Maharg next argued that, even if the District's scheme was not discriminatory at all, the scheme was unconstitutional because it imposed a burden on interstate

commerce that was clearly excessive in relation to the putative benefits. Although the court acknowledged that the District's scheme placed *some* burden on interstate commerce, the court held that this burden was not "excessive," and rejected this argument as well. Thus, the court held that the Commerce Clause did not prohibit the District's regulatory scheme, which restricted the disposal of Van Wert County waste to certain designated landfills that had agreed to pay the District's disposal tax.

c. **United States v Kentucky**, 252 F3d 816 (CA 6, 2001), cert denied, 122 S Ct 396 (2001).

The Sixth Circuit held that federal laws governing radioactive materials preempt the State of Kentucky's solid waste laws. As a result, the State's environmental agency cannot impose restrictions on the disposal of solid wastes generated by the United States Department of Energy (DOE) in a DOE landfill on the basis of the radioactive nature of the wastes.

In 1995, the Kentucky Natural Resources and Environmental Protection Cabinet (Cabinet) issued DOE a permit to construct a solid waste landfill for contained solid wastes generated by DOE's Paducah Gaseous Diffusion Plant, a facility designed to produce enriched uranium fuel. In 1996, the Cabinet issued DOE an operating permit for the landfill which imposed restrictions on the radioactivity levels of solid wastes that could be placed in the landfill. Through Kentucky's administrative processes, the DOE appealed the permit restrictions that related to radioactive characteristics of the wastes that the DOE could dispose of in the landfill. But the Cabinet affirmed the permit restrictions. The DOE then sued the Cabinet in state court for a review of the Cabinet's decision. In April 1999, following the DOE's unsuccessful administrative appeal of the State's permit restrictions and before its proceedings in state court, the DOE sued the State of Kentucky in the United States District Court for the Western District of Kentucky. The DOE sought an order from the District Court invalidating the State's restrictions on the DOE's handling of radioactive solid wastes.

The DOE argued in the district court that the Atomic Energy Act of 1954 preempts state regulations relating to disposal of radioactive materials. Moreover, the DOE contended that the federal government is immune from state regulation. The State countered that the district court should dismiss the DOE's suit, arguing that under prior precedent, the district court should accord discretion to the Cabinet and decline jurisdiction over the case.

Article VI, Section 2 of the United States Constitution provides that notwithstanding anything in a state's laws or constitution, laws of the United States authorized by the United States Constitution "shall be the supreme Law of the Land." In accordance with the United States Constitution, the Supreme Court's precedents have articulated two ways in which state laws may be preempted by federal laws:

1. Congress clearly indicates its intent to completely occupy a given field of regulation, leaving virtually no room for regulation by the states; or

2. Even if Congress has not completely displaced state regulation in a given field, state law is still preempted to the extent that it conflicts with federal law, either when it is impossible to comply with both state and federal law or when state law presents an obstacle to the accomplishment of Congress' legislative intent.

The district court compared the treatment by federal agencies of the two federal laws addressing wastes - RCRA and the Atomic Energy Act. Under RCRA, the United States promulgated regulations governing the generation, treatment, and disposal of hazardous wastes. RCRA authorizes states to enforce RCRA regulations in lieu of the federal government. Under the Atomic Energy Act, the DOE promulgated regulations governing the handling of radioactive materials. But the Atomic Energy Act does not authorize states to regulate radioactive wastes in lieu of the federal government. Moreover, the district court observed that in cases involving mixed wastes - that is, wastes containing both hazardous wastes and radioactive wastes - RCRA, which may be enforced by states, governs the hazardous waste portion of the wastes, while the Atomic Energy Act, which is not enforced by the states, governs the radioactive portion of the mixed wastes. Thus, because the solid wastes generated by the Paducah DOE Plant were potentially subject both to RCRA and the Atomic Energy Act, only the federal government could impose conditions on the plant's disposal of radioactive materials. Therefore, the district court concluded that the State of Kentucky's attempt to regulate the radioactive materials was preempted by federal law.

The State appealed the district court's decision to the Sixth Circuit, arguing that the Cabinet has authority under Kentucky solid waste laws to regulate solid waste disposal, including solid wastes that contain radioactive materials. The mere fact that the Paducah DOE Plant generates state-

regulated solid wastes that happen to contain radioactive materials should not, according to the State, preclude state regulation. Moreover, the State argued that the Atomic Energy Act does not expressly regulate solid wastes contaminated with radioactive materials. But the Sixth Circuit pointed out that the disputed permit conditions expressly limited the amount of radioactivity that the DOE may place in its landfill. Those conditions represented a clear attempt by the State to regulate materials exclusively regulated by the Atomic Energy Act. Under United States Supreme Court precedent, **Pacific Gas & Electric Co v State Energy Res Conservation & Dev Comm'n**, 461 US 190 (1983), the Supreme Court has held that “the federal government has occupied the entire field of nuclear safety concerns.” Thus, the Sixth Circuit concluded, “[w]hile federal law does not preempt state solid waste regulations, . . . states may not regulate the radioactive component of solid waste.” Therefore, the Sixth Circuit held that the State’s permit conditions regulating the radioactive content of solid wastes are preempted by federal law.

The State also contended that the district court did not explain why the State’s regulation of solid wastes that happened to also be radioactive conflicted with the Atomic Energy Act. The Sixth Circuit emphasized, however, that because, under the Supreme Court’s **Pacific Gas & Electric** decision, the federal government completely occupies the field of regulation of radioactive materials, DOE had no need to identify specific conflicts between the State’s permit conditions and federal law in order to show that the permit conditions were preempted by federal law.

Because the district court found the State’s permit requirements preempted by federal law, the district court did not consider the DOE’s argument that the federal government’s radioactive materials management practices were immune from regulation by the State. However, the Sixth Circuit addressed the question by simply noting that the RCRA definition of solid waste expressly excludes radioactive materials regulated under the Atomic Energy Act. Thus, although RCRA contains provisions expressly waiving federal sovereign immunity with respect to state solid waste regulation, the United States has not, under RCRA or any other law, waived immunity from state regulation of radioactive materials. Therefore, the DOE facility was immune from state regulation of its radioactive materials.

The State of Kentucky vigorously argued that the district court should not have even considered DOE’s case

because the court should have accorded discretion to the State under prior precedent and law. The State contended that because the DOE’s lawsuit was still pending in state court, the district court should have abstained from hearing the DOE’s case and dismissed the federal lawsuit. However, the Sixth Circuit quoted prior precedent, which stated:

When state and federal courts have concurrent jurisdiction to decide preemption questions, a federal court should abstain to allow the state court to decide the preemption issues. However, . . . if the issues present facially conclusive claims of federal preemption, we will not abstain, but instead will decide the preemption question.

GTE Mobilnet of Ohio v Johnson, 111 F3d 469, 475 (CA 6, 1997). The Sixth Circuit agreed with the district court’s conclusion that the DOE’s claim that the Atomic Energy Act facially preempted state solid waste laws, and obviated any state court findings. Because the Sixth Circuit agreed with the district court’s finding that the Atomic Energy Act preempts state solid waste regulations to the extent that such regulations control handling of radioactive materials and could see no justification for abstaining from addressing the DOE’s claim, the Sixth Circuit affirmed the district court’s ruling that state permit conditions relating to disposal of radioactive materials were preempted by federal law.

d. **United Dairy Farmers, Inc v United States**, 267 F3d 510 (CA 6, 2001).

The Sixth Circuit affirmed a district court’s decision that a dairy company could not deduct soil remediation costs as ordinary business expenses under 26 USC 162 of the Internal Revenue Code (the Code). The dairy company claimed that its soil remediation costs at two separate properties were ordinary and necessary business expenses allowing the continued use of the property, but the government claimed that the remediation resulted in permanent improvements that allowed a different use of the property and, therefore, must be capitalized under 26 USC 263(a) of the Code.

United Dairy Farmers, Inc. (UDF), an Ohio corporation, manufactures and distributes milk and ice cream products to its own convenience stores, and sells its products to over 1,000 wholesale accounts throughout a six-state area. In 1989, UDF purchased two stores, store #649 in Columbus, Ohio and store #140 in Cincinnati,

Ohio, both which contained underground gasoline storage tanks left behind by former occupants. On both properties, the tanks had leaked, causing soil contamination. UDF, although aware of soil contamination at both sites, paid more for the sites than they were worth in their contaminated state. In 1990, UDF spent \$136,864 on soil remediation for the store #649 property. In 1991, UDF spent \$123,698 on soil remediation for the store #140 property. Subsequently, in 1993 UDF took a \$259,980 deduction pursuant to § 162 of the Code for the cleanup costs. The Internal Revenue Service (IRS) determined that these costs could not be deducted, and the district court affirmed this decision. UDF appealed.

At a trial hearing, UDF had the burden of proving, by a preponderance of the evidence: (1) that any assessments imposed by the IRS were arbitrary and erroneous; and (2) the amount of deduction to which it was entitled. Section 162(a) of the Code allows deduction of all “ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.” However, under § 263(a)(1) of the Code, an expense cannot be deducted if it is capital in nature, meaning an expense “paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate.” So, if an expense were to fall under the language of § 263(a), that section would “trump” the deductibility provision of § 162(a), and the expense would have to be capitalized. Therefore, in order to be deductible, the expense must be both “ordinary and necessary” within the language of § 162(a) and fall *outside* the group of capital expenditures covered by § 263(a). Because the Code describes what should be capitalized generally, but enumerates allowable deductions specifically, “deductions are strictly construed and allowed only as there is a clear provision therefor.”

UDF claimed that its soil remediation costs were deductible as ordinary and necessary business expenses under § 162. The government claimed, however, that these expenditures resulted in permanent improvements to UDF’s property and, therefore, must be capitalized under § 263.

The Fourth Circuit has recently addressed the issue of deductibility of environmental cleanup costs under § 162. In **Dominion Resources, Inc v United States**, the court considered whether environmental cleanup costs were simply repairs, and thus deductible under § 162, or permanent improvements, which must be capitalized

under § 263. The Fourth Circuit’s analysis relied on a test that focused on the nature of the improvement, rather than on the value added by the improvement. Under **Dominion Resources**, costs that simply restore value to property “that existed prior to deterioration or to a discrete event that damaged the property” are deductible as repairs under § 162, while costs that allow the property to be used “in a different way” must be capitalized under § 263. To determine whether UDF’s environmental cleanup costs allowed the property to be used “in a different way,” the court had to decide whether UDF’s property conditions should have been evaluated prior to contamination of the soil, as UDF claims it should have been, or after the contamination, as the government contends it should have been. UDF contended that property conditions should have been evaluated “prior to the condition necessitating the expenditure.” However, the district court declined to apply this analysis to the UDF issue because the district court considered this to apply only to “restoration cases,” in which a taxpayer acquires property in a clean condition, then contaminates it in the order of everyday business operations. In contrast, UDF purchased both properties *after* they had been contaminated. The Sixth Circuit agreed.

UDF offered no comparisons of its property use before and after the soil remediation was completed, and offered no arguments or testimony that its property use after the cleanup was unchanged, or, in other words, that its post-cleanup property use was not being used in a “new and different” way. Therefore, UDF failed to show that it had a right to the § 162 deduction. Furthermore, the court found that the large environmental cleanup costs incurred by UDF, relative to the two properties’ value, make UDF’s claim of simply making incidental repairs to clean up the properties and keep them running efficiently seem suspect. In this case, UDF incurred nearly \$260,000 in cleanup costs for the two properties that it actually purchased for only \$765,000. UDF made a last argument that it was entitled to deduct the remediation expenses as bad debt expenses, because the prior owners had a legal obligation to reimburse UDF for the expenses and did not. Because this issue was brought up for the first time on appeal, the court found the argument without merit. Therefore, for the reasons stated above, the Sixth Circuit affirmed the district court’s decision dismissing UDF’s claims that they were due a readjustment by the IRS.

It should be noted that this case may have limited practical application as a result of the enactment of the

Federal Taxpayer Relief Act (TRA) in 1997 (the expenditures at issue by UDF were all incurred prior to 1997). Under the TRA, environmental cleanup costs for brownfield properties are fully deductible business expenses in the year in which the costs are incurred and do not have to be capitalized. These provisions apply to eligible costs incurred or paid from the date of enactment (August 5, 1997) of the TRA. Under the original provisions of the TRA, eligible property must have been located in “targeted areas” based on several factors including poverty level, zoning and population, among other factors. In 2000, Congress expanded the TRA and extended the sunset to January 1, 2004. As a result of the 2000 amendments, it is no longer necessary that an eligible property be within a “targeted area” as long as the “State Environmental Agency” confirms in writing that the property “is an area at or on which there has been a release (or threat of release) or disposal of a hazardous substance” and the site is not on, or proposed for, the Federal NPL. A site that is contaminated solely from a petroleum release is also not eligible.

e. *Isle Royale Boaters Ass’n v Norton*, 154 F Supp 2d 1098 (WD Mich, 2001).

The United States District Court for the Western District of Michigan held that a group of boaters had standing to bring a lawsuit challenging a General Management Plan (GMP) adopted by the National Park Service; however, the court also held that the Park Service acted within its authority and had not violated any federal regulations in adopting the GMP.

Isle Royale National Park (Isle Royale) is a federal wilderness area located on an island in the waters of Lake Superior. In February 1994, the Park Service began the process of preparing a GMP to guide the administration of the island for the next 15 - 20 years. A series of public meetings was held, and in March 1998, the Park Service produced a draft GMP, which also served as an Environmental Impact Statement (EIS) required by the National Environmental Policy Act (NEPA). The draft GMP contained five alternative plans, one of which was selected as the preferred plan by the Park Service. After comments and revisions, a final GMP/EIS was produced in August 1998, which outlined the alternatives for managing the Park, and identified the preferred plan. A ROD selecting the preferred plan was put into effect in May 1999.

The goal of the chosen GMP stated the following:

To meet the diverse expectations and needs of Isle Royale visitors while emphasizing the natural quiet that is fundamental to wilderness experiences. All park areas will be available to all visitors, so long as users participate in ways that are consistent with the access, facilities, and opportunities provided. Management zones will provide guidance for managing specific areas for desired visitor experience and resource conditions.

The Plan provided that:

Campgrounds will be designed and access provided to separate motorized and non-motorized uses in a few areas; certain docks will be removed or relocated, for example, and some new campgrounds will be provided. A variety of uses will be available that will be fairly evenly distributed across the island. Use limits may become necessary in some management zones to prevent overcrowding and maintain quiet and solitude. Quiet/no-wake water zones will be established to reduce noise and wake impacts in numerous areas. Other regulations aimed at reducing sound associated with humans will also be implemented.

The Isle Royale Boaters Association (the Boaters), a group of motorboaters who regularly visit Isle Royale, disagreed with many aspects of the proposed GMP, particularly those affecting motorboaters. The Boaters sued the United States Department of Interior, of which the National Park Service is a part, to stop implementation of the new GMP. The Boaters’ objections were that the plan proposed to remove some docks and shelters, to remove a trail, and divide the park into zones allowing varying levels of use and modification of the environment within these levels, and created future non-motorized zones in the Park. The Boaters alleged that the Park Service’s proposed actions violated several statutes, including the Administrative Procedures Act (APA), the Americans with Disabilities Act (ADA), the Rehabilitation Act, the Wilderness Act, and NEPA. The Boaters’ lawsuit was brought under the APA, which governs the procedures with which federal agencies adopt new rules or take “final agency actions.” Under the APA, a court may set aside an agency’s decision only if the decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” Under an

APA lawsuit, a court must consider whether the agency acted within the scope of its legal authority, adequately explained its decision, based its decision on facts on the record, and considered relevant factors.

The Park Service initially argued that the Boaters did not have standing to bring the suit because the GMP was not a final agency action that harmed the Boaters. But the court found that a prior Sixth Circuit case, *Sierra Club v Slater*, 120 F3d 623 (CA 6, 1997) was precedent for concluding that “a final EIS or the ROD issued thereon constitute the ‘final agency action’ for purposes of the APA.” In the Boaters’ case, the GMP also served as a final EIS, which was a final agency action. Because the Boaters engage in motorboating in and around the Park and could face injury to these interests if the Park Service carried out the GMP/EIS, the Boaters had the right to sue to protect their interests under NEPA because the EIS is a NEPA requirement.

The court next reviewed whether the Boaters had standing to bring suit under the Rehabilitation Act and the ADA. The Boaters stated in their complaint that their membership includes members who are disabled. The Rehabilitation Act extends its coverage to “any person aggrieved by any act or failure to act by any recipient of Federal assistance of a Federal provider of such assistance under section 504 of this Act.” The Park Service, being a unit of the Department of the Interior, is a “Federal provider of . . . assistance under section 504 of this Act;” and it provides assistance to a “department, agency, special purpose district, or other instrumentality of a State or of a local government.” The court concluded that Rehabilitation Act applies to the Department of the Interior, and that even non-disabled individuals who are affected by discrimination against disabled individuals may be “aggrieved,” and be allowed sue under the Rehabilitation Act if they are directly affected by the action taken against a disabled individual.

Under the ADA, the lawsuit could be brought under section 42 USC 12132, which provides that “[t]he remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 . . . shall be the remedies, procedures and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202.” The court found that the Boaters could sue under the ADA on the same terms as under the Rehabilitation Act even though they were not themselves disabled.

Several Boaters complained that they would suffer harm as a result of the impact of the proposed GMP on themselves and disabled family or friends. One boater was concerned that the GMP’s ban on generators in the park would prevent him from keeping refrigerated medicines there so that his sick son could enjoy the park. Another complained that a doctor who uses the park could not bring along refrigerated medicines in case park visitors needed his care. But the court found that because the boy had outgrown his illness and the doctor’s need was just a precaution in case someone needed medicine, no alleged actual injuries that would confer standing were caused by the GMP. Other boaters complained that removing one of the docks would prevent them from getting to parts of the park because of poor health or old age, requiring them to backpack to those areas. But the court rejected the moderate difficulty or pain in walking as harm sufficient to give the Boaters the right to sue. Only one out of four affidavits submitted with the lawsuit showed sufficient injury to sue the Park Service under the Rehabilitation Act and the ADA. It was submitted by an individual who was sufficiently disabled that he could not get out of a boat without a dock. Because certain docks were planned to be removed from the Park, this affidavit was sufficient to give the Boaters the right to sue. The Boaters also complained of the Park Service’s plan to divide the Park into zones, some of which would prohibit motor boats, to remove certain docks and add others, and to remove certain shelters accessible to motorboaters, and eliminate a particular trail. The Boaters alleged that these plans were “arbitrary and capricious.” The court, however, found that the GMP was consistent with the Wilderness Act because the Wilderness Act leaves much to the discretion of the Park Service. The proposed actions were intended to “preserve and protect the park’s wilderness character for use and enjoyment by present and future generations,” which satisfied the Wilderness Act’s broad discretionary standard. The Park Service cited safety concerns with respect to certain docks and noted that the number of docks would actually increase from 20 to 22. The court found nothing arbitrary or capricious in the dock plans. Similarly, the court found the reduction of shelters from 88 to 70 to be consistent with the Wilderness Act’s general prohibition of shelters in wilderness areas and, therefore, not arbitrary or capricious. Finally, the court found the Park Service’s plan to close a particular trail was intended to protect archaeological resources and that the Boaters failed to show that resources would be harmed by the trail’s closure.

The Boaters complained that Isle Royale Wilderness Act required continued maintenance of dock facilities, noting that several docks were in poor repair. The court pointed out that the Park Service has considerable discretion in how it manages the Park, and found no indication that the amount of dock space would be reduced under the GMP. Moreover, the Boaters did not provide evidence that any docks had deteriorated to the point that they were unusable or that any failure to maintain the docks had harmed the Boaters. Thus the Boaters' allegations of Isle Royale Wilderness Act violations had no merit.

The Boaters complained that the GMP emphasized resource protection at the expense of visitor use and enjoyment, while the National Park Service Organic Act and Isle Royal National Park Act require a balancing of these factors. The court again disagreed. For example, the GMP separates the Park into zones, some of which provide quiet/no-wake water areas, reducing noise to meet the needs of hikers and canoe/rowboat paddlers. The court found that overall, the GMP equally emphasized resource protection and use and enjoyment.

The Boaters complained that the GMP violated NEPA because it did not rigorously analyze alternatives, including the "no action" alternative. NEPA rules dictate the procedures for analyzing alternative actions: (1) rigorously explore all reasonable alternatives; (2) consider each alternative in detail; (3) include alternatives that other agencies may implement; (4) include the "no action" alternative; (5) identify the preferred alternative; and (6) indicate any mitigation measures to be taken not part of the proposed action. Also, NEPA requires agencies to conduct a five-step analysis of its selected alternative: (1) state the environmental impact of the action; (2) state any unavoidable adverse environmental effects of the action; (3) identify alternatives to the action; (4) explain the relationship between short-term and long-term effects of the action; and (5) describe irreversible commitments of resources resulting from the proposed action.

The Boaters did not complain that the Park Service did not conduct an analysis of alternatives. Rather, they complained that the Park Service's analyses were too brief. The court pointed out that NEPA regulations do not "prescribe a minimum page length for discussion of alternatives." Instead, the EIS must simply serve its purpose in helping an agency properly consider the environmental impacts of its decisions. One specific

concern expressed by the Boaters was the lack of a site-specific analysis, failure to supplement the EIS after changes were made between the draft GMP and the final GMP, failure to disclose critical documents, and lack of accuracy in the Park Service's analysis of park visitor counts and integrity in the economic feasibility of the GMP. The court found that: (1) the GMP indicated that a site-specific analysis would be performed for each individual action before it is performed, satisfying the site-specific analysis requirement; (2) the changes made to the GMP after the draft was publicized were too minor to warrant a supplemental EIS; (3) the documents that the Park Service allegedly failed to disclose were already public documents; and (4) the visitor count errors were insubstantial and the economic analysis was conducted by an independent firm with no evidence of undue influence by the agency. Therefore, the court rejected these allegations.

The Boaters claimed that the GMP would make access to the park more difficult for disabled persons by removing certain docks and shelters. The court rejected this claim as well, noting that more docks would be available under the GMP and few of the shelters being removed were readily accessible from any docks. Thus, the boaters could not make a credible claim of harm to handicapped users of the park. In conclusion, although the Boaters were able to show that they had standing to sue, the court found none of their claims had merit. Thus, the Court dismissed the suit.

f. Northwoods Wilderness Recovery, Inc v United States Forest Service, No. 2:00-CV-15 (WD Mich, 2001).

The United States District Court for the Western District of Michigan granted summary judgment to the United States Forest Service (Forest Service), finding that an environmental group failed to provide facts to support its arguments that the Forest Service had not followed applicable procedures in approving the selective cutting of a national forest.

On February 11, 1999, the Forest Service authorized the selective cutting of 804 acres of northern hardwood trees in the Ottawa National Forest. Northwoods Wilderness Recovery, Inc. (Northwoods), an environmental group, filed an administrative appeal with the Forest Service. After an appeals officer affirmed the Forest Service's decision, Northwoods appealed to the district court. In its complaint, Northwoods alleged that, in approving the selective cutting, the Forest Service: (1) violated the terms of a forest plan; (2) failed to adequately

assess the environmental impact of the approved logging; (3) failed to adequately assess the impact of the approved logging on several species of birds and wildlife; and (4) failed to issue an EIS when one was required by law.

The National Forest Management Act (NFMA) requires the development of strategic plans for the management of each unit of the Forest Service. In 1986, the Ottawa National Forest issued its plan (forest plan), which divided the forest into several Management Areas (MAs), and specified strategies for each MA. The plan for the MA at issue in the case provided for the selective cutting of a maximum average of 2800 acres of trees per year. The Forest Service's decision would result in the cut acreage exceeding this average. As a result, Northwoods argued that the Forest Service had violated the terms of the NFMA.

The court observed, however, that the forest plan provided that there would be no restriction on the acreage of "uneven-aged sugar maples" that could be selectively cut within any ten-year period. To avoid dismissal of its claim, Northwoods would have had show that the MA contained trees *other* than sugar maples. Northwoods failed to provide any such information. In fact, the record indicated that "sugar maples [would] be the dominant type of tree harvested" in the selective cutting. Therefore, the court dismissed the claim relating to violation of the forest plan.

NEPA requires all federal agencies to provide an EIS detailing the environmental impact of any "major Federal action significantly affecting the quality of the human environment." Federal regulations allow an agency to conduct an Environmental Assessment (EA) in order to determine whether an EIS is necessary. The Forest Service performed an EA and issued a Finding of No Significant Impact (FONSI), finding that the selective cutting would have no significant impact on the environment. Northwoods claimed that the Forest Service had not adequately considered the potential environmental impacts in the EA and FONSI, and thus, had violated NEPA. The court noted that, in analyzing an agency's final decision, it would set aside the agency's determination only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law This is a difficult standard for [Northwoods] to satisfy, and they have not done so here." The Forest Service had in fact conducted a detailed examination of the potential environmental impact of the selective logging. Thus,

Northwoods had not met its burden of proof, and its claim relating to environmental impact was dismissed.

Northwoods also claimed that the EA inadequately assessed the impact of selective logging on four species: (1) the northern goshawk; (2) the American bittern; (3) the red-shouldered hawk; and (4) the Canada lynx. Northwoods alleged that with respect to each species, the Forest Service had made erroneous conclusions and relied on insufficient and/or faulty data. The court found, however, that the Forest Service had specifically addressed each animal at issue, and had used reliable studies to form its conclusions, and thus dismissed Northwoods's claim relating to impact on birds and wildlife. The court noted that Northwoods was "[b]asically . . . asking the Court to accept their scientific studies and reject those relied upon by [the Forest Service]. 'When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts.'" Finally, Northwoods attacked the Forest Service's decision that an EIS was not necessary, alleging that the EA had failed to consider several factors required to be considered by federal regulations. The court noted the holding of the Sixth Circuit that "[a]n agency decision, based on an EA, that no EIS is required, can be overturned only if it is arbitrary, capricious, or an abuse of discretion," which placed a heavy burden of proof on Northwoods, requiring it to show that the Forest Service's decision was clearly wrong. The court further observed that, in contrast to Northwoods's claim that the Forest Service had failed to consider required factors, the EA contained a detailed analysis of those factors. Because Northwoods did not provide any other reasons why the decision was wrong, it failed to present facts to support its claim, and its claim was dismissed.

g. Heartwood, Inc v United States Forest Service, 2001 WL 1699203 (WD Mich, 2001).

The United States District Court for the Western District of Michigan held that an environmental group did not have standing to challenge the Forest Service's decision not to prepare an EA of the agency's planned wildlife habitat improvement projects in a national forest because the group did not demonstrate that its members used the specific forest lands or observed the wildlife that would be affected by the planned projects.

Heartwood, Inc. (Heartwood) sued the Forest Service and the district manager for the Huron-Manistee National Forest (Forest) (collectively, Defendants), alleging that the

Forest Service had failed to comply with the NEPA by failing to prepare a publicly available EA before deciding to perform various wildlife habitat improvement projects. In December 1999, the Forest Service issued a "scoping letter" describing proposed wildlife habitat improvement projects for the Service for the next fiscal year. The Forest Service received four responses to the scoping letter from the public, including one from Heartwood. In March 2000, the Forest Service prepared a "biological assessment" pursuant to the Endangered Species Act (ESA) to assess the potential effects of the proposed projects on federally listed or proposed endangered species with the potential to be found in or near the project areas. The biological assessment concluded that the projects would have no effect on any such species. The Forest Service also performed a "biological evaluation" to evaluate the potential effects of the projects on sensitive species other than those listed or proposed to be listed as endangered under the ESA. The biological evaluation concluded that the projects could have potential impacts on three such species.

In April 2000, the Forest Service issued a Notice of Decision and Decision Memo regarding the work. The Decision Memo described the details of the projects as well as the results of the biological assessment and biological evaluation. The Decision Memo addressed whether an additional EA of the projects' environmental impact pursuant to NEPA was required. NEPA was intended to ensure that decisions regarding "major federal action" would take into account all relevant information relating to the impacts of the action on humans and the environment. NEPA requires federal agencies to prepare an "environmental impact statement" for major federal actions that significantly affect the quality of the human environment. In addition, regulations promulgated by the Council on Environmental Quality (CEQ) provide that, even if a federal action is one which does not categorically require an EIS, the agency in question must prepare an EA to help it consider whether the action will, in fact, significantly affect the environment. If so, the agency must prepare an EIS.

The CEQ regulations also direct federal agencies to identify "categorical exclusions" to NEPA requirements, defined as "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by" the federal agency. If a proposed action falls within a categorical exclusion, the agency need not prepare and EIS or and EA. The

regulations also require an agency to establish exceptions to the categorical exclusions for "extraordinary circumstances in which a normally excluded action may have a significant environmental effect." Under these regulations, the Forest Service adopted procedures implementing NEPA's requirements, including a list of categorical exclusions and extraordinary circumstances for determining when an EIS or EA would be required. Those procedures had been published and made available for public comment in 1991 and 1992.

In the case at hand, the Forest Service's Decision Memo concluded that an EA was not required under NEPA because the project fell within the Forest Service's categorical exclusion for "wildlife habitat improvement activities which do not include the use of herbicides or do not require more than one mile of low standard road construction" and there were no "extraordinary circumstances." The decision was considered final and not subject to appeal. Nonetheless, Heartwood attempted to appeal and comment on the Decision Memo, claiming that an "extraordinary circumstance" was present. The Forest Service denied the appeal, and Heartwood appealed to the court. Both parties moved for summary judgment.

The Defendants argued that they were entitled to summary judgment because Heartwood lacked standing to bring its claim. The doctrine of standing is based on Article III of the United States Constitution, which limits the jurisdiction of the federal courts to "cases" and "controversies." United States Supreme Court decisions have long held that standing is an essential part of the Constitution's case-or-controversy requirement. Over the years, the courts have developed a three-part standing test. First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not just hypothetical. Second, the challenged action of the defendant must have caused the injury. Third, it must be likely that the injury will be redressed by the requested relief. Further, the courts have held that a party cannot simply rely on injury to the environment; rather, the party must show that he has or will suffer some individualized, concrete harm as a result of an alleged violation of a law by the defendant. The party must "somehow differentiate himself from the mass of people who may find the conduct of which he complains to be objectionable only in an abstract sense."

In this case, Heartwood argued that it had standing because it presented evidence that “its members use the area of the Forest that will be affected by the projects and thus will suffer injury to their interest in aesthetic or recreational enjoyment of the affected area.” Heartwood also claimed that its members had “suffered an informational injury as a result of the Forest Service’s failure to prepare an EA.” Therefore, Heartwood claimed, it had demonstrated that it, or its members, had suffered an injury-in-fact.

The court began its analysis by observing that the United States Supreme Court has held that, in the context of environmental laws such as NEPA, “plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.” Other courts, the court observed, “have reduced the injury in fact requirement under NEPA to a two-part test requiring a plaintiff to show: (1) that by failing to comply with NEPA the agency created or increased the risk of actual, threatened, or imminent or environmental harm; and (2) the failure to comply has increased the risk of environmental harm to a concrete interest of the plaintiff as shown by either a ‘geographical nexus to, or actual use of the site of the agency action.’”

In support of its claim to have standing, Heartwood offered affidavits from three of its members, all of whom alleged that they use the Forest, including the areas to be subject to the proposed projects, for various recreational purposes, and that the proposed projects would affect their use and enjoyment of the Forest. The court held that these affidavits were insufficient to confer standing on Heartwood. Relying on the United States Supreme Court’s 1990 decision in *Lujan v National Wildlife Federation*, the court held that “the statements in the affidavits offered by Heartwood about use of ‘the project area’ or use of ‘the area which is the subject of this lawsuit’” were too vague. The court noted that this case involved “small, discrete areas of a very large tract of land,” and that “[t]he projects . . . will occur on 86 of the 531,000 acres of land” within the Forest, “representing only 0.02% of the total land space [W]hen faced with a motion for summary judgment on the issue of standing, a plaintiff must do more than assert generalized allegations in an affidavit which could *conceivably* demonstrate use of the affected land; rather, a plaintiff must set forth specific facts showing injury from use of the affected land.” (Original emphasis.) The affidavits offered by Heartwood, the court held, “do

not meet this requirement,” because they did not provide details showing past or future planned use of the specific project areas. Accordingly, the affidavits did “not suffice to establish actual injury” to the affiants “because [they] did not provide a factual basis to conclude that the affiant[s] will suffer an actual injury to [their] recreational or aesthetic values by, for example, viewing the effects of the action on the environment.”

Heartwood placed great weight on the United States Supreme Court’s decision in *Friends of the Earth, Inc v Laidlaw Environmental Services, Inc*, (2000), in which the plaintiff group was found to have standing where, among other things, one of its members had canoed in a river approximately forty miles downstream of a source of pollution. The court, however, concluded that *Friends of the Earth* was distinguishable because the group’s members in that case established that they used the polluted river, whereas Heartwood had failed to show that its members would use the land that would be affected by the Forest Service’s projects. Further, Heartwood had failed to show that the projects’ effects would “transcend the boundaries of the project area and impact the same watershed and the same wildlife used and observed by its members.”

The court also rejected Heartwood’s claim that it had standing because it had “suffered an informational injury as a consequence of the Forest Service’s improper use of a categorical exclusion, i.e., it was denied information about the projects which should have been included in an EA.” Essentially, Heartwood was alleging that the Forest Service’s alleged violation of NEPA in failing to prepare an EA injured its ability to disseminate information that is essential to its activities. The court stated that it had found no Supreme Court or Sixth Circuit precedent addressing whether “informational injury” may suffice to satisfy Article III’s standing requirements in a NEPA case. Other courts, however, had found “that allowing informational injury to supply the basis for Article III standing in a NEPA case would be contrary to established Supreme Court precedent requiring more than a mere interest in an environmental problem to confer standing because any plaintiff, whether organization or individual, could meet the standing requirement by simply alleging a need for the information for environmental purposes.” Therefore, the court granted the Defendants’ request for summary judgment and dismissed the lawsuit on the basis that Heartwood lacked standing to pursue its claims in federal court.

h. *Sierra Club v United States Fish & Wildlife Service*, 189 F Supp 2d 684 (WD Mich, 2002).

The United States District Court for the Western District of Michigan granted summary judgment to the MDNR and the United States Fish and Wildlife Service (USFWS) under the doctrines of mootness and standing.

MDNR had applied for, and received, several forest management grants from USFWS under the authority of the federal Pittman-Robertson Act. The Sierra Club filed suit to force MDNR and USFWS to comply with the proper regulatory procedures concerning four grants: (1) the Operations and Maintenance Grant; (2) the Hunting Access Grant; (3) the Planning Grant; and (4) the Habitat Management Grant. Specifically, the Sierra Club alleged that MDNR and/or USFWS had: (1) violated NEPA by segmenting grant requests according to the activities the grants would support, rather than applying for one grant covering all activities; (2) violated NEPA by applying a categorical exclusion to the Operations and Maintenance Grant, so that an assessment of the environmental impacts of the grant would not be required; (3) violated NEPA by failing to prepare other EAs; (4) violated the ESA by failing to perform an intra-agency consultation as to impacts on endangered species; and (5) violated the Pittman-Robertson Act by inadequately specifying the activities to be performed with funds from some of the grants. The court observed that in order to prove its case under these statutes, the Sierra Club had to show that the USFWS's decisions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." MDNR and USFWS moved for summary judgment on all of the Sierra Club's claims.

Before entertaining the merits of a party's arguments, however, a court must answer the threshold question of whether the court has the power to hear the suit. Article III of the United States Constitution limits the jurisdiction of federal courts to actual "cases and controversies." This limitation encompasses the doctrines of standing, justiciability, and mootness. The court here found that it did not have the power to hear any of the Sierra Club's claims, based on the doctrines of standing and mootness. To pass the test for mootness, the relief sought, if granted, must "make a difference to the legal interests of the parties." In other words, a claim must be dismissed if "subsequent events make it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." MDNR

had stopped applying for the Habitat Management Grant after 2000, and was no longer receiving those funds, so any relief the court might order for that grant would not have any effect on the parties. Thus, the court held that the Sierra Club's claims concerning the Habitat Management Grant were moot.

With respect to Article III standing, the court observed that a claimant must show: (1) a "concrete" and "particularized" injury; (2) a causal connection between the injury and the conduct complained of; and (3) that the injury is redressable. The Sierra Club claimed that two types of injuries were caused by MDNR and USFWS's violations. First were "aesthetic injuries," which are potential effects on plants and wildlife. Second were "informational injuries," caused by failures to perform the studies required under the various statutes underlying the Sierra Club's claims. Aesthetic injuries are "concrete" and "particularized." However, the Sierra Club failed to show a causal connection between the injuries and the alleged violations and how the court's requiring compliance with various regulations would compensate for those injuries. The court noted that harm to plants and wildlife, if it occurs, is caused by actual forest mismanagement practices, not by procedural regulatory violations. Furthermore, forcing MDNR and USFWS to comply with the proper procedures for grant issuance would not necessarily affect actual forest management activities that occur after the grants are issued, and, thus, would not redress the injuries complained of. Therefore, the court held that the Sierra Club lacked standing to bring any claims on the basis of aesthetic injuries. Following its earlier decision in **Heartwood, Inc v United States Forest Service**, the court held that "informational injuries" in the context of violations of environmental regulatory procedures are insufficient to confer standing. Because the Sierra Club did not claim any injuries that passed the test for standing, it lacked standing to bring any of its claims. Thus, all of the Sierra Club's claims were dismissed.

i. *Hunley v DuPont Automotive*, 174 F Supp 2d 602 (ED Mich, 2001).

The United States District Court for the Eastern District of Michigan granted summary judgment to DuPont Automotive (DuPont), holding that DuPont did not breach its duty to a security guard who claimed that he was injured in connection with a paint spill at DuPont's plant.

In 1997, a 2,400 gallon paint spill occurred at DuPont's paint manufacturing facility. At the time of the spill, the plaintiff, Jerome Hunley, was working at the facility as a Pinkerton security guard. Certain policies and procedures established that, in the event of a spill, security guards were to generate a series of head count reports to account for all employees at the plant, but were not to enter the spill area. After the paint spill, Mr. Hunley was sent into the paint spill area by his Pinkerton supervisor to deliver head count reports to the fire brigade chief. Mr. Hunley alleged that he was not warned of any danger or provided with protective clothing for his visit to the spill area. Two days later, Mr. Hunley was driving his pickup truck at a speed of sixty to eighty miles per hour, against rush hour traffic, when his truck became airborne and landed on top of another vehicle, killing the woman inside. Following the traffic accident, he acted bizarrely and was ultimately diagnosed with schizophrenia. Mr. Hunley filed suit against DuPont, alleging that his schizophrenia was caused by exposure to the paint spill, and that DuPont was negligent in failing to warn him of the dangers associated with such a spill and/or provide him with protective clothing to guard against such dangers. In order to avoid summary judgment, Mr. Hunley needed to establish and prove that: (1) DuPont owed a duty to protect him; (2) DuPont breached that duty by falling below the required standard of care; (3) DuPont's failure to meet that standard of care caused his mental illness; and (4) he was entitled to compensation for his injuries. DuPont argued that it did not have a duty to protect Mr. Hunley because the events that resulted from his exposure to the paint spill were unforeseeable. The court observed, however, that DuPont's argument did not affect the initial question of whether a duty existed. The court held that DuPont did have a duty to protect its contracted security guards from paint spills.

In deciding whether DuPont breached its duty to protect its contracted security guards from paint spills, the court first had to establish the standard of care that DuPont owed to the guards. The court first noted that contracted security guards are generally deemed to be "business invitees" of the owners of the premises they are hired to guard. An owner of premises is required to warn business invitees of danger "only if the danger was actually known of or, by the exercise of reasonable care, should have [been] known to pose an unreasonable risk to the invitee." In other words, DuPont had to warn Mr. Hunley of: (1) known risks; and (2) reasonably foreseeable risks. The court held that DuPont had not breached its duty to

protect Mr. Hunley. First, the court observed that it was not "foreseeable that witnessing an emergency response to a paint spill could cause a psychotic episode," and DuPont was only required to protect against known or foreseeable risks. Second, the court noted that the plant's policy of forbidding Pinkerton security guards from entering a spill area was adequate protection against the type of harms that *could* foreseeably result from exposure to a paint spill.

The court further held that, even if DuPont had failed to adequately warn or protect Mr. Hunley, he had assumed the risk of his injuries. The assumption of risk doctrine "provides that an employee assumes the risks of injury from ordinary activities," and, therefore, cannot recover from an employer for injuries incurred while performing those activities. The doctrine is limited, however, to an employer-employee situation. Mr. Hunley was employed by Pinkerton rather than by DuPont and, thus, was not DuPont's employee. Therefore, the conventional assumption of risk doctrine would not apply to Mr. Hunley. The court examined past Michigan court decisions, however, and determined that assumption of risk could apply to a non-employee "if he/she is harmed by performing the very duty that he/she has been hired to perform." Because Mr. Hunley alleged that his injuries were incurred while he was delivering a head count, which was one of the duties he was hired to do, Mr. Hunley assumed the risk of injury. Because Mr. Hunley failed to prove the "breach of duty" element of a negligence case, and had also assumed the risk of his injuries, the court awarded summary judgment to DuPont. This made it unnecessary for the court to examine the issues of causation and damages.

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

The United States District Court for the Eastern District of Michigan held that a rendering plant is not a "nuisance per se" under Michigan law and denied the City of Melvindale's motion for a preliminary injunction that was brought three years into the case.

Darling International, Inc. (Darling) operates a rendering plant in Melvindale, Michigan. Rendering involves the use of heat and pressure to reduce dead animals and unused animal parts from slaughtering houses into ingredients used in consumer, medical, and industrial processes. Two actions were brought against Darling. One was brought by certain residents of Melvindale and the other was brought by the City of Melvindale. Both the

residents and the City alleged that Darling's plant emits noxious odors and pollutants including air contaminants from animal by-products, which they characterized as the "Darling odor." The City's claims were not brought on behalf of its citizens, but on the City's own behalf, alleging interference with the City's use of its property and loss of tax revenue from declining property values.

The residents asserted that Darling's emissions constitute a "nuisance per se," which is defined as "an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained." The court explained that the activity complained of must be "an intrinsically unreasonable or dangerous activity, without regard for care or circumstances," and if it "serves a beneficial public purpose and is capable of being performed in a manner so as not to pose any nuisance, then it cannot be considered a nuisance per se." A nuisance per se is a question of law for the court and, therefore, is well suited for consideration before trial.

The court first observed that the residents had attached to their motion copies of complaints that Darling's plant emitted a bad odor, which would appear to be more of an argument that Darling's activities constitute a nuisance *in fact* (as opposed to a nuisance per se), a claim that would not be appropriate for consideration at that stage in the case. The residents also argued that Michigan case law holds that a rendering plant such as Darling's constitutes a nuisance per se - citing a 1927 case in which the Michigan Supreme Court held that decaying garbage in a "piggery" may constitute a nuisance per se. The court observed that no Michigan case had determined, however, that the sort of activities pursued by Darling constitute a nuisance per se. The residents also cited another Michigan Supreme Court case from 1926 for the proposition that slaughterhouses are regarded as a "prima facie" nuisance. The court stated, however, that a "prima facie" nuisance is a form of nuisance *in fact*, not a nuisance per se. Therefore, the residents were unable to present any case law that provided a basis for the court to hold that Darling's activities constitute a nuisance per se.

The residents finally argued that the violation of a zoning ordinance constitutes a nuisance per se because a Michigan statute provides that "a use carried on in violation of a local ordinance or regulation adopted pursuant to [the City and Village Zoning Act] is a nuisance per se." As evidence of violations, the residents cited complaints

filed with, and notices of violation issued by, the Wayne County Department of Environment, Air Management Division (WCAMD) and a "Stipulation for Entry of Final Order by Consent" (Consent Order) entered into with WCAMD.

Darling argued that many Michigan cases show that industries similar to Darling's do not constitute a nuisance per se, and the court observed that the only case involving a rendering plant stated that, if operated in an area zoned for such a use, a rendering plant does not constitute a nuisance per se. Regarding the residents' zoning ordinance violation argument, Darling argued that there was no legally admissible evidence of the alleged violations. The court agreed that the complaints filed with, and notices of violations issued by, WCAMD were inadmissible under the Federal Rules of Evidence (FRE) because Darling entered nolo contendere (i.e., "no contest") pleas in response to them. Further, the very terms of the Consent Order provided that Darling entered into it for settlement purposes only, that the Order did not constitute an admission of liability by Darling, and it was not an admission that Darling had violated the law. The FRE also provides that settlements such as the Consent Order are not admissible to prove liability for a claim. Because there was no Michigan case law showing that Darling's operation constituted a nuisance per se and there was no admissible evidence of a violation of state or municipal law, the court denied the residents' motion for summary judgment on liability for operating a nuisance per se.

Regarding the City's motion for a preliminary injunction, the court first observed that it was "peculiar" for the City to seek a "preliminary" injunction three years into the litigation. The court explained that it must consider and balance four factors when ruling on a motion for a preliminary injunction: (1) whether the moving party has a strong likelihood of success on the merits; (2) whether the moving party would suffer irreparable injury without the injunction; (3) whether issuing the injunction would cause substantial harm to others; and (4) whether issuing the injunction would serve the public interest.

In considering the first factor, the court observed that, based on its previous discussion, the City did not have a strong likelihood of success on the merits on a nuisance per se claim. The court further observed that the City also did not have a strong likelihood of success on the merits of a nuisance in fact claim in light of facts asserted by Darling that there are other industries in the area that

may account for all or a part of the odor complained of. The court stated that the mere possibility of success was not sufficient to grant a preliminary injunction. Regarding the second factor, the court stated that the City must show that the harm that would result without the preliminary injunction must be irreparable, and not merely substantial. The court observed that the harm alleged to be suffered by the City, a decline in property values, is not irreparable because it can be compensated by monetary damages. Further, the City's three-year wait in requesting a preliminary injunction cut against its contention that the harm allegedly suffered is irreparable.

Considering the third factor, the court stated that it appeared that issuing the preliminary injunction would not cause substantial harm to non-parties to the litigation, but it certainly would cause substantial harm to Darling. The court also observed that one of the purposes of a preliminary injunction is to preserve the status quo for trial - i.e., to preserve the relative positions of the parties until the trial is held, which would not happen if the City was granted the injunction. With respect to the fourth factor, the court stated that while it would be in the public interest to reduce the noxious odors coming from Darling's plant, it also would be "in the public interest to resist efforts at [obtaining a] preliminary injunction on the eve of trial after three years of litigation." Therefore, in light of its consideration of the four factors, but primarily because the City would not suffer irreparable harm, the court denied the City's request for a preliminary injunction.

k. Olden v LaFarge Corp, 203 FRD 254 (ED Mich, 2001).

The United States District Court for the Eastern District of Michigan held that the emission of cement kiln dust (CKD) from a cement manufacturing facility and subsequent accumulation of the CKD on private property did not give rise to a trespass or public nuisance claim, but could form the basis for a private nuisance or negligence claim. The court additionally declined to abstain from hearing the case on the grounds that it might interfere with state proceedings, and held that the suit could properly be brought as a class action.

The defendant, LaFarge Corporation, has owned and operated a cement plant in Alpena, Michigan since 1987. The plant is subject to the requirements of several federal and Michigan environmental statutes, as well as the terms of a consent order between LaFarge and the Michigan

Attorney General concerning several violations of Michigan environmental law. CKD is a fine powder that is a byproduct of the cement manufacturing process. As a result of its operations, LaFarge's plant emits some CKD into the air, which can cause a bad odor and cover vehicles, homes, and outdoor vegetation with a "white film" when it settles. Additionally, the CKD allegedly had caused damage to vinyl siding and had killed rose bushes on at least one occasion. The plaintiffs, several Alpena residents who were affected by the CKD accumulation, filed a class action suit, claiming damages, requesting injunctive relief, and requesting court-ordered medical programs resulting from "the loss of use and enjoyment of home and property, mental and emotional anguish, diminution of market value of their property, and injury to personal and real property." The residents based their claims on the theories of trespass, nuisance, and negligence. Although the CKD emissions from LaFarge's plant were identified as the cause of all the residents' injuries, the extent of those injuries, and the amount of damages claimed, varied among the different residents. LaFarge argued that the residents' claims should be dismissed because the residents did not set forth the factual basis necessary to support their claims. Additionally, LaFarge asked the court to abstain from deciding the case, and attacked the certification of the residents as a class, instead claiming that the residents' suits should be brought individually.

The court first noted that, in federal cases based on diversity jurisdiction such as the one brought by the residents, the court was required to apply state law. Thus, the court would evaluate the residents' claims under Michigan law.

Trespass is an "unauthorized invasion upon the private property of another." The residents were claiming that, by emitting CKD that later accumulated on their property, LaFarge was causing the CKD to trespass on their property. The court observed, however, that "[i]f the invasion is 'ambient dust, smoke, soot, or fumes,' then the remedy sought should be nuisance" rather than trespass. Because CKD was essentially "ambient dust," the court dismissed the residents' trespass claim. In evaluating the residents' nuisance claim, the court first observed that two basic types of nuisance claims exist in Michigan: private and public nuisance. A public nuisance is "unreasonable interference with a right common to the general public," whereas a private nuisance is "an interference with the use and enjoyment of" private land. Additionally, "[p]ollution of the air by the release of contaminants can constitute a

private or public nuisance.” The court held that the residents did not set forth facts supporting a claim for public nuisance because they did not allege any interference of a “right common to the general public.” Instead, the residents claimed that they and their personal property had been harmed.

However, the court held that a claim for private nuisance was supported by the facts. To state a claim for private nuisance, the residents had to show that: (1) a physical invasion interfered with their property rights; (2) significant harm occurred as a result of that invasion; (3) LaFarge caused the invasion; and (4) LaFarge’s conduct was either intentional and unreasonable, or negligent, reckless, or ultrahazardous. The residents alleged that LaFarge had caused CKD to physically invade their “persons and property, causing a substantial and unreasonable interference with [their] use and enjoyment of their property.” Thus, the residents had pleaded the elements of a private nuisance.

In passing, the court additionally noted that Michigan recognizes the doctrine of nuisance “per se,” which is “an act, occupation, or structure which is a nuisance at all times and under any circumstances.” Without examining whether LaFarge’s plant could be a nuisance per se, the court summarily held that the residents had not made such a claim, and, thus, did not state a claim for nuisance per se.

To state a claim for negligence, the residents had to show four elements: (1) that LaFarge owed a duty to the residents; (2) LaFarge breached that duty; (3) the breach caused an injury to the residents; and (4) the residents suffered damages from the breach. In their complaint, the residents alleged that LaFarge “breached its duty to exercise ordinary care and diligence when it improperly constructed, maintained, operated, engineered, and/or designed the facility and it knew, or should have known, that such actions would cause [the residents’] person and property to be invaded by toxic pollutants and air contaminants, including but not limited to the emission of particulate.” The above allegations encompassed all four elements of a valid negligence claim. Thus, the court held that the residents had stated a claim for negligence.

LaFarge asked the court to abstain from deciding the case pursuant to the **Burford** doctrine, which allows a court to do so when federal court review of a state-regulated actor would lead to “[d]elay, misunderstanding of local

law, and needless federal conflict with the State policy,” to “protect complex state administrative processes from undue federal interference.” More specifically, LaFarge claimed that a decision in the case could conflict with LaFarge’s duties under its consent judgment concerning violations of Michigan law, and thus, would result in “second guessing a state agency’s conclusions in the state’s efforts to implement a consistent and coherent state policy with regard to quality of air and emissions standards.”

The court began its examination of LaFarge’s argument by noting that “[a]bstention is the exception, not the rule.” Furthermore, abstention can only apply to injunctive or other discretionary relief; it does not apply to claims for damages. Additionally, **Burford** abstention is appropriate only when: (1) timely and adequate state review, performed in a centralized forum with special competence in the matter, is available; and (2) the case involves difficult questions of state law or a federal decision would disrupt state efforts to form a consistent policy on the matter.

The court then rejected LaFarge’s request, first observing that LaFarge failed to show that the Michigan Circuit Court with jurisdiction over the residents’ claim for injunctive relief was a forum with “specialized” competence regarding environmental liability. Additionally, the court stated that although the “potential” for interference with the consent judgment existed, in light of the residents’ “common law entitlement to injunctive relief if they prove the existence of a public nuisance,” such interference would not be “undue.” Thus, the court declined to abstain from hearing the case. The residents could only bring their suit as a class action if they showed, among other things, that the injuries alleged in the complaint were “typical” of the injuries affecting the various residents. LaFarge alleged that this “typicality” requirement was “not met because of the great variance in damages sought by the named class members.”

The court cited the rule that “[a] claim is typical if ‘it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.’” The residents’ claim involved the same event or practice or course of conduct, as they were all claiming that LaFarge’s emissions caused their injuries. Furthermore, the legal theories involved, negligence and nuisance, were the same with respect to all the residents’ claims. Thus, the court held that, despite the residents’ varying claims for damages, the claims were “typical” for the purposes of class certification.

Additionally, the residents were required to show that the class members would be “adequately represented” by the class representatives. Such adequate representation is not possible if the representative “class members have interests that are antagonistic to the other class members.” LaFarge argued that antagonistic interests existed between the representative class members because the members wanted different injunctive remedies. For example, one member merely wanted the CKD emissions to stop, while another wanted that plus reimbursement for damages to his house caused by the CKD, and a third representative sought the ultimate goal of closing down LaFarge’s plant for good. The court held that the class interests would be adequately represented notwithstanding the differences between the class representatives because the representatives all focused on stopping the CKD emissions, and claims for damages were not at odds with claims aimed towards stopping CKD emissions.

LaFarge also argued that class certification was inappropriate because individualized defenses were available against some of the class members. The court observed, however, that “[t]he mere existence of individualized defenses does not bar class certification,” and such certification is inappropriate only if such defenses “overshadow the primary claims’ by diverting the attention of the class representatives away from fairly representing the class.” Because the court ultimately held that class certification was proper in this case, the court apparently concluded that the individualized defenses available to LaFarge did not overshadow the class claims.

I. Lansing Bd of Water & Light v Deerfield Ins Co, 183 F Supp 2d 979 (WD Mich, 2002).

The United States District Court for the Western District of Michigan held that a pollution exclusion in a liability insurance policy does not prevent insurance coverage for a claim by an asbestos removal contractor against an insured property owner, where the direct cause of the claim was an alleged misrepresentation by the insured owner concerning the quantity of asbestos to be removed, rather than the removal of the asbestos itself.

The Lansing Board of Water and Light (LBWL) needed to remove and dispose of asbestos located in its Ottawa Station. It asked asbestos removal contractors to submit bids on the project, and supplied drawings of the plant and other information for bidders to use in preparing their bids. LBWL awarded the asbestos removal contract to SCS Group, L.C. (SCS), which then subcontracted some

of the work to Performance Abatement Services, Inc. (PAS). After PAS began work on the project, it discovered that there was substantially more asbestos to be removed than it had estimated based on the drawings that LBWL had provided. PAS sued LBWL and SCS, claiming that LBWL had misrepresented the true quantity of asbestos to be removed, and that as a result PAS removed and disposed of a substantial quantity of asbestos without receiving additional contract payments. PAS claimed, among other things, that LBWL had misrepresented the facts upon which bidders were asked to provide bids.

Deerfield Insurance Co. (Deerfield), which had issued a liability insurance policy to LBWL, defended LBWL against the claim by PAS, but reserved its rights to claim that its policy did not cover the PAS claim. Deerfield paid \$1.8 million to PAS to settle the PAS litigation. Anticipating that Deerfield would deny coverage and ask LBWL to reimburse the \$1.8 million, LBWL sued Deerfield in federal court seeking a declaratory judgment that the Deerfield insurance policy covered the PAS claim. Deerfield asked the court to rule that the pollution exclusion in the policy, which excluded coverage for “any claim arising out of any . . . removal . . . of . . . contaminants or pollutants,” prevented coverage of the PAS claim. Deerfield argued that the pollution exclusion applied because the PAS litigation involved LBWL’s liability for removal and disposal of asbestos. LBWL argued that the PAS litigation involved alleged misrepresentation of facts leading to a contract cost overrun, and that asbestos was simply the subject of the contract. LBWL argued that the claim did not “arise out of” the removal of asbestos, but arose out of an alleged misrepresentation.

The court agreed with LBWL, finding that the case was very similar to the facts in **Owens-Corning v National Union Fire Ins Co**, 1998 WL 774109 (CA 6, 1998). In that case, shareholders of Owens-Corning alleged that company officials had misrepresented the company’s financial exposure to asbestos claims. The Sixth Circuit, applying Ohio law, held that Owens-Corning’s liability insurer had a duty to defend the shareholder lawsuit, notwithstanding a pollution exclusion clause, because the shareholder lawsuit did not “arise out of” asbestos, but arose out of alleged misrepresentations by the company. The Sixth Circuit held that the words “arising out of” mean that there must be a close causal connection between the underlying claim and an insured event.

Relying on the **Owens-Corning** case, the court held that the asbestos at LBWL's Ottawa Station was "too distant a cause of the underlying claim" against LBWL for that claim to have "arisen out of" asbestos, and that "the *immediate* cause of the claim was alleged misrepresentation." (Emphasis in original.) Therefore, the court held that the pollution exclusion did not prevent coverage of LBWL's claim. The court distinguished a recent decision by the Michigan Court of Appeals, **McKusick v Travelers Indemnity Co**, in which that court had held that a pollution exclusion prevented coverage for an accident in which a hose being used by the insured to deliver chemicals broke and sprayed chemicals on the employees of its customer. In **McKusick**, the actual release of the chemicals was the direct cause of the injuries to the employees, while in LBWL's case, the alleged misrepresentation was the direct cause of the injury to PAS.

B. State Developments

1. Wetlands

a. **Huggett v MDNR, 464 Mich 711 (2001).**

The Michigan Supreme Court held that the farming activity exemption to the statutory wetland permit requirements does not encompass a landowner's proposed cranberry farm, and because the operation did not fall within the production and harvesting draining exemption or the existing farming exemption, the landowner is required to obtain a wetland permit to proceed.

Wallace Huggett acquired a 325-acre parcel of land in Cheboygan County, Michigan (the Property) after he foreclosed a mortgage that had been assigned to him. All but 47 acres of the Property was classified as wetlands. After acquiring title, Huggett proposed to build a 200-acre cranberry farm on the Property. In order to create conditions conducive to growing cranberries, he proposed placing fill material in wetlands areas, excavating and removing soil from wetland areas, building dikes and culverts, digging irrigation ditches, and constructing a reservoir, pumping station, roads and an airstrip.

In 1990, MDNR advised Huggett that he needed a wetland permit under Part 303 of NREPA to proceed with the proposed cranberry farm. Upon applying for a permit later that year, the application was denied. Huggett then requested a contested case hearing under the APA, but after a year, the hearing had not occurred. Huggett

subsequently filed an action seeking a declaration that his proposed cranberry farm was not subject to the wetland permit requirements because the farm's creation would be an exempted farming activity. After several hearings, a trial court held that Huggett's proposed cranberry farm was indeed a farming activity exempt from the wetland permit requirements under Part 303. In so ruling, the court stated that the exemption "includes all activities necessary to commence and to continue farming in a commercially viable manner and to bring land into agricultural production." MDNR appealed.

Upon appeal, the Michigan Court of Appeals reversed the trial court on the exemption issue on the basis that the farming exemption was intended to apply to land already in use as a farm, and did not apply to new farming or agricultural activities. Therefore, because Huggett wanted to establish a new cranberry farm rather than continue an already existing one, the Appeals Court held that Huggett must obtain a wetlands permit. Subsequently, the Michigan Supreme Court granted Huggett leave to appeal, limited to the issue of whether the court of appeals correctly interpreted the farming activities exemption. To determine whether the activities necessary to establish and operate Huggett's proposed cranberry farm were permissible uses exempt from the wetland permit requirements, the court examined the statutory language of Part 303. If statutory language was clear and unequivocal, then the court could conclude that the legislature intended the meaning exactly as written, and the statute would be enforced as written.

Huggett asserted that the activities necessary to establish and operate the proposed cranberry farm are not subject to the wetland permit requirements because the section that exempts farming activities provides a list of various types of farming activities that begins with the term "including." Huggett argued that by beginning the list with "including," the legislature intended that the listed activities would serve only as an example of the types of exempted farming activities. Therefore, Huggett reasoned that the farming activities exemption includes all of the activities necessary for operating a farm, and presumes that he can engage in all the activities necessary to establish and run his proposed cranberry farm without a wetland permit.

The supreme court disagreed, stating that when a statute uses a general term followed by specific examples included within the general term, as does the farming

exemption, the principle of statutory construction applies in which the general words shall be construed as applying only to things of the same “kind, class, character, or nature as those specifically enumerated.” Under this principle, the supreme court found that the general exemption for farming activities can include activities not specifically listed in the farming exemption language, but the activities must be of the same kind, class, character or nature as the specific activities listed. The activities Huggett sought to exempt, however, are not in the kind, class, character or nature of operating a farm, the court ruled.

According to Part 303, conducting the following activities without a permit is prohibited in wetlands: “a) depositing or permitting the placing of fill material in a wetland; b) dredging, removing, or permitting the removal of soil or minerals from a wetland; c) constructing, operating, or maintaining any use or development in a wetland; or d) draining surface water from a wetland.” However, under the same section of the statute, a permit is not required for “minor drainage.” Although the court found that this language may normally leave room for debate about whether drainage activities are “minor” or not, the court held that in this case there was no debate. Huggett’s proposed activities undeniably amount to more than minor drainage, and also include filling and dredging in a wetland, which are all prohibited. Therefore, the court found that Huggett’s proposed activities do not fit within the farming activities exemption. Thus, the supreme court affirmed the court of appeals decision reversing the trial court’s findings that Huggett’s proposed activities were within the farming activities exemption.

2. Underground Storage Tanks

a. *Goyette Mechanical Co v Superior Env'tl Corp*, 2001 WL 1404806 (Mich App, Nov 9, 2001).

The Michigan Court of Appeals reversed a trial court’s order granting summary disposition to the defendant in a negligence suit that stemmed from the removal of underground storage tanks.

Goyette Mechanical Company (Goyette) was the successor to Gary Stephan, who had hired Superior Environmental Corp. (Superior) as a consultant to oversee the removal of underground storage tanks on his property. Wolverine Contractors (Wolverine) was hired to remove the tanks. The arrangement was made on the assumption that payment for Wolverine’s work would be provided under the Michigan Underground Storage Tank Financial

Assurance fund program (MUSTFA). Funding for Wolverine’s work under MUSTFA was rejected, however, because Stephan had failed to select Wolverine through the competitive bidding procedures that are required under MUSTFA.

Goyette sued Superior for professional malpractice, claiming that Superior was negligent in failing to ensure use of the proper bidding procedures, and that Goyette (through Stephan) was injured because it would now be responsible for paying Wolverine. Superior’s defenses were: (1) Goyette could not show any injury because Wolverine’s agreement was based on the premise that Wolverine would look solely to MUSTFA for reimbursement for its work and, thus, Stephan was not personally obligated to pay Wolverine; (2) Stephan’s claim for malpractice was not transferable to Goyette; (3) Goyette failed to support its claims with expert testimony; and (4) the statute of limitations had run, barring Goyette’s claims. Goyette disagreed with all of Superior’s contentions, and specifically asserted that the agreement did not limit Wolverine to obtaining compensation solely from MUSTFA. The trial court agreed with Superior concerning the agreement between Stephan and Wolverine, and granted Superior’s motion for summary disposition.

The court of appeals reversed the trial court, holding that summary disposition was inappropriate. Such judgment can only be rendered when no factual dispute needs to be resolved, leaving a court with only legal issues to decide. The court found, however, that a factual dispute existed regarding whether Stephan could be liable to Wolverine. The court held that, even if the agreement stated that Wolverine would look only to MUSTFA for compensation, Wolverine had a non-contractual claim against Stephan because it “expend[ed] its resources and labor on behalf of Stephan to clean up his property.” Because Wolverine had a claim against Stephan, a factual issue remained concerning the amount of compensation Wolverine was entitled to receive for the work it had performed. Additionally, because Superior and Goyette advanced differing accounts of the agreement between Wolverine and Stephan, a factual dispute existed regarding the true substance of the agreement. Because factual disputes remained unresolved, summary disposition was inappropriate.

Superior also argued that Stephan’s malpractice claim against it could not be assigned to Goyette. The court disagreed, observing that only *legal* malpractice claims are

not assignable, and none of the public policy reasons for prohibiting the assignment of legal malpractice claims would apply to Stephan's claim.

The court additionally ruled that Goyette was not required to support its claims with expert testimony. Such testimony is required "only in those cases where the jury cannot determine the applicable standard of care or determine whether the defendant's conduct amounted to a breach of that standard of care, because such knowledge is beyond the common knowledge and experience of laymen." The standard of care applicable to Goyette's claim, however, was explicitly set forth in MUSTFA, so the jury would have no trouble ascertaining it. Furthermore, the trial court had determined that an "obvious goof up" had occurred. In such a situation, the jury would have no problem deciding whether the standard of care had been breached. The appeals court agreed with the trial court that Superior's statute of limitations defense had been waived. Such a defense must be raised in the answer to the complaint. Because Superior failed to raise the argument in its answer, and never sought to amend its answer to include the defense, that defense was waived.

3. Environmental Remediation

a. **RCO Engineering, Inc v ACR Industries, Inc, 246 Mich App 510 (2001), appeal denied, 642 NW2d 679 (2002).**

On remand, the Michigan Court of Appeals held that, in a cost recovery lawsuit under the former MERA, the defendant was allowed to use evidence of whether a cleanup was cost-effective in the trial because the parties disputed whether MDNR had approved method Type A or Type B environmental cleanup. The Michigan Supreme Court directed the court of appeals to consider on remand whether the trial court erred in denying the plaintiff's motion *in limine* on the grounds that the defendant was permitted to present evidence regarding the cost effectiveness of a Type B cleanup, despite MDNR's so-called approval of the Type A cleanup. The court of appeals concluded that, had the MDNR approved the Type A cleanup of the site, the trial court's denial of defendant's motion *in limine* would not have been in error. Further, because the issue of whether the MDNR had approved the Type A cleanup was contested, the court of appeals concluded that the trial court did not err in permitting evidence of the disputed cost-effectiveness of the Type A remediation to the jury. Accordingly, the court of appeals remanded the case to the trial court for further proceedings.

b. **Attorney General v Woodland Oil Co, 2001 WL 849375 (Mich App, July 27, 2001).**

The Michigan Court of Appeals held that MDEQ could not recover costs it incurred in responding to a release of hazardous substances because MDEQ waited more than six years after physical on-site construction of the remedial action began before filing its cost recovery complaint.

In 1983, a release of heating oil was discovered at a bulk storage plant in Frankfort, Michigan owned by Woodland Oil Company, Inc. (Woodland). Woodland developed a three-phase cleanup plan for the Frankfort site. On April 20, 1989, the MDEQ project manager for the site approved Woodland's plan and advised it to proceed with Phase I, the removal of approximately 2,500 cubic yards of contaminated soil. Woodland removed the contaminated soil, emptied all the storage tanks at the bulk storage plant, reconditioned them, and built a new bulk storage plant. Because of a dispute between Woodland and the former site owner about who was responsible to perform the rest of the cleanup, MDEQ took over the cleanup in 1991 and began to implement Phase II of Woodland's remediation plan, which included groundwater monitoring. It was uncertain whether additional releases of heating oil and gasoline occurred after 1991.

On April 11, 1997, MDEQ filed a complaint in Ingham County Circuit Court seeking to recover MDEQ's response costs from Woodland under Part 201 of NREPA. The trial court dismissed MDEQ's complaint before trial because it ruled that MDEQ's claim was barred by two separate provisions of the Part 201 statute of limitations: (1) MCL 324.20140(1)(a), which requires that a party seeking to recover response activity costs must file a complaint within six years after the beginning of physical on-site construction activities for the remedial action selected or approved by MDEQ; and (2) MCL 324.20140(2) which (before it was amended in June, 2000) required a party seeking to recover response activity costs "that accrued prior to July 1, 1991" to file a complaint no later than July 1, 1994.

MDEQ appealed to the Michigan Court of Appeals, arguing in part that Woodland had released gasoline or oil at the site after July 1, 1991. On March 31, 2000, the Michigan Court of Appeals, relying on its subsequently-reversed decision in **Shields v Shell Oil Co, 237 Mich App 682 (1999), reversed, 463 Mich 939 (2000)**, affirmed the trial court's decision, but sent the case back

to the trial court to determine whether MDEQ had presented enough evidence that Woodland had released gasoline or oil after July 1, 1991. Because the court of appeals based its decision entirely on the July 1, 1994 deadline in MCL 324.20140(2), it did not consider whether the six year statute of limitations in MCL 324.20140(1)(a) applied to the case.

On July 29, 2000, Governor Engler signed legislation amending the section of the statute of limitations that applies to pre-1991 response costs, so that the July 1, 1994 deadline for filing a cost recovery complaint applies only to response activity costs that were incurred before July 1, 1991. The amendment allows MDEQ or other plaintiffs to recover response activity costs incurred after July 1, 1991, regardless when the hazardous substances were released, as long as the plaintiff files a complaint within the six year limitations period provided in MCL 324.20140(1)(a).

On December 27, 2000, the Michigan Supreme Court reversed the court of appeals decision in **Shields v Shell**. It also nullified the court of appeals decision in the **Woodland Oil** case and sent it back to the court of appeals for appropriate action. After hearing new arguments from both sides, the Michigan Court of Appeals concluded that the July 1, 1994 deadline in MCL 324.20140(2) did not apply to MDEQ's claim against Woodland because MDEQ was not seeking to recover any costs incurred before July 1, 1991. Although its complaint was not clear on that point, MDEQ's attorneys told the trial court at the hearing on Woodland's motion for summary disposition that MDEQ limited its claim to costs incurred after July 1, 1991.

Next, the court of appeals had to decide whether the trial court had correctly ruled that the six year statute of limitations in MCL 324.20140(1)(a) barred MDEQ from recovering response costs. That section, which was not affected by the June, 2000 amendment, and was not discussed in the supreme court's **Shields v Shell** decision, states that actions to recover response activity costs must be commenced "within 6 years of initiation of physical on-site construction activities for the remedial action selected or approved by" MDEQ. MDEQ acknowledged that MCL 324.20140(1)(a) applied to the Woodland site, but argued that the six year limitations period had not begun to run because Woodland had not performed a "remedial action." MDEQ claimed that there was no "remedial action" because: (1) there was never a "final

plan" to remediate the site; (2) the three-phase cleanup plan which Woodland submitted to MDEQ in 1989 did not meet the statutory requirements of MCL 324.20118(2) for a "remedial action plan"; and (3) MDEQ never "approved or selected a remedial action." MDEQ argued that the work that Woodland performed, including the excavation and removal of 2,500 cubic yards of contaminated soil, was only an "interim response activity" that was insufficient to trigger the six year statute of limitations. The court of appeals rejected MDEQ's arguments. It evaluated the statutory definitions of "response activity," "remedial action," and "remedial action plan," and concluded that:

An "interim response activity" is essentially a quick response to a release In other words, it is a temporary activity until a plan can be developed to implement a remedial action. (Citation omitted.) A "remedial action," on the other hand, is essentially a work plan that is designed and implemented to completely eliminate a hazard. Contrary to [MDEQ's] analysis, a "final plan" is not needed to give rise to a "remedial action."

Applying this reasoning to the facts in the case, the court of appeals concluded that Woodland's extensive work was "not a quick response," but instead a "remedial action." The fact that MDEQ is apparently still conducting response activities at the site in accordance with Woodland's three-phase plan supported the court's conclusion. The court rejected MDEQ's argument that a response activity cannot be a "remedial action" if it does not comply with the requirements of MCL 324.20118(2), because that provision does not define "remedial action," but merely explains what a "remedial action" is required to accomplish. Therefore, the court concluded that the work performed by Woodland and by MDEQ constituted a "remedial action." MDEQ argued that it had never "approved" a remedial action plan. The court rejected this argument because on April 20, 1989, the MDEQ project manager for the site sent a letter to Woodland that approved the Woodland plan and told Woodland to begin cleanup work.

Finally, the court ruled that "physical on-site construction activities for the remedial action" began in 1989 when Woodland removed 2,500 cubic yards of contaminated soil, eight years before MDEQ filed its cost recovery complaint in 1997. Therefore, the court concluded that the six year limitations period began to

run in 1989, and that MCL 324.20140(1)(a) prevented MDEQ from recovering any response costs related to the remedial action. However, the court held that if there was additional contamination at the site that was not covered by the remedial action plan approved in 1989, MDEQ may be entitled to recover response activity costs related to such contamination. Therefore, the court of appeals sent the case back to the trial court to consider whether MDEQ had incurred costs related to contamination not covered by the 1989 remedial action plan.

c. *Thermofil, Inc v Haigh Indus, Inc*, 2001 WL 1480746 (Mich App Nov 20, 2001).

The Michigan Court of Appeals reversed a trial court's decision that the statute of limitations applicable to private cost recovery actions under Part 201 barred a cost recovery action while affirming the trial court's decision that the common law claims were barred by the applicable statute of limitations.

Until 1977, the defendant Haigh Industries, Inc. (Haigh) operated a metal stamping business on a site currently owned by the plaintiff, Thermofil, Inc. (Thermofil). When it owned the property, Haigh allegedly disposed of hazardous substances in its wastewater, which was discharged into an unlined seepage lagoon. In September 1987, water samples established the presence of hazardous substances in the groundwater at the site. In 1988, Thermofil was directed by MDEQ to conduct response activities at the site. Thermofil subsequently sent correspondence to Haigh in June 1988, notifying Haigh of the contamination and demanding that Haigh pay for the cost of remedial investigation and possible remedial action. Haigh refused to pay for such activities. Thermofil nevertheless conducted an extensive remedial investigation, incurring costs of over \$2,000,000. The investigation revealed extensive contamination. Because of an amendment to Part 201, however, the DEQ determined in 1995 that Thermofil was not liable for the contamination at the site. After that determination, Thermofil did not conduct any further remedial action at the site.

In June 1999, Thermofil filed suit against Haigh under Part 201, seeking recovery of the costs Thermofil incurred while conducting remedial investigations. Thermofil also sought to recover those costs, plus damages, under the common law theories of nuisance, trespass, negligence, and abnormally dangerous activity. The trial court ruled

that all of Thermofil's claims were barred by the applicable statutes of limitations. When the trial court rendered its decision, the applicable statute of limitations under Part 201 provided:

For recovery of response activity costs and natural resources damages that *accrued* prior to July 1, 1991, the limitation period for filing actions under this part is July 1, 1994. (Emphasis added).

Following a 1999 decision by the Michigan Court of Appeals, the trial court held that Thermofil's cause of action "accrued" when it purchased the property, and thus accrued before July 1, 1991, regardless of whether Thermofil had incurred any costs before that date. Any suit, therefore, would have to be filed before July 1, 1994 to avoid being barred. Because Thermofil did not file its suit until 1999, its claims were barred.

On appeal, the court of appeals noted that after the trial court rendered its decision, the statute of limitations had been amended to read:

For recovery of response activity costs that were *incurred* prior to July 1, 1991, the limitation period for filing actions under this part is July 1, 1994. (Emphasis added).

The amendment explicitly applies retroactively. In light of this change, the Michigan Supreme Court had reversed the 1999 court of appeals decision upon which the trial court had relied on, because the statutory language now clearly indicates that it only applies to suits for costs *incurred*, rather than causes of action that *accrued*, before July 1991. Under the amended statute, Thermofil's suit would not be barred if Thermofil could show both that it had incurred costs on or after July 1, 1991, and that other applicable statutory provisions would not bar the suit. The court of appeals reversed the trial court's decision so these arguments could be addressed at trial. With respect to Thermofil's common law claims under nuisance, trespass, negligence, and abnormally dangerous activity, those claims would be barred unless Thermofil had filed suit less than three years after its claims had accrued. The trial court noted that because the contamination at issue was not readily apparent to Thermofil, the claims would accrue pursuant to the "discovery rule," meaning that Thermofil's claims would accrue "when [it] discovers, or, through the exercise of reasonable diligence, should have discovered" the existence of the contamination and who

was probably responsible for it. Because Thermofil had sent a letter to Haigh concerning the contamination in June 1988, the trial court found that Thermofil's cause of action accrued no later than that date. Because Thermofil had not filed its suit until 1999, eleven years later, the trial court ruled that Thermofil's common law claims were barred by the statute of limitations.

On appeal, Thermofil claimed that the "continuing-wrongful-acts doctrine," rather than the "discovery rule," should apply. This doctrine states that when a wrongful act is occurring on an ongoing basis, the statute of limitations does not begin to run until the act has stopped occurring. Thermofil argued that the continuous presence of hazardous materials on its property was a "continuous wrongful act," and, thus, the statute of limitations had not begun to run. The court of appeals rejected Thermofil's argument because "a continuing wrong is established by continual tortious *acts*, not by continual harmful effects from an original, completed act." The latest date that Haigh could have committed any wrongful acts at the site was in 1977, when it had ceased operations on the property. In 1988, when Thermofil discovered that Haigh might be responsible, the lingering contamination was a harmful "effect" from a completed act, and the doctrine did not apply. Thus, the court of appeals affirmed the trial court's decision that Thermofil's common law claims were barred by the statute of limitations.

d. Russell v Lechnar, 2001 WL 1011863 (Mich App, Sept 4, 2001).

The Michigan Court of Appeals reversed a lower court's ruling that the widow of the former owner of a property contaminated by leaking underground storage tanks was liable for 75% of past and future costs to clean up the contamination as an owner of the property because she held a "dower" interest in the property at the time her husband owned and operated a gasoline station on the property. Dower is an ancient property interest intended to provide for widows even when they were written out of their husband's wills. The court of appeals held that the widow's dower interest in the contaminated property could not have arisen until after her husband had sold the property and, even if she did have a dower interest in the property, that interest was insufficient to make her liable as an owner under Part 201.

Geraldine Lechnar's now-deceased husband, Jack Lechnar, purchased the property at issue in 1979 under a land contract and operated a gas station on it until 1987,

after which he leased the property to Wayne Russell, who opened a muffler shop and also sold gasoline. Mr. Russell testified that, to his knowledge, Mrs. Lechnar did not have any control over the property or help her husband operate the gas station. She did, however, sign the lease payment checks. In 1990, Mr. and Mrs. Russell purchased the property from Jack Lechnar under a land contract. The land contract was signed by both Mr. and Mrs. Russell and Mr. and Mrs. Lechnar. Mr. Lechnar, however, did not himself receive a warranty deed to the property until 1991 when he paid off his land contract with the previous owner. The warranty deed did not contain Mrs. Lechnar's name, only that of her husband. In 1993, Mr. Lechnar executed a quitclaim deed to the property to himself and his wife.

In 1994, the Russells decided to remove the underground storage tanks from the property because they had stopped selling gasoline. It was discovered at that time that soil on the property had been contaminated by releases from the tanks. The Russells retained an environmental consultant to clean up the contamination and incurred response activity costs in doing so. The Russells filed suit against Mrs. Lechnar and the prior owners and operators of the gas station formerly located on the property in 1996. Mr. Lechnar had died in 1995.

The trial court found that Mrs. Lechnar was liable as an owner of the property under Part 201 because she had a dower interest in the property at the time her husband owned and operated the property, she signed the lease payment checks, and because she was still collecting land contract payments from the Russells at the time of the trial. Because the trial court found that most of the contamination was caused during the time Mr. Lechnar operated the gas station between 1979 and 1987, the court assessed Mrs. Lechnar 75% of the past response activity costs and also declared her to be liable for 75% of all reasonable future response activity costs necessary to complete the cleanup.

Mrs. Lechnar appealed the trial court's holding that she was liable as an "owner" under Part 201. Part 201 holds liable "the owner or operator of a facility at the time of disposal of a hazardous substance if the owner or operator is responsible for an activity causing a release or threat of release." The court of appeals stated that because there was no evidence that Mrs. Lechnar operated the gas station, the issue for it to decide was whether she was an "owner" of the property. Under Part 201, an "owner" is defined as

“a person who owns a facility,” but that definition also excludes “[a] person who holds indicia of ownership primarily to protect the person’s security interest in the facility, including, but not limited to, a vendor’s interest under a recorded land contract, unless the person participates in the management of the facility.” The court further noted that “owner” is defined under Part 213 (Leaking Underground Storage Tanks) of NREPA as follows:

[A] person who holds, or at the time of a release who held, a legal, equitable, or possessory interest of any kind in an underground storage tank system or in the property on which an underground storage tank system is located including, but not limited to, a trust, vendor, vendee, lessor, or lessee and who is liable under part 201.

The court also observed that Part 201 is patterned after CERCLA and, therefore, it was appropriate to look to CERCLA case law in interpreting similar issues under Part 201.

Reviewing the transactional history of the property, the court observed that Mrs. Lechnar was never listed on the land contract or the deed. Citing 1899 Michigan Supreme Court precedent, the court stated that dower rights do not attach to a land contract vendee’s (i.e., the buyer’s) interest in a land contract because legal title rests in the vendor (i.e., the seller) until the land contract is paid off. Therefore, the court held that Mrs. Lechnar did not have a dower interest in the property until the land contract was satisfied by her husband in 1991. Mr. Lechnar, however, no longer operated a gas station on the property at that time because he had sold it to the Russells under another land contract in 1987. The court further noted that a federal district court has also held that dower rights to property did not make a wife an owner of the property under CERCLA. Thus, the court held that the trial court had erred in finding that Mrs. Lechnar was an owner of the property under Part 201 due to her dower interest while her husband operated the gas station up until 1987.

Because the trial court erred in holding that Mrs. Lechnar was an owner during the period of 1979 - 1987 when her husband operated the gas station, its allocation of damages to her on the basis that most of the contamination occurred during this period was also incorrect. The court next considered whether Mrs. Lechnar

was ever an owner of the property between 1987 and 1990 when the Russells leased the property. The court observed that the only evidence that she was an owner during that period was that she signed the lease checks the Russells paid to Mr. Lechnar. The court observed, however, that this only showed that she and her husband shared finances - that it was not enough to show that she actually owned the property. When Mr. Lechnar sold the property to the Russells in 1990, he added Mrs. Lechnar to the deed. The court held, however, that this did not make her an owner because her interest in the property constituted indicia of ownership held as a security interest. Part 201 excludes from the definition of owner “[a] person who holds indicia of ownership primarily to protect the person’s security interest in the facility, including, but not limited to, a vendor’s interest under a recorded land contract.” The court also relied on the holding of a Michigan federal district court interpreting the status of a land contract vendor under CERCLA and Part 201, where the district court held that as a matter of law a person who held title to property as a land contract vendor fell within the CERCLA and Part 201 “secured creditor” exemption from the definition of owner under both statutes. Therefore, the court found that Mrs. Lechnar was never an owner of the property and, consequently, reversed the trial court’s judgment assessing her for approximately \$25,000 in past costs and 75 % of future costs.

4. Michigan Environmental Protection Act

a. *Genesco, Inc v MDEQ*, 250 Mich App 45 (2002).

The Michigan Court of Appeals upheld the dismissal of a lawsuit brought under Part 17 of NREPA, formerly known as the Michigan Environmental Protection Act, or “MEPA,” that challenged a cleanup remedy selected under Part 201 of NREPA. The court held that Part 17’s judicial review provisions do not override Part 201’s prohibition on pre-enforcement litigation regarding cleanup remedies selected by MDEQ.

Genesco, Inc. operated a leather tannery in the City of Whitehall, on the shores of White Lake, in an area known as “Tannery Bay.” For over a century, Genesco and other tanneries operating in that area discharged their industrial wastewater into White Lake, contaminating its bottomlands with various hazardous substances, including arsenic, chromium, and mercury. After studying various alternatives for cleaning up the lake bottom, Genesco

concluded that the best response would be to leave contaminated sediment in place and prohibit its disturbance through restrictive deed covenants. In 1999, Genesco submitted this proposed response action to MDEQ for its approval pursuant to Part 201. MDEQ, however, disagreed with Genesco's conclusion and, instead, insisted that the contaminated sediment must be dredged from the lake bottom. Believing that MDEQ's plan would "destroy the White Lake ecosystem" by unnecessarily stirring up the sediments, Genesco sued MDEQ under Part 17. Genesco sought a court order that would prohibit MDEQ from implementing its dredging remedy.

The trial court dismissed Genesco's suit because Part 201, which generally governs environmental cleanups, prohibits courts from reviewing challenges to a MDEQ cleanup plan before MDEQ initiates an enforcement action to require compliance with that plan or to recover cleanup costs. On appeal, Genesco argued that Part 17, which authorizes a court to prohibit any activity that would pollute, impair or destroy the environment, "trumps Part 201's pre-enforcement bar to judicial review." The court of appeals, however, agreed with the trial court's decision and upheld the dismissal. The court of appeals first noted that Part 17 and Part 201 share a common goal of protecting the environment, but that they achieve this goal in different ways. "[T]he approach of Part 17 is to preserve the environment through the obtaining of declaratory and injunctive relief [i.e., court orders] in court, while Part 201 encourages the prompt cleanup of hazardous substances through administrative or private action and assignment of financial responsibility." These approaches, the court noted, are very different.

Under Part 17, any person may seek a court order to prohibit conduct that "is likely to pollute, impair, or destroy the air, water, or other natural resources." Part 17 provides private citizens with "a direct method for enforcing environmental regulations and challenging an administrative agency's decision." It also allows a court to substitute its judgment for the judgment of MDEQ regarding the "validity, applicability, and reasonableness" of a "standard for pollution or for an antipollution device or procedure." Part 201, however, "generally defer[s] to administrative agencies to determine the appropriate response to contaminated sites and limit[s] pre-enforcement judicial review." Specifically, "Part 201 provides that a state court does *not* have jurisdiction to review challenges to a 'response activity selected or approved by the department . . .'" except in certain

enumerated situations, none of which [were applicable to Genesco's challenge]."

Recognizing that the "plain language of Part 17 and 201, and the differing approaches to judicial review and participation, seemingly conflict," the appeals court turned to the principles of statutory construction to resolve this conflict. The court held that these principles "dictate that claims under Part 17 may not be brought where the underlying controversy is over a 'response activity' as defined in Part 201." "Otherwise," the court reasoned, "the MDEQ's efforts to clean up toxic sites might often be delayed by pre-enforcement litigation and the intent of the Legislature expressed in [Part 201] would be frustrated." Although MDEQ must comply with Part 17, judicial review of MDEQ's activity with respect to a Part 201 response action plan "is delayed until after the response activity is completed." Thus, the court held that Part 17 supplements, but does not supplant, Part 201 and upheld the trial court's dismissal of Genesco's lawsuit.

5. Miscellaneous

a. **West Bay Exploration Co v City of Farmington Hills, 2001 WL 690727 (Mich App, June 19, 2001), appeal denied, 640 NW3d 879 (2002).**

The Michigan Court of Appeals held that, where a city council denied a company an oil drilling permit, the denial was a "final decision" that was ripe for judicial review, and the circuit court erred by concluding otherwise. In **Electro-Tech, Inc v HF Campbell Co**, 433 Mich 57, the Michigan Supreme Court held that, in an action for damages resulting from an unconstitutional regulatory taking, a decision of an administrative body must be "final" before it is judicially reviewable. The finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury. The **West Bay** court found that the resolution that denied the drilling permit reflected a unanimous decision by the city council to deny the drilling company's application because the city council did not believe the company supplied sufficient information addressing concerns related to the release of hydrogen sulfide. The court concluded that the resolution unequivocally denied the company's application and constituted a 'final order' under any meaningful definition of that phrase. The fact that the resolution provided for resubmission of the application with suggestions on other relevant information did not make the decision any less final, and there was no language in the resolution that

made denial of the permit conditional, or showed that the pending application remained before the city council for further deliberation. The resolution merely provided guidelines in the event of reapplication. Therefore, the court concluded that the resolution denying the company's application for a drilling permit constituted a final decision of the city council which was ripe for review by the circuit court, and so found that the circuit court had erred in denying review.

b. Travis v Preston, 249 Mich App 338 (2002).

The Michigan Court of Appeals held that an amended version of the Right To Farm Act (RTFA) cannot be applied retroactively to bar a suit to enforce a local zoning ordinance against an allegedly malodorous hog farm, and the previous version of the RTFA does not bar the suit. The court of appeals, however, found that the trial court had erred in making personal visits to the area in controversy without first informing the parties, and by relying on personal observations from the visits in rendering judgment. Because these errors had irreparably tainted the trial and judgment, the court of appeals reversed and remanded for a new trial.

Keith and Glenn Preston (the Prestons) began Preston Farms, a hog farming operation, in Algansee Township, Michigan in 1986. Soon afterward, residents Pete and Edna Travis and Richard and Patricia Johnson (the Residents), who live near the hog farm, filed a nuisance action against the Prestons. The suit alleged that the hog farming operation generated obnoxious and offensive odors that made their homes uninhabitable, reduced the value of their homes, and deprived them of the peaceful use and enjoyment of their homes. The Residents also alleged that the hog farm violated Michigan law, constituted a nuisance entitling the Residents to damages and injunctive relief, and violated Section 11.06 of the local Algansee Township Zoning Ordinance (the Zoning Ordinance). The Zoning Ordinance reads as follows:

Control of Heat, Glare, Fumes, Dust, Noise, Vibrations and Odors. Every use shall be so conducted and operated that it is not obnoxious or dangerous by reason of heat, glare, fumes, odors, dust, noise or vibration beyond the lot on which the use is located.

After the suit was filed, the Residents and Prestons agreed that the Residents would not pursue injunctive relief. The Prestons then moved for summary disposition,

arguing that the Michigan Right to Farm Act (RTFA) barred any nuisance action against them. The trial court, after initially denying the Prestons' motion, subsequently dismissed all theories of the Residents' complaints, except the assertion that the hog farm violated the Zoning Ordinance. The trial court concluded that enforcement of local zoning laws was allowed under the RTFA. After a bench trial, the trial court reaffirmed its ruling that the RTFA did not override the authority of local zoning ordinances, and found that the Prestons had violated the Zoning Ordinance. The trial court further concluded that the Residents had standing to bring a private action to enforce the Ordinance. While presenting its opinion, the trial court judge revealed that he had visited the area of the hog farm and the Residents' homes on five separate occasions to personally investigate the odor and explicitly relied on these observations in rendering judgment in favor of the Residents. The Traveses and Johnsons were awarded \$29,000 each. The Prestons appealed.

On appeal, the court of appeals examined five issues: (1) whether a recent amendment to the RTFA barring nuisance suits based on local laws would apply retroactively to bar the Residents' suit; (2) whether the previous version of the RTFA would allow the Residents' suit; (3) whether the Zoning Ordinance exceeded the types of restrictions authorized by Michigan's Township Rural Zoning Act; (4) whether the trial judge's visits to the scene in controversy, without notifying the parties, required reversal of the judgment; and (5) whether damages would be a proper remedy under the zoning ordinance.

The RTFA provisions in effect at the time the Residents filed suit generally protected farming operations from nuisance lawsuits, but allowed actions filed to enforce local zoning laws. However, the amended version of the RTFA, which became effective after the trial court's judgment, provides that:

Beginning June 1, 2000 . . . it is the express legislative intent that this act preempt any local ordinance, regulation, or resolution that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural and management practices developed under this act . . . [a] local unit of government shall not enact, maintain, or enforce an ordinance, regulation, or resolution that conflicts in any manner with this act or generally accepted agricultural and management practices developed under this act.

If the amended version applied retroactively, it would bar the Residents' suit to enforce the zoning ordinance.

The court of appeals held that the provision does not apply retroactively. The court observed that a statute will not be applied retroactively "in the absence of a clear expression by the Legislature that the act be so applied." Because the RTFA provision did not expressly address the issue of retroactivity, and the language of the provision indicated that it would operate "[b]eginning June 1, 2000," the court could not find a clear expression of intent for the provision to apply retroactively.

Having decided that the pre-amendment version of the RTFA applied to the Residents' suit, the court of appeals next determined whether the Residents could bring their suit under the pre-amendment RTFA. The court held that the Residents could bring their suit under the pre-amendment RTFA because the suit sought to enforce the Zoning Ordinance, and enforcement of local zoning laws was specifically allowed under the prior RTFA. Furthermore, the Residents had standing to bring the suit because their injury was of a "special character distinct and different from the injury suffered by the public generally."

The court of appeals next examined whether the odor restriction in the Zoning Ordinance was authorized under Michigan's Township Rural Zoning Act, which sets forth the types of permissible township zoning ordinances. The court held that, under the Act, which allows restrictions "which regulate the use of land and structures . . . to promote public health, safety, and welfare," odor restrictions are "clearly" authorized. In rendering its opinion, the trial court judge revealed that he had visited the site of the alleged nuisance "on five separate occasions before and after the trial," without notifying the parties, to personally observe the extent of the odor emanating from the Prestons' hog farm. The trial court also explicitly relied on these observations in its opinion. Although the Prestons failed to move for a new trial, the court of appeals chose to address the issue "in the interest of justice."

The court of appeals held that the judge's actions "irreparably tainted the trial and judgment" and required reversal of the judgment and a new trial before a different judge. Although personal observations of the scene in controversy by a trial judge are allowed by M.C.R. 2.513(B), the court of appeals noted that earlier decisions held that making such visits without first notifying the

parties is "misconduct" requiring a new trial, primarily because of concerns that "the trial judge may have viewed an incorrect location and that the parties' lack of presence at the judge's viewing may have hindered the parties' decisions whether to offer additional proofs at trial."

The court of appeals further stated that, while a personal visit is proper to clarify the judge's understanding of undisputed facts, the trial judge here was impermissibly "making an independent investigation and observation regarding the strength of the odors coming from [the Prestons'] farm." Additionally, because the trial court relied on its own observations in rendering judgment, the court of appeals remanded the case to a different judge in order to "preserve the appearance of justice." In closing, the court of appeals observed that the trial court would not be able to award damages in the new trial. Because the Residents' action would be to enforce the Zoning Ordinance, the available remedies would be dictated by Michigan's Township Rural Zoning Act, which only authorizes a court to abate a nuisance. Although the Residents had agreed with the Prestons not to pursue an abatement action, the court of appeals ordered the trial court to mandate abatement of the nuisance if a violation of the Zoning Ordinance was found.

c. McKusick v Travelers Indem Co, 246 Mich App 329 (2001).

The Michigan Court of Appeals affirmed a trial court ruling which denied coverage for a products liability claim based on specific language in a pollution exclusion endorsement to a commercial general liability (CGL) policy.

Hi-Tech Engineering, Inc. (Hi-Tech) designs and manufactures systems that its customers use to deliver liquids through high-pressure hoses. A high-pressure hose manufactured by Hi-Tech burst while being used by Polaris Industries (Polaris) in Wisconsin, to deliver a chemical used to manufacture polyurethane foam. The chemical escaped from the broken hose. William McKusick, an employee of Polaris, and a co-worker were injured by exposure to the chemical while they were cleaning up the spill.

McKusick and his co-worker commenced a products liability lawsuit against Hi-Tech in Wisconsin state court. Hi-Tech asked Travelers Indemnity Company (Travelers), its CGL insurer, to defend the action, but Travelers refused, arguing that the claim was not covered because of the

pollution exclusion in the policy. Hi-Tech sued Travelers in Michigan state court, asking the court to require Travelers to provide insurance coverage. While Hi-Tech's case against Travelers was pending, McKusick and Hi-Tech settled their litigation in Wisconsin by an agreement under which Hi-Tech admitted liability, consented to the entry of a judgment, agreed to pay a portion of the judgment, and gave McKusick the right to seek the balance of the judgment from Travelers. McKusick then commenced an action against Travelers in Michigan state court to collect the balance owed on the Wisconsin judgment against Hi-Tech.

Travelers then filed a motion asking the Michigan trial court to rule that the pollution exclusion in its policy meant that Travelers had no duty to provide coverage to Hi-Tech. After the trial court granted Travelers's motion, Travelers filed a similar motion in the action which McKusick brought against Travelers. The trial court in that case agreed with Travelers, and held that because the insurance policy did not cover Hi-Tech for McKusick's claim, McKusick had no right to recover anything from Travelers.

On appeal, McKusick argued that the pollution exclusion in the Travelers policy did not apply to McKusick's products liability claim against Hi-Tech because the pollution exclusion applied only to claims arising from traditional forms of environmental pollution. The Michigan Court of Appeals rejected this argument, noting that the pollution exclusion in the Travelers policy expressly precluded coverage for bodily injury arising out of the discharge of pollutants "which arises out of 'your work' . . . or . . . which arises out of 'your product.'" The court also noted that the Travelers policy defined "your product" as "any goods or products . . . manufactured, sold, handled, distributed or disposed of by" the insured. The high-pressure hose manufactured by Hi-Tech clearly qualified as "your product" under the definition in the policy.

The court of appeals observed that neither the Michigan Supreme Court nor the Michigan Court of Appeals had ever considered this particular version of a pollution exclusion, nor had either court ever considered a claim under a CGL policy in a factual context in which the escape of pollutants did not result in the pollution of land, air, water, or other traditional environmental media. The court of appeals briefly discussed a 1999 decision by the Sixth Circuit, applying Michigan law, in which the

Sixth Circuit held that a differently-worded pollution exclusion in a CGL policy did not prevent coverage for personal injury resulting from the exposure to fumes from chemicals used by the insured while sealing a floor in a room immediately above where the insured was working. The court of appeals also briefly discussed several other cases cited by McKusick in which other courts had held that differently-worded pollution exclusions did not preclude coverage for personal injuries resulting from the release of fumes used by the insureds while working in a building, or for personal injuries incurred after years of exposure to toxic fumes and dust in a manufacturing facility.

The court of appeals did not disagree with the outcome of those decisions, but it held that those cases "are factually distinguishable" from McKusick's case for several reasons. First, the court of appeals noted that "the pollution provision in this case is more broad" than the exclusions in the other cases because the exclusion in the Travelers policy expressly applies when the release of pollutants arises from the insured's work or products. Second, the court of appeals noted that, in McKusick's case, his injuries were caused by exposure to a chemical that was released when a high-pressure hose burst and spewed the chemical throughout the manufacturing plant; in contrast, the chemicals in the other cases were placed where they were supposed to be placed and were used as they were intended to be used, even though such use resulted in the migration of fumes within a confined area.

McKusick argued that the pollution exclusion in the Travelers policy shall apply only if the release of pollutants was "widespread," or if the release resulted in pollution of land, air, or water, or affected natural resources. The court rejected that argument, because the pollution exclusion in the Travelers policy unambiguously excluded coverage for releases arising out of Hi-Tech's products, with no requirement that the release must be widespread. The court of appeals recognized that other courts had ruled that the terms "discharge," "release," and other terms in the pollution exclusion are environmental terms of art, and that the pollution exclusion therefore applies only when the incident results in contamination of traditional environmental media. The court of appeals neither agreed nor disagreed with that reasoning, but held that that reasoning does not apply to a release of pollutants resulting from the failure of the insured's product, where the pollution exclusion at issue expressly excludes coverage for releases "arising from" the insured's product.

d. *Silver Creek Drain Dist v Extrusions Div, Inc*, 245 Mich App 556 (2001).

The Michigan Court of Appeals held that the Uniform Condemnation Procedures Act (UCPA) does not authorize courts to offset estimated remediation costs against the market value of contaminated property when calculating the amount of just compensation due to a property owner in a condemnation proceeding. In addition, the court held that the proper method for arriving at just compensation is to separate the question of just compensation from the question of liability for environmental cleanup and, therefore, ruled that the trial court erred when it deducted estimated cleanup costs from fair market value to establish a just compensation amount.

Extrusions Divisions, Inc. (Extrusions) purchased a parcel of real estate in Grand Rapids, Michigan commonly known as “Old South Field” (the Field). Originally intending to use it for expansion of its adjacent complex, Extrusions built a fence around the Field but otherwise left it vacant and unimproved. In 1990, Silver Creek Drain District (the District) began evaluating options for alleviating flooding in the area. Through a series of public meetings it was determined that Old South Field was an excellent location for construction of a storm water detention pond. In January 1992, the City of Grand Rapids (the City) refused to grant Extrusions a permit to construct a warehouse on the Field. As a result, Extrusions filed an inverse condemnation claim against the City and the Kent County Drain Commission (the Commission) in October 1992. Extrusions claimed that the City’s refusal to grant the permit, and the failure of the Commission to “pursue a purchase” of the Field, comprised an unconstitutional taking of private property without just compensation.

In March 1994, the District offered Extrusions “just compensation” for the Field in the amount of \$211,300. The District stated within its offer that it reserved the right to bring a federal or state cost recovery action against Extrusions regarding the release of hazardous substances on the property by the former owners. In May 1994, the District executed a “Declaration of Taking,” declaring that the Field was being taken to effect a necessary public improvement. The Declaration was recorded with the Kent County Register of Deeds on June 6, 1994 and on June 21, 1994 the County Treasurer executed an affidavit attesting to the deposit of \$211,300 as estimated just compensation. On June 29, 1994 the District filed its condemnation action against Extrusions, again reserving

its right to bring a cost recovery action regarding hazardous substance releases on the Field.

In February 1995, a trial court ordered the Field conveyed to the District pursuant to stipulation of the parties, and ordered the District to pay Extrusions \$211,300 for the taking. Despite this, in April 1995 the District brought a motion requesting the \$211,300 remain in escrow as security for remediation costs associated with the contamination of the Field. The District estimated the total remediation costs to be \$467,100. Extrusions claimed it was not liable for remediation costs and argued for the release of the escrowed funds. In November 1995, the trial court ordered the District to remove the funds from escrow and pay it to Extrusions, along with accrued interest from the date of conveyance. The District complied.

In November 1997, pursuant to a bench trial, the trial court issued an opinion regarding valuation of the Field, finding that the value of the Field at the time of the taking was \$278,800, without taking the cleanup costs into consideration. The court also found that at the time of the taking, a reasonable purchaser would have required a Type-C Closure from MDNR as a condition for closing. The court determined that the reasonable cost of securing the Type-C Closure was \$237,768. Subtracting that amount from the value of the property, the court arrived at a sum of \$41,032, which it concluded was the net fair market value of the property and constituted just compensation on the date of the taking. The court then issued a final order without explaining the apparent inconsistency with its earlier ruling, which stated that Extrusions was “entitled to keep all amounts previously paid to it [by the Drain District].” Extrusions appealed.

On appeal, Extrusions presented three separate arguments to show that the trial court had erred in determining the amount of just compensation for the taking of the Field. First, Extrusions argued that the trial court should not have considered the environmental contamination and potential cleanup costs when it calculated just compensation for the property. Second, Extrusions argued that the trial court erred in its determination that the fair market value of the Field, without consideration of environmental cleanup costs, was \$278,800. Third, Extrusions claimed that the trial court erred by failing to consider and award damages caused to its existing adjacent complex as a result of the condemnation of the Field.

Michigan has adopted the UCPA, which provides procedures for the condemnation, acquisition, or exercise of eminent domain of real property by public agencies. Section 5 of the UCPA provides that a condemnation complaint “shall ask that the court ascertain and determine just compensation to be made for the acquisition of the [condemned] property.” The UCPA, however, provides very little guidance regarding the factors a court should consider when determining just compensation. Both Section 5 and Section 8 of the UCPA were amended in 1993. Section 5 was amended to require the condemning agency to either “reserve or waive its rights to bring federal or state cost recovery actions against the present owner of the property arising out of a release of hazardous substances at the property.” Section 8 was amended to provide “if the agency reserves its rights to bring a state or federal cost recovery claim against an owner, under circumstances that the court considers just, the court may allow any portion of the money deposited pursuant to section 5 to remain in escrow as security for remediation costs of environmental contamination on the condemned parcel.”

Due to the plain language of the amendments, the court concluded that the UCPA does not give courts the authority to offset the estimated remediation costs against the market value of contaminated property when calculating the amount of just compensation due to a property owner. The amended language also supports the conclusion that any form of cost recovery arising from environmental contamination should be pursued in a separate cause of action. The court believed that these amendments would have no purpose if a court could simply deduct remediation costs from the fair market value of the condemned property. Therefore, the court held that the trial court erred in deducting estimated cleanup costs from the existing fair market value to arrive at a just compensation amount, and reversed the trial court’s ruling that \$41,032 constituted just compensation.

Extrusions next argued that the trial court erred in finding that the value of the Field without consideration of environmental contamination was \$278,800. The District’s expert appraiser estimated the value of the Field on the date of the taking to be \$211,300, while Extrusions’ appraiser estimated the value to be \$346,300. The trial court averaged the two values and found the value of the land at the time of the taking to be \$278,000. The Field value had been assessed at \$264,600 in 1993, and the trial court found that to be relatively consistent with its finding. However, Extrusions claimed upon appeal that

the trial court had erred in its determination of the value of the Field, because the taking occurred in 1994, and the 1993 assessed value was not an accurate indication of value. The appeals found no error in the trial court’s decision because the trial court did not use the assessed value from 1993, but merely compared it to the average of the two separate appraisals. A trial court’s findings of fact may not be set aside unless clearly erroneous, and in this case the court could not say that the trial court had clearly erred.

Extrusions next argued that the trial court erred in finding that the taking did not cause damage to its adjacent North Complex. Extrusions claimed that it had intended to use the Field to build additional warehouse facilities or parking spaces. In **State Highway Comm’r v Walma**, 369 Mich 687, 690 (1963), the Michigan Supreme Court stated that when a partial taking occurs:

The measure of damages is the injury done to the fair market value of the entire tract by the taking of only a part. In other words the owner is entitled to recover the difference between the market value of the entire tract before the taking and the market value of what is left after the taking.

The court found that, at the time of the taking, the Field was a contaminated, vacant plot that was not properly graded for construction. In addition, evidence suggested that Extrusions had sufficient warehouse and parking facilities for the North Complex. Therefore, the appeals court did not find that the trial court had clearly erred in finding that there had been no damage to the North Complex. The decision of the trial court was reversed on the issue of the amount of just compensation and the case was sent back to the trial court for further proceedings.

e. **Village of Nashville v Michigan Twp Participating Plan**, 2001 WL 879007 (Mich App, Aug 2001).

The Michigan Court of Appeals held that a pollution exclusion clause in a liability policy that excluded coverage for discharges of pollutants “which are at any time transported . . . as waste by or for the insured,” precluded coverage for several municipalities that unknowingly sent PCB contaminated waste oil to an oil recycling plant.

The Village of Nashville and the Townships of Castleton and Maple Grove, located in Eaton County, Michigan, jointly operate a solid waste transfer station

that receives and sorts waste products before sending them to recycling or disposal facilities. Someone delivered four drums of waste oil to the transfer station that turned out to be PCB-contaminated. The transfer station sent the waste oil to an oil recycling plant, which, in turn, blended the waste oil with approximately 200,000 gallons of other waste oil that the oil recycler had intended to sell to others for use as fuel. When the oil recycler discovered the contamination, it could no longer sell the 200,000 gallons as fuel. It sued the Village and Townships under various environmental statutes, and also for breach of contract, fraud, trespass, and negligence. When the Village and the Townships asked their liability insurance carrier to defend the case, the insurer refused to do so because the liability insurance policy included an “absolute pollution exclusion.”

The Village and the Townships successfully defended against the oil recycler’s lawsuit, and then sued their insurer to recover their defense costs. The trial court ruled in favor of the Village and the Townships, and awarded them damages of \$276,947, plus interest. The insurer appealed to the Michigan Court of Appeals, arguing that it had no duty to provide a legal defense for the Village and the Townships because the pollution exclusion in the general liability policy excluded coverage for property damage “arising out of the . . . discharge . . . of pollutants which are at any time transported . . . or processed as waste by or for the insured” The Village and the Townships conceded that some of the legal claims in the oil recycler’s complaint were indeed based on environmental laws, and that those claims were barred by the pollution exclusion; however, they argued that the oil recycler’s claims for breach of contract, fraud, trespass, and negligence could not be considered “classic environmental claims” and, therefore, should not be barred by the pollution exclusion.

The court of appeals cited its June 8, 2001 decision in *McKusick v Travelers Indemnity Co*, for the proposition that “a pollutant need not cause traditional environmental pollution before triggering a pollution exclusion with regard to the ‘discharge, dispersal, seepage, migration, release, or escape of pollutants.’” The court held that the *McKusick* decision required it to hold that a claim based on the contamination of a recycled fuel product by PCBs in waste oil is barred by the pollution exclusion. The court of appeals concluded that the insurer had no duty to cover the loss and, therefore, had no duty to defend the Village and the Townships in the lawsuit by the oil recycler. The court of appeals also held that similar language in the

“errors or omissions” extension to the liability policy precluded any coverage under that extension to the policy. Finally, the court held that the pollution exclusion in the policy was not ambiguous and, therefore, the Townships and the Village could not have had any “reasonable expectation of coverage” by the policy for the kind of loss that occurred.

f. ABC Barrel & Drum Sites v Detrex Corp, 2002 WL 264985 (Mich App, Feb 19, 2002).

The Michigan Court of Appeals has dismissed a claim for fraudulent inducement, holding that a merger clause in the contract at issue barred the claim.

In 1992, the United States filed a civil suit against a group of companies (the Group), seeking to recover costs the United States incurred in responding to the release of hazardous substances at two sites. The defendant, Detrex Corporation (Detrex), was a member of the Group. The Group’s members entered into an agreement between themselves that determined the amount of the total liability for which each Group member would be responsible. The Group subsequently settled with the United States, and most members paid the amounts they had been allocated under the agreement. Detrex, however, refused to pay any money, so the other Group members paid Detrex’s share, which exceeded \$700,000, and sued Detrex to recover that amount. Detrex filed a counterclaim and affirmative defense, alleging, among other things, that the other Group members had fraudulently induced it to enter into the allocation agreement by making the following oral representations: (1) the litigation would be aggressively defended until a verdict was reached; (2) the Group would institute an extensive action against other companies to reduce Detrex’s allocated share, and (3) under no circumstances would Detrex’s allocated share exceed \$100,000. The trial court ruled in favor of the Group, and Detrex appealed.

The Michigan Court of Appeals affirmed the trial court’s holding, finding that Detrex did not allege facts to support a claim for fraudulent inducement. The Group’s agreement contained a “merger clause,” specifying that all agreements, written or otherwise, between the parties are contained in the written document. In rejecting Detrex’s argument, the court observed the rule that “a contract with a merger clause nullifies all antecedent claims . . . includ[ing] any collateral agreements that were allegedly an inducement for entering into the contract.” Because Detrex’s claim was based on oral “collateral agreements,”

the representations that formed the basis for Detrex's claim were nullified by the merger clause. Additionally, the court observed that a successful fraudulent inducement claim requires a claimant to establish that it "reasonably relied" upon promises of future conduct made by another party. The court had recently held that it is "unreasonable for a party to rely on statements or promises not contained within a written agreement, when that agreement contains [a merger] clause." According to this precedent, Detrex's reliance on the oral promises made by the Group was unreasonable, and, therefore, Detrex could not show that it reasonably relied on such representations.

g. Reiss v MDEQ, No. 00-17799-CM (Mich Ct Cl, April 26, 2001).

The Michigan Court of Claims dismissed a negligence claim brought by homeowners against MDEQ and its Director, Russell J. Harding, because those parties are immune from liability under Michigan law. The claim against MDEQ and Harding arose from their alleged inaction with respect to groundwater contamination beneath a Rochester Hills subdivision.

Scott and Loriann Reiss, together with their two minor children, lived on residential property near School Road in Rochester Hills, Michigan. Contamination leaking from a nearby landfill had contaminated the groundwater in the area, causing spontaneous fires in the Reiss' basement, putrid smells, and indoor air contamination. Further, Reiss claimed that, as a direct result of the contamination, for years his family had suffered nausea, sleepiness, forgetfulness, and irritability, among other mental and physical ailments. The concentration of the contamination near Reiss' house was so high that, in March 2000, explosive levels of contaminants collected in the basement drain of a neighboring house, causing that structure to "explode with catastrophic force, demolishing the house."

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

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

Reiss argued that MDEQ and Harding should not be immune from tort liability because Harding and other MDEQ employees "acted in a grossly negligent manner so as to show deliberate indifference to the health and safety of the public." The court rejected this argument as to MDEQ because the "gross negligence exception" to governmental immunity applies only to officers, employees, members or volunteers of the agency, and not to the agency itself. Therefore, the court held that MDEQ could not be liable for Harding's or any other MDEQ employee's gross negligence.

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

II. LEGISLATION

A. Federal Legislation

Federal Pub. Law And Effective Date

Description

Pub Law 107-118 (HR 2869) Jan 11, 2002

Small Business Liability Relief and Brownfields Revitalization Act amends various provisions of CERCLA to provide relief for certain businesses from liability under CERCLA and to promote the cleanup and reuse of brownfields.

Pub Law 107-188 (HR 3448) June 12, 2002

Title IV of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 amends the SDWA by adding new sections requiring assessments of vulnerability of certain community water systems to terrorist or other intentional acts intended to disrupt the safe drinking water supply; requires additional assessments by federal government to develop methods to prevent disruption of the water supply, including prevention, detection, monitoring and response to threats.

B. State Legislation

Michigan Pub. Act And Effective Date

Description

2001 Public Acts

PA 12 (SB 38) July 1, 2001

Amends Part 801 of NREPA to increase the penalties for operating watercraft under the influence of alcohol or a controlled substance.

PA 15 (HB 4409) June 12, 2001

Amends Part 821 of NREPA to increase fines for failure to obtain snowmobile trail permits and to increase the permit fee.

PA 16 (HB 4538) June 12, 2001

Amends Part 821 of NREPA to create snowmobile trail improvement fund and provide for promulgation of rules to administer the fund.

PA 23 (HB 4412) June 18, 2001

Amends Part 417 of NREPA to provide for game bird hunting preserves; revises licensing fees and rescinds shooting preserve rules.

PA 49 (HB 4792) July 23, 2001

Amends MCL 324.5522 regarding air pollution fee structure for operating permit program.

PA 50 (HB 4912) July 23, 2001

Amends Part 437 of NREPA regarding the game and fish trust fund and creates joint legislative work group to report on tax credit issues and alternative funding options for game and fish protection programs.

- PA 114 (SB 152) Aug 6, 2001
Amends MCL 324.3101 and adds § 324.3103a to provide for the regulation of ballast water from ships in the Great Lakes, including use of ballast water treatment methods for all oceangoing vessels.
- PA 148 (HB 4925) Feb 1, 2002
Amends Part 821 of NREPA regarding operation of snowmobiles and convictions under various statutes.
- PA 165 (HB 4626) Nov 7, 2001
Adds MCL 324.5419 (arsenic testing of drinking water) and .11153 (new fee for site identification number) and amends Parts 111 and 121 of NREPA regarding various fees for hazardous waste disposal and liquid industrial waste disposal.
- PA 174 (HB 4753) Dec 11, 2001
Amends MCL 324.2131 to revise the cap on the land exchange facilitation fund used to receive proceeds from the sale of state surplus land.
- PA 176 (HB 5013) Dec 11, 2001
Adds Part 82 to NREPA regarding the establishment of conservation plans and practices.
- PA 227 (SB 819) Jan 2, 2002
Amends the MCL 324.9101 definition of state agency to include state public university as it pertains to soil erosion and sedimentation control.
- 2002 Public Acts**
- PA 52 (SB 796) [when SJR T becomes part of the State Constitution]
Amends Part 19 of NREPA to provide for expanded investment authority for the natural resources trust fund.
- PA 54 (SB 798) [when SJR T becomes part of the State Constitution]
Amends Part 71 of NREPA to provide for expanded investment authority of state parks endowment fund.
- PA 55 (SB 799) [when SJR T becomes part of the State Constitution]
Amends Part 439 of NREPA to provide for expanded investment authority for the nongame fish and wildlife trust fund.
- PA 56 (SB 800) [when SJR T becomes part of the State Constitution]
Amends Part 437 of NREPA to provide for expanded investment authority for the game and fish protection trust fund.
- PA 57 (SB 801) [when SJR T becomes part of the State Constitution]
Amends MCL 409.312a to provide for expanded investment authority for the civilian conservation corps endowment fund.
- PA 148 (HB 5118) Apr 5, 2002
Amends MCL 324.502, .32503 and .33938 and adds MCL 324.501a and .61505a to prohibit the use of slant drilling for gas and oil beneath the Great Lakes except for certain circumstances.
- PA 396 (HB 4625) May 30, 2002
Authorizes the issuance of general obligation bonds to finance sewage treatment works projects, storm water projects and non-point source projects.

PA 397 (HB 5892) [Does not take effect until PA 396 question approved by voters in Nov 5, 2002 election]	Adds Parts 52 (strategic water quality initiatives) and 197 (Great Lakes water quality bond implementation) regarding the projects referenced in 2002 PA 396.
PA 398 (HB 4893) [Does not take effect until PA 396 question approved by voters in Nov 5, 2002 election]	Amends MCL 324.5303 criteria for expenditures under the state water pollution control revolving fund.
PA 418 (SB 989) June 5, 2002	Amends Part 83 (pesticide control act) of NREPA to provide for general amendments, adding various sections and repealing other acts and parts of acts.

III. ADMINISTRATIVE RULEMAKINGS

A. EPA Final Rulemakings

Federal Register Notice	Description
Clean Water Act, Great Lakes 66 Fed Reg 30,187 (June 5, 2001)	Notice of availability of “Great Lakes Strategy” re: basin-wide priorities and activities.
Clean Air Act, NSPS and NESHAP 66 Fed Reg 30,905 (June 8, 2001)	Notice of availability of document additions to Applicability Determination Index Database.
Clean Water Act, Drinking Water 66 Fed Reg 31,086 (June 8, 2001)	Amends 40 CFR. Parts 9, 141 and 142 filter backwash recycling requirements for public water systems.
Clean Air Act, NSPS 66 Fed Reg 31,117 (June 11, 2001)	Partial withdrawal of April 10, 2001 final rule re: 40 CFR 60.46a definition of boiler operating day and data substitution requirements.
CERCLA, NPL 66 Fed Reg 32,235 (June 14, 2001)	Adds 10 new sites to the NPL.
Clean Air Act, NESHAP 66 Fed Reg 34,548 (June 29, 2001)	Technical corrections to 40 CFR Part 63 NESHAP for oil and natural gas production facilities.
Clean Air Act, NESHAP 66 Fed Reg 35,087 (July 3, 2001)	Amends 40 CFR Parts 63 and 264 standards for hazardous waste burning in cement kilns, lightweight aggregate kilns and incinerators.
Clean Air Act, NSPS 66 Fed Reg 36,473 (July 12, 2001)	Amends 40 CFR Part 60 standards for certain large municipal waste combustors.
Clean Air Act, NESHAP 66 Fed Reg 36,924 (July 16, 2001)	Amends 40 CFR Part 63 standards for Group I and Group IV polymers and resins.
Clean Air Act, NESHAP 66 Fed Reg 37,591 (July 19, 2001)	Amends 40 CFR Part 63 standards for chemical recovery combustion sources at kraft, soda, sulfite and stand-alone semichemical pulp mills.

Clean Water Act, Testing 66 Fed Reg 37,961 (July 20, 2001)	Notice of availability of “Methods for Assessing the Chronic Toxicity of Marine and Estuarine Sediment-Associated Contaminants with the Amphipod <i>Leptocheirus Plumulosus</i> .”
Clean Air Act, NESHAP 66 Fed Reg 40,121 (Aug 2, 2001)	Amends 40 CFR Part 63 standards for pharmaceuticals production.
Clean Air Act, SIP 66 Fed Reg 40,895 (Aug 6, 2001)	Amends 40 CFR Part 52 to revise Michigan’s SIP with respect to Muskegon County’s ozone maintenance plan.
Clean Air Act, NESHAP 66 Fed Reg 40,903 (Aug 6, 2001)	Amends 40 CFR Part 63 standards for Group IV polymers and resins.
CERCLA, NPL 66 Fed Reg 41,241 (Aug 7, 2001)	Notice of availability of public health assessment for Wurtsmith Air Force Base, Oscoda, MI.
Clean Water Act, Water Quality 66 Fed Reg 41,875 (Aug 9, 2001)	Notice of availability of “Draft Report on Costs Associates With the Total Maximum Daily Load Program.”
Clean Water Act, Water Quality 66 Fed Reg 42,226 (Aug 10, 2001)	Notice of availability of “Final Guidance: Coordinating CSO Long-Term Planning with Water Quality Standards Reviews.”
Clean Air Act, NSPS 66 Fed Reg 42,608 (Aug 14, 2001)	Amends 40 CFR Part 60 standards for nitrogen oxide emissions from certain electric utility steam generating units.
Clean Air Act, NESHAP 66 Fed Reg 44,218 (Aug 22, 2001)	Amends 40 CFR Part 63 to establish standards for boat manufacturing facilities.
Clean Air Act, Monitoring 66 Fed Reg 44,978 (Aug 27, 2001)	Amends 40 CFR 60.13 to remove certain requirements regarding continuous opacity monitors on effluent streams.
Clean Water Act, Drinking Water 66 Fed Reg 46,221 (Sept 4, 2001)	Amends 40 CFR Part 141 unregulated contaminant monitoring requirements for public water systems.
CERCLA, NPL 66 Fed Reg 47,583 (Sept 13, 2001)	Adds 11 new sites to the NPL.
Clean Water Act, Water Quality 66 Fed Reg 49,186 (Sept 26, 2001)	Notice of availability of draft “Aquatic Life Criteria Document for Atrazine.”
Clean Water Act, Water Quality 66 Fed Reg 49,381 (Sept 27, 2001)	Notice of availability of draft “Ballast Water Report.”
Clean Air Act, NSPS 66 Fed Reg 49,830 (Oct 1, 2001)	Amends 40 CFR Part 60 standards for certain industrial - commercial - institutional steam generating units.
Hazardous Waste Management 66 Fed Reg 50,195 (Oct 2, 2001)	Notice of availability of guidance document “Recognizing Completion of Corrective Action Activities at RCRA Facilities.”

- Hazardous Waste Management 66 Fed Reg 50,332
(Oct 3, 2001) Amends 40 CFR 261.3 to clarify revisions to the mixture rule.
- Clean Water Act, Pretreatment 66 Fed Reg 50,334
(Oct 3, 2001) Amends 40 CFR Part 403 pretreatment program requirements for publicly-owned treatment works.
- Clean Air Act, NESHAP 66 Fed Reg 52,361
(Oct 15, 2001) Amends 40 CFR Part 63 standards for hazardous waste combustors; partial withdrawal of July 3, 2001 final rule.
- Hazardous Waste Management 66 Fed Reg 52,762
(Oct 17, 2001) Notice of availability of "Handbook of Groundwater Protection and Cleanup Policies for RCRA Corrective Action."
- Hazardous Waste Management 66 Fed Reg 52,918
(Oct 18, 2001) Notice of availability of draft "Guidance on Demonstrating Compliance with the Land Disposal Restrictions Alternative Soil Treatment Standards" and "Interpretative Memorandum on the Stabilization of Organic-Bearing Hazardous Waste."
- Clean Water Act, Water Quality 66 Fed Reg 43,044
(Oct 18, 2001) Amends 40 CFR Parts 9, 122, 123, 124 and 130 to establish April 30, 2003 as the effective date of revisions to the TMDL and NPDES revisions published on July 13, 2000; also revises date for next submittal of list of impaired waters from April 1 to October 1, 2002.
- Solid Waste Management 66 Fed Reg 53,535
(Oct 23, 2001) Amends 40 CFR Parts 257 and 258 criteria for classification of solid waste disposal facilities and practices and criteria for municipal solid waste landfills and disposal of residential lead-based paint waste.
- Clean Air Act, NESHAP 66 Fed Reg 55,577
(Nov 2, 2001) Amends 40 CFR Part 63 standards for sterilization facilities to eliminate certain MACT requirements.
- Clean Air Act, NESHAP 66 Fed Reg 55,844
(Nov 2, 2001) Amends 40 CFR Part 63 generic maximum achievable control technology standards.
- Clean Air Act, NSPS and NESHAP
66 Fed Reg 57,453 (Nov 15, 2001) Notice of availability of document additions to Applicability Determination Index Database.
- Clean Air Act, NSPS 66 Fed Reg 57,824
(Nov 16, 2001) Amends 40 CFR Part 60 standards for certain large municipal waste combustors.
- Hazardous Waste Management 66 Fed Reg 58,258
(Nov 20, 2001) Amends 40 CFR Parts 148, 261, 268, 271 and 302 to list certain wastes and establish land disposal restrictions for certain wastes generated from inorganic chemical manufacturing processes.
- Clean Air Act, Permits 66 Fed Reg 59,161
(Nov 27, 2001) Amends 40 CFR Part 70 definition of major source.
- Clean Air Act, NESHAP 66 Fed Reg 63,313
(Dec 6, 2001) Amends 40 CFR Part 63 to extend compliance date for hazardous waste combustors in response to court decision.

Clean Air Act, Permits 66 Fed Reg 64,038 (Dec 11, 2001)	Notice of deficiency of Michigan's Title V operating permit program.
Clean Air Act, NESHAP 66 Fed Reg 65,072 (Dec 17, 2001)	Amends 40 CFR Part 63 standards for phosphoric acid manufacturing plants and phosphate fertilizers production plants.
Clean Water Act, NPDES 66 Fed Reg 65,256 (Dec 18, 2001)	Amends 40 CFR Parts 9, 122, 123, 124 and 125 to implement standards for new facilities that use water withdrawn from rivers, streams, lakes, reservoirs, estuaries, oceans or other waters of the United States for cooling purposes.
Clean Water Act, POTWs 66 Fed Reg 66,228 (Dec 21, 2001)	Notification of EPA's decision that numeric standards or management practices are not warranted for dioxin and dioxin-like compounds in sewage sludge that is disposed of at a surface disposal site or incinerated in a sewage sludge incinerator.
Solid Waste Management 66 Fed Reg 67,108 (Dec 28, 2001)	Withdraws Oct. 23, 2001 rule regarding disposal of residential lead-based paint waste.
Clean Water Act, Wetlands 67 Fed Reg 2020 (Jan 15, 2002)	Notice by COE of reissuance of all existing nationwide permits and one new general condition.
Hazardous Waste Management 67 Fed Reg 2962 (Jan 22, 2002)	Amends 40 CFR Parts 260, 264 and 271 requirements for corrective action management units.
Clean Water Act, NSPS 67 Fed Reg 3370 (Jan 23, 2002)	Amends 40 CFR Parts 9 and 434 standards for the coal mining point source category.
Clean Air Act, Ozone 67 Fed Reg 4185 (Jan 29, 2002)	Amends 40 CFR Part 82 to remove restrictions on certain fire suppression substitutes for ozone-depleting substances.
Clean Water Act, Water Quality 67 Fed Reg 4429 (Jan 30, 2002)	Notice of availability of "Methods for Collection, Storage and Manipulation of Sediments for Chemical and Toxicological Analyses: Technical Manual."
CERCLA, NPL 67 Fed Reg 5218 (Feb 5, 2002)	Deletes Lake Linden parcel and Operable Unit 2 of Torch Lake Superfund Site, Houghton County, MI, from the NPL.
Clean Air Act, NESHAP 67 Fed Reg 6521 (Feb 12, 2002)	Revises list of categories of major and area sources of HAP emissions under CAA § 112(c).
Clean Air Act, NESHAP 67 Fed Reg 6968 (Feb 14, 2002)	Amends 40 CFR Parts 63, 266 and 270 requirements for hazardous waste combustors.
Clean Air Act, NESHAP 67 Fed Reg 8202 (Feb 22, 2002)	Amends 40 CFR Part 63 standards for certain natural gas transmission and storage facilities.
Clean Air Act, NESHAP 67 Fed Reg 9156 (Feb 27, 2002)	Amends 40 CFR Part 63 to establish standards for leather finishing operations.

- Hazardous Waste Management 67 Fed Reg 9174
(Feb 27, 2002) Notice of availability of “Completion of Corrective Action Activities at RCRA Facilities” draft guidance memorandum.
- Hazardous Waste Management 67 Fed Reg 11,251
(Mar 13, 2002) Amends 40 CFR Part 261 definition of solid waste and use of the toxicity characteristic leaching procedure in response to court order.
- Clean Air Act, Ozone 67 Fed Reg 13,272
(Mar 22, 2002) Notice of expansion of list of acceptable substitutes for ozone-depleting substances under the Significant New Alternatives Policy program.
- Clean Air Act, NSPS and NESHAP 67 Fed Reg 14,936 (Mar 28, 2002) Notice of availability of document additions to Applicability Determination Index Database.
- Hazardous Waste Management 67 Fed Reg 16,263
(Apr 4, 2002) Amends 40 CFR Parts 148, 261, 268, 271 and 302 to not list certain wastes generated from the production of paint.
- Clean Air Act, NESHAP 67 Fed Reg 16,317
(Apr 5, 2002) Amends 40 CFR Part 63 standards for solvent extraction for vegetable oil production.
- Clean Air Act, NESHAP 67 Fed Reg 16,582
(Apr 5, 2002) Amends 40 CFR Part 63 general provisions and requirements for control technology determinations for major sources under CAA § 112(g) and (j).
- Clean Air Act, NESHAP 67 Fed Reg 16,615
(Apr 5, 2002) Amends 40 CFR Part 63 standards for the portland cement manufacturing industry.
- Clean Air Act, NESHAP 67 Fed Reg 17,762
(Apr 11, 2002) Amends 40 CFR Part 63 to establish standards for certain sources at petroleum refineries.
- Clean Air Act, NESHAP 67 Fed Reg 17,824
(Apr 11, 2002) Amends 40 CFR Part 63 to establish standards for wet-formed fiberglass mat production.
- CERCLA / Clean Air Act 67 Fed Reg 19,750
(Apr 23, 2002) Notice of guidance on the CERCLA § 101(10)(H) federally permitted release definition as it applies to grandfathered sources under the CAA.
- Clean Air Act, SIP 67 Fed Reg 21,868
(May 1, 2002) Amends 40 CFR Parts 51, 52, 96 and 97 in response to the court’s remand on the NO_x SIP call and CAA § 126 rule.
- Clean Water Act, Wetlands 67 Fed Reg 31,129
(May 9, 2002) Amends 40 CFR Part 232 and 33 CFR Part 323 definitions of “fill material” and “discharge of fill material.”
- Clean Water Act, Water Quality 67 Fed Reg 34,709
(May 15, 2002) Notice of availability of EPA’s proposed “Policy on Water Quality Trading.”

B. State Final Rulemakings

Michigan Register Notice	Description
Air Quality 2001 MR 15 (Sept 1, 2001), p. 2	Amends Mich Admin Code R 336.1210 - .1215 and .1299 (renewable operating permits).
Water Quality 2001 MR 16 (Sept 15, 2001), p. 2	Rescinds Mich Admin Code R 323.1151 - .1169 and adds 324.2001 - .2009 (spillage of oil and polluting materials).
Air Quality 2001 MR 16 (Sept 15, 2001), p. 32	Rescinds Mich Admin Code R 336.1913 and .1914 (emission limitations and prohibitions, miscellaneous).
Air Quality 2002 MR 5 (Apr 1, 2002), p. 2	Revises Mich Admin Code R 336.1301, .1303, .1330, .1331, .1371, .1372 and .1374 (Part 3 - emission limitations and prohibitions - particulate matter).
Air Quality 2002 MR 5 (Apr 1, 2002), p. 20	Amends Mich Admin Code R 336.1401 and .1403 (Part 4 - emission limitations and prohibitions - sulfur-bearing compounds).
Air Quality 2002 MR 5 (Apr 1, 2002), p. 25	Amends Mich Admin Code R 336.1601, .1602, .1604 - .1608, .1610, .1615 - .1619, .1622, .1623, .1627 - .1631 and .1651 (Part 6 - emission limitations and prohibitions - existing sources of VOC emissions).
Air Quality 2002 MR 5 (Apr 1, 2002), p. 51	Amends Mich Admin Code R 336.1701 - .1705 (Part 7 - emission limitations and prohibitions - new sources of VOC emissions).
Air Quality 2002 MR 5 (Apr 1, 2002), p. 55	Amends Mich Admin Code R 336.1901, .1906, .1911 and .1930 - .1932 (Part 9 - emission limitations and prohibitions - miscellaneous).
Air Quality 2002 MR 5 (Apr 1, 2002), p. 60	Amends Mich Admin Code R 336.2001 - .2005, .2007, .2011 - .2014, .2021, .2040, .2041 and .2060 (Part 10 - intermittent testing and sampling).
Air Quality 2002 MR 5 (Apr 1, 2002), p. 156	Amends Mich Admin Code R 336.2101, .2150, .2155, .2159, .2170, .2175, .2189 and .2190 (Part 11 - continuous emission monitoring).

COMMITTEE REPORTS

NOMINATING COMMITTEE

At the April 6, 2002 Environmental Law Section Council meeting, Chairperson, John Tatum appointed a Nominating Committee consisting of Thomas Wilczak, Todd Dickinson and Beth Gotthelf. The Nominating Committee met several times by telephone conference. After considering the selection criteria and goals, the Nominating Committee recommends Todd Dickinson for Chairperson-Elect and Grant Trigger for Secretary/Treasurer. For the 2-year position on the Council created

by Grant Trigger's nomination for Secretary/Treasurer, the Nominating Committee recommends William Burton. For additional 3-year terms on the Council, the Nominating Committee recommends and renominates John Byl, Susan Johnson, Michael Leffler, Sharon Newlon, Robert Schroeder and Susan Topp. The election for these positions will be held at the business meeting of the Environmental Law Section on September 26, 2002 at 9:00 a.m. in Grand Rapids.

PROGRAM COMMITTEE

The Program Committee held a meeting on Tuesday, March 27, 2001. Attendees included John Byl, Matt Eugster, Joe Quandt, John Tatum, Susan Topp and Tom Wilczak.

1. Committee Liaison Reports.

a. Water. While there was no report, it was suggested that the recent bills introduced by Senator Sikkema might be a good topic for the water committee. Perhaps Beth Gotthelf could contact Ken Gould regarding this possible program.

b. Air. The air committee has scheduled a program on, among other things, the MACT hammer.

c. Ethics. The ethics committee has a program scheduled on April 5.

2. Planning Programs for Remainder of 2002.

a. Higgins Lake on June 21. John Tatum will contact Andy Hogarth and Lynn Buhl concerning their participation in the program at Higgins Lake on June 21. They will be invited to talk about a topic of their choice, and we are hoping that the new Part 201 rules will be public by then.

b. Annual Program in September. The annual program in September will be a joint program with the Real Estate Section on September 26 from 10:00 to 11:45. The business meeting of the Section will take place from 9:30 to 10:00. John Byl has discussed this with Karen Custer of Miller Johnson, who is the designated representative from the Real Estate Section to coordinate the planning of this program. Everyone has agreed that mold is an appropriate topic. We should also consider select portions of the new Part 201 rules, particularly those portions that relate to real estate issues, such as access and similar topics. John Byl will discuss this with Karen Custer and report to the group at our next meeting.

c. Possible Program in the Fall. We discussed the possibility of inviting the MDEQ to give the same training that is provided internally to staff of the MDEQ. John Tatum will ask Andy and Lynn Buhl if such training is expected in connection with the new Part 201 rules.

d. Other Possible Programs. Given the success of the program in Gaylord, there was a general view that we should continue to do joint programs with the real estate section, and perhaps we should consider another one next winter.

The Program Committee held a meeting on Wednesday, May 15, 2002. Attendees included John Byl, Matt Eugster, Jim O'Brien, Art Siegal, Susan Topp and Tom Wilczak.

1. Committee Liaison Reports.

No reports.

2. Planning Programs for Remainder of 2002.

a. Higgins Lake on June 21. John Byl will prepare a notice on the listserv, inviting Environmental Section members to the program at Higgins Lake on June 21. Andy Hogarth and Lynn Buhl of the DEQ will discuss current topics at the DEQ, including the new Part 201 rules. John Tatum will introduce Andy and Lynn.

b. Annual Program on September 26. The annual program is scheduled for September 26 from 10:00 to 11:45 a.m. in Grand Rapids. This program is being held jointly with the Real Estate Section. The topics include mold and the new Part 201 rules. Deb Alderink of Environmental Health Resources and John Yeager of Willingham & Coté will discuss the mold topic, and Lynelle Marolf will discuss real estate and transactional aspects of the new Part 201 rules.

c. Possible Programs in the Fall. We discussed a number of possible topics for programs in the fall.

(i) Geographical Information Systems (GIS) mapping. John Tatum has had discussions with others concerning GIS mapping in local units of government. Apparently, the City of Detroit and Wayne County are considering possible GIS mapping. These computer maps provide a tremendous amount of detail, including the location of sewer lines, electrical lines, roads, and other information. They also can identify those parcels that are known to be "facilities" under Part 201. It may be appropriate to do an interactive program on GIS mapping that would include a demonstration. This topic will be discussed further at our June meeting. John Tatum has offered to take the lead on organizing a program or portion of a program on this topic.

(ii) Qualification of an Expert under Daubert. Matt Eugster will discuss this with the chair of the Environmental Litigation Committee and Jim O'Brien will discuss this topic with the chair of the Superfund Committee, to assess the level of interest in this topic.

(iii) Part 201 Rules. Jim O'Brien will discuss this topic with the chair of the Superfund Committee (Chris Dunsky). Although this topic is being covered at Higgins Lake and the Annual Program, those programs will likely cover only portions of the Rules, and the Superfund Section may be interested in a more comprehensive program to discuss the content of the new rules.

(iv) Training Session on Environmental Law for Three Other Sections. Tom Wilczak reported a discussion he had with a judge, and we may follow up with a possible session that might include training on environmental litigation for municipal attorneys, prosecutors and judges.

(v) Brownfield Funding Legislation. This may become a relevant topic if and when new legislation is passed, which is expected in the next several months.

(vi) Program Involving the Corps of Engineers. The Corps of Engineers is often involved in wetlands and other issues, including major Superfund cleanups. Tom Wilczak will discuss this topic with the Chair of the Wetlands Committee.

(vii) Mercury Issues, including Mercury Vaccine Litigation. We may want to consider this topic in the future.

(viii) Environmental Insurance Coverage. We may want to consider an update on insurance coverage issues at a program.

The Program Committee held a meeting on Wednesday, June 19, 2002. Attendees included John Byl, Matt Eugster, Art Siegal, John Tatum, and Tom Wilczak.

1. Committee Liaison Reports.

No reports.

2. Planning Programs for Remainder of 2002.

a. Higgins Lake on June 21. Approximately 35 people are signed up for the Higgins Lake program.

b. Annual Program on September 26. The annual program is scheduled for September 26 from 10:00 to 11:45 a.m. in Grand Rapids. This program is being held jointly with the Real Estate Section, and the planning for this program is completed.

c. Possible Programs in the Fall. Please refer to the minutes from the May meeting. John Tatum intends to follow up with organizing a program on GIS mapping and will report at the next program committee meeting.

3. Next Meeting.

Please note that the next meeting will be held on Wednesday, August 21, 2002 at 5:30 p.m. The call in number is 800-226-0194, code # 298963. There will be no meeting in July.

MICHIGAN ENVIRONMENTAL CASENOTES

These casenotes include Michigan state and federal decisions rendered from March 1, 2002 through June 11, 2002.

United States v Twp of Brighton, 282 F 3d 915 (CA 6,2002)

http://www.michbar.org/opinions/us_appeals/2002/031302/14289.html

The federal government brought suit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) against the township of Brighton for cleanup costs incurred at a superfund site. The site covered approximately fifteen acres. Because the owners of the property were judgment proof, the United States sued the township for cleanup costs of the entire fifteen acres, based on the township's use of approximately three acres of the site as a township dump between 1960 and 1973. Earlier, the district court had found the township liable for all costs as an operator of a facility, the defendant appealed, and the circuit court vacated the judgment and remanded the case to the district court on the issues of liability and the divisibility of costs. On remand, the district court summarily reaffirmed its previous conclusions and defendant again appealed. On this appeal, the circuit court again vacated the judgment, remanded the case to the district court, and ordered the district court to hold an evidentiary hearing regarding these issues. In doing so, the court stated that the district court had failed to apply the standards previously set forth in its earlier remand. The circuit court found that the district court should have held an evidentiary hearing to hear the parties' evidence related to the issues remanded. Instead, the district court relied solely on the evidence previously submitted at trial. The circuit court found this to be insufficient to review the issues, especially in light of the changed legal standards previously set forth by the circuit court's first decision, and because the judge who heard the case on remand was not the same one that had heard the evidence at trial.

United States v Rapanos, 190 F Supp 2d 1011 (ED Mich, 2002)

This case involved a complicated procedural history, ultimately leading to a remand to the district court to

consider defendant's conviction for violating of the Clean Water Act (CWA), in light of the Supreme Court's decision in *Solid Waste Agency v Army Corps of Eng'rs*, 531 US 159; 121 S Ct 675; 148 L Ed2d 576 (2001). Defendant was convicted of violating the CWA after he, without a permit, filled his wetlands with sand. Defendant's property was located approximately twenty miles from the nearest navigable waters. At trial, neither the court nor the jury had found that the wetlands were connected to any navigable waters, which would bring them within the scope of the CWA. On remand, the court found that the wetlands on the defendant's property were not connected to navigable waters, and it set aside defendant's earlier conviction. The court determined, relying on Supreme Court precedent, that there must be some significant nexus between defendant's wetlands and navigable waters to make defendant subject to the permit requirements of the CWA. Here, the nearest navigable water was 20 miles away. The court reasoned that, although the Supreme Court had broadly defined "navigable waters," the term would be devoid of meaning if it was without some limitations. The court concluded that the federal government had failed to prove that the nearest navigable water was affected by defendant's actions and, therefore, it could not regulate defendant's actions under the CWA.

Thomas v George Jerome & Co, unpublished opinion per curiam of the Court of Appeals, decided May 21, 2002 (Docket No. 224259); 2002 WL 1040471.

<http://www.michbar.org/opinions/appeals/2002/052102/15052.pdf>

In this case, plaintiff sued defendants under Part 17, Environmental Protection, of the Natural Resources and Environmental Protection Act ("NREPA"). The trial court dismissed plaintiff's claims after he failed to post security bonds. Plaintiff appealed. On appeal, the court addressed whether the court rule or the statute governing security bonds was applicable here because, under the statute, the bond would be capped at \$500, and the trial court had set the security bond amount at \$169,000. The Court of Appeals held that it was the court rule that was applicable here. Relying on *McDougall v Schanz*, 461 Mich 15 (1999), the court reasoned that setting this security bond was more a matter of procedure and practice than a matter

of substantive law because this statute was not intended to regulate environmental issues. Because it was more a matter of procedure and practice, the court rule should prevail over the statute, so the \$500 cap was inapplicable. But the court also went on to say that the court rule required that the amount of the security bond be reasonable, and it reversed and remanded the bonding issue back to the trial court to determine a reasonable bond amount.

Freund v Silagy, unpublished opinion per curiam of the Court of Appeals, decided May 14, 2002 (Docket No. 228974); 2002 WL 988573.

<http://www.michbar.org/opinions/appeals/2002/051402/14996.pdf>

In 1997, Silagy, an employee of the Department of Environmental Quality (DEQ), claimed that plaintiff had deposited fill in a wetland without a permit. Based on this claim, a misdemeanor complaint was filed against plaintiff. The criminal charges were later dismissed, and plaintiff then sued alleging, among many things, malicious prosecution, fraud, abuse of process, and intentional infliction of emotional distress. The trial court dismissed plaintiff's claims pursuant to defendant's motion for summary disposition. Plaintiff appealed. On appeal, the court summarily upheld the dismissal of several counts because they had not been preserved for appeal or because they were untimely. After further review, the court also upheld the dismissal of the malicious prosecution, fraud, abuse of process, and intentional infliction of emotional distress counts. First, the court upheld the dismissal of the malicious prosecution claim because there was sufficient probable cause here for defendant to believe that plaintiff was the perpetrator. There was physical proof that the wetland was being filled, and the plaintiff had told defendant that he was the person responsible for issues related to those wetlands. Since plaintiff could not prove lack of probable cause, he could not prove malicious prosecution. Second, the court also upheld the dismissal of the fraud claim because plaintiff failed to plead reliance on any false statement. Third, the court upheld the dismissal of the abuse of process count because plaintiff did not allege that defendant sought any personal benefit from the criminal charges brought against him. Finally, the court also upheld dismissal of the intentional infliction of emotional distress claim because there was no question of material fact about defendant's conduct that could be considered extreme or outrageous.

National Wildlife Federation & Upper Peninsula Environmental Coalition v Cleveland Cliffs Iron Co & Michigan Dept of Environmental Quality, unpublished opinion per curiam of the Court of Appeals, decided June 11, 2002 (Docket No. 232706); LEXIS 820.

Plaintiffs challenged a permit issued by the Michigan Department of Environmental Quality allowing Cleveland Cliffs Iron Co. to fill approximately 80 acres of wetlands and a mile of stream with waste rock. The claim was brought under the Michigan Environmental Protection Act which states that "any person may maintain an action." The trial judge found that plaintiffs lacked standing to pursue the action because they did not suffer particularized harm. The Court of Appeals relied on the plain language of MEPA and reversed the trial court's decision on standing. The Court decided that compliance with additional standing requirements was not necessary to have standing under MEPA. The Court also distinguished *Lee v Macomb County Board of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001), in which the Michigan Supreme Court adopted the federal *Lujan* test as Michigan's standing test. The Court stated that there was no indication that *Lee* overruled past jurisprudence addressing MEPA's grant of standing. This opinion is currently unpublished; NWF and UPEC are petitioning for publication. Additionally, Defendants Cleveland Cliffs and Empire are seeking leave to appeal to the Michigan Supreme Court.

These Casenotes were prepared by Thomas M. Cooley Law School students Patricia Wilson and Tracey Lackman and F. Michelle Halley, Lake Superior Attorney, National Wildlife Federation.

MINUTES ENVIRONMENTAL LAW SECTION COUNCIL MEETING

Saturday, April 6, 2002

Call to Order at 10:05 a.m.

Present:

Ken Burgess, Chris Dunsky*, Sharon Feldman, Hilda Gurley-Highgate*, Peter Holmes*, Steve Huff*, Lee Johnson, Sharon Newlon*, Rich Patterson, Tom Phillips, Joe Quandt*, John Tatum, Susan Topp*, Charles Toy, Grant Trigger, Tom Wilczak .(* by telephone)

Absent:

Chuck Barbieri, Paul Bohn, John Byl, Charlie Denton, Todd Dickinson, Jeff Haynes, Craig Hupp, Pat Paruch, Claudia Rast, Chris Bzdok, Susan Johnson, Mike Leffler, Jeff Magid, Saul Mikalonis, Mike Ortega, Bob Schroder, Beth Gotthelf, Mike Robinson, Rich Baron, Sally Churchill.

Minutes:

The minutes of the January 19, 2002 meeting were approved on motion by Lee Johnson and seconded by Toy, after being revised to list the adjournment time as 12:01 p.m. and to list the next meeting as April 6, 2002.

Secretary/Treasurer's Report:

Dickinson's report on the Section's financial statements for January/February 2002 were accepted.

Membership Committee Report:

Trigger reported on the membership survey, which generated 235 responses. The responses indicated that the Section generally appears to be meeting the needs of its members. A majority of respondents favored the development of simulcast programs by the Section. The responses also indicate that the Section is not very diverse - only about 20% of the respondents are female and about 5% are people of color. It was agreed that the survey responses would be distributed to the members and that the Council would discuss at its Higgins Lake meeting whether to continue the legislative update, case note and other services currently provided to the members.

Program Committee Report:

Quandt reported on upcoming programs, including a joint program with the Real Estate Section at the Annual Meeting on such topics as toxic mold and the Part 201 rule revisions, and a program for the Higgins Lake meeting on June 21, 2002, at which Andy Hogarth and Lynn Buhl are expected to discuss the Part 201 rules, enforcement and other issues of interest. A Fall program is tentatively planned for October 2002; it likely will cover the Part 201 rules, perhaps with MDEQ providing a training session for part of the program. Trigger suggested that the Fall program also include a Brownfield update in light of the scheduled expiration of Brownfield statutory authority at the end of this year. The possibility of a joint program with the Business Section on transactional issues was also discussed.

Journal Committee Report:

Tatum reported that he will ask Honigman Miller Schwartz and Cohn to prepare the Section's State of the Law article again this year and noted that efforts will be made to ensure that it is included in the ICLE disk.

Technology Committee Report:

Tatum asked whether to allow attorney recruiting firms to post ads on the Section's list serve. There was considerable discussion of whether we should reject the request or, allow it as a worthwhile service to our members, perhaps with payment of a fee. The issue will be considered further at the Higgins Lake meeting on June 21. Tatum also asked if there were any concerns regarding the Section's web page links to member firms; hearing no concerns, Tatum concluded that the link service should continue. Quandt will consider the possibility of simulcasting next Fall's program with help from Trigger.

Subject Matter Committee Reports:

(a) **Air Committee Report:** Burgess reported on the Committee's March 21 program in Lansing as well as a possible plant tour for the Fall.

(b) **Environmental Ethics Committee:** Gurley-Highgate reported on the April 5, 2002 Brown Bag Lunch program in Detroit, which was sparsely attended, but nevertheless generated interesting ideas.

(c) **Environmental Litigation:** Huff reported that the Committee plans to publish an article in the next issue of the Environmental Law Journal on mold issues and the recent Michigan Supreme Court decision in the *Pohutski v Allen Park* case, which held that the trespass-nuisance exception to governmental immunity is inapplicable to local municipalities. Trigger reported that the Michigan Supreme Court has denied the appeal of the *RCO Engineering v ACR Indus* case regarding environmental cleanup, despite submission of an amicus brief by the attorney general's office supporting reversal of the appellate court decision.

(d) **Natural Resources/Wetlands:** Patterson reported that he was preparing a revised mailing list from prior lists and that he will try to resurrect the committee. Burgess recommended making a solicitation to the general listserv, as it had yielded many more names than were on old Air Committee lists. A suggestion was made that "flood plains" be added to the Committee name.

(e) **Real Estate:** No report.

(f) **Solid and Hazardous Waste/Insurance:** No report. Susan Johnson had suggested to Tatum that the Committee be dissolved and its issues be addressed under the Superfund Committee. Hearing no objection, the Chair dissolved the Committee.

(g) **Superfund:** Dunsky reported on the February 9, 2002 meeting in Lansing, which discussed the new CERCLA amendments and also included a presentation by Frank Ruswick of MDEQ regarding lender liability for treatment, storage and disposal facilities. Dunsky also confessed that he participated in a seminar in Gaylord regarding the CERCLA amendments, in which he borrowed shamelessly from the presentations made at the February 9 meeting.

(h) **Surface/Groundwater:** No report.

Liaison Reports:

(a) **State Bar of Michigan Board of Commissioners:** Toy reported that the next Board meeting is scheduled for April 28, 2002.

(b) **Real Estate:** Tatum reported that Paruch had advised him that she had received no feedback from the Real Estate Section on the Homeward Bound Program that was conducted on February 7, 2002.

(c) **Administrative Law Section:** Feldman reported that the next Administrative Law Quarterly was due for publication shortly and the next Administrative Law Section Council meeting is scheduled for April 9, 2002. The Section's Spring program will be held on May 21, 2002, at the East Lansing Marriott on the topics of access to governmental information, emerging technologies, and the integrity of the administrative law process.

(d) **Oil & Gas:** Toy reported that the Committee still exists, but no appointments were made to it this year.

Chairperson's Report:

Tatum reported that he received an inquiry regarding a set of markers out for significant developments in the law, and that environmental law is scheduled to be the next subject topic if the ad hoc committee continues to exist. He also noted an April 1, 2002 e-mail report from Karen Williams to Section Chairs and Council members regarding scheduled Bar activities. Tatum will work with Williams to ensure that the status report is distributed to the full Council listserv.

Vice Chairperson's Report:

Wilczak reported that his historical budget analysis shows that the Section's finances have remained fairly constant over the past few years, although the recent decline in membership has resulted in decreasing dues income. He reported that expenses generally remained flat, except for the dinner and print expenses last year to celebrate the Section's 20th anniversary, which resulted in a balance forward for 2002 of only \$3,200. Wilczak will distribute a copy of the analysis to the Council for further discussion at Higgins Lake. Trigger suggested asking the Bar to report on an accrual basis, rather than the current cash accounting basis.

Old Business:

(a) **20th Anniversary Celebration Print:** Toy reported that MDNR has accepted the Section's offer of a framed print and asked that it be presented at an NRC meeting, but that no response was received from MDEQ. Toy further reported that his discussions with an assistant attorney

general indicated that the attorney general's office would appreciate the Section offering it a framed print. Toy further reported that the Learning Center may accept the original or a print for display in the first floor of the new court building.

(b) **MDEQ OAH PFD:** Tatum reported that the completion of MDEQ's move to its new building may allow additional ALJ opinions to be converted for online posting. The Office of Administrative Hearings has an extern who has been working to convert the most recent opinions. Tatum further reported that Craig Hupp is examining the possibility of converting MDEQ orders for online posting.

(c) **Environmental Law Essay Contest:** Holmes reported that announcements of the Environmental Law Essay Contest had been sent to all six Michigan law schools, the University of Toledo Law School, the University of Notre Dame Law School, and with the assistance of Paul Bohn, several Canadian law schools. Holmes further reported that by spreading horror stories about his final

exam, he had induced some of his environmental law students at Wayne State to consider submitting essays in lieu of taking the exam.

New Business:

Tatum reported that he had appointed Wilczak to chair the Nominating Committee and Dickinson to serve as a member of the Committee. Johnson reported that he is working with the Air and Waste Management Association on an indoor air and mold presentation to be included at the Association's May 16, 2002 seminar in Plymouth. Tatum agreed that an announcement of the seminar could be posted on the list serve.

Next Meeting:

June 21, 2002, at 10:00 a.m. at the Ralph A. McMullen Conference Center at Higgins Lake.

Adjourned at 11:45 a.m.

SUMMARY OF PROPOSED SECTION DUES INCREASE

During the June 22, 2002 Environmental Law Section Council meeting a proposal to increase the section dues from \$20/year to \$30/year was discussed. Considerable discussion was also devoted to the issue of whether a dues increase to \$25 or \$30 was appropriate. It was concluded after reviewing the general annual operating budget and the average dues for other sections (which range from \$20 to \$45 and average about \$25 to \$30) that an increase to \$30 would be proposed and voted on at the annual meeting in September. The reasons in support of this increase include the following:

- Our costs to produce the Environmental Law Journal have gradually increased. Because the recently completed member survey showed very strong support for the Journal we believe continued support of the Journal is an important service to Section members.

- Although Section sponsored programs and seminars generally produce net income for the Section we can offer improved educational programs with the more stable baseline budget that a dues increase can offer.

- The State Bar is considering charging back to Sections certain support service fees. If that is implemented

we may have a budget limitation. While in principle the Section Council does not support such a fee arrangement we may not have any choice.

- In addition, the membership survey that was completed this spring demonstrated strong support for continuing the membership services we offer through the Journal, the internet regulatory notice and educational and training programs.

- Finally, Section dues have not been increased for a number of years and because we have maximized our efficiencies we believe that a dues increase is therefore, appropriate.

In effect the Section has been able provide relatively efficient services with a modest annual cost (currently \$20). We believe members have demonstrated that they appreciate the benefits Section membership provides and continuing those services will require a stable budget that the dues increase can provide.

We recommend this increase and invite any comment or suggestion on the proposal.

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