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STATE OF THE LAW

2003

Recent Developments in Environmental Law

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STATE OF THE LAW 2003

I. INTRODUCTION

The following summarizes selected Michigan and federal environmental judicial decisions from May 2002 through May 2003, and statutory and regulatory developments from June 2002 through June 2003. 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.

II. JUDICIAL DECISIONS

A. Federal Judicial Decisions

1. Clean Water Act

a. *Borden Ranch Partn v US Army Corps of Engrs*, 123 S Ct 599 (2002).

In an appeal from a Ninth Circuit Court of Appeals decision, the United States Supreme Court split 4-4 over the question of whether the “deep ripping” of regulated wetlands is a discharge that requires a permit under Section 404 of the Clean Water Act (CWA) (Section 404). As a result, the Ninth Circuit’s decision—which held that “deep ripping” in regulated wetlands does require a permit—was allowed to stand.

Angelo Tsakopoulos purchased Borden Ranch, located in central California, in 1993. At the time, the property contained vernal pools, swales, and intermittent drainages, all of which are protected wetlands under Section 404. These wetlands were created by a dense layer of soil called a “clay pan,” which prevents surface water from seeping down into the underlying soil. Tsakopoulos planned to convert the ranch into vineyards and orchards, both of which require deep root systems. To allow the roots to penetrate deep enough into the soil, however, the clay pan had to be breached. So Tsakopoulos began “deep ripping” the wetlands, dragging four- to seven-foot long metal prongs through the soil to gouge holes in the clay pan. In the process of deep ripping, soil is disgorged onto the surface.

The CWA prohibits the “discharge of any pollutant” into the waters of the United States (including certain wetlands). The term “pollutant” is defined to include dredged spoil, biological materials, rock, and sand. An exception to this prohibition arises under Section 404, which allows the

United States Army Corps of Engineers (COE) to issue a permit for the discharge of dredged or fill material into regulated waters. In Tsakopoulos’s view, deep ripping was not an activity that was prohibited under the CWA, and therefore, it did not require a permit under Section 404. The COE disagreed and issued several cease and desist orders and administrative orders against Tsakopoulos, who finally responded by filing suit to challenge the COE’s jurisdiction over deep ripping. At trial, the court agreed with the COE, finding over 300 separate violations, and gave Tsakopoulos the choice of paying a \$1.5 million penalty or paying \$500,000 and restoring four acres of wetlands. Tsakopoulos appealed the ruling to the Ninth Circuit.

Tsakopoulos did not contest the issue of whether the wetlands on his property were regulated waters under the CWA. Instead, he claimed that deep ripping could not result in the discharge of a pollutant into those waters. Because deep ripping only stirs up what is already there (i.e., the soil), he argued, nothing had actually been discharged into the wetlands, and certainly no pollutant had been added. The Ninth Circuit disagreed, however, citing numerous cases for the proposition that “activities that destroy the ecology of a wetland are not immune from the CWA merely because they do not involve the introduction of material brought in from somewhere else.” Therefore, the court held that by disrupting the clay pan and spreading it around, and allowing the wetlands to drain to subsurface soil in the process, Tsakopoulos had added a “pollutant” to the wetlands.

Tsakopoulos also argued that the Section 404 “farming exceptions” applied to his activities. Under these exceptions, a permit is not required for “normal farming . . . and ranching activities, such as plowing,” or for the substitution of one wetland crop for another. However, the exceptions do not apply if the “recapture provision” is triggered, which occurs when the activity has the purpose of “bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced.” The court observed that Tsakopoulos’s activities changed the use of the property from ranching to orchards and vineyards, and in addition, substantially impacted the wetlands by allowing them to drain. Moreover, the court ruled that Tsakopoulos was engaging in a radical alteration of the hydrological regime of the property, rather than merely substituting one crop for another. Therefore, the court held,

the “recapture provision” applied, rendering the farming exceptions inapplicable. Tsakopoulos appealed the Ninth Circuit’s decision to the United States Supreme Court. Justice Kennedy recused himself from the decision because of a connection to Tsakopoulos, which made an even 4-4 split possible. The split results in the Ninth Circuit decision being affirmed in a brief one-paragraph opinion without any substantive discussion by the Court.

b. United States v Pauley, 321 F3d 578 (CA 6, 2003).

The Sixth Circuit Court of Appeals held that a district court judge lacked the authority to vacate a CWA fine, which had been issued by another judge, *sua sponte* (of his own accord, instead of on motion by a party in the case). In 2000, Alice Pauley, her husband Joseph Morrison (collectively, the Pauleys), and her father, Samuel Pauley, were found liable for trenching, grading, and filling wetlands on Harsens Island, Michigan without a permit, in violation of the CWA. A penalty hearing was set for 2001. Shortly after the ruling, Samuel Pauley quitclaimed his interest in the property at issue to the Pauleys. After selling his interest, he entered into a consent decree with the United States by which he agreed to hire a contractor to restore the property. The consent decree was, however, contingent upon his receiving permission to enter the property, either from the Pauleys themselves or through a court order requiring the Pauleys to allow access. In early 2001, the court ordered the Pauleys to allow a contractor and the COE to access the property.

At the penalty hearing a few weeks later, the court imposed a \$25,000 fine against the Pauleys, citing their long history of noncompliance with the law and false promises to remedy their violations. The court observed the “strong indications that the [Pauleys] were, essentially, stringing the Corps along, and trying to see if . . . the Corps would simply give up after a period of time.”

Later that year, it became apparent that the Pauleys would not allow access to their property despite the court order requiring them to do so, and the United States filed an emergency motion to enforce the consent decree. The case was assigned to a different judge than the one who had imposed the penalty against the Pauleys. At the hearing on the emergency motion, in an attempt to convince the Pauleys to allow access to the property, the new judge indicated his distaste for using fines as a coercive tool, and entered an order vacating the civil penalty. The United States appealed that order.

The Sixth Circuit held that the judge had exceeded his authority by vacating the fine. The court noted that the judge’s action was tantamount to relieving the Pauleys from a “final judgment,” and that such relief is governed by Fed. R. Civ. P. 60(b)(6), which provides that “[o]n motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment” for “any . . . reason justifying relief from the operation of the judgment.” Citing past precedent, the court observed that the phrase “on motion” had been interpreted to limit the use of Rule 60(b)(6) to situations where a party has made a motion for relief from a final judgment. Therefore, the court held, the judge could not vacate the fine in the absence of a motion from the Pauleys.

The court also pointed out that “district courts should not use their authority under Rule 60(b) to reward parties’ contempt of prior orders,” and noted that “exceptional or extraordinary circumstances” were necessary in order to justify Rule 60(b) relief. While changed circumstances affecting the statutory penalty factors, such as the Pauleys’ ability to pay the fine, could have justified the use of Rule 60(b), “the only unusual circumstance present was that the [Pauleys] intransigently refused to comply with the district court’s order to allow access to the property for remediation.” Instead, the fine had been vacated to induce the Pauleys to comply with the order requiring them to allow access to their property. In the court’s eyes, “[v]acating a prior order for the sole purpose of inducing compliance with another order would reward contempt,” and, therefore, did not justify Rule 60(b) relief. In closing, the court offered the scathing observation that “[the Pauleys’] blatant refusal to comply with a court order would have warranted contempt proceedings, but certainly not a reward for their obstruction.” Because the vacation of the fine was not warranted under Rule 60(b), the court reversed the judge’s order and returned the case for reinstatement of the fine.

c. MDEQ v EPA, 318 F3d 705 (CA 6, 2003).

The Sixth Circuit Court of Appeals rejected the State of Michigan’s challenge to the U.S. Environmental Protection Agency’s (EPA) authority to issue a National Pollutant Discharge Elimination System (NPDES) permit to a facility on a Native American reservation. EPA had issued a NPDES permit to a wastewater treatment facility located on the Saginaw Chippewa Isabella Reservation. The State filed a petition for review to the EPA Environmental Appeals Board (EAB), claiming that the Michigan Department of Environmental Quality (MDEQ), not EPA, is the appropriate authority to issue such permits on the reservation.

The EAB dismissed MDEQ's petition, holding that MDEQ did not identify with sufficient clarity and specificity its objections to EPA's action in issuing the permit.

On the State's appeal, the court first noted that EPA had promulgated rules to ensure the orderly conduct of business before the EAB. One such rule, the court noted, governs the content of petitions to obtain EAB review of EPA decisions. The rule provides that the petition must "show" that the challenged actions of EPA were based on a "finding of fact or conclusion of law which is clearly erroneous" or the "exercise of discretion or important policy consideration" that, in the EAB's discretion, should be reviewed. The EAB had dismissed the State's petition for failure to comply with this rule. The EAB's denial also cited several prior EAB decisions that "a petitioner may not simply restate or refer to its original comments in order to be granted review."

The court stated that it would overturn the EAB's decision only if it was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." The court noted that the EAB had "consistently held that a petitioner must satisfy the pleading requirements set out in the regulation in order to meet its burden of showing that review is warranted." One such requirement was the need for "a petitioner to both state the objections to the permit that are being raised for review, and to explain why the [EPA's] previous response to those objections (i.e., the [EPA's] basis for the decision) is clearly erroneous or otherwise warrants review." The court found that the EAB "has consistently applied this rule in denying petitions for review."

In this case, the State's petition for review merely declared that EPA's actions were unauthorized and referred the EAB to two appendices. The appendices contained the challenged permit, the State's comments objecting to the proposed permit along with the original attachments to the comments, and EPA's responses to the comments. The court upheld the EAB's dismissal of MDEQ's petition, holding that it was not an abuse of discretion. The court noted that "[i]nstead of explaining to the [EAB] why the [EPA's] detailed responses to its comments were clearly erroneous, Michigan simply repackaged its comments and the EPA's response as unmediated appendices to its petition to the [EAB]. This does not satisfy the burden of showing entitlement to review."

Although EPA has the discretion to relax or modify its procedural rules "when in a given case the ends of justice require it," the court stated that "its decision not to relax or modify its rule in this case was not an abuse of discretion."

The court found that the EAB's rule against "the unmediated resubmission of comments and subsequent responses" was not a "hidden" rule, as it "has been stated and restated throughout [EAB] decisions." Therefore, the court declined "to review on the merits the petitioners' challenge to the EPA's authority to issue the permit."

As a final argument, the State asserted that, aside from the court's jurisdiction to review the EAB's decision, the court also had jurisdiction to review procedures used by EPA to prevent *the State's* issuance of discharge permits to facilities located on the reservation. However, the court held that the State had "procedurally defaulted" its chance for judicial review of this issue by failing to meet its burden to submit a proper petition to the EAB on the EPA-issued permit.

2. Comprehensive Environmental Response, Compensation, and Liability Act

a. Kalamazoo River Study Group v Eaton Corp, 258 F Supp 2d 736 (WD Mich, 2002).

The Kalamazoo River Study Group (KRSG), an association of four paper companies, brought a contribution action under CERCLA against Eaton Corporation (Eaton) in the United States District Court for the Western District of Michigan for polychlorinated biphenyl (PCB) contamination released into the Kalamazoo River. In a May 9, 2001 decision, the court found Eaton liable for PCB contamination released from two of its three automotive parts manufacturing plants located along the Kalamazoo River because the evidence established that Eaton had more likely than not released PCB contamination from its plants located in Battle Creek and Kalamazoo into the River. The 2001 case, however, considered only Eaton's liability under the CERCLA contribution claim.

The "allocation" phase of KRSG's contribution action was held in a February 2002 trial in which the court determined the extent of Eaton's liability for the PCB contamination in the Kalamazoo River. KRSG sought a ruling that Eaton was liable for 40% of the \$29,226,865.09 in past investigation costs, as well as 40% of all future investigation and cleanup costs. The court held that it was equitable to allocate to Eaton only 10% of the costs of investigating a portion of the River upstream of Morrow Lake and in the vicinity of Eaton's Battle Creek plant – which amounted to only \$62,261.58.

The Kalamazoo River Superfund site consists of a 35-mile stretch of the River listed on the National Priorities List

(NPL). The upstream end of the NPL site begins at the confluence of the Kalamazoo River and Portage Creek downstream to the Allegan City Dam, plus three miles of Portage Creek. Eaton's Kalamazoo plant was located three miles downstream from the upstream end of the NPL site and was downstream of three of the four KRSG members. Under a 1990 administrative consent order with the MDNR, KRSG agreed to fund and conduct a remedial investigation and feasibility study of a 95-mile stretch of the River, which also included the NPL-listed portion of the River. Thus, included within the study area was Morrow Lake, created by damming the Kalamazoo River approximately five miles upstream of the NPL site. Eaton's Battle Creek plant, which was demolished in 1984, was located approximately 15 miles further upstream of the Morrow Lake Dam and, therefore, was located upstream of all four members of the KRSG.

The court explained that it was established in the previous cases that the PCBs found at the NPL site consist primarily of Aroclors 1242, 1248, 1254, and 1260. KRSG acknowledged that its members were primarily responsible for the majority of Aroclor 1242 present at the NPL site, while Aroclors 1254 and 1260 account for only 2 to 3 % of the PCBs in the KRSG members' landfills. In the Morrow Lake sediments, however, approximately 90 % of the PCBs are Aroclors 1254 and 1260, and those Aroclors account for approximately 25 % of the PCBs in the sediments of the Kalamazoo River between Morrow Lake and the Allegan Dam. KRSG, therefore, argued that because of the difference between the proportion of Aroclors 1254 and 1260 in the River and the landfills, the KRSG members could not be responsible for the majority of those Aroclors at the NPL site. KRSG argued that the evidence showed that the PCBs more likely than not came from Eaton, while Eaton argued that the quantity of any PCBs it contributed to the River was so small as to be negligible.

The court acknowledged that, due to the fact that none of the parties were aware of their disposal of PCBs, the court must rely upon circumstantial evidence in order to arrive at an allocation. In its 2001 decision finding liability, the court determined with respect to Eaton's Battle Creek Plant that: (i) the primary PCBs present were Aroclors 1248 and 1254; (ii) the PCBs were not used in process oils, but came from leaking electrical equipment and hydraulic systems, which were normally closed systems; and (iii) even if the PCBs from the leaks were absorbed by the floors or swept up and discarded, some were probably contained in the facility's effluent and made it from the ditch into which the plant discharged its wastewater and into the Kalamazoo River. The

court, however, noted that its determination of liability regarding the Battle Creek plant was based upon what was now known to be erroneous testimony that the Clark Equipment Company (Clark) did not discharge process wastewater to the same ditch that Eaton also discharged.

After the liability stage of the trial, it was learned that Clark discharged process wastewater to the ditch up until 1978. Clark manufactured industrial trucks, tractors, trailers, stackers, and forklifts – operations that involved forging, machining, and hard chrome plating. KRSG's expert conceded that, based upon this new evidence, that the PCBs present in the ditch could have come from Clark if its effluent contained PCBs. Although there was no direct evidence that Clark discharged PCBs, similar to Eaton, Clark's plant had PCB-containing electrical equipment. Clark also had approximately 30 hydraulic systems that could have contained PCBs and the forklifts it manufactured could have used PCB-containing hydraulic fluids.

Since the 2001 liability trial, KRSG's expert also collected a number of new sediment samples from the ditch and the Kalamazoo River, the results of which were extensively discussed by the court. Based upon a comparison of the PCB data relating to the ditch and PCB data from the Kalamazoo River at and downstream of Eaton's discharge, KRSG's expert opined that the Battle Creek plant was among the most contaminated throughout the Kalamazoo River system and caused significant PCB contamination of the River, including Morrow Lake and downstream through the NPL site. KRSG argued that the court should revise its earlier findings and conclude that Eaton used large quantities of PCB-containing process oils. KRSG further argued that given the significant PCB contamination found in the ditch and the adjacent River, it was reasonable to conclude that Eaton caused PCB contamination of a magnitude similar to that caused by KRSG's members, which reached more than 50 miles downstream of the member's facilities.

The court disagreed with KRSG's expert's conclusions on five bases. First, the court noted that it was impossible to know if the PCBs in the ditch came from Eaton or Clark. Second, the PCBs in the ditch did not match the PCBs found at Eaton's Battle Creek plant. As discussed above, the court previously found that primarily Aroclor 1248, with significant amounts of Aroclor 1254, were used at the plant. Aroclor 1248 was not detected at all in the ditch or river samples and the Aroclors present in the sediments did not match the Aroclors found in the Battle Creek plant's floor.

Third, the court pointed out that neither of the Aroclors found in the PCB-containing hydraulic oil known to have been purchased by the plant were found in the ditch. Fourth, the court stated that KRSG's arguments ignored the other potential sources of PCBs located upstream of Eaton's Battle Creek plant, with 25% of the Kalamazoo River watershed being located upstream of the plant. The court observed that the Aroclors identified by KRSG in the vicinity of the Battle Creek plant were consistent with the types found in electrical equipment such as transformers and capacitors, which were commonly used in a variety of industries. The court also pointed to data from 1972 showing the presence of Aroclor 1254 in the effluent of two other companies located in Battle Creek. Another study in 1971 found that the most significant source of PCBs to the Kalamazoo River upstream of Battle Creek was from the Battle Creek River, which flows into the Kalamazoo River upstream of Eaton's plant. The court noted that, despite this evidence, KRSG's expert did not perform any testing upstream of Eaton's plant.

Finally, the court stated that it ascribed little significance to KRSG's expert's comparison of the ditch sediment samples to those taken from the Kalamazoo River, observing that the ditch samples would naturally be more concentrated because they had not been subject to the dilution effects seen in the River due to greater flows and the addition of clean sediment. The court next summarized the testimony of Eaton's expert, which the court found to be more persuasive than the testimony of KRSG's expert, noting that Eaton's expert had more expertise in the areas of hydrogeology and PCB transport in rivers and had recently testified before a Congressional subcommittee on contaminated sediment issues. Eaton's expert testified that river sediment will normally show a gradient in PCB concentration, with the highest concentrations near the source and declining concentrations proceeding downstream from the source.

Eaton's expert testified that if the Eaton Battle Creek plant was a source of PCBs to the River, he would expect to see detectable concentrations of PCBs in the 13-mile stretch of the River from the plant to Morrow Lake, with a gradient of the highest concentrations near Eaton's plant and declining concentrations proceeding downstream. Such was not the case, however. A 1976 study found no Aroclor 1254 in the sediments between Eaton's plant and Morrow Lake. Other data collected between 1993 and 2000 from Battle Creek through the NPL site to Lake Allegan also showed no declining gradient of PCB concentrations starting at Eaton's Battle Creek plant. Eaton's expert testified that the data appeared to indicate multiple sources of Aroclor 1254 to the

River and was not consistent with a single or primary source of PCBs originating from Eaton's plant. Eaton's expert testified that the evidence strongly supported the PCBs found in Morrow Lake originated from a source close to the Lake, not 15 miles upstream. Further, two other industrial facilities that discharged to Morrow Lake were identified as possible sources of PCBs to the Lake. In addition, the MDEQ project manager identified KRSG's members' landfills as potential sources of windborne PCBs to Morrow Lake. Eaton's expert admitted that some amount of PCBs from Eaton's plant may have entered the ditch, traveled to Morrow Lake, and also traveled over the Morrow Lake Dam and into the NPL site; however, he opined that Eaton's plant did not release any measurable quantities of PCBs to the Lake or the NPL site.

The court concluded that KRSG had "provided no persuasive, credible, or reliable new evidence which would undermine [the court's] previous determination that any releases from Eaton's Battle Creek facility were minimal" In fact, the new evidence that Clark discharged to the ditch prior to 1978 further decreased the likelihood that the PCBs in the ditch were attributable to Eaton. The court found that the evidence supported the conclusion that Eaton's Battle Creek plant was not a significant source of PCBs to the NPL site – that the PCBs contributed by the plant would not be measurable above background levels.

In explaining its 2001 finding that Eaton was liable for the release of PCBs from its Kalamazoo plant to the Kalamazoo River, the court noted that it also found at that time it was unlikely that any PCBs were used at the plant in an open process. During the 2002 allocation trial, KRSG presented new evidence of testing performed by MDEQ in 2001 which detected PCB Aroclors 1248 and 1260 at 3.2 and 2.1 parts per billion (ppb), respectively, in a sample from a "product dispenser." KRSG also presented evidence that sampling in 1983 showed that four of five press pits at the plant had total PCB levels of 12,000 ppb, 57,000 ppb, 94,000 ppb, and 880,000 ppb.

KRSG argued that MDEQ's detection of PCBs in a process oil 30 years after PCBs were banned from such uses was significant, while Eaton's expert argued that the single detection was so low as to not indicate residual contamination and supported the conclusion that it was related to isolated incidental contamination. KRSG argued that the presence of PCBs in the press pits confirmed Eaton's use of PCB-containing process oils.

The court rejected KRSG's arguments that this new evidence required the court to conclude that Eaton widely used PCB-containing process oils at its Kalamazoo plant. The new evidence did not address the court's findings in the 2001 trial that the plant had no reason to use PCBs in its processes and that PCBs were not present in the area where metal chips were stored and process oils drained off them and into the soils below. The court further stated that evidence of PCB use in the plant was not significant if the PCBs did not reach the Kalamazoo River. Accordingly, the court turned its attention to the data from the Zantman Drain and the River.

KRSG again presented evidence based on the additional testing it performed in the Zantman Drain and the River after the 2001 liability trial. The court stated that the Drain was "a stagnant, slow moving, organically rich ditch" that "would have been an excellent environment for capturing PCBs that came down the Drain." However, only Aroclor 1260 was detected in the Drain. The court reasoned that if an assortment of Aroclors were released into the Drain, they should have been present in the Drain's sediments. There was no evidence that the Zantman Drain was a significant source of the other Aroclors present in the River. Therefore, the court concluded that Eaton's Kalamazoo facility was not a significant source of PCBs to the River.

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

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

KRSG argued "that based on the three Gore Factors of volume of discharge, toxicity, and cooperation with governmental authorities, Eaton should be allocated 40% of the River investigation and remediation costs [KRSG] has incurred and will incur in the future at the Site." The court found, however, that the equities with regard to cooperation with governmental agencies worked in the favor of neither KRSG nor Eaton. Further, neither KRSG nor Eaton was careful regarding the release of wastes into the River. Therefore, the court stated it would give no weight to the cooperation factor.

Regarding the toxicity factor, KRSG argued that PCBs present in fish was driving the sediment cleanup and that Aroclor 1254 accumulated in fish four times more than the Aroclor 1242 released by KRSG's members. KRSG argued that, therefore, Aroclor 1254 is more toxic than Aroclor 1242 and its discharge should be weighted more heavily. The court noted that it had rejected this same argument in the 2000 case KRSG brought against Rockwell International and the Sixth Circuit Court of Appeals found no error in the court's approach of treating all PCBs on an equal toxicity basis. Therefore, the court held that because cooperation and toxicity were not relevant to the allocation in the case at hand, the most relevant Gore factor was the volume of PCBs released to the site by each party.

KRSG argued that Eaton should be liable for most of the PCB contamination downstream of Eaton's Battle Creek plant to the Morrow Lake Dam and should be liable for a significant portion of the Aroclor 1254 and 1260 contamination downstream of the Dam. In addressing KRSG's arguments, the court extensively analyzed the evidence presented by KRSG's and Eaton's experts. Regarding KRSG's contribution of Aroclors 1254 and 1260 to the River, the court found:

The Court concludes that it is more likely than not that 2 to 5% is representative of the KRSG's discharges of Aroclors 1254 and 1260 to the River. Thus, most of the Aroclors 1254 and 1260 in the Kalamazoo River . . . between Morrow Lake and Lake Allegan had to have come from sources other than [KRSG]. The Court agrees with [KRSG] that because Aroclors 1254 and 1260 are not associated with paper wastes and because they are not found in the [landfills] in any significant ratio, much of the PCB Aroclors 1254 and 1260 now present in sediments between Morrow Lake Dam and Lake

Allegan Dam is attributable to sources other than [KRSG's] members' papermaking operations.

The court again noted that the failure of KRSG to do any testing upstream of the Eaton Battle Creek plant prevented it from showing by a preponderance of the evidence that Eaton was the source of the PCBs in Morrow Lake, as opposed to sources further upstream. Further, there was no gradient of PCBs going downstream from the Battle Creek plant. The court also concluded that Morrow Lake was not a significant source of PCBs to the NPL site. If it had been, the court stated that one would expect to find a gradient of Aroclor 1254 declining downstream of the Morrow Lake Dam. Instead, the evidence showed a multiple source pattern for Aroclor 1254 within the NPL site. The court further noted that MDEQ had not expressed an interest in remediating Morrow Lake and the River upstream. The court held as follows:

Because this Court finds that Eaton's Battle Creek facility was not a significant source of PCBs to Morrow Lake, and because this Court now concludes that Morrow Lake was not a significant source of PCBs to the NPL Site, Eaton Battle Creek's facility [sic], which is upstream of Morrow Lake, is an even less significant contributor of PCBs to the NPL Site.

Based upon the finding contained in this opinion and all of the previous opinions in this case, this Court concludes that the [Aroclor] 1254 in the NPL Site came from multiple sources. Eaton was one of those many sources. So were [KRSG's] members.

The court stated that it assumed that every industry along the Kalamazoo River was a possible source of a small amount of Aroclor 1254 to the NPL site. The court found insufficient evidence, however, for singling out Eaton as a significant source of Aroclor 1254 to the NPL site. The court, therefore, found Eaton's contribution of PCBs to the NPL site to be "very minimal."

The court held that it would not be equitable to require Eaton to participate in the high cost of remediating the NPL site because: (1) Eaton was not a significant source of Aroclor 1254 to the NPL site; (2) small quantities of Aroclor 1254 were contributed by a large number of industries; and (3) the total amount of Aroclor 1254 would not have required remediation but for the large amount of Aroclor 1242 discharged by KRSG's members – that is, the PCBs

contributed by Eaton did not affect the scope of, or need for, a cleanup.

Notwithstanding this holding, however, the court held that Eaton should be required to pay some portion of the cost of the investigation performed upstream of Morrow Lake. Based on the discovery of PCBs at Eaton's Battle Creek plant and in Morrow Lake, Eaton's lack of any historical records, and the presence of Aroclor 1254 beyond that which could be attributed to KRSG's members, both KRSG and Eaton had an interest in determining the amount of PCBs Eaton contributed to the Kalamazoo River. The court thus concluded that Eaton had reaped the benefits of the investigation conducted by KRSG and held that it would be equitable to require Eaton to bear 10% of the costs of investigating the River upstream of Morrow Lake and in the vicinity of Eaton's Battle Creek plant. With respect to the costs of KRSG's investigation of the Kalamazoo River downstream of Morrow Lake, however, the court concluded that KRSG would have incurred those costs regardless of Eaton's involvement as a potential source. Therefore, the court held that Eaton should bear none of the investigation costs incurred within the NPL site. Consequently, the court held that Eaton must pay KRSG \$62,261.58, plus prejudgment interest as provided under Section 107(a) of CERCLA, for its share of the investigation costs.

b. American Special Risk Ins Co v City of Centerline, 2002 WL 1480821 (ED Mich, 2002).

As a result of a citizen suit by the neighbors of the South Macomb Disposal Authority (SMDA) landfills, the State of Michigan sued SMDA in 1986 and ordered it to clean up its landfills. SMDA then sued its liability insurance carriers to pay the costs of remediating the landfills. The insurance carriers then filed a lawsuit in the United States District Court for the Eastern District of Michigan, not against SMDA but against the cities who are its members, asking the court to require the cities to reimburse the insurance companies their "fair share" of cleanup costs. In August, 2001, the court ruled that the cities had arranged to dispose of wastes at the landfill, and therefore are liable to the insurers under CERCLA. The court scheduled a second trial to consider the issue of how cleanup costs should be allocated between the cities and SMDA.

Just before the allocation trial, the cities filed a motion asking the court to dismiss SMDA's claim against the cities based on an August 14, 2001 decision by the United States Court of Appeals for the Fifth Circuit (which sits in New Orleans) in **Aviall Services, Inc v Cooper Indus, Inc.** The

Aviall decision held that Section 113(f) of CERCLA authorizes a lawsuit by one responsible party to compel another responsible party to pay its fair share of response costs, only when the first responsible party has been sued by EPA or a state under Sections 106 or 107 of CERCLA. The **Aviall** decision caused great concern among environmental lawyers and even at EPA, because that decision may have the unintended effect of making responsible parties refuse to remediate contaminated properties unless EPA or a state sues them under CERCLA. EPA and many state agencies are concerned that voluntary cleanups at brownfield sites and Superfund sites will be discouraged if the **Aviall** decision is accepted by other courts. This concern increased when the Department of Justice filed a brief with the Fifth Circuit asking it to affirm the decision of its panel.

In the **SMDA** case, the court in Michigan declined to follow the **Aviall** case. It held instead that the key to determining when a party has a contribution claim is whether that party has been compelled to pay or remediate the site, not whether it has been sued by EPA or a state in court under CERCLA. Thus, the court concluded that CERCLA allows a contribution claim under Section 113(f) even in the absence of a previous lawsuit. Although this decision is not binding on other federal judges, even in Michigan, it will nonetheless provide some encouragement to responsible parties to remediate sites without requiring EPA or the state to sue them.

A second interesting issue that the court decided is whether a court should hear testimony from “experts” on how a court should allocate contribution costs among liable parties. The cities called attorney John Barkett, a well-known environmental attorney from Atlanta, Georgia, who frequently serves as an allocation consultant, to testify concerning how the court should allocate response costs between SMDA and the cities. The court acknowledged that “Barkett is an attorney experienced in performing CERCLA allocation work.” Nonetheless, the court concluded that Mr. Barkett’s proposed testimony was essentially the same as the arguments that an attorney for one of the parties, rather than an expert witness, would present to the court. Therefore, the court excluded Mr. Barkett’s testimony.

3. Insurance

a. **Lessard v City of Allen Park, 247 F Supp 2d 843 (ED Mich, 2003).**

The United States District Court for the Eastern District of Michigan refused to transfer to state court a series of cases brought by homeowners and their insurers against local sewage authorities and governments for damages caused by sewer system backups in September 2000.

In 1977 and again in 1987, the EPA brought two major cases against both the Detroit Water and Sewerage Department (DWSD) and the communities it serves, and Wayne County and the Downriver communities it serves through the Wyandotte Wastewater Treatment Plant. The actions, which alleged violations of water quality standards and wastewater treatment requirements, were settled by consent judgments entered by the court. One of the pervasive problems addressed by the consent judgments related to wet weather problems – specifically, combined sewer overflows (CSOs). These occur during storm events when a sewer system allows sanitary sewage and storm water runoff to combine in the same conveyances and the excessive flow threatens to overwhelm the sewage treatment plant. To protect the plant, the operator may divert some of the incoming flow directly to surface waters without treatment.

Among other things, the 1987 consent judgment required Wayne County and the Downriver communities to create a means to balance the flow of wastewater, a process that is particularly important in wet weather events. Wayne County and the Downriver communities were allowed to bypass the system, however, and open gates to release excess flows from the system into the Detroit and Rouge Rivers during “emergency wet weather events” until September 2002. The Court retained jurisdiction over the 1987 consent judgment for the purpose of ruling on any motion by any party to enforce the terms and conditions of the consent judgment.

In September 2000, a reported 100-year rainstorm struck the Downriver area of suburban Detroit. The basements of approximately 13,000 homes became flooded in the Downriver area as a result of sewer system backups caused by an overwhelming flow of storm water into the sewer system. The affected homeowners and, in some cases, their insurers, sued their respective municipalities, Wayne County or both in state court for this flooding event in 34 proposed class action suits, claiming that the improper operation of the sewer system by the defendants caused damage to their property. Some of the municipal defendants cross-claimed or filed third-party complaints against Wayne County claiming that the County was responsible for the flooding

and should indemnify them or contribute to any damages that they may be forced to pay the plaintiffs.

Wayne County had the cases moved to the federal court, alleging that the claims of the municipalities against it gave rise to federal subject matter jurisdiction under the 1987 consent judgment. In turn, the plaintiffs filed motions for remand, contending that the federal court lacked subject matter jurisdiction. The court rejected the motions, finding that federal subject matter jurisdiction existing over cases in which Wayne County was named a third-party defendant. The plaintiffs appealed to the Sixth Circuit, which denied their petition, holding that the complaint against Wayne County by one of the municipal defendants “arises from obligations established in a consent decree entered in a case initiated under federal statute.”

The plaintiffs then filed renewed motions to transfer of the cases back to state court, arguing that recent decisions by the United States Supreme Court and the Sixth Circuit had raised new questions regarding the court’s prior decision that it had subject matter jurisdiction. The court, however, held that, for two reasons, it had subject matter jurisdiction over all of the cases related to the basement flooding.

First, the court noted that the plaintiffs claimed, among other things, that the defendants’ actions caused a trespass and a nuisance. Under Michigan law, the court observed, trespass/nuisance by a governmental entity is “a direct trespass upon, or the interference with the use or enjoyment of, and that results from a physical intrusion caused by, or under the control of, a governmental entity.” To prevail on a trespass/nuisance claim, “a plaintiff must show: (1) condition (nuisance or trespass); (2) cause (physical intrusion); and (3) causation or control (by the government).” The Court found that determination of the “causation or control” element of the plaintiffs’ cases “turns necessarily on the interpretation of the two federal court Consent Judgments.” As the court explained, “plaintiffs must establish that ‘but for’ the defendant’s acts, their injuries would not have occurred. This can only be answered by recourse to the Consent Judgments. The Consent Judgments delegate specific duties to both DWSD and Wayne County and each of the Downriver communities, and once plaintiffs identify the condition of trespass/nuisance, they must then prove who was responsible for that act. Given the complex web of duties and relationships under the Consent Judgments, plaintiffs cannot bypass this issue.” Accordingly, “since the resolution of the ‘cause and control’ elements turn on the resolution of federal law, as mandated by the Consent Judgments, a federal

question appears on the face of the complaint and this court has original jurisdiction over those claims.”

The court also held that it had “supplemental jurisdiction” over other claims, such as the plaintiffs’ claim of unconstitutional takings from the flooding, “that are so related to claims in the action within [the court’s] original jurisdiction that they form part of the same case or controversy.”

For its second reason of finding that it had jurisdiction over the cases, the court noted that various parties in the 1987 and 1977 litigation matters had filed motions for declaratory judgment regarding the parties’ rights, responsibilities, liabilities and legal relationships under the consent judgments “with regard to sewer backups which have periodically caused basement flooding in the downriver communities.” The court held that, because it had “original jurisdiction over the declaratory judgment actions,” and because the state law claims of the basement flooding plaintiffs would rely, in part, on the court’s decisions involving the Consent Judgments, it was appropriate for the court to exercise its supplemental jurisdiction over the basement flooding plaintiffs’ state law claims.

b. Dow Chem Co v Fireman’s Fund Ins Co, 217 F Supp 2d 816 (ED Mich, 2002).

The United States District Court for the Eastern District of Michigan held that liability insurance policies were “triggered” at the time groundwater contamination took place, even though the municipal water systems affected by the contamination did not have to pay for special filtration equipment until after enforceable drinking water standards were adopted in 1988.

From the 1950’s through 1977, Dow Chemical Company (Dow) of Midland, Michigan manufactured two pesticides known as DBCP and EDB, which were widely used on crops grown in California. In the early 1970’s, certain studies suggested that DBCP and EDB might cause cancer in laboratory rats. A 1977 study identified the two pesticides as possible causes of infertility in human males. Dow stopped selling DBCP and EDB in 1977.

In 1979, DBCP and EDB were detected in groundwater at various locations in California’s San Joaquin Valley. The State of California issued non-enforceable advisories against drinking groundwater containing more than 1.0 part per billion (ppb) of either pesticide. In 1988, the State of California adopted mandatory maximum contaminant levels

that prohibited the consumption of groundwater containing 0.2 ppb of DBCP or 0.05 ppb of EDB. As a result, numerous municipalities in the San Joaquin Valley had to purchase and install special filtration equipment to meet the new standards, or had to close and replace their groundwater production wells.

As early as 1981, some municipalities sued Dow to recover the costs of closing and replacing their wells or purchasing filtration equipment. Most of the municipalities sued Dow only after the state had adopted standards for EDB and DBCP in 1988, and sought to recover their costs of purchasing special filtration equipment. Dow settled many of the lawsuits by reimbursing the costs that the municipalities had incurred.

Fireman's Fund Insurance Company (Fireman's Fund) had sold six liability insurance policies to Dow covering the period from 1956 through 1976. The policies issued between 1956 and 1970 promised to reimburse Dow for any liability incurred "for occurrences during the policy period." The policies issued from 1971 through 1976 promised to reimburse Dow for liability resulting from "property damage which occurs during the policy period." Fireman's Fund paid Dow's legal costs of defending the lawsuits by the municipalities, but it refused to pay Dow for the cost of settling with the municipalities. Dow sued Fireman's Fund in 1996 to require Fireman's Fund to reimburse Dow's settlement costs. The parties agreed that the policies were governed by Michigan law, even though the alleged injuries had occurred in California.

Fireman's Fund moved for summary judgment on the ground that its policies did not apply to the claims by the municipalities. Fireman's Fund argued that under Michigan law, a liability insurance policy applies only when an "injury-in-fact" occurred during the policy period. Fireman's Fund argued that none of the municipalities suffered any "injury-in-fact" between 1956 and 1976, even though they had been extracting and distributing contaminated groundwater during that time, because it was not until 1979 that the State of California adopted enforceable regulations that legally restricted their right to use the contaminated water. In response, Dow argued that the application of the pesticides during the 1950s through 1970s was the event that ultimately caused the municipalities' losses, and that event occurred during the Fireman's Fund policy periods.

The court ruled that the language of the particular policies is critical in determining whether a liability policy is

triggered by a certain event. It noted that each Fireman's Fund policy issued from 1956 through 1970 promised to reimburse Dow whenever there was an "occurrence" during the policy period, and did not specify that the property damage itself, or Dow's liability to the injured party, must occur during the policy period. In contrast, the 1971 to 1976 policies required that "property damage," not just an "occurrence," take place during the policy period.

The court relied on a decision by the Michigan Supreme Court in **Gelman v Fidelity & Cas Co**, holding that a liability insurance policy is triggered when "injury-in-fact" occurs. The court decided that both the 1956 to 1970 policies, and the 1971 to 1976 policies, were triggered because the addition of dangerous chemicals into groundwater constitutes an "injury" to that water, and that such an injury is "property damage" even if under California law the municipalities did not own the groundwater, but simply had the right to extract and use it. Therefore, the court denied Fireman's Fund's motion and allowed the case to proceed to trial.

4. Miscellaneous

a. **Tahoe-Sierra Preservation Council, Inc v Tahoe Regl Plan Agency, 122 S Ct 1465 (2002).**

The United States Supreme Court ruled that, when determining whether temporary land-use restrictions constitute a "taking" of property requiring compensation under the Fifth Amendment of the United States Constitution, each restriction must be considered on a case-by-case basis.

The late 1950s saw a marked rise in the level of land development in the Lake Tahoe Basin (Basin), and also a marked decline in the trademark clarity of Lake Tahoe's blue waters. Land development had led to the replacement of much natural land, which tends to absorb water and soften the erosive effect of rainfall, with impervious surfaces such as asphalt, which produce more runoff. For this reason, land development was highlighted as the probable reason for the increased nutrient loading of Lake Tahoe and its concomitant diminished clarity.

In response to these concerns, the States of California and Nevada adopted the Tahoe Regional Planning Compact (Compact) in 1968, which created the Tahoe Regional Planning Agency (TRPA) "to coordinate and regulate development in the Basin and to conserve its natural resources." In 1980, the Compact was amended to direct TRPA to develop regional air quality, water quality, soil conservation, vegetation preservation, and noise standards, and adopt a regional plan to carry out those standards. The

Compact classified land by districts, including “high hazard” or “sensitive” lands, which have steeper slopes and thus produce more runoff, and “Stream Environment Zones” (SEZ), which are areas near streams or wetlands that, in their natural state, act as filters for much of the debris that was finding its way into Lake Tahoe. In 1981 and 1983, as TRPA was having difficulty meeting the Compact’s deadlines for carrying out its duties, TRPA enacted two ordinances that “effectively prohibited all construction on sensitive lands in California and on all SEZ lands in the entire Basin for 32 months, and on sensitive lands in Nevada (other than SEZ lands) for eight months.”

The ordinances were challenged in 1984 by the Tahoe Sierra Preservation Council, a nonprofit organization representing about 2,000 landowners in the Basin, and a class of 400 individual owners of vacant parcels on SEZ, high hazard, or sensitive lands in the Basin (collectively, the “landowners”). The landowners had purchased their lands before the Compact existed, under the impression that the construction of single-family homes on their properties would be allowed if “they complied with all reasonable requirements for building.” The landowners alleged that by temporarily banning such construction, the ordinances temporarily deprived them of all economically viable use of their properties, and pointed to the Supreme Court’s decisions in *Lucas v South Carolina Coastal Council* and *First English Evangelical Church of Glendale v County of Los Angeles* as establishing that such deprivation was a “taking” that requires compensation. After a protracted series of appeals, the Ninth Circuit eventually held that the ordinances did not effect a “taking.”

The Supreme Court began its analysis by highlighting the distinction between “physical” and “regulatory” takings. The Fifth Amendment explicitly requires compensation for a physical taking, or actual acquisition of property for a public purpose, such as condemnation. “But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* [categorical] rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by essentially ad hoc, factual inquiries, designed to allow ‘careful examination and weighing of all the relevant circumstances.’”

The Court observed that two main issues exist in a regulatory takings situation: when a regulation goes “too far” so as to constitute a taking; and “how compensation is measured once a regulatory taking is established.”

On the issue of whether a taking occurred, the Court first rejected the landowners’ arguments that *First English* and *Lucas* established a categorical rule where any regulation prohibiting development on property would constitute a taking. The Court noted that, aside from the fact that the inquiry is always determined on a case-by-case basis, *First English* had actually identified two situations where such a regulation would not be a taking: (1) when the governmental entity’s action was for the purpose of protecting public safety; and (2) when “normal delays” involving such approvals as zoning changes, permits, and variances were involved. Thus, the Court observed, *First English* “implicitly rejected” a categorical rule for regulatory takings.

The Court noted that *Lucas* actually did establish a categorical rule, but that rule did not advance the landowners’ cause because the *Lucas* rule only applies to permanent regulations. In *Lucas*, the Court had held that a state statute permanently banning development on the defendants’ unimproved property was a regulatory taking because the statute resulted in a permanent and “complete elimination of value” or a “total loss.” The *Lucas* rule did not apply to the landowners’ situations, however, because the Lake Tahoe moratoria were only temporary, and a finding that the value of the landowners’ property was “completely eliminated” would require the Court to “effectively sever a 32-month segment from the remainder of each landowner’s fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria.” The Court explained that this could not be done because if a court only looked at the time a particular regulation was in effect, “every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings.” Instead, a complete ban is one that covers the whole property interest, both geographically *and* chronologically.

The Court next turned to the question of whether, “in the interests of fairness and justice,” it should create a new rule to cover the landowners’ situation. The Court discussed three categorical rules that were suggested by the landowners: (1) any temporary deprivation of economic use of one’s property is a taking; (2) the same rule, with an exception for normal delays for zoning, permits, or variances; or (3) allow a short (one year or so) period for deliberations, but any longer prohibition would be a taking.

The Court, however, declined to create any such *per se* rule. The Court initially reiterated that it has consistently “eschewed any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public

action be compensated by the government, rather than remain disproportionately concentrated on a few persons.” The Court also noted several specific problems that would be created by a categorical rule. Turning to the first, and broadest, possible rule, the Court observed that such a rule would apply to ordinary legal processes, such as zoning and building permit requirements, and “would render routine government processes prohibitively expensive or encourage hasty decision-making.”

The second and third proposed rules were rejected because, although they would have a lesser impact on existing governmental processes, they would still seriously impact the planning process. Noting that “the consensus in the planning community appears to be that moratoria, or ‘interim development controls’ as they are often called, are an essential tool of successful development,” the Court opined that placing categorical restrictions on moratoria might “force officials to rush through the planning process or to abandon the practice altogether,” and provide landowners with “incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth.”

Additionally, the Court noted its past precedent holding that, in the interest of allowing for “well-reasoned decisions” by a land-use authority, a regulatory takings case is not “ripe,” or ready to be heard in court, until a land-use authority has had the chance to exercise its “full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law.” In other words, a developer or landowner cannot sue to overturn a land-use regulation until it has, for example, attempted to obtain a building permit but has been denied because of the regulation. In light of this requirement, a *per se* rule would “create a perverse system of incentives,” because landowners would be required to wait for their claims to ripen, but then the government would be required to compensate them for that delay.

The Court went on to observe that the interest in allowing enough time for proper decision making applied even more strongly where a regional plan, such as the TRPA plan, was involved, because of the difficulty of formulating a cohesive plan covering a large area. While noting that “any moratorium that lasts for longer than one year should be viewed with special skepticism,” the Court nevertheless held that a categorical rule was “too blunt an instrument” for such complicated, fact-based situations.

The Court also clarified the precise scope of its decision, explaining that its refusal to formulate a categorical rule for temporary moratoria did not mean that such regulations could never be a taking, but instead, merely recognized that “the temporary nature of a land-use restriction . . . should not be given exclusive significance one way or another, and temporary land-use regulations must be examined on a case-by-case basis.

The Court declined to address the second issue of what compensation should be awarded, because the landowners had relied solely on an argument for a categorical rule, and had failed to present an argument based on case-specific factors. Because the landowners’ only argument had been rejected by the Court, there was no basis upon which the Court could rule that a taking had occurred, so the issue of compensation was irrelevant.

b. Sierra Club v US Fish & Wildlife Service, 189 F Supp 2d 684 (WD Mich, 2002).

The Michigan Department of Natural Resources (“MDNR”) had applied for, and received, several forest management grants from the United States Fish and Wildlife Service (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 the National Environmental Policy Act (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 environmental assessments; (4) violated the Endangered Species Act (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, the court first examined the threshold question of whether the court had jurisdiction 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 found that it did not have jurisdiction over 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, and could not be heard by the court.

With respect to 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 the MDNR and USFWS 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.

Although aesthetic injuries are "concrete" and "particularized," the court held that 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 US 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, the Sierra Club lacked standing to bring any of its claims. Thus, all of the Sierra Club's claims were dismissed.

c. Little Traverse Bay Bands of Odawa Indians v Great Spring Waters of Am, Inc, 203 F Supp 2d 853 (WD Mich, 2002).

In a case of first impression, the United States District Court for the Western District of Michigan held that there is no private right of action to enforce the provision of the Water Resources Development Act of 1986 (WRDA) relating to the diversion or exportation of Great Lakes water outside of the Great Lakes basin.

Great Spring Waters of America and its parent company, Perrier Group of America (collectively, Perrier) were recently granted a license by the MDEQ to pump 400 gallons of water per minute from Sanctuary Springs in Mecosta County for diversion to Perrier's water bottling plant. Sanctuary Springs also supplies water to Osprey Lake, which flows into the Muskegon River and Little Muskegon River, which are tributaries of Lake Michigan.

The Little Traverse Bay Bands of Odawa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, and Little River Band of Ottawa Indians (collectively, the "Indian Tribes") filed suit to enjoin Perrier's license under the following WRDA provision:

No water shall be diverted or exported from any portion of the Great Lakes within the United States, or from any tributary within the United States of any of the Great Lakes, for use outside the Great Lakes basin unless such diversion or export is approved by the Governors of each of the Great Lakes States.

Under the statute, the "Great Lakes States" are Illinois, Indiana, Michigan, Minnesota, Ohio, Pennsylvania, New York, and Wisconsin. Apparently, Governor John Engler of Michigan had deemed it unnecessary to obtain the approval of the other Great Lakes States' governors before MDEQ licensed Perrier to pump water from Sanctuary Springs. The Indian Tribes alleged that Perrier's pumping and subsequent bottling and sale of the water would result in at least some of the water being exported out of the Great Lakes basin, and

thus, because Governor Engler had not obtained the requisite approvals, Perrier's license was issued in violation of the WRDA.

The Indian Tribes asserted that they had standing to sue under the statute because they were riparian landowners, and, furthermore, held fishing rights on Lake Michigan and its tributaries pursuant to the 1836 Treaty of Washington. Perrier argued that the suit should be dismissed because the Great Lakes provision of the WRDA does not provide for suits by private parties such as the Indian Tribes.

After examining the intent behind this "fairly opaque" provision of the WRDA, as evidenced through precursor statutes and WRDA's legislative history, the court turned to the specific question at hand: whether WRDA, which does not explicitly provide a private right of action, could be read to imply such a right. To answer this question, the court employed the four-part test set forth by the United States Supreme Court in *Cort v Ash*. Under this test, a statute implies a private right of action if: (1) the party filing suit is "one of the class for whose especial benefit the statute was enacted;" (2) there is an indication of legislative intent to create a private right of action; (3) such right is consistent with the underlying purposes of the legislative scheme; and (4) the cause of action is not one that has traditionally arisen under state law, so that it would not be inappropriate to infer a cause of action based solely on federal law. The court noted that, of these factors, "Congressional intent is the touchstone."

In examining the first factor, whether the Indian Tribes are "members of a special class which was intended to be benefited by" the WRDA, the court noted that "there is no indication in the statute that any special benefits were intended to be conveyed upon any limited class of riparians, users or property owners . . . Rather, the Act in its wording and history describes a general and public right which inures to all persons who live by, use and enjoy" the Great Lakes. Furthermore, "Congress did not draft this prohibition to convey any special rights or protections upon tribal members." Therefore, this provision of the WRDA was not created to specially benefit parties such as the Indian Tribes.

On the second factor, whether an indication of Congressional intent to imply a private right of action exists, the court held that:

all of the indications are that no such cause of action was intended. The language of the statute and

legislative history is couched in light of the history of and deference to the Great Lakes Governors. The Act intended that the Governors have authority to make decisions jointly to protect the resource and enforce the prohibition, and the Act assumes, perhaps not wisely, that the Governors will act in favor of the interests of their citizens, including property holders. It is also apparent that enforcement of the prohibitions by private citizens was not contemplated because: this might frustrate the ability of the Governors to resolve issues utilizing uniform conservation principles; the Act is so non-specific that it has failed to provide sufficient criteria for judicial enforcement; the failure to include "private right of action" language as to this section of the WRDA appears intentional in that said language is included as to another recent provision of the WRDA; and, Congress at the times of enactment understood that the Governors were embarking on a long-term project to negotiate terms pertinent to enforcement, including conservation standards and dispute resolution terms.

Thus, the court held that the statute intended to remain silent on the means of enforcement, so that the Great Lakes governors could collaborate to create mutually acceptable criteria and enforcement measures between themselves.

The court recognized some potential problems that could arise with a scheme where no enforcement mechanism was provided. "One problem, posed here, is what is to be done when the Governors elect, as they have apparently done in this case, to ignore the statutory proscription." While the court acknowledged this problem, the court declined to alter its conclusion to account for it: "While it must be admitted that this is a significant and potentially terrible problem, it is also a problem that the Act appears to overlook for the present in the hopes that later legislation or dispute resolution mechanisms will resolve it . . . the solution to this problem is not to try to enforce a vague statute, especially where the sense of Congress is that precise conversation standards and dispute resolution mechanisms must await further political negotiation."

Another problem "is the absence of an explicit enforcement mechanism of the Governors to utilize to supervise a wayward Governor." The court found that this concern was significant, but could be overcome through pending negotiations between the Governors, or even by lawsuits filed by the Great Lakes States in the Supreme Court.

The court also noted the possibility that:

the Governors might elect to enforce or not enforce the proscription of the Act in a manner which served their interests, but was contrary to the federal interests in the Great Lakes waters. The Court assumes without deciding that in such a case that officers of the federal government could bring suit to enforce the Act, but that federal enforcement might well be difficult especially in the absence of governing federal standards and in the absence of a Congressional delegation of authority to an officer of the executive branch.

The court next examined the third factor, whether a private cause of action would be consistent with the WRDA's statutory scheme, and held that it would not be consistent. As mentioned earlier, the statute intended to place authority over enforcement in the hands of the Great Lakes States Governors, and allowing suits to be filed by "disgruntled individual users and riparians would only complicate and frustrate" that scheme.

Finally, the court considered the fourth factor, whether the interest protected by the statute is a state or federal interest. A finding that federal interests are protected would favor implying a federal private right of action. But if the court instead found that state interests were primarily protected, the converse would apply. The Indian Tribes had argued that federal interests were protected "based on the federal interests in regulating Indian affairs." The court rejected this argument, finding that such tribal interests were "fairly peripheral" to the statute, but agreed with the ultimate conclusion that federal interests were the focus of the statute: "The waters of the Great lakes are navigable waters of the United States used to ferry goods between the States. The waters also occupy a huge and important source of fresh water for the United States, which is critical to interstate commerce." Thus, the court held, "interests in [the statute's] enforcement are primarily federal."

Only the fourth factor favored implying a private right of action. Thus, after considering all four factors together, the court held that the Great Lakes provision of the WRDA does not allow for a private right of action, and dismissed the Indian Tribes' claim.

d. United States v County of Muskegon, 298 F3d 569 (CA 6, 2002).

The Sixth Circuit Court of Appeals has upheld a lower

court's ruling that a county's sewer ordinance that restricted the county's ability to treat wastewater discharged by industrial companies did not unconstitutionally interfere with the county's earlier agreement to provide maximum sewer services to an industrial company.

Muskegon County, Michigan (County) operated a sewage treatment system under a permit issued pursuant to the CWA. In 1992, the United States initiated an enforcement action against the County alleging violations of the permit, the CWA, and certain compliance orders issued by the EPA. S.D. Warren Company (S.D. Warren), a company that discharged wastewater into the County's system, had helped finance the initial construction and upgrading of the system. For many years S.D. Warren, other industries and municipalities in the County were parties to service agreements with the County that obligated the County to "provide the maximum possible service" to the contractees.

In settlement of the 1992 enforcement action brought by the United States in 1994, the County revised its sewer ordinance in restricting the levels of pollutants that could enter the system. In 1995, S.D. Warren and other private users of the system sued in state court, alleging that the revised ordinance effectively mothballed a significant portion of the system's capacity, in violation of the service agreements. In 1996, the state court held in favor of the companies and issued an order preventing the County from enforcing the 1994 ordinance.

In 1997, while the County's appeal from the order was pending in a state appeals court, the United States initiated another enforcement action against the County in federal district court, alleging that the County did not have a proper industrial pretreatment program. S.D. Warren and other companies intervened in support of the County. The State of Michigan and certain municipalities intervened in the litigation in support of the United States.

While both the state appeal and the federal enforcement action were pending, the County gave notice in 1997 that its sewer service agreements with the companies and municipalities would be terminated as of January 1, 2000, and in 1998 enacted a new ordinance that was substantially similar to the 1994 ordinance that had been enjoined by the state court. After the termination notice was given, but before the effective date of termination, the federal district court entered two consent decrees. The first consent decree settled the municipalities' claims against the County based on the

1998 ordinance. The second consent decree settled the United States' claims against the County and the state, and also incorporated the 1998 ordinance.

S.D. Warren appealed the consent decrees and related decisions by the federal district court. S.D. Warren contended that the district court abused its discretion in finding the consent decrees fair and reasonable and argued that the decrees unconstitutionally impaired and breached the service agreements with the County. S.D. Warren also argued that, given the proceedings in the state court, the federal courts lacked jurisdiction over the matter.

The Sixth Circuit rejected S.D. Warren's arguments, finding that the federal court had jurisdiction, that the County had lawfully terminated the service agreements, and that the consent decrees did not unconstitutionally impair contractual obligations. The court first held that the federal court properly considered the question even though related litigation was pending in the state courts. The court noted that the state court's order applied to the 1994 ordinance, and that the federal consent decrees involved not the 1994 ordinance, but the later 1998 ordinance. Although the two ordinances were alike, the court held, the problem with the 1994 ordinance was that it was at odds with the service agreements. The court placed weight on the fact that the County gave notice terminating the service agreements in 1997 and later enacted the 1998 ordinance. Because the companies had not challenged the termination notice, the court saw no reason to delay adjudication of the questions brought before it on the 1998 ordinance.

The court also rejected the United States' argument that the companies' appeal was moot because the County had terminated the service agreements effective back in 2000. The court held that S.D. Warren on appeal had raised a question whether the County's termination notice was effective. Nevertheless, on review, the court held that the termination notice was effective and did, in fact, terminate S.D. Warren's service agreement with the County.

Finally, the court held that the district court had correctly found that its grant of relief to the County had not unconstitutionally impaired pre-existing contractual obligations of the County. S.D. Warren's argument rested in part, on the Contract Clause of the United States Constitution, which states that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts." Citing United States Supreme Court precedent, the court stated that, to breach this provision, an impairment must be

"substantial" and even if a "substantial impairment" exists, the court must still determine "whether the adjustment of the rights of the parties to the contractual relationship was reasonable and appropriate in the service of a legitimate and important public purpose."

In this case, the court agreed that some provisions of the 1998 ordinance were in conflict with the terms of the service agreements, and further agreed that the effect of the conflict was to impair the obligation of the contract between the County and S.D. Warren.

The court held, however, that the impairment was not "substantial." One test to gauge the substantiality of an impairment, the court stated, was whether the right abridged was one that induced the parties to contract in the first place. In this case, the court found no evidence in the record that S.D. Warren would have rejected the service agreement had it incorporated the requirements of the 1994 or 1998 ordinances: "One can speculate that such an ordinance would have been a deal breaker, but speculation would not suffice; we need proof, and S.D. Warren has pointed to none."

In addition, S.D. Warren failed to show that enforcement of the 1998 ordinance resulted in any curtailment of the company's discharges prior to the date of termination of its service agreement. Nor did it show that the ordinance interfered with any planned expansion of the volume of pollutant discharges prior to the termination date. Accordingly, the court upheld the district court's decision in favor of the government and against S.D. Warren.

e. Andrews v Holly Township, 216 F Supp 2d 678 (ED Mich, 2002).

The United States District Court for Eastern District of Michigan abstained from ruling on whether a Michigan township properly adopted a "no wake" ordinance under the Watercraft and Marine Safety provisions of the Michigan Natural Resources and Environmental Protection Act (NREPA).

In 1993, Michael and Brenda Andrews purchased property on Marl Lake in Holly Township. At the time, there were no restrictions on use of the lake. In 1998, citing concerns over shoreline erosion that was possibly caused by the wakes from jet skis and other watercraft on Marl Lake, a group of Marl Lake homeowners (not including the Andrews) petitioned the Holly Township Board of Trustees to declare the lake a "no wake" lake, which would restrict all watercraft on the lake to a very slow speed.

Sections 80110, 80111, and 80112 of NREPA together provide that, in order for a local unit of government to pass an ordinance regulating watercraft speeds, the following procedure must be followed: (1) the local unit of government passes a resolution requesting MDNR assistance; (2) MDNR holds a public hearing; (3) MDNR prepares an ordinance and submits it to the local unit of government; and (4) if the local unit of government approves the MDNR-submitted ordinance, it enacts an ordinance that is identical to the one proposed by MDNR.

After receiving the residents' petition, the Board of Trustees held a hearing at which no one opposed the petition. The Board then adopted a resolution authorizing the MDNR to conduct a public hearing and investigation concerning the propriety of making Marl Lake a "no wake" lake. A few weeks after the resolution was passed, the Andrews appeared at a Board meeting and voiced their opposition to restricting watercraft speeds on the lake.

In April 1999, the MDNR published a newspaper notice announcing a public hearing for the purpose of "gather[ing] information . . . concerning possible problems on the waters of Marl Lake." The Andrews purportedly never saw the notice. The hearing was attended by ten residents, all of whom favored the "no wake" restriction. After the hearing, the MDNR prepared an investigative report recommending that Holly Township adopt a "no wake" ordinance for Marl Lake. In August 1999, the township attorney drafted, and the Board of Trustees passed, such a "no wake" ordinance.

After several local residents, including the Andrews, objected, the Board of Trustees reconsidered and requested MDNR to hold another public hearing on the issue and review some corrected information that may have been inaccurately reported. The MDNR declined, however, stating that conditions at the lake had not changed so as to warrant a reconsideration, and a public hearing would be held only if the township requested that the "no wake" ordinance be rescinded. The Township decided not to take any further action, and the ordinance remained in effect. The Andrews then filed suit in federal court to enjoin enforcement of the ordinance.

In their suit, the Andrews alleged that: (1) the ordinance was invalid because the township and MDNR did not follow the procedures required in Mich. Comp. Laws §§ 324.80110, .80111, and .80112; (2) MDNR's notice of its public hearing was deficient under the due process clauses of the Michigan and United States Constitutions; (3) Holly Township

exceeded its police powers in enacting the ordinance; (4) the ordinance constituted a "regulatory taking" under the Michigan and United States Constitutions; (5) the ordinance was an unconstitutional delegation of power under NREPA; (6) Holly Township's "deliberate indifference" to the Andrews' constitutional rights gave rise to a claim under federal civil rights laws; and (7) the ordinance was an "outright ban" on the use of watercraft that are necessary to engage in certain aquatic sports, in violation of the Federal Aid in Sport Fish Restoration Act, 16 USC 777 *et seq.* In response, Holly Township argued that the federal court should abstain from deciding the case, and therefore, should dismiss the Andrews' claims.

The court observed that the abstention issue "goes to the heart of the appropriateness of the exercise of federal jurisdiction in this case" and, therefore, was of paramount importance. The court first outlined the **Burford** abstention doctrine, which mandates that federal courts should not rule on state law issues if: (1) the ruling would interfere with the operation of state administrative agencies; (2) "a case presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,'" or (3) the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

The court also explained the **Pullman** abstention doctrine, which applies "only when a state law is challenged and resolution by the state of certain questions of state law may obviate the federal claims, or when the challenged law is susceptible of a construction by state courts that would eliminate the need to reach the federal question."

The court held that both doctrines applied to the present case. **Burford** abstention was appropriate, in the court's view, because the NREPA provisions at issue required the cooperation and involvement of MDNR and local government, so a ruling on the law would affect state agencies and local interests. Such issues, the court observed, were "best left to the Michigan courts to resolve." In addition, the **Pullman** doctrine applied because if a Michigan court determined that the ordinance was not properly adopted under NREPA, then examination of the Andrews' federal constitutional and statutory claims would be unnecessary. As the court explained, "this case is really about whether or not Holly Township has adopted a valid ordinance, regardless of the Andrews' creative constitutional claims, which is best left to the Michigan courts." Having decided to abstain, the

court dismissed the Andrews' claims without prejudice so that they could be brought in state court.

f. Center for Biological Diversity v Lueckel, 248 F Supp 2d 660 (WD Mich, 2002).

The Center for Biological Diversity (Center) sued several federal officials, alleging that the Forest Service had violated federal laws by failing to observe procedural requirements in the Wild and Scenic Rivers Act (WSRA), the National Forest Management Act (NFMA), and the NEPA, as those statutes related to Forest Service activities in the Ottawa and Hiawatha National Forests. The United States District Court for the Western District of Michigan held that the Center lacked standing to sue for those violations and dismissed the suit.

The WSRA gives Congress the authority to designate any river as "wild," "scenic," or "recreational." Once a river is designated as such, the WSRA requires the Forest Service to conduct its activities around the river "as to protect and enhance" its wild, scenic, or recreational values. The WSRA also imposes two procedural obligations on the Forest Service concerning such rivers. First, the Forest Service must "establish detailed boundaries" for each designated river zone within one year of the date of designation. Until publication of the detailed boundaries, the WSRA establishes one-quarter mile boundaries measured from the ordinary high water mark on either side of the river. Second, the Forest Service must prepare a "comprehensive management plan" (CMP) for each designated river segment that will "provide for the protection of river values" within three fiscal years of the date of designation. At the time of the suit, the Forest Service readily admitted that it had not established boundaries or CMPs for the designated rivers in the Ottawa and Hiawatha Forests as required by the WSRA.

The NFMA requires the Forest Service to devise an integrated Land Resource Management Plan (LRMP) for each National Forest, and requires public involvement in the development, review, revision, and amendment of those LRMPs. The Center contended that the Forest Service violated the NFMA when it failed to amend or revise the Ottawa and Hiawatha Forest LRMPs to adopt and/or implement CMPs for the designated rivers in those forests.

The NEPA requires the Forest Service to prepare an Environmental Impact Statement (EIS) for any proposed major federal action that may significantly affect the quality of the environment. The EIS must include an analysis of any adverse environmental impact that cannot be avoided should the project be implemented, alternatives to the

proposed action, and any irreversible and irretrievable commitment of resources which would be involved if implemented. To determine whether a proposed action may significantly affect the quality of the environment and require an EIS, the agency may first prepare an Environmental Assessment (EA). In certain limited circumstances, the agency may authorize a Categorical Exclusion (CE), thereby excluding the proposed project from the NEPA's EIS and EA requirements.

The Center claimed that "[c]reating Comprehensive Management Plans and establishing detailed river corridor boundaries constitute major federal actions that will significantly affect the quality of the human environment," and, therefore, the WSRA requirements triggered NEPA's EIS and EA requirements. Because the Forest Service did not create CMPs or establish boundaries as required under the WSRA, it also failed to prepare an EIS, EA, or a CE for those activities, and, therefore, the Center argued, violated NEPA.

The Center moved for summary judgment on the WSRA claims, requesting an injunction requiring the Forest Service to comply with the WSRA requirements. In support of its motion, the group offered nine affidavits from group members detailing detrimental logging and road-building activities that were ongoing near the designated rivers, and offering opinions on the possible detrimental effect of the Forest Service's failure to create CMPs and designate the proper river boundaries so as to protect the rivers from such activities.

In considering the group's request for an injunction, the court observed that "[i]njunctive relief is an extraordinary remedy, which does not automatically follow a violation of a procedural environmental statute;" in addition to proving a violation of the WSRA, the Center also must show "the likelihood of irreparable harm to [its] members as a result of the violations." The burden was on the Center to show that its members were threatened with "actual and imminent," not speculative or hypothetical, injury.

The court held that the Center had failed to meet that burden. The affidavits offered by the Center, the court observed, did not contain specific allegations about how the members would be injured by the Forest Service's violations; instead, they "almost uniformly contain vague and speculative references to general environmental damage that could occur" as a result of those violations. This "theoretical possibility of harm," the court held, fell "far short of a showing of actual

irreparable harm required for injunctive relief.” Thus, the court denied the Center’s motion.

The Forest Service officials also moved for summary judgment that the Center lacked standing to sue in federal court. In order to have standing, the Center had to show: (1) that it or its members had or would suffer an individualized, concrete harm as a result of the WSRA violations (injury in fact); (2) a causal link between that harm and the officials’ actions (causation); and (3) that there is a likelihood that the requested relief would ameliorate the alleged harm (redressability).

The court observed that the United States Supreme Court has held that, in the context of environmental laws, the injury in fact requirement is satisfied when members of an environmental group “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.” Citing other precedent, however, the court also noted that the Center had to “do more than assert generalized allegations . . . which could *conceivably* demonstrate use of the affected land; rather, [the Center] must set forth specific facts showing injury from use of the affected land.”

The Center asserted that in a 2001 decision, **Heartwood, Inc v US Forest Service**, the court had recognized that “generalized allegations of use may suffice” for purposes of the injury-in-fact requirement “where the action alleged to cause the injury will affect a large area or has general application to a large area.” The court pointed out, however, that its statement in **Heartwood** did not apply in situations where alleged harm would be “contained and localized.” In the court’s opinion, the Center’s alleged injury was “contained and localized” because it related to specific activities around the designated rivers. Therefore, **Heartwood** did not authorize the group’s hypothetical and generalized affidavits concerning potential injury. Because the Center did not provide facts showing specific injury, it did not meet the injury-in-fact requirement, and thus, lacked standing.

The court also observed that the Center’s “vague and conclusory statements regarding the impact of the absence of CMPs and detailed river boundaries” would likewise fail to satisfy the causation and redressability requirements. Concerning causation, the Center failed to address whether there would be any difference in the Forest Service’s activities if it *had* complied with the requirements. In other words, unless the alleged harmful activities would be prohibited by the WSRA’s requirements, then the Forest Service’s failure to

comply with those requirements did not cause whatever injury was alleged. Because the Center failed to establish that link, it did not meet the causation requirement. Concerning redressability, the court merely noted that the vague hypothetical statements offered by the Center did not explain how or why the proposed injunction would cure the alleged harm. Therefore, the Center also failed to meet the redressability requirement. Because the Center failed to meet the requirements for standing, the court dismissed the suit against the Forest Service officials.

B. State Judicial Decisions

1. Part 201 (Environmental Remediation)

a. **Omega Env't, Inc v Saco & Sons, Inc, 2002 WL 31105088 (Mich App, Sept 20, 2002).**

The Michigan Court of Appeals held that a gasoline dispenser is not a “facility” for purposes of Part 201 of NREPA. Omega Environmental, Inc. (Omega) sued Saco & Sons, Inc. (Saco). Saco then filed a counter-claim against Omega, and also filed a claim against C.F. Fick & Sons, Inc. (Fick), who apparently owned a gasoline dispenser on the property in question. Saco’s claim against Fick was based on the theory that Fick owned the gasoline dispenser, that the gasoline dispenser was a “facility” under Part 201 of NREPA, and that Fick was, therefore, liable for cleanup costs on the property because Fick was the owner or operator of a “facility” from which there was a release of hazardous substances.

The trial court submitted to the jury the question of whether the gasoline dispenser was a “facility.” The jury determined that it was not, and found that Fick was therefore not liable under Part 201. The jury also held that Omega was liable to Saco in the amount of \$4,100, representing one-half of one percent of the total cost of remediating contaminated soil on the property.

On appeal, the court of appeals held that the trial judge should not have asked the jury to determine whether the gasoline dispenser was a “facility” because that is a question of law that must be determined by a judge rather than a jury. Part 201 defines “facility” as “any area, place, or property where a hazardous substance in excess of [certain concentrations] has been released, deposited, disposed of or otherwise comes to be located.” The court of appeals held that the language of this definition focuses on real property, not personal property such as gasoline dispensing equipment. The court concluded that because a gasoline dispenser is not a “facility” Fick could not be held liable under Part 201 as the owner of the gasoline dispenser.

b. Attorney General v Stramaglia, No. 1996-5468-CZ (Macomb County Cir Ct, Apr 9, 2002).

A Macomb County Circuit Court judge imposed over \$36 million in civil fines, likely the largest environmental civil fine ever imposed in Michigan, against several persons and companies who were convicted of illegal dumping and the unlicensed operation of waste disposal facilities.

Several persons and companies (the Defendants) were convicted in May 2001 of illegally dumping construction wastes including insulation, broken concrete, roofing materials, used mattresses, and other trash at numerous sites in Michigan over the course of 12 years, in violation of several provisions of NREPA. In addition to the waste, hazardous substances in excess of Part 201 limits were found at all of the sites. The court's order instructed the parties to clean up the sites, "directed the parties to establish a timetable for conducting the appropriate response activities and remedial actions at the sites, and reserved imposition of the mandatory fines permitted by NREPA." The court later entered separate orders establishing timetables for response activities and remedial actions at the sites.

The court had given the Defendants an opportunity to submit plans to clean up the sites, but explained that some Defendants had failed to submit any plans, and all proposals actually submitted were "gravely inadequate." One proposal was to "essentially bury the problem" by covering the sites and building houses there, at a loss of \$420,000 per home. The court scoffed at this idea, observing that it was "hardly self-financing." Another proposal involved the removal of 211,851 cubic yards of waste from one of the dumping sites. However, this proposal overlooked the facts that at least 15,000 more cubic yards of waste existed at the site and hazardous substances needed to be removed from soil at the site.

The court rejected various legal issues that were raised by the Defendants. One Defendant claimed that he had been denied access to a site that was being cleaned up by the MDEQ. Because the Defendant had not submitted any remediation plans to the court, however, the court deemed his contention "not relevant." Other Defendants noted that in remediating contamination at their site, MDEQ had demolished a building on the property; the Defendants claimed that the value of this building should be offset against any fines imposed. The court noted that "solid waste . . . 'had been packed so tightly inside the building that windows

broke and walls collapsed from the pressure.' . . . Accordingly, the building has no value to offset." Another argument was that solid waste at some sites was "accumulated as an improvement to farmland," which the court deemed "sufficiently absurd as to require no further comment." Other arguments were summarily dismissed by the court because they were not properly preserved for appeal.

The court also repeatedly indicated that the Defendants' long history of intentional violations worked strongly in their disfavor: "In light of his past actions, his credibility is, charitably speaking, less than sterling;" "the figures are clearly suspect;" "[his] past practices at the sites present sufficient justification to disregard his request to continue work at the sites."

The court instituted the following remedies: (1) MDEQ was authorized to conduct response activities at each site; (2) the Defendants would be "jointly and severally liable for all costs to be or actually incurred for the response activities and remedial actions at each site" performed by MDEQ; (3) any proceeds from the sale of the sites would be held in escrow and used first to reimburse MDEQ's response costs, then to offset fines levied against the Defendants; (4) civil fines were imposed in the amount of \$250,000 for each violation by each dumper at each site, which would total over \$36 million; and (5) an earlier court order against further dumping was made permanent, and expanded to preclude the Defendants from interfering with MDEQ's activities at the sites.

2. Part 115 (Solid Waste)

a. Attorney General v Richmond Sanitary Landfill, Inc, 2002 WL 31058346 (Mich App, Sept 13, 2002).

In 1991, Richmond Sanitary Landfill, Inc. (Richmond I) entered into a consent order with the MDNR to address environmental violations related to the operation of a landfill. William G. McCarthy (McCarthy) became president of Richmond I in 1992. Later that year, Richmond I was restructured for tax reasons and merged into a new corporation also named Richmond Sanitary Landfill, Inc. (Richmond II). When the lender foreclosed its mortgage on the landfill in 1995, a limited partnership known as Osceola County Waste Services, L.P. (OCWS) purchased the landfill at the foreclosure sale. The general partner of OCWS was Environmental Rehab, Inc. (ERI), and a corporation for which McCarthy was the sole officer, shareholder, and director.

In 1995, the Michigan Attorney General sued Richmond II, OCWS, ERI and McCarthy for violations of the 1991 consent order. The trial court granted a motion by the Attorney General to hold all defendants liable for the consent order violations. The defendants appealed to the Michigan Court of Appeals.

OCWS and ERI argued that they had no obligation to comply with the consent order because they were not parties to that case. The consent order states that it is “binding on the parties to this action, their officers, servants, and employees, and those persons in active concert or participation with them who receive actual notice of this Consent Order.” The appeals court agreed with the trial court that, although neither OCWS or ERI was a party to the action, or an “officer,” “servant,” or “employee” of a party, the consent decree was nonetheless binding on OCWS and ERI because they had actual notice of the consent order when they acquired the landfill in 1995. McCarthy was aware of the consent order when he became president of Richmond I in 1992, and his knowledge was attributable to OCWS and ERI. The appeals court also found that OCWS and ERI were “in active concert or participation with” both Richmond I and Richmond II, because the term “active concert or participation” refers to someone who is “legally identified with the party or, at least, deemed to have aided or abetted the party in the conduct in question.” The Court concluded that OCWS and ERI were “in active concert and participation” with Richmond I and Richmond II because McCarthy’s presence in all the corporations and partnerships involved in the case was “pervasive and controlling.”

The appeals court also upheld the trial court’s judgment that McCarthy himself was personally liable for the violations of the consent order. An individual officer or director of a corporation can be personally liable if he exercised control over the facility and had knowledge of environmental violations at the facility. McCarthy had taken some steps to avoid personal liability, including having his companies hire a separate waste management services company to operate the landfill so that McCarthy did not handle day-to-day management of the landfill. However, the appeals court held that McCarthy was personally liable nonetheless because he himself was responsible for selecting the waste management companies hired to operate the landfill, and because McCarthy was personally involved in negotiating compliance issues with the State of Michigan.

3. Part 213 (Underground Storage Tanks)

a. Attorney General v Clark Refining & Mktg Inc, 2003 WL 133052 (Mich App, Jan 10, 2003).

The Michigan Court of Appeals upheld the trial court’s determination that the State of Michigan could recover only a portion of the costs it incurred in investigating groundwater contamination and connecting residences to a municipal water supply from the owner/operator of a nearby leaking underground storage tank (UST). The State argued that Clark Refining and Marketing (Clark) should be held liable under the former Leaking UST Act (now Part 213 of NREPA) for all such “corrective action” costs the State incurred – i.e., that the harm caused by the released from Clark’s UST was not divisible from other sources of contamination in the area. Clark also appealed, arguing that the trial court had wrongfully ordered it to pay more than its fair share of the State’s cleanup costs.

Before analyzing the State’s claim that the harm caused by Clark’s leaking UST was not divisible, the court summarily rejected the State’s argument that the trial court erred by failing to find Clark jointly and severally liable because the State never raised this *legal* argument before the trial court. Instead, the State had simply made the *factual* argument that Clark had *actually caused* the State to incur all of the corrective action costs.

The court next addressed the State’s argument that Clark had failed to prove the divisibility of the harm – i.e., the amount of the corrective action costs the State incurred in response to just Clark’s UST release, as opposed to contamination caused by other persons. Both the State and Clark agreed that, given the lack of case law under the Leaking UST Act, it was proper for the court to look to cases under the CERCLA for guidance because both CERCLA and the Leaking UST Act contain virtually identical language regarding apportionment of cleanup costs. Under CERCLA, courts have observed that whether harm is divisible is an “intensely factual” issue and that when considering divisibility of harm, courts will have to take into consideration the relative toxicity, potential to migrate, and synergistic capacity of the contaminants at issue. If a party can show divisibility, then it should be liable only for that portion of the harm fairly attributable to it.

The State argued that the contamination at the site was commingled, and, therefore, could not be divisible. The trial court found, however, that Clark had refuted this argument by showing the presence of chlorinated volatile

organic compounds (VOCs) that would not be present in the gasoline released by Clark and a separate release of gasoline from the Chevron station across the street from Clark's station.

The court observed that the State's own witnesses said that the chlorinated VOCs could be separately measured and that the State had for some time independently tracked the chlorinated VOCs in the groundwater. The evidence at trial indicated that the State had "distinguished, measured, monitored, and traced" the chlorinated VOCs separately from the gasoline released by Clark and had incurred costs specifically related to the chlorinated VOCs for monitoring residential wells, providing bottled water and connecting residences to municipal water. Therefore, the court held that, under the reasoning of the CERCLA cases, the trial court correctly ruled that Clark was not responsible for all of the State's costs because the chlorinated VOCs were distinguishable from Clark's gasoline release and because the State clearly incurred corrective action costs to investigate and protect the residents from the chlorinated VOC contamination.

With respect to the gasoline release from the Chevron station across the street, the State argued in its complaint that the two plumes of gasoline contamination had merged into a single commingled plume. At trial, however, the State dropped this argument and simply argued that only one release had occurred and it was from Clark's station. In response to the State's position, Clark presented evidence that the State had incurred costs in investigating and monitoring two separate releases, one from Clark and the other from Chevron. Clark's expert witnesses also testified that groundwater flow and the contamination found at Chevron's station and wells in the area clearly showed that a plume of gasoline contamination emanated from the Chevron station. The appeals court observed that, while the State's and Clark's experts presented conflicting testimony on the groundwater flow and interpretation of the data, it is the trial court's responsibility to determine the credibility of the witnesses and the weight of their testimony. Therefore, the appeals court stated that it must defer to the trial court's observations and held that the trial court did not err in finding the harm divisible.

The State next argued that the trial court incorrectly held that the State could not recover from Clark any corrective action costs it incurred after March 31, 1994. The appeals court held that the trial court had properly established this cutoff date.

At trial, Clark provided testimony that Clark's environmental consultant met with the State's project manager for the site in January 1994 to present a remedial action plan and told the State that Clark wanted to take over the investigation in order to avoid additional costs to the State. The State's project manager subsequently issued a letter to Clark stating that Clark's plan for further investigation was acceptable and that the State was turning over the gasoline investigation to Clark, while the State would concentrate on investigating the chlorinated VOCs at the site.

At trial, however, the State's project manager retreated from her statements in the letter and testified that Clark did not adequately investigate the site. Clark countered this testimony with evidence that the State never expressed dissatisfaction with Clark's investigation nor did it request that Clark modify its corrective action plan. The appeals court again observed that, given the conflicting testimony, it is the trial court's responsibility to determine the credibility of the witnesses. The trial court concluded that the State had clearly relinquished investigation of the gasoline contamination to Clark in March 1994. The appeals court also observed that the trial court based its decision, in part, "on its finding that [the State's] witnesses were 'very untruthful' regarding the extent of [Clark's] liability for costs incurred at the site."

The State argued that the trial court had made mathematical errors in calculating Clark's liability. The appeals court agreed with Clark that the State had failed to adequately brief the argument and appeared to simply argue that the trial court's arithmetic was "unfair," not that the trial court made any calculation errors. In calculating the corrective action costs that the State could recover from Clark, the trial court multiplied the State's costs by a fraction based on the number of houses that required municipal water due to Clark's gasoline release (27) versus the total number of houses connected to the municipal system due to contamination at the site (199). The State argued that it was not attempting to recover the cost of connecting all 199 of the houses and, therefore, the trial court should not have used that number. The appeals court, however, observed that the evidence the State offered regarding its corrective action costs included all of the investigation it performed between 1986 and 1999 – which included expenses incurred years before Clark even owned the property, before Clark's gasoline release occurred, and after the March 1994 cutoff date. Based on this evidence, the appeals court held that the trial court's equation to determine the extent of Clark's liability was reasonable.

Finally, the court addressed Clark's argument that the trial court incorrectly held it liable for the State's cost to connect 27 homes to the municipal water system. Again the court upheld the trial court's determination.

The trial court held that there was a causal relationship between Clark's gasoline release and the State's need to take prompt action to protect the residents from the groundwater contamination. The trial court observed that, while the trial testimony did not precisely define the direction of groundwater flow at the site, the drinking water wells of the 27 houses within the general flow direction were at risk of being contaminated and that the State reasonably acted to prevent or minimize contamination by connecting the 27 homes to the municipal drinking water supply. The trial court further observed that, given the circumstances, "it was not incumbent upon the [S]tate to test the area for a significant length of time before taking action to protect the public health." The appeals court further observed that at trial, the State's and Clark's scientific and geological evidence conflicted on almost all critical issues.

The court characterized Clark as essentially arguing that because it had by 1999 fully defined and contained its plume of gasoline contamination (presumably before it reached the 27 homes), the State unreasonably decided to connect the 27 homes to the municipal supply in 1994. The court agreed with the State that it was correct for the trial court to take into account the extent of the State's knowledge at the time Clark's contamination was confirmed and the State's obligation to protect the public health. The appeals court agreed with the trial court's conclusion that the State acted properly in connecting the homes that could have been foreseeably impacted by the release based upon the projected migratory path of the contamination.

Clark, however, argued that the widespread chlorinated VOC contamination in the area triggered the State's decision to connect the 27 homes to the municipal water supply. While the State's witnesses testified that the presence of the chlorinated VOCs in several residential wells contributed to the decision to connect the homes to the municipal supply, they also testified that the presence of the chlorinated VOCs alone was not a threat to public health and that the Michigan Department of Public Health did not decide to make the municipal drinking water connections until Clark's gasoline release was also discovered.

The appeals court observed that the trial court's designation of the area for which Clark was liable was made

difficult by the numerous types of contamination discovered in the area and multiple sources and multiple potentially responsible parties. The court further observed that, given the data then available, the State "did not have the benefit of hindsight or the luxury of months of testing and modeling the area when it exercised its obligation to protect the public." Finally, acknowledging the difficulty of dealing with such complex environmental issues, the court observed "that the trial court took great pains to sort out complex data to arrive at a result that kept faith with the law and the purposes of the statute."

4. Part 17 (Environmental Protection Act)

a. **Thomas v Intercounty Drain Bd for Crapeau Creek Drain, 2002 WL 1482797 (Mich App, July 9, 2002), appeal denied 659 NW2d 239 (Mich, Mar 31, 2003).**

The Michigan Court of Appeals held that a trial court had erroneously dismissed a plaintiff's challenge to a drain project under Part 17 of NREPA (also known as the Michigan Environmental Protection Act (MEPA)). The appeals court held that the plaintiff had alleged sufficient facts and law to state a proper claim under MEPA and that the plaintiff had "standing" to bring his claim because MEPA allows "any person" to bring a properly-stated claim.

Robert Thomas (Thomas) appealed the trial court's dismissal of his claims against defendants Intercounty Drain Board for Crapeau Creek Drain, Macomb County Public Works Office, Anthony V. Marrocco, and MDEQ (collectively, Drain Board). Thomas had brought suit against the Drain Board under MEPA, challenging its approval of a drain improvement project. MEPA provides, among other things, that "the attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."

As a preliminary matter, the appeals court addressed whether the case was moot because the drain project had been completed. The appeals court held that the case was not moot because the "relief of restoration could be granted even though the project is completed and is an appropriate remedy in MEPA claims." The appeals court next addressed whether the trial court had correctly dismissed Thomas's claim brought pursuant to MEPA on two bases: (1) failure to state a claim on which relief can be granted; and (2) lack of standing.

Addressing whether the trial court had correctly dismissed Thomas's action for failure to state a claim on which relief can be granted, the appeals court observed that the test is whether a claim is legally sufficient based on the pleadings alone. All factual allegations in support of the claim are accepted as true, "as well as any reasonable inference or conclusions that can be drawn from the facts and construed in the light most favorable" to the person making the claim. A motion to dismiss for failure to state a claim on which relief can be granted "should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery."

The appeals court next reviewed MEPA to determine exactly what constitutes a properly stated claim under MEPA. Citing Michigan Supreme Court precedent, the appeals court found that MEPA requires an allegation that a statute, rule or other standard that is meant to protect against the pollution or impairment of a natural resource has been violated. A claim that an environmental protection standard has been violated is sufficient to show that the affected "natural resource has been, or is likely to be, harmed," the appeals court stated. The appeals court held that this includes a claim that the challenged activity required a permit under the applicable law but no permit had been issued for it. The appeals court held the Thomas's pleadings met this standard.

The appeals court next addressed whether the trial court had properly dismissed the case based on lack of standing. "Standing" is a principle that requires a claimant to have a legally sufficient stake in the outcome of the case at hand to be permitted to pursue its claim. The appeals court noted that MEPA states that "the attorney general or *any person* may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction." The appeals court stated that "[t]he Legislature is presumed to have intended the meaning it plainly expressed" in this "clear and unambiguous" language. Accordingly, the appeals court held that "the trial court erred in granting summary disposition based on" lack of standing. The appeals court sent the case back to the trial court for further consideration consistent with the court's opinion.

b. **National Wildlife Fedn v Cleveland Cliffs Iron Co**, 2002 WL 1308236 (Mich App June 11, 2002), appeal granted in part by ___ NW2d ___ (Mich July 3, 2003) (Table, No 121990).

The Michigan Court of Appeals held that Part 17 of the NREPA allows *any* person to bring a lawsuit under that statute, regardless of whether that person otherwise meets the traditional test for judicial "standing."

The National Wildlife Federation and the Upper Peninsula Environmental Council sued the MDEQ and two northern-Michigan mining companies regarding MDEQ's grant of a permit allowing the companies to fill wetlands and streams on their property with mining waste. The trial court held that the environmental groups had not suffered any direct injury from the permitted activity and, accordingly, lacked "standing" to sue.

The doctrine of "standing" in Michigan courts is a judicially-created limitation on the right to sue. Generally, a person has "standing" to bring a lawsuit only if that person has suffered an injury in fact, caused by the person being sued, that can be redressed by the court. If a person lacks "standing," the court will dismiss the person's lawsuit.

The environmental groups appealed the trial court's ruling, arguing that the Michigan Legislature has eliminated any injury-in-fact requirement for a person to have standing to sue under MEPA, which provides that:

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

The appeals court held that, "in light of the plain language of the statute," when the Legislature said "any person" may sue under MEPA, the Legislature meant "*any* person." Accordingly, the court declined to "read in an additional requirement of compliance with non-statutory standing prerequisites," and reversed the trial court, allowing the environmental groups' lawsuit to proceed.

5. Part 307 (Inland Lakes and Streams)

a. **Yee v Shiawassee County Bd of Commrs, 651 NW2d 756 (Mich App, 2002), appeal denied 659 NW2d 491 (Mich, Feb 28, 2003).**

The Michigan Court of Appeals held that Part 307 of the NREPA and its predecessors are the only avenue for legally establishing a “normal level” for an inland lake, and, thus, a lake level established as part of a dam construction permit issued by the Michigan Department of Conservation is not legally enforceable. Additionally, the court found that Part 307 proceedings can only be initiated by county commissioners, not by private parties. The court also held that the initiation of Part 307 proceedings to establish a lake level that would flood a riparian landowner’s property would not be an unconstitutional taking of that property.

Bambi Lake was created in the early 1970s when a dam was constructed along a branch of Spring Hollow Creek in Shiawassee County. The dam was constructed pursuant to a permit issued by the Michigan Department of Conservation under the Dam Construction Approval Act (DCAA), and that permit specified that the “crest elevation” of Bambi Lake would be 799 feet above sea level. The lake level apparently remained stable until 1994, when it began to rise. William Yee, a lakefront property owner, was affected by these rising levels when water encroached onto his land, killing vegetation, and the floor of Yee’s basement began to crack as a result of the increased hydrostatic pressure beneath his home. In an attempt to lower the lake level, Yee removed the top spillway log from the dam, allowing more water to escape from the lake. This attempt was foiled, however, when surrounding property owners replaced the log and padlocked it.

In response to his neighbors’ actions, Yee sued several parties, including his neighbors, alleging that the 1970 dam construction permit established a legally enforceable lake level. Yee asked the court to hold that this level was legally enforceable, and by acting to keep the lake level above this enforceable limit, the neighbors were guilty of causing a trespass on his property. The trial court ruled that it had no jurisdiction to determine a legal lake level in the absence of an action filed under Part 307, and because no such action had been filed, Yee’s suit was dismissed.

Soon after Yee’s suit was dismissed, his neighbors petitioned the Shiawassee County Board of Commissioners to establish the current lake level as the “normal” lake level for Bambi Lake under Part 307. Yee responded by filing suit

to enjoin the county commissioners from setting such a lake level, on the basis that the 1970 permit set the normal level and the commissioners lacked authority to alter it. Additionally, Yee filed another lawsuit, posed as a claim to quiet title and determine interests in land, that requested the same relief: a finding that the 1970 permit established the lake’s legal level. These cases were also dismissed because Yee’s claims were based on the lake level established by the 1970 permit, which had already been determined to be legally unenforceable in Yee’s earlier lawsuit. Yee appealed all three decisions, which were consolidated into one case by the appeals court because they all dealt with essentially the same issues.

The appeals court agreed with the trial court that Part 307 (and its predecessor statutes) was the only avenue by which to establish a legal lake level, and, thus, the level established in the 1970 permit under the DCAA was unenforceable. The appeals court held that the language of the DCAA, combined with the enactment of a predecessor to Part 307, made it clear that the DCAA was not intended as an instrument for setting lake levels:

[I]t is clear that the act’s provisions were intended simply to provide for a method of regulating the construction of dams in this state in order to ensure their structural integrity. Although this goal would necessarily require consideration and approval of proposed impoundment surface areas and levels, nothing in the act indicates that these were intended to establish an enforceable lake level. To the contrary, that a construction permit issued under the DCAA was not intended to establish an enforceable lake level is clearly evinced by the Legislature’s amendment of the DCAA in July 1970 (just three months after issuance of the [1970] permit), to require successful permit applicants to petition for the establishment of a legal lake level under the Inland Lake Level Act of 1961 . . . It is fundamental that the classes of cases over which the circuit courts have subject-matter jurisdiction are defined by this state’s constitution and Legislature. By enacting the procedures outlined in Part 307 . . . and its predecessor, the ILLA, the Legislature clearly limited the court’s power to determine legal lake levels to those actions initiated by the county commissioners in accordance with the act.

Additionally, on the issue of who can initiate a Part 307 action to determine lake levels, the court found that:

[a]lthough nothing in part 307 specifically excludes initiation of such proceedings by an individual . . . , we conclude that, by enacting such a comprehensive scheme for the establishment and maintenance of legal lake levels, the Legislature has signified its intent to vest authority to initiate such a proceeding solely within the county board of commissioners or its delegated authority. Accordingly, without such action by these public authorities, a circuit court is powerless to act.

In so holding, the appeals court overruled its 1966 decision in **Arnold v Ellis**, in which the court had examined a predecessor to Part 307 and had held that the statute did not foreclose a private cause of action to establish lake levels. In rejecting **Arnold**, the court held that:

[t]he panel in **Arnold** . . . failed to consider the comprehensive nature of the statutory scheme employed by the Legislature or the public purpose in devising that scheme, and we therefore reject its conclusion that suit by an individual is not foreclosed. In any event, because that case was decided prior to November 1, 1990, we are not bound to follow the decision.

Yee also argued that Bambi Lake was beyond the scope of Part 307 because the lake was private, and Part 307 only applies to public lakes. The appeals court rejected this argument, noting that the statutory definition of “inland lake,” which delimits Part 307 jurisdiction, “does not require that the lake be public in order to be subject to the provisions of Part 307.”

Finally, Yee claimed that the initiation of Part 307 proceedings by a county board of commissioners “would amount to an unconstitutional taking of his property for a non-public purpose.” The appeals court observed, however, that Part 307 was enacted to serve a public purpose, as the preamble to the statute explicitly provides that it is “for the protection of the public health, safety and welfare . . . [and] the conservation of the natural resources of this state.” Application of Part 307 to Yee’s situation would likewise serve a public purpose, as “regulation of the lake level directly protects not only those private lands fronting the lake, but also those public resources and property interests located downstream from the spillway.” Thus, the initiation of Part

307 proceedings to set the level of Bambi Lake at an elevation that would be detrimental to Yee’s property would not be an unconstitutional taking of that property.

6. Part 303 (Wetland)

a. **King v MDEQ, No 2002-1025 (Macomb County Cir Ct, Aug 23, 2002).**

In an August 23, 2002 opinion, the Circuit Court for the County of Macomb held that the Office of Administrative Hearings (OAH) of the MDEQ improperly dismissed a petition for a contested case hearing challenging a wetlands determination by MDEQ in a Wetland Assessment Report (WAR) because the petition was not filed within the sixty days after MDEQ issued the WAR.

MDEQ’s Land and Water Management Division (LWMD) conducted a “Level 3” Wetland Assessment of property owned by Marrocco Enterprises, Inc. (Marrocco) and issued a WAR identifying the presence of wetlands on the property on October 16, 2001. The WAR indicated that MDEQ would conduct a reassessment if requested to do so within thirty days, provided that the request was “accompanied by evidence supporting different or supplemental findings in relation to vegetation, soil, or hydrology.” On December 3, 2001, 48 days later, acting on behalf of Marrocco, Jeffrey King sent a letter to MDEQ requesting an extension of time within which to file the request for a reassessment. King’s letter also asked that MDEQ provide its response before December 15, 2001, on the belief that a contested case hearing before the OAH had to be requested within sixty days after issuance of the WAR.

On December 19, 2001, after expiration of the sixty-day period, MDEQ orally notified King and Marrocco that a reassessment would not be conducted and King and Marrocco that day filed by facsimile a petition formally requesting a contested case hearing. MDEQ followed up the oral response with a confirmatory letter on December 21, 2001.

The Administrative Law Judge (ALJ) subsequently issued an opinion and order that denied King and Marrocco’s request for a wetlands reassessment and a contested case hearing. In reaching this conclusion, the ALJ relied on Section 104 of the Michigan Administrative Procedures Act (APA) which sets a 60-day deadline for a party to seek judicial review of a “final” decision issued by an administrative agency. The ALJ reasoned that the WAR was a final agency decision and ruled that King and Marrocco were likewise subject to a 60-day

deadline for seeking a contested case hearing, which is an administrative proceeding. Therefore, the ALJ held that, after the 60-day period expired, the OAH had no jurisdiction to hear the contested case requested by King and Marrocco. The ALJ further ruled that, even if the OAH had jurisdiction to hear the contested case, King and Marrocco still would not prevail because: (i) they addressed their petition for a contested case to the LWMD, not the OAH; (ii) they requested the wetlands reassessment after the 30-day deadline set in the WAR; and (iii) their December 3, 2001 letter by its own terms was not a request for a contested case hearing.

King and Marrocco petitioned the Circuit Court for judicial review of the ALJ's decision pursuant to the APA and the Michigan Court Rules (MCR). The court first considered King and Marrocco's request for a court declaration under the MCR. MDEQ argued that the court lacked jurisdiction because an adequate means of judicial review was provided under the APA. MDEQ further argued that, even if the court had jurisdiction to issue the requested declaration, King and Marrocco's request for a wetlands reassessment should be denied because MDEQ had the authority to enforce the 30-day deadline and King and Marrocco had failed to provide the additional information required by statute. King and Marrocco conversely argued that MCR 2.605(A) conferred jurisdiction on the court and that the 30-day deadline was not established in accordance with statutory requirements.

The court concluded that the request for a declaration should be denied because an adequate avenue for appellate review was available to King and Marrocco under the APA, which specifically vests the court with jurisdiction over an administrative tribunal's final decision in a contested case. The court concluded that the request for a declaration constituted "an improper attempt to circumvent the appellate procedure set forth under the APA." Therefore, the court did not address the validity of the 30-day deadline set in the WAR for requesting a wetlands reassessment.

The court next considered whether the ALJ properly ruled that the OAH had no jurisdiction to conduct a contested case hearing because King and Marrocco petitioned for a contested case after 60 days. MDEQ argued that the sixty-day deadline for seeking judicial review of a final agency decision applied to the WAR, arguing that the WAR was a final agency decision. MDEQ argued that "[i]nasmuch as a court would lose appellate jurisdiction after the expiration of sixty days, so, too, was the ALJ divested of jurisdiction to entertain a contested case after the passage of the same time."

King and Marrocco "argue[d] that the WAR did not trigger the sixty-day deadline under any statutory provision or administrative rule" and that the ALJ improperly relied upon a provision of the APA that applied only to license applications. King and Marrocco requested that the ALJ's decision be reversed and/or sent back to the ALJ in order to conduct a contested case hearing.

The court stated that it would apply the following the standard of review under the APA in reaching its decision:

(1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

. . . .

(c) Made upon unlawful procedure resulting in material prejudice to a party

. . . .

(2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings.

The court explained that the sole issue was whether the ALJ properly dismissed King and Marrocco's petition for a contested case hearing because they failed to comply with the 60-day deadline. The court explained that Part 303 of NREPA requires "that an agency provide, upon request, contested case hearings to persons aggrieved by the agency's action." The court further explained that Part 303, in turn, looks to the APA to govern the manner in which the agency conducts the contested case hearing and that, under the APA, a party may appeal an agency's "final order" within 60 days after the mailing of notice of the final order. The court noted that although the APA did not expressly define the term "final order," the APA contains a description of the content and format of a final decision. The court stated, for example, that a final decision must include "findings of fact and conclusions of law [that are] separated into sections captioned or entitled 'findings of fact' and 'conclusions of law.'" The court held that the WAR did not constitute "a final agency decision since it lacked clearly delineated sections, as mandated under [the APA]" and, as an aside, questioned "whether the WAR's drafter(s) had the authority to make legal conclusions." The court further held that the ALJ had misplaced his reliance on a section of the APA that pertained only to license applications, which the WAR did not involve.

The court held that, therefore, “the ALJ’s decision was contrary to law because the ALJ followed an unlawful procedure resulting in material prejudice to a party” and it was appropriate to send the matter back to the OAH to conduct a contested case hearing. Therefore, the court held that King and Marrocco’s failure to petition for a contested case within 60 days was not fatal. As a final matter, the court considered and denied King and Marrocco’s request for peremptory reversal. The court explained that “[p]eremptory reversal is appropriate when there is an error ‘so manifest that an immediate reversal of the judgment or order appealed from should be granted without formal argument or submission.’” The court found the request for peremptory reversal to be moot, given that the court had already deemed it appropriate to consider the arguments in the party’s briefs.

7. Insurance

a. *Busch v Holmes*, 662 NW2d 64 (Mich App, 2003).

The Michigan Court of Appeals upheld a trial court decision that Lloyds of London (Lloyds) need not reimburse one of its insureds for attorney fees defending against a federal indictment for knowingly discharging oil into waters of the United States.

A federal grand jury in the Western District of Michigan indicted Gregory J. Busch (Busch) for knowingly discharging oil into waters of the United States in violation of the CWA. A knowing violation of the CWA is a criminal offense for which a first offender may be fined between \$5,000 and \$50,000 per day of violation, imprisoned for up to three years, or both. A negligent violation of the CWA is subject to a criminal fine between \$2,500 and \$25,000 per day of violation, imprisonment of up to one year, or both.

Busch asked Lloyds, from whom he had purchased an Oil Pollution Insurance Policy, to defend him against the indictment. Lloyds declined to provide an attorney to defend Busch, but said that it might reconsider if the evidence at Busch’s trial showed that the discharge had been accidental. Busch hired an attorney to defend against the criminal charges, which were ultimately resolved by a plea bargain under which Busch pleaded guilty to negligently violating the CWA, agreed to pay a \$25,000 criminal fine, and agreed to a 60 day suspension of his Coast Guard license. Lloyds paid \$10,000 of the \$25,000 fine, but refused to pay any of Busch’s \$157,350 attorney fees. Busch sued Lloyds to recover his attorney fees. The trial court ruled on a motion for summary disposition that the Lloyds policy did not cover

the cost of defending a criminal prosecution, and denied Busch’s claim.

Busch appealed to the Michigan Court of Appeals based on a long line of cases holding that an insurer’s duty to defend against tort claims is broader than its duty to indemnify the insured for such claims. Those cases hold that an insurer must defend claims that are “arguably” covered by the policy. The appeals court held, however, that those cases did not apply because the Lloyds policy did not include an agreement to defend, but only a requirement that Lloyds reimburse expenses incurred by the insured in defending against liabilities covered by the policy. The appeals court determined that a requirement that an insurer reimburse defense costs incurred by an insured is different from a requirement that an insurer provide a legal defense.

The Lloyds U.S. Oil Insurance Policy insured Busch against “expenses . . . defending against . . . any liability insured” by the policy. Liabilities insured by the policy included: (1) liability under Section 1002 of the Oil Pollution Act (OPA) for the costs of removing discharged oil; (2) liabilities under Section 1002 of the OPA for damages resulting from such discharges, including damages to natural resources and damages to real or personal property; (3) liability under Section 1005 of the OPA for interest on claims for removal costs and damages; and (6) equivalent liabilities under state law. The appeals court observed that the indictment against Busch did not seek to impose any of the kinds of liabilities insured by the Lloyds policy, but instead sought to impose liability for criminal penalties under the CWA. Because the policy did not insure against claims for criminal liability, the policy provision that required Lloyds to reimburse costs of defending against insured claims did not apply to the cost of defending against a criminal indictment.

Busch claimed that the Confirmation of Insurance, a two-page document that supplemented the Lloyds policy, granted additional coverage of \$10,000 per incident for “fines and penalties as covered under the Oil Pollution Act”; this apparently was the provision under which Lloyd reimbursed Busch for \$10,000 of his \$25,000 fine. Busch argued that the Confirmation of Insurance established a duty for Lloyd to cover Busch’s legal defense costs. The appeals court rejected this argument because, although the Confirmation of Insurance covered a limited amount of fines and penalties, it did not provide any coverage for associated legal defense costs.

Because the appeals court agreed with the trial court that the Lloyds policy clearly did not provide coverage for the cost of defending against a criminal indictment, it considered it unnecessary to discuss whether the trial court had correctly decided that an insurer's agreement to do so would violate Michigan public policy.

8. Miscellaneous

a. **Thomas v George Jerome & Co, 2002 WL 1040471 (Mich App, May 21, 2002).**

The Michigan Court of Appeals affirmed a trial court's decision denying a motion for summary disposition and granting motions to add affirmative defenses.

Robert Thomas brought an action against various corporations and individuals, the City of New Baltimore, Michigan, and the MDEQ, based on provisions of NREPA. The trial court made various rulings, including denying Thomas's motion for summary disposition, and granting motions to add affirmative defenses.

Thomas had alleged NREPA causes of action against one of the parties, Brooks Williamson, and had moved for summary disposition on these counts. The trial court had denied Thomas's motion because discovery had not been completed, and, thus, the motion was "premature." The appeals court noted that the trial court's reasoning was incorrect because a court rule "clearly states that only the pleadings may be considered when ruling on such a motion." Therefore, the status of discovery should have been irrelevant to the trial court's determination.

The appeals court, however, ruled that the trial court's decision was still proper. In response to Thomas's complaint, Brooks Williamson had either categorically denied Thomas's allegations or stated that he lacked sufficient knowledge to admit or deny the allegations. The court observed that the 1990 Michigan Supreme Court decision in **Nasser v Auto Club Ins Ass'n** established that summary disposition is improper when material allegations in the complaint are categorically denied, regardless of whether such denials are ultimately unsuccessful. Thus, because Brooks Williamson had categorically denied Thomas's allegations, **Nasser** established that summary disposition was improper, and the trial court's decision to deny Thomas's motion was correct, albeit for different reasons than those stated by the trial court.

The trial court had also granted various parties' motions to add the affirmative defense set forth in Part 17 of NREPA,

which provides that a party is not liable when it shows that "there is no feasible and prudent alternative to defendant's conduct and that his or her conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction." The trial court had granted the motions because it found that Thomas was aware of the statute, and thus, it would not be unfair to Thomas to allow addition of the affirmative defense.

The appeals court agreed with the trial court, and elaborated on its reasoning:

There was no evidence of bad faith in defendants' delays in raising this affirmative defense. Furthermore, we agree with the trial court's conclusion that [Thomas] would not be prejudiced if the trial court granted the requests for amendment. There is no evidence that [Thomas] would be denied a fair trial. Discovery was incomplete, there was no impending trial date, and there was no evidence that defendants' delays in raising this defense resulted in the loss of valuable witnesses or evidence. Finally, [Thomas] was not surprised by this affirmative defense because it is provided for by the NREPA, the act [Thomas] relied on to state a cause of action against defendants.

The appeals court also noted the general rule that amendment of pleadings "should be freely granted when justice requires." Thus, the Court of Appeals affirmed the trial court's decision to allow addition of the affirmative defense under Part 17 of NREPA.

b. **Preserve the Dunes, Inc v MDEQ, 655 NW2d 263 (Mich App, Oct 4, 2002), appeal granted 661 NW2d 231 (Mich, Mar 25, 2003).**

The Michigan Court of Appeals held that the MDEQ exceeded its authority under the Sand Dune Mining Act when it issued a permit to allow Technisand, Inc. (Technisand) to mine sand from a critical dune area.

Technisand was engaged in the business of supplying industrial sand to various manufacturing industries. In 1991, Technisand purchased property in Berrien County that contained sand dunes. In 1992, Technisand acquired the sand mining permit that had been owned by the seller of the property. The permit only allowed mining in "non-critical" dune areas on the site.

In 1994, Technisand applied to the MDNR for the permit to be expanded to include an additional 126.5 acres of the site. After the expansion, Technisand planned to remove 7 million tons of sand from the surface and 950,000 tons of sand from the sub-surface, and Technisand proposed to create two lakes and to relocate threatened plant species. In the process, however, most of a “critical” dune area would be removed. MDNR denied Technisand’s request, citing the statutory prohibition against mining in critical dune areas.

In 1996, after most environmental regulatory authority in Michigan had been transferred from MDNR to MDEQ, MDEQ informed Technisand that changes in state government, along with “additional information” that had come to light, had prompted MDEQ to reconsider Technisand’s permit request. Technisand submitted a revised application that was approved by MDEQ with no reference to the statutory prohibition against mining in critical dune areas.

A group of local citizens formed an organization called Preserve the Dunes, Inc. and filed suit against Technisand and MDEQ, claiming that the permit was illegal under MCL 324.63702(1), which provides that:

the department shall not issue a sand dune mining permit within a critical dune area . . . after July 5, 1989, except under either of the following circumstances:

(a) The operator seeks to renew or amend a sand dune mining permit that was issued prior to July 5, 1989, subject to the criteria and standards applicable to a renewal or amendatory application.

(b) The operator holds a sand dune mining permit issued pursuant to section 63704 and is seeking to amend the mining permit to include land that is adjacent to property the operator is permitted to mine, and prior to July 5, 1989 the operator owned the land or owned rights to mine dune sand in the land for which the operator seeks an amended permit.

According to Preserve the Dunes, this section established that MDEQ could not allow Technisand to mine the critical dune areas unless Technisand met one of the two enumerated exceptions. Preserve the Dunes argued that Technisand did not meet these exceptions because they apply only to the original “operator” of an existing sand dune mining

operation. In other words, even if the permit was issued before July 5, 1989 or the adjacent land in question was owned before that date, the exceptions apply only if the original permit holder or owner is the same person that is applying for a permit under the exceptions. Therefore, because Technisand did not obtain the land and permit until 1991 and 1992, respectively, it does not qualify for these exceptions to the ban on mining in critical dune areas.

Although MCL 324.63702(1) and its counterpart statutory sections do not provide for a private right of action, Preserve the Dunes challenged the permit under Part 17 of NREPA, which allows private parties to file suit against any person, including State agencies, “for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.” In addition to its statutory argument that MDEQ lacked the authority to issue the permit, Preserve the Dunes claimed that MDEQ’s action, even if authorized by statute, violated Part 17 because it would “destroy a unique, irreplaceable, and fragile natural resource” of the state.

MDEQ and Technisand argued in rebuttal that Preserve the Dunes’ lawsuit was time-barred because it was brought too long after the permit had been issued, citing the Revised Judicature Act’s 21-day limitation on such challenges. Alternatively, they argued that Technisand did meet the statutory exceptions, and, therefore, MDEQ was authorized to issue the permit. They also asserted that the permit would not result in destruction of natural resources, and, thus, Preserve the Dunes did not state a proper claim under Part 17 of NREPA.

On a motion for summary disposition, the trial court dismissed Preserve the Dunes’ claim based on MCL 324.63702(1), holding that it was time-barred. The court also held alternatively, that Technisand met one of the statutory exceptions because those exceptions are “operation,” not “operator,” based, and Technisand had purchased a mining “operation” that existed before July 5, 1989. At trial, the court also ruled in favor of MDEQ and Technisand on the issue of whether the permit violated Part 17 of NREPA because it would destroy natural resources. Applying the factors set forth in *Portage v Kalamazoo Co Rd Comm*, the court found that the damage caused by Technisand’s mining would not rise to the level of harm contemplated by Part 17, citing the fact that the dunes at issue made up only one-tenth of one percent of Michigan’s critical dune areas. Preserve the Dunes appealed.

The appeals court started by determining the standard by which it would judge whether MDEQ and Technisand's actions would harm the environment. The court observed that the **Portage** factors that were utilized by the trial court might be appropriate in some circumstances, but not where a statute specifically covered the activities at issue. The court cited MCL 324.1702, which provides that:

if there is a standard for pollution or for an antipollution device or procedure, fixed by rule or otherwise, by the state or an instrumentality, agency, or political subdivision of the state, the court may:

- (a) Determine the validity, applicability, and reasonableness of the standard.
- (b) If a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.

The court interpreted this to mean that a court must consider applicable environmental statutes and cannot allow activities that would violate those statutes:

only if the applicable standard is *deficient*, may the court adopt a different, higher standard The court may not substitute a weaker standard and certainly may not completely ignore an appropriate standard or procedure There will not always be an existing, applicable standard, in which case, the court may simply apply the general “umbrella” standard under MEPA prohibiting the impairment, destruction, or pollution of a natural resource. However, in this case, . . . the Legislature entered the arena, and prohibited mining in critical dune areas except under two specifically laid out circumstances. The Legislature’s prohibition is not merely a “nicety” nor is it merely “procedural.” Accordingly, [MCL 324.63702(1)] provides the standard and procedure for mining in critical dune areas in this MEPA action.

Thus, the appeals court held that the requirements of MCL 324.63702(1), which limit mining in critical dune areas to two specific circumstances, would be the applicable standard for Preserve the Dunes’ Part 17 claim.

When the trial court had dismissed one of Preserve the Dunes’ claims as being time-barred, it had done so on the basis that the claim was a “purely procedural” challenge

requesting review of an administrative permit decision, which carried a 90-day statute of limitations under the Administrative Procedures Act. The court treated this as separate from the Part 17 claim.

The appeals court agreed with Preserve the Dunes that this characterization was erroneous, and that the entirety of Preserve the Dunes’ challenge to the permit decision was one claim under Part 17 of NREPA. Noting that the trial court had not cited any authorities to support its decision, the appeals court cited precedent establishing that permits could be challenged under Part 17, and, therefore, there were no grounds for the trial court to separate the permit challenge from Preserve the Dunes’ other arguments concerning environmental damage.

Furthermore, because all claims arose under Part 17 of NREPA, the administrative hearing process and its 90-day limitation were not fatal to Preserve the Dunes’ claims. Part 17 provides that “[i]f administrative, licensing, or other proceedings are required or available to determine the legality of the [agency’s] conduct, the court *may* direct the parties to seek relief in such proceedings.” The court noted that the “word ‘may’ designates discretion,” and, therefore, administrative procedures, and their corresponding statutes of limitations, would apply only if the court decided to invoke them: “a MEPA litigant is not required to exhaust administrative remedies before seeking judicial review.” Additionally, the court can invoke such administrative proceedings only where they are “required or available.” The administrative challenge procedure was not “available” to Preserve the Dunes because the 90-day period for challenging the permit had expired. Thus, the court held that the trial court had erred in invoking the administrative limitations period. The statutes that did govern Preserve the Dunes’ claims, Part 17 and the relevant standard for Part 17 in this case, MCL 324.63702(1), contained no limitation provisions. Therefore, the court held that Preserve the Dunes’ claims were not time-barred.

Because the Part 17 standard in this case was MCL 324.63702(1), the court next turned to that provision to determine whether Technisand’s permit was properly issued under one of the exceptions set forth in that provision. As mentioned above, MDEQ and Technisand had generally argued that Technisand was “grandfathered” in under subsection (b) of the statute because the permit Technisand purchased had been in existence before July 5, 1989, even though Technisand had not purchased the permit until after that date. More specifically, they argued that the term

“operator” in the statute did not relate to a person, which would require the person applying for the permit today to be the same person who held the permit on July 5, 1989. Instead, they claimed, the word “operator” related to operations, meaning that the mining operation that is the subject of the permit request must be the same one that existed on July 5, 1989. The trial court accepted this argument.

The appeals court disagreed for several reasons. First, the court pointed to the definition of “operator,” which refers to an “owner,” “lessee,” or “person.” Second, the court noted that the statute in question uses the term “operation” in other sections, but not in MCL 324.63702(1), indicating that “operation” and “operator” do not mean the same thing. Third, the court explained that:

if the privilege of expansion into critical dune areas were tied to “operations” as opposed to “operators,” there would be no limit to who could obtain amendments . . . each new permit owner could point back to the date upon which the very first operation at the site commenced and could successfully argue that theirs was simply a continuance. This approach completely overlooks the ownership focus of the definition of “operator” and disregards the idea that existing owners were “grandfathered in” based on their reliance on the state of the old law, and the right to mine in critical dune areas.

Thus, the term “operator” meant person, not operation, and Technisand did not qualify for the exception because it was not the same person who held the permit on July 5, 1989.

MDEQ had also argued that Technisand qualified under subsection (a) of the statute, which allows a person to “renew or amend” a permit that was issued before July 5, 1989. The trial court had rejected this argument, and the appeals court agreed that subsection (a) did not apply to the situation at hand. While renewals or amendments were generally covered under subsection (a), the court explained, the specific situation of amendment to include an adjacent area was covered under subsection (b). Thus, to read subsection (a) to cover the situation addressed by subsection (b) would render subsection (b) superfluous. Additionally, the court observed that to read the statute in the way suggested by MDEQ would result in MDEQ having power to “amend” any permit to include critical dune areas, effectively destroying the general prohibition against mining such areas,

which would be an “absurd result.” Because Technisand did not meet either of the statutory exceptions to the prohibition against mining in critical dune areas, the court held that MDEQ’s authorization of mining in such areas was improper, and Preserve the Dunes was entitled to judgment in its favor.

c. Bestway Recycling, Inc v Bean, 2003 WL 21186596 (Mich App, May 20, 2003).

The Michigan Court of Appeals upheld the dismissal of a lawsuit filed against two MDEQ employees, alleging that they had sampled a landfill monitoring well in a grossly negligent manner. The court upheld the trial court’s dismissal of the suit because it had been filed more than three years after the plaintiffs knew, or should have known, of their claims.

Bestway Recycling, Inc. (Bestway) and Aaro Disposal, Inc. (Aaro) sued two MDEQ employees, Lawrence Bean and James Sygo, for gross negligence arising out of allegedly fraudulent groundwater sampling conducted at a sanitary landfill located in Waterford Township, Michigan. This landfill had been the subject of a cease and desist order issued by the MDEQ in 1990 that was based, in part, on the results of groundwater sampling conducted by Mr. Bean on a groundwater monitoring well known as “Monitoring Well #19.” Bestway and Aaro alleged that this sampling was conducted in a fraudulent and grossly negligent manner and that the resulting cease and desist order caused extensive injury to their respective businesses. The trial court, however, dismissed the lawsuit because the applicable three-year statute of limitations period had expired before Bestway and Aaro filed suit.

On appeal, the appeals court first confirmed that Michigan law provides that the period of limitations is three years for an action alleging gross negligence, and that this period “runs from the time the claim accrues.” The claim accrues, the court explained, “at the time the wrong upon which the claim is based was done regardless of the time when damages result.” The court then stated that, under the “discovery rule,” a claim accrues when “on the basis of objective facts, a plaintiff should have known or been aware of a possible cause of action.” Applying these rules to Bestway and Aaro’s claims, the court concluded that, because the plaintiffs “concede that they were aware of an injury in 1992 when [their] assets were sold at a substantially reduced value caused by the state’s actions regarding the landfill, [the] dispute focuses on when plaintiffs became aware, or should have become aware, of the cause of the injury, which, alleged here, is the gross negligence of” the MDEQ employees.

Bestway and Aaro claimed that they did not discover Mr. Bean's allegedly fraudulent conduct until June 1997, when his field notes were presented as evidence in a separate lawsuit regarding the 1990 cease and desist order. Accordingly, they claimed that their suit against the MDEQ employees was filed within the three years under the "discovery rule." Without deciding whether the discovery rule applied in this case, however, the court held that Bestway and Aaro were aware of their potential cause of action against Bean and Sygo much earlier than 1997.

The appeals court held that Bestway and Aaro should have known of their potential cause of action against as early as 1991 based on evidence produced in the litigation concerning the 1990 cease and desist order. The court noted that "[t]hroughout the years of the landfill litigation, including the early 1990s, plaintiffs continually and intensely challenged contamination findings by the state, and they asserted that the state's action was illegal and motivated by political pressure." Further, the court noted that the plaintiffs' own expert testified prior to 1992 that the MDEQ's results for Monitoring Well #19 "were so high in comparison to the results from other samplings [that] *any reasonable person familiar with these types of issues knew or should have known that the results were likely flawed and cannot reasonably be used as the basis for an enforcement action.*" (Emphasis added by the court.) Therefore, the appeals court affirmed the trial court's dismissal of the lawsuit based on the running of the three year limitations period.

III. LEGISLATION

A. Federal Legislation

Federal Public Law and Effective Date

Pub Law 107-303 (HR 1070) Nov 27, 2002

Description

Great Lakes and Lake Champlain Act of 2002 amends the Clean Water Act to authorize EPA to provide assistance for remediation of sediment contamination in areas of concern and to authorize research and development assistance; also authorizes the establishment of a Center for Brownfields Excellence to receive transfers of technology expertise in redevelopment of certain properties.

Pub Law 107-308 (HR 3908) Dec 2, 2002

Reauthorizes the North American Wetlands Conservation Act under 16 USC 4401 et seq.

Pub Law 108-23 (HR 289) May 19, 2003

Ottawa National Wildlife Refuge Complex Expansion and Detroit River International Wildlife Refuge Expansion Act expands the boundaries of the wildlife refuges and allows transfers of property located within the refuge boundaries that are under the jurisdiction of other agencies to the Department of Interior.

B. State Legislation

Michigan Public Act and Effective Date 2002 Public Acts

PA 434 (HB 5556) June 10, 2002

Amends MCL 324.48701 to increase the amount of trout streams and to allow children to take one fish out of designated trout streams.

PA 461 (HB 5758) June 21, 2002

Amends the arsenic testing program under Part 54 of NREPA.

PA 496 (HB 5380) July 3, 2002

Amends the scrap tire provisions of Part 91 of NREPA; adds MCL 324.16909a.

PA 507 (HB 4719) Mar 31, 2003

Amends MCL 333.12541 to require public notice with respect to water testing at public beaches.

PA 598 (SB 0003) Dec 16, 2002

Adds MCL 123.311 to establish procedures for the dissolution of municipal refuse collection authorities.

PA 650 (SB 795) Dec 23, 2002

Adds MCL 324.32504a to allow the sale, lease or other agreements concerning lighthouses and bottomlands.

PA 676 (HB 5953) Mar 31, 2003

Adds MCL 320.2031 - .2036 to regulate certain forestry management practices.

PA 727 (HB 6502) Dec 30, 2002

Amends MCL 125.2663 and .2665 to revise the brownfield redevelopment authority approval process and extends the sunset date.

**Michigan Public Act and Effective Date
2003 Public Acts**

Description

PA 02 (HB 4198) Apr 22, 2003

Amends Part 825 of NREPA regarding assumption of risk when operating snowmobiles.

PA 14 (HB 4257) June 5, 2003

Amends Parts 303 and 325 of NREPA to allow certain beach maintenance activities and removal of vegetation on Great Lakes riparian lands.

IV. ADMINISTRATIVE RULEMAKINGS

A. EPA Final Rulemakings

Federal Register Notice

Description

Clean Air Act, NESHAP
67 Fed Reg 39,301 (June 7, 2002)

Amends 40 CFR Part 63 standards for certain generic maximum achievable control technologies ("MACT").

Clean Air Act, NAAQS
67 Fed Reg 39,602 (June 10, 2002)

Amends 40 CFR Part 61 requirements for consolidated emissions reporting.

Clean Air Act, NESHAP
67 Fed Reg 39,764 (June 10, 2002)

Amends 40 CFR Part 63 to establish standards for surface coating of metal coil.

Clean Air Act, NESHAP
67 Fed Reg 40,045 (June 11, 2002)

Amends 40 CFR Part 63 to establish standards for cellulose products manufacturing.

Clean Air Act, NESHAP
67 Fed Reg 40,478 (June 12, 2002)

Amends 40 CFR Part 63 to establish standards for primary copper smelting.

Clean Water Act, Sludge
67 Fed Reg 40,554 (June 12, 2002)

Notice of data availability for standards for the use or disposal of sewage sludge.

Clean Air Act, NESHAP
67 Fed Reg 40,578 (June 12, 2002)

Amends 40 CFR Part 63 standards for phosphoric acid manufacturing and phosphate fertilizer production plants.

Clean Air Act, NESHAP
67 Fed Reg 48,814 (June 13, 2002)

Amends 40 CFR Part 63 standards for phosphoric acid manufacturing and phosphate fertilizer production plants.

Clean Air Act, NESHAP
67 Fed Reg 41,118 (July 14, 2002)

Amends 40 CFR Part 63 standards for secondary aluminum production.

Clean Air Act, NESHAP
67 Fed Reg 43,112 (June 26, 2002)

Notice of revisions to the area source category list under the Integrated Urban Air Toxics Strategy under CAA Sections 112(c)(3) and 112(k)(3).

Clean Air Act, SIP
67 Fed Reg 43,548 (June 28, 2002)

Amends 40 CFR Part 62 to revise and rescind certain provisions of Michigan's SIP.

Clean Air Act, NESHAP
67 Fed Reg 44,371 (July 2, 2002)

Amends 40 CFR Part 63 and withdraws portions of April 5, 2002 direct final rule.

- Clean Air Act, NESHAP
67 Fed Reg 44,452 (July 2, 2002)
- Clean Air Act, NESHAP
67 Fed Reg 44,766 (July 5, 2002)
- CERCLA, RQs
67 Fed Reg 45,314 (July 9, 2002)
- Clean Air Act, NESHAP
67 Fed Reg 45,588 (July 9, 2002)
- Clean Air Act, NAAQS
67 Fed Reg 45,635 (July 10, 2002)
- Clean Air Act, NESHAP
67 Fed Reg 45,885 (July 10, 2002)
- Solid Waste Management
67 Fed Reg 45,915 (July 11, 2002)
- Clean Air Act, NESHAP
67 Fed Reg 46,289 (July 12, 2002)
- Clean Water Act, Water Quality
67 Fed Reg 47,042 (July 17, 2002)
- Clean Air Act, Ozone
67 Fed Reg 47,703 (July 22, 2002)
- Hazardous Waste Management
67 Fed Reg 47,798 (July 22, 2002)
- Clean Water Act, NPDES
67 Fed Reg 48,099 (July 23, 2002)
- Clean Air Act, NEHSAP
67 Fed Reg 48,254 (July 23, 2002)
- Hazardous Waste Management
67 Fed Reg 48,393 (July 24, 2002)
- Hazardous Waste Management
67 Fed Reg 49,617 (July 31, 2002)
- Clean Air Act, SIP
67 Fed Reg 50,808 (Aug 6, 2002)
- Clean Air Act, NESHAP
67 Fed Reg 52,616 (Aug 13, 2002)
- Notice of data availability of databases EPA plans to use to propose NESHAP for hazardous waste burning combustors.
- Amends 40 CFR Part 63 standards for portland cement manufacturing industry and April 5, 2002 final rule.
- Amends 40 CFR Part 302 to correct errors and remove obsolete language from reportable quantity regulations.
- Amends 40 CFR Part 63 to establish standards for rubber tire manufacturing facilities.
- Amends 40 CFR Part 81 by deleting Michigan attainment status for all areas for particulate matter measured as total suspended particulate.
- Amends 40 CFR Part 63 to establish standards for polyvinyl chloride and copolymers production facilities.
- Amends 40 CFR Part 258 location restriction requirements for municipal solid waste landfills for airport safety.
- Amends 40 CFR Part 63 general MACT with respect to dry spinning spandex production processes.
- Amends 40 CFR Part 112 requirements for spill prevention, control and countermeasure plans ("SPCC") and facility response plans.
- Amends 40 CFR Part 82 list of substitutes for ozone-depleting substances in the foam blowing sector under the Significant New Alternatives Policy ("SNAP") program.
- Notice of availability of and request for comment on draft *Contaminated Sediments Science Plan*.
- Notice of data availability used by EPA to establish standards for concentrated animal feeding operations.
- Amends 40 CFR Part 63 to establish standards for surface coating of large appliances.
- Amends 40 CFR Parts 261, 266, 268 and 271 requirements for recycling of hazardous secondary materials to make zinc fertilizer products.
- Amends 40 CFR Part 271 authorization of Michigan's hazardous waste program.
- Amends 40 CFR Part 93 requirements for certain submissions under the transportation conformity rule.
- Withdraws June 14, 2002 direct final rule establishing standards for secondary aluminum production facilities.

Clean Water Act, Water Quality 67 Fed Reg 57,228 (Sept 9, 2003)	Notice of availability of national management measures to control nonpoint source pollution from urban areas.
Clean Air Act, NSPS, NESHAP 67 Fed Reg 58,028 (Sept 13, 2002)	Notice of availability of additions to the Applicability Determination Index database.
Clean Air Act, Permits 67 Fed Reg 58,529 (Sept 17, 2002)	Amends 40 CFR Parts 70 and 71 to clarify the scope of sufficiency monitoring requirements for federal and state operating permits programs.
Clean Water Act, Water Quality 67 Fed Reg 58,990 (Sept 19, 2002)	Amends 40 CFR Parts 9 and 430 effluent limitations for the bleached papergrade kraft and soda subcategory of the pulp, paper and paperboard point source category.
Clean Air Act, NESHAP 67 Fed Reg 59,787 (Sept 24, 2002)	Amends 40 CFR Part 63 requirements for secondary aluminum production facilities.
Hazardous Waste Management 67 Fed Reg 62,618 (Oct 7, 2002)	Amends 40 CFR Parts 268 and 271 land disposal restrictions to designate new treatment subcategories for radioactively contaminated cadmium-, mercury- and silver-containing batteries.
Hazardous Waste Management 67 Fed Reg 62,647 (Oct 8, 2002)	Withdraws July 11, 2002 direct final rule regarding landfill location restrictions for airport safety.
Clean Water Act, Water Quality 67 Fed Reg 64,216 (Oct 17, 2002)	Amends 40 CFR Part 420 effluent limitations and pretreatment standards for the iron and steel manufacturing point source category.
Clean Air Act, NESHAP 67 Fed Reg 64,498 (Oct 18, 2002)	Amends 40 CFR Part 63 to establish standards for friction materials manufacturing facilities.
Clean Air Act, NESHAP 67 Fed Reg 64,742 (Oct 21, 2002)	Amends 40 CFR Part 63 requirements for publicly owned treatment works.
Safe Drinking Water 67 Fed Reg 65,220 (Oct 23, 2002)	Amends 40 CFR Parts 136, 141 and 143 to include updated test procedures for contaminants in wastewater and drinking water.
Clean Water Act, Water Quality 67 Fed Reg 65,876 (Oct 29, 2002)	Amends 40 CFR Part 136 test procedures for analysis of mercury in water; revises EPA Method 1631.
Clean Air Act, NESHAP 67 Fed Reg 68,038 (Nov 8, 2002)	Amends 40 CFR Part 63 to correct effective date of standards for secondary aluminum production facilities.
Clean Water Act, Water Quality 67 Fed Reg 68,039 (Nov 8, 2002)	Amends 40 CFR Part 131 to withdraw the federal human health and aquatic life water quality criteria for toxic pollutants applicable to Michigan.
Clean Air Act, NESHAP 67 Fed Reg 68,124 (Nov 8, 2002)	Notice of revisions to source category list for standards under CAA Sections 112(c)(6) and 112(k).
Clean Air Act, NESHAP 67 Fed Reg 68,526 (Nov 12, 2002)	Amends 40 CFR Part 61 standards for benzene waste operations.

- Clean Water Act, Water Quality
67 Fed Reg 69,952 (Nov 19, 2002)
- Amends 40 CFR Part 136 whole effluent toxicity test methods.
- Safe Drinking Water
67 Fed Reg 70,850 (Nov 27, 2002)
- Amends 40 CFR Parts 141 and 142 requirements for consumer confidence reports and public notifications.
- Clean Water Act, Water Quality
67 Fed Reg 71,165 (Nov 29, 2002)
- Notice of availability of draft *Strategy for National Clean Water Act Industrial Regulations*.
- Hazardous Waste Management
67 Fed Reg 71,169 (Nov 29, 2002)
- Notice of availability of draft guidance for evaluating the vapor intrusion to indoor air pathway from groundwater and soils.
- Hazardous Waste Management
67 Fed Reg 71,964 (Dec 3, 2002)
- Notice requesting comments on OSWER 9355.0-85, draft *Contaminated Sediment Remediation Guidance for Hazardous Waste Sites*.
- Clean Air Act, NESHAP
67 Fed Reg 72,330 (Dec 4, 2002)
- Amends 40 CFR Part 63 to finalize standards for facilities that coat paper and other web substrates.
- Clean Air Act, NESHAP
67 Fed Reg 72,580 (Dec 6, 2002)
- Amends 40 CFR Part 63 standards for portland cement manufacturing facilities.
- Clean Air Act, NESHAP
67 Fed Reg 77,687 (Dec 19, 2002)
- Amends 40 CFR Parts 63 and 270 requirements for hazardous waste combustors.
- Clean Air Act, Ozone
67 Fed Reg 77,927 (Dec 20, 2002)
- Amends 40 CFR Part 82 to expand the list of acceptable substitutes for ozone-depleting substances under the SNAP program.
- Clean Water Act, NPDES
67 Fed Reg 78,948 (Dec 26, 2002)
- Amends 40 CFR Part 125 requirements for cooling water intake structures for new facilities.
- Clean Water Act, Water Quality
67 Fed Reg 79,091 (Dec 27, 2002)
- Notice of availability of revised *National Recommended Water Quality Criteria*.
- Clean Air Act, NESHAP
67 Fed Reg 79,808 (Dec 30, 2002)
- Amends 40 CFR Part 63 standards for secondary aluminum production facilities.
- Clean Air Act, PSD and NSR
67 Fed Reg 80,186 (Dec 31, 2002)
- Amends 40 CFR Parts 51 and 52 requirements for NSR applicability requirements for modifications to allow sources more flexibility.
- Clean Air Act, NAAQS
67 Fed Reg 80,326 (Dec 31, 2002)
- Amends 40 CFR Part 58 standards for particulate matter.
- Clean Water Act, Water Quality
68 Fed Reg 557 (Jan 6, 2003)
- Notice of development of ecoregional nutrient criteria for lakes, and reservoirs and rivers and streams.
- Clean Water Act, Water Quality
68 Fed Reg 560 (Jan 6, 2003)
- Notice of development of nutrient criteria technical guidance manual for estuarine and coastal marine waters.
- Clean Air Act, Ozone
68 Fed Reg 614 (Jan 6, 2003)
- Amends 40 CFR Part 50 NAAQS for ozone in response to court remand.

- Clean Water Act, Water Quality
68 Fed Reg 1348 (Jan 9, 2003)
- Clean Water Act, Water Quality
68 Fed Reg 1608 (Jan 13, 2003)
- Clean Air Act, NESHAP
68 Fed Reg 2227 (Jan 16, 2003)
- Clean Air Act, Ozone
68 Fed Reg 2820 (Jan 21, 2003)
- CERCLA, Brownfields
68 Fed Reg 3430 (Jan 24, 2003)
- Clean Air Act, Ozone
68 Fed Reg 4004 (Jan 27, 2003)
- Clean Air Act, Federal Plan
68 Fed Reg 5144 (Jan 31, 2003)
- Clean Air Act, NESHAP
68 Fed Reg 6082 (Feb 6, 2003)
- Clean Water Act, NPDES
68 Fed Reg 7176 (Feb 12, 2003)
- Clean Air Act, NSPS, NESHAP, Ozone
68 Fed Reg 7373 (Feb 13, 2003)
- Clean Air Act, NESHAP
68 Fed Reg 7706 (Feb 18, 2003)
- Clean Air Act, SIP
68 Fed Reg 8550 (Feb 24, 2003)
- Hazardous Waste Management
68 Fed Reg 8757 (Feb 25, 2003)
- Clean Air Act, PSD SIP
68 Fed Reg 11,316 (Mar 10, 2003)
- Clean Water Act, NPDES
68 Fed Reg 11,325 (Mar 10, 2003)
- Amends 40 CFR Part 112 requirements for SPCC Plans.
- Notice of availability of *Water Quality Trading Policy*.
- Amends 40 CFR Part 63 to establish standards for municipal solid waste landfills.
- Amends 40 CFR Part 82 to establish an allowance system to control the consumption and production of certain ozone-depleting substances.
- Amends 40 CFR Part 312 to clarify interim standards and practices for all appropriate inquiry to establish an innocent landowner defense under CERCLA.
- Amends 40 CFR Part 82 to add substitutes for ozone-depleting substances in the fire suppression and explosion protection sector.
- Amends 40 CFR Part 62 to establish a Federal plan to implement emission guidelines for small municipal waste combustion units located in areas not covered by an approved state or tribal plan.
- Amends 40 CFR Part 61 to partially withdraw the Nov. 12, 2002 direct final rule for benzene waste operations.
- Amends 40 CFR Parts 9, 122, 123 and 412 requirements for concentrated animal feeding operations.
- Notice of additions to the Applicability Determination Index database.
- Amends 40 CFR Part 63 requirements for chemical recovery combustion sources at kraft, soda, sulfite and stand-alone semichemical pulp mills.
- Amends 40 CFR Part 62 to approve several Michigan rule revisions for incorporation into the Michigan SIP to address excess emissions during startup, shutdown or malfunction.
- Notice of availability of *Guidance on Completion of Corrective Action Activities at RCRA Facilities*.
- Amends 40 CFR Part 52 requirements for federal implementation plan portions of non-approved state SIPs
- Amends 40 CFR Part 122 requirements for storm water discharges for oil and gas construction activity that disturbs one to five acres of land.

- Clean Air Act, NESHAP
68 Fed Reg 11,745 (Mar 12, 2003)
- Clean Water Act, Water Quality
68 Fed Reg 11,791 (Mar 12, 2003)
- Clean Water Act, NSPS
68 Fed Reg 12,266 (Mar 13, 2003)
- Clean Air Act, NESHAP
68 Fed Reg 12,590 (Mar 17, 2003)
- Clean Water Act, NPDES
68 Fed Reg 13,608 (Mar 19, 2003)
- Clean Water Act, NPDES
68 Fed Reg 14,164 (Mar 24, 2003)
- CERCLA, Brownfields
68 Fed Reg 14,339 (Mar 25, 2003)
- Safe Drinking Water
68 Fed Reg 14,502 (Mar 25, 2003)
- Clean Water Act, Water Quality
68 Fed Reg 15,170 (Mar 28, 2003)
- Clean Water Act, Sewage Sludge
68 Fed Reg 17,379 (Apr 9, 2003)
- Clean Air Act, NSPS
68 Fed Reg 17,990 (Apr 14, 2003)
- Clean Air Act, NESHAP
68 Fed Reg 18,008 (Apr 14, 2003)
- Clean Air Act, NESHAP
68 Fed Reg 18,062 (Apr 14, 2003)
- Clean Air Act, Modeling
68 Fed Reg 18,440 (Apr 15, 2003)
- Clean Air Act, NESHAP
68 Fed Reg 18,730 (Apr 16, 2003)
- Clean Water Act, Water Quality
68 Fed Reg 18,890 (Apr 17, 2003)
- Amends 40 CFR Part 63 standards for rubber tire manufacturing facilities.
- Notice of availability of technical support document for the assessment of detection and quantitation concepts.
- Amends 40 CFR Part 439 requirements for the pharmaceutical manufacturing point source category.
- Amends 40 CFR Part 63 standards for surface coating of metal coil.
- Amends 40 CFR Parts 9, 122, 123, 124 and 130 to withdraw a July 13, 2000 rule revising the water quality planning and management regulation and revisions to the NPDES program in support of the revisions to the water quality planning and management regulation.
- Withdraws Dec. 26, 2002 direct final rule regarding cooling water intake structures for new facilities.
- Withdrawal of Jan. 24, 2003 final rule amending 40 CFR Part 312 requirements for all appropriate inquiry.
- Amends 40 CFR Part 141 national primary drinking water regulation for arsenic.
- Notice of availability of draft *Handbook for Management of Onsite and Clustered (Decentralized) Wastewater Treatment Systems* and final *Voluntary National Guidelines for Management of Onsite and Clustered (Decentralized) Wastewater Treatment Systems*.
- Notice of request for comments on EPA review of CWA regulations regarding the use and disposal of sewage sludge under 40 CFR Part 503.
- Amends 40 CFR Part 60 standards for stationary gas turbines.
- Amends 40 CFR Part 63 to establish standards for coke ovens.
- Amends 40 CFR Part 63 to establish standards for polyurethane foam fabrication operations.
- Amends 40 CFR Part 61 guidelines on air quality models.
- Amends 40 CFR Part 63 to establish standards for refractory products manufacturing facilities.
- Amends 40 CFR Part 112 compliance dates for facilities to amend and implement SPCC Plans.

- Clean Air Act, NESHAP
68 Fed Reg 19,076 (Apr 17, 2003)
- Clean Air Act, NESHAP
P68 Fed Reg 19,375 (Apr 21, 2003)
- Clean Air Act, NESHAP
68 Fed Reg 22,976 (Apr 29, 2003)
- Clean Air Act, NESHAP
68 Fed Reg 24,562 (May 7, 2003)
- Clean Water Act, NSPS
68 Fed Reg 25,686 (May 13, 2003)
- Clean Water Act, Great Lakes
68 Fed Reg 26,616 (May 16, 2003)
- Clean Air Act, NESHAP
68 Fed Reg 26,690 (May 16, 2003)
- Clean Air Act, NESHAP
68 Fed Reg 27,646 (May 20, 2003)
- Clean Air Act, NESHAP
68 Fed Reg 27,913 (May 22, 2003)
- Clean Air Act, NESHAP
68 Fed Reg 28,606 (May 23, 2003)
- Clean Air Act, NSPS
68 Fed Reg 31,611 (May 28, 2003)
- Clean Air Act, NESHAP
68 Fed Reg 31,746 (May 28, 2003)
- Clean Air Act, NESHAP
68 Fed Reg 32,172 (May 29, 2003)
- Clean Air Act, NESHAP
68 Fed Reg 32,586 (May 30, 2003)
- Amends 40 CFR Part 63 to establish standards for hydrochloric acid production facilities.
- Amends 40 CFR Part 63 to establish standards for reinforced plastic composites production facilities.
- Amends 40 CFR Part 63 to establish standards for asphalt processing and asphalt roofing manufacturing facilities.
- Republication of April 29, 2003 NESHAP for asphalt processing and asphalt roofing manufacturing facilities to correct numerous errors.
- Amends 40 CFR Part 438 to establish standards for the metal products and machinery point source category.
- Notice of approval of submission by Great Lakes states, including Michigan, to prohibit mixing zones for bioaccumulative chemicals of concern in the Great Lakes System.
- Amends 40 CFR Part 63 to establish standards for brick and structural clay products manufacturing and clay ceramics manufacturing facilities.
- Amends 40 CFR Part 63 to establish standards for integrated iron and steel manufacturing facilities.
- Amends 40 CFR Part 63 to establish standards for semiconductor manufacturing facilities.
- Amends 40 CFR Part 63 to establish standards for surface coating of metal furniture.
- Withdraws April 14, 2003 direct final rule amending NSPS for stationary gas turbines.
- Amends 40 CFR Part 63 to establish standards for surface coating of wood building products.
- Amends 40 CFR Part 63 to establish standards for printing, coating, and dyeing of fabrics and other textiles.
- Amends 40 CFR Part 63 NESHAP general provisions and requirements for control technology determinations.

B. State Final Rulemakings

Michigan Register Notice

Drinking Water

2002 MR 10 (June 15, 2002), p. 2

Description

Amends Mich Admin Code R 325.10410 (public notification and public education regarding lead).

Drinking Water

2002 MR 10 (June 15, 2002), p. 5

Amends Mich Admin Code R 325.10604c and .10604f (state drinking water standards and analytical techniques).

Drinking Water

2002 MR 10 (June 15, 2002), p. 14

Amends Mich Admin Code R 325.10705, .10710, .10710a, .10710d, .10716, .10717b and .10734 and rescinds .10736 and .10738 (surveillance, inspection and monitoring).

Drinking Water

2002 MR 10 (June 15, 2002), p. 41

Amends Mich Admin Code R 325.10103, .10105 - .10109 and .10112 (general provisions).

Drinking Water

2002 MR 10 (June 15, 2002), p. 48

Amends Mich Admin Code R 325.11506 (operating reports and recordkeeping).

Air Quality

2002 MR 10 (June 15, 2002), p. 50

Adds Mich Admin Code R 336.1915 and .1916 (emission limitations and prohibitions-miscellaneous – excess emissions).

Air Quality

2002 MR 10 (June 15, 2002), p. 53

Amends Mich Admin Code R 336.1102, .1104, .1105, .1108, .1113, .1118 and .1120 (general provisions).

Water Quality

2002 MR 22 (Dec 15, 2002), p. 2

Adds Mich Admin Code R 323.3001 - .3027 (water quality trading).

Air Quality

2002 MR 22 (Dec 15, 2002), p. 31

Amends Mich Admin Code R 336.1801 and adds .1802 and .1817 (emission limitations and prohibitions – oxides of nitrogen).

Environmental Response

2002 MR 24 (Jan 15, 2003), p. 2

Amends Mich Admin Code R 299.5501 *et seq.* (environmental contamination response activity rules promulgated under Part 201 of NREPA).

Water Quality

2003 MR 1 (Feb 1, 2003), p. 2

Amends Mich Admin Code R 323.1171 - .1175, .1180 and .1181 and rescinds .1174 (cleaning agents and water conditioners).

Admin. Hearings

2003 MR 2 (Feb 15, 2003), p. 2

Adds Mich Admin Code R 324.1 - .81 (contested case and declaratory ruling procedures).

Drinking Water

2003 MR 2 (Feb 15, 2003), p. 14

Amends Mich Admin Code R 325.10102 - .10106, .10108 and .10109 (general provisions).

Drinking Water

2003 MR 2 (Feb 15, 2003), p. 23

Amends Mich Admin Code R 325.10308b (variances and exemptions – best available technology).

- Drinking Water
2003 MR 2 (Feb 15, 2003), p. 27
- Amends Mich Admin Code R 325.10401 - .10409, .10411 - .10420 and adds .10401a, .10408a and .10408b (public notification and public education).
- Drinking Water
2003 MR 2 (Feb 15, 2003), p. 67
- Amends Mich Admin Code R 325.10604a and .10605 and adds .10610, .10610a - .10610c, .10611, .10611a and .10611b (state drinking water standards and analytical techniques).
- Drinking Water
2003 MR 2 (Feb 15, 2003), p. 76
- Amends Mich Admin Code R 325.10702, .10704, .10706, .10707b, .10719a, .10719d and .10720; adds .10719e, .10719f and .10720a; and rescinds .10719 and .10721 (surveillance, inspection and monitoring).
- Drinking Water
2003 MR 2 (Feb 15, 2003), p. 90
- Amends Mich Admin Code R 325.11002 and .11008 and rescinds .11004 and .11009 (treatment systems and pumping facilities).
- Drinking Water
2003 MR 2 (Feb 15, 2003), p. 92
- Amends Mich Admin Code R 325.11502, .11505a and .11506 and rescinds .11503 (operation reports and recordkeeping).
- Land and Water Management
2003 MR 5 (Apr 1, 2003), p. 2
- Amends Mich Admin Code R 323.3101 and .3110 (aquatic nuisance control).
- Air Quality
2003 MR 5 (Apr 1, 2003), p. 13
- Amends Mich Admin Code R 336.1122 (definitions).
- Environmental Assistance
2003 MR 5 (Apr 1, 2003), p. 17
- Amends Mich Admin Code R 299.2903, .2924, .2926 and .2927 and adds .2925 (sewerage systems).
- Water Quality
2003 MR 10 (June 15, 2003), p. 2
- Amends Mich Admin Code R 323.2101 *et seq.*; also adds .2161a; and rescinds .2111 and .2126 (wastewater discharge permits).

WINDFALL LIEN PROVISION

Brownfield Property Sellers Could be in for a Big Surprise

By: Scott Broekstra, Grant Gilezan and Mark Jacobs*
Dykema Gossett PLLC

INTRODUCTION

Congress had good intentions when, on January 11, 2002, it reformed parts of Superfund (CERCLA) by enacting the Small Business Relief and Brownfield Revitalization Act amendments (“Amendments”). Congress attempted to jumpstart Brownfield investment by providing funding for Brownfield redevelopment and by exempting from liability new owners of contaminated sites, otherwise known as “bona-fide prospective purchasers” or “BFPPs”, as long as they satisfy the various requirements to obtain that status,¹ and do not impede the performance of a response action or natural resource restoration.

The incentives to redevelop Brownfield property are compromised, however, by Congress’ creation of a “Windfall Lien,” which arises the moment USEPA incurs response costs on the property. The uncertainties regarding the nature, amount, and operation of the lien as created by the Amendments may discourage investors from pursuing redevelopment of Brownfield properties affected by the lien. Until the Windfall Lien is clarified by Agency guidance or court decision, the benefits that may be derived from the Amendments may not be fully realized. Until such guidance or other clarification is complete, however, Brownfield redevelopers will need to approach and resolve with EPA any potential Windfall Lien in advance of affected transactions.

The Mechanics of the Lien

Lien Creation and Valuation. The statutory provision creating the Windfall Lien is CERCLA § 107(r). The lien attaches only to property owned by a BFPP. Conversely, if the owner does not qualify for BFPP status, but is instead considered to be a potentially responsible party (PRP), then a federal lien for response costs under CERCLA Section 107(j) applies. The Windfall Lien arises automatically by operation of law at the time that unrecovered response costs are first incurred by the United States. The amount of the lien may not exceed the increase in fair market value (FMV) of the property attributable to the cleanup, which is computed at the time of sale or other disposition of the property. Thus,

the increase in FMV is the ceiling for the amount of the lien, even if the government’s unrecovered costs are greater. For example, if the unrecovered response costs are \$400,000 and the total increase in FMV after sale is \$200,000, the lien could not be more than \$200,000.

Lien Priority. Although the drafters seemingly tried to hide the provision deep within the Amendments (see CERCLA § 107(r)(4)(C)), the Windfall Lien is made subject to the notice and recordation requirements of the § 107(j) federal lien. Therefore, to be perfected, a Windfall Lien must be recorded in the place required under state law (which is usually the County Register of Deeds). More importantly, the Windfall Lien is subject to any earlier recorded liens (such as mortgages); therefore, the lien does not have “superpriority” status. Some earlier commentators appear to suggest that the Windfall Lien has no notice or recordation requirements. This is inaccurate. The notice and recordation requirement for the government removes some (but obviously not all) of the uncertainty related to the Windfall Lien.

No Statute of Limitations Applies. The statute provides that the Windfall Lien will continue indefinitely until satisfaction of the lien by sale of the BFPP’s property, satisfaction of the lien by other means, or by recovery of all the government’s costs incurred on the property. It is clear from the statutory language that the three-year statute of limitations does **not** apply to the Windfall Lien, which distinguishes it from a federal lien under § 107(j). Therefore, any cost incurred by the government, no matter how old, can be recovered under the lien.

No Foreclosure Ability. Conspicuously absent from the statutory scheme is a mechanism for the government to satisfy the lien through foreclosure. On the other hand, the § 107(j) lien specifically allows for an *in rem* action against the property; therefore, the absence of a similar provision in § 107(r),—coupled with the provisions indicating that satisfaction of the Windfall Lien will occur upon sale of the property—may suggest that foreclosure will not be an option for the government to achieve satisfaction of the lien.

Contacts with EPA staff working on the Windfall Lien guidance indicate that EPA does not intend to satisfy Windfall Liens through foreclosure.

The Chilling and Uncertain Effects of the Windfall Lien

The Windfall Lien concept makes sense if the goal of the amendments was to increase the assets of the Superfund; however, in light of the legislation's paramount purpose of revitalizing Brownfield investment, the concept is dubious at best. According to the legislative history, the lien provision is intended to prevent the brownfield BFPP from "reaping a windfall" from the purchase and resale of contaminated property. The problem with this line of reasoning is that a developer who purchases contaminated property assumes various risks that are not associated with a greenfield. For example, contaminated property carries a stigma that may make it hard to finance, sell or lease. Moreover, the developer may need to invest substantial capital into removing potential exposure hazards to people who may work or visit the property. Developers who take the risk of investing in contaminated property need to earn a greater return on their investment than can be realized on clean properties just to cover these costs and risks. By taking away the potential rewards for developing contaminated property, the Windfall Lien has the potential to make brownfield investment unpalatable. Below is a list of concerns that Brownfield investors should be aware of when considering a Brownfield investment:

1. How will the amount of the lien be calculated?

Probably the biggest uncertainty with the Windfall Lien is how the lien will be valued. Because the amount of the lien will be determined by the increase in FMV attributable to the response activity (a very subjective parameter), the issue is obviously ripe for litigation based on different valuations by different experts. Assuming that the FMV of most listed Superfund Sites or other heavily contaminated properties was close to zero before clean-up, it will be easy to envision a scenario where EPA will argue that any and all increase in value was solely due to its clean-up activity. Add to this the complicating factors of (1) accounting for increased property values due to building improvements; and (2) simple market appreciation, and the valuation of the EPA lien quickly becomes unworkably complex. It is difficult to imagine that even the clearest guidance document will be able to remove this hornet's nest.

2. Heightened Due Diligence Based on Unknown Response Costs

Because there is no statute of limitations for response costs, EPA can dig deep into its files to attempt to collect on costs that otherwise would have been ineligible for cost recovery long ago. To accomplish due diligence responsibilities, investors will need to review all EPA files pertaining to the property in an attempt to determine any potential unrecovered response costs. If EPA files indicate the existence of a potential lien due to EPA response action at the site, and the response activity appears to be substantial, developers should consider contacting EPA to discuss potential settlement of the lien, or at a minimum, an agreement to establish the maximum amount of the lien to be placed on the property.

3. Impacts On Ability to Finance

The lien notice requirements, as well as the provisions establishing priority of earlier recorded liens, will give some comfort to lenders and title insurers. On the other hand, there is nothing to stop EPA from recording its Windfall Lien after the BFPP purchases the property. Even though the bank's mortgage may have priority, the lien or threat of a lien will decrease the value of the property to the owner and thereby put the lender's security interest at risk. The EPA's apparent inability to foreclose its lien is also a benefit to lenders; however, the requirement that the lien be satisfied upon sale is a significant disincentive for Brownfield investors who hope to make a profit from their investment. It should be kept in mind that any uncertainty about the amount of the lien will: (1) make lenders uneasy; and (2) make it impossible to run a reliable pro forma to determine if the development project is an economic venture.

4. Impacts On Ability to Re-Sell The Property

The Windfall Lien will live on until all unrecovered response costs are satisfied, or until the lien is satisfied upon sale of the property. It should be kept in mind that, if EPA does not recover all of its costs from the first BFPP because the estimated increase in FMV was less than the amount of EPA's unrecovered costs, the EPA may attempt to collect the remainder of its response costs from the next purchaser by placing a new lien on the property. The second BFPP will need to determine whether the EPA's response costs will not be fully recovered at the time of the first BFPP's sale. On the other hand, the second BFPP could demand a deep discount on the property to cover the costs of any potential amount of the unrecovered response costs (and potential future lien). Therefore, it is possible that, due to price concessions to his purchaser, the original BFPP may bear most if not all the

costs of the unrecovered response costs, even if there is only a modest increase in FMV. This scenario would create a significant disincentive for Brownfield investment.

5. EPA's Choice - Pursue Other PRPs or Enforce Windfall Lien

There is no requirement in the statute that EPA first attempt to recover its response costs from other viable PRPs as opposed to collecting on a Windfall Lien. If past experience is an indicator, EPA has always gone for the easy mark as opposed to tracking down difficult PRPs for cost recovery purposes. Although it would obviously be more equitable for EPA to first seek recovery from the liable parties, it remains to be seen if EPA will put this into practice. Because payment of a Windfall Lien would be equivalent to the payment of EPA's response costs, a BFPP should be able to sue and seek contribution under CERCLA § 113 against other liable PRPs. Because the BFPP is a non-liable party under CERCLA, there is a compelling argument that its action would be for cost recovery under § 107, as opposed to § 113, which means the BFPP could possibly be reimbursed for his attorney fees. Still, the thought of litigation of any kind related to cost recovery is not much of an incentive for brownfield investment.

Potential Solutions

In its May 31, 2002, "Guidance on Prospective Purchaser Provisions of Brownfields Law", EPA indicates it will consider entering into a Prospective Purchaser Agreement (PPA) in situations where the potential for a Windfall Lien will deter brownfield investment. In lieu of a formal PPA, the developer can seek legal counsel, and enter into negotiations to settle any potential Windfall Lien upfront with EPA, prior to the purchase of the property.

On at least one occasion, USEPA Region 9 has entered into a settlement agreement with a BFPP to settle a Windfall Lien. This was accomplished through a relatively uncomplicated ten page settlement agreement between the purchaser and the Agency, where the Windfall Lien was settled for the sum of \$100,000 related to a seventeen acre parcel within the San Gabriel Valley Superfund Site. In the agreement, EPA released its "potential" lien on the property under CERCLA § 107(r) in exchange for the payment. EPA reserved its rights to seek damages for future disposal of hazardous substances, failure of the BFPP to comply with all the requirements under the statute to obtain and retain BFPP status, and for natural resource damages (NRDs). (The reservation of rights related to NRD appears to be

inconsistent with the BFPP's status as a non-liable party, unless it is limited to NRDs associated with future contamination). EPA also reserved its rights to undertake future response actions at this Site or to seek to compel parties other than the BFPP to perform or pay for response actions.

If there is a potential for a Windfall Lien on Brownfield Property, a relatively simple settlement of this type (facilitated with the aid of counsel) may be the developer's best bet. If the amount of the lien is unknown and EPA is unwilling to commit to a firm amount, or otherwise settle the claim due to timing issues, environmental insurance is another option for the cautious developer to protect him or herself. Moreover, future EPA guidance related to the Windfall Lien, expected to be released sometime this year, will hopefully clarify and limit much of the uncertainty related to the lien. However, based on EPA's practice of making its guidance general enough to fit all situations and circumstances, it is likely that significant uncertainties related to the Windfall Lien will still remain.

¹To acquire BFPP status, landowners or tenants who knowingly acquire or lease contaminated property after January 11, 2002, can avoid CERCLA liability if they can establish by a preponderance of the evidence that:

- *All disposal of hazardous substances occurred before the purchaser acquired the facility.*
- *The purchaser conducted an "appropriate inquiry" prior to purchase*
- *The purchaser complied with all release reporting requirements*
- *The purchaser took "appropriate care" by taking reasonable steps to stop any continuing release of hazardous substances, prevent any threatened future release, and prevent exposure to any previously released contaminants.*
- *The purchaser cooperates, assists, and provides access to persons who are authorized to conduct response actions on the property.*
- *The purchaser complies with any land use restrictions and does not impede the effectiveness or integrity of any institutional control.*
- *The purchaser must establish that it is not responsible for the contamination or affiliated with any responsible party at the Site. (unfortunately, the statutory language is less than clear regarding what is necessary to establish these requirements)*

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COMMITTEE REPORTS

Nominating Committee

By: Todd R. Dickinson
Nominating Committee Chairperson

The Nominating Committee has addressed itself to the following four tasks: (1) nominating six persons for election to three-year terms as Council members; (2) nominating two persons for election to fill seats that were vacated and filled by appointment last year, leaving one year of their respective terms remaining as of September 2003; (3) nominating one person for election to the office of Secretary/Treasurer, which has a term of one year; and (4) nominating one person to the office President-Elect, which has a term of one year, after which the office-holder automatically succeeds to the office of President.

The Bylaws of the Section require that a person must have served for no less than two years as an active member of a committee in order to be eligible for election to the Council, and must have served not less than four full years as a voting member of the Council in order to be eligible for election as an officer of the Section. Art. IV, Sec. 2. In addition, the Nominating Committee is instructed by the Bylaws to consider specific factors in the interests of recognizing a nominee's prior contributions to the work of the Section, sometimes referred to as "sweat equity," and promoting a diversity of viewpoints and personal backgrounds among Council members and Section officers. Art. III, Sec. 2; Art. IV, Sec. 2.

The Nominating Committee met and conferred by telephone on four occasions, reviewed the directives of the Bylaws, sought and considered input from the membership of the Section and the Council, contacted prospective candidates to discuss their eligibility and willingness to serve, and deliberated to arrive at a proposed slate of nominees. They are: Grant Trigger, for President-Elect; Peter Holmes, for Secretary Treasurer; Chris Dunsky, Scott Hubbard, Tim Lozen, Chuck Barbieri, Lee Johnson, and Tom Phillips for the six Council seats with three-year terms; and Ken Burgess and Bill Burton for the two Council seats with one-year remaining in their terms. The nominees' respective addresses and brief summaries of their respective qualifications are set forth below.

Grant R. Trigger
Honigman Miller Schwartz and Cohn, LLP
660 Woodward Avenue, Suite 2290
Detroit, MI 48226

Grant Trigger is currently the Section's Secretary/Treasurer, and has served on the Council for five years. He previously served as chairperson of the Membership Committee, and prepared and administered the most recent ELS membership survey conducted two years ago. Grant has been Chairperson and Vice-Chairperson of the Superfund Committee, and has organized and presented numerous educational programs for the Section for over ten years. Grant also co-chaired the Section's 20th anniversary commemorative painting committee.

Peter D. Holmes
Clark Hill PLC
500 Woodward Avenue, Suite 3500
Detroit, MI 48226

Peter Holmes is completing his sixth year of service as a member of Council. He is the current Vice-Chairperson of the Journal Committee, and was instrumental in organizing and conducting the Journal Committee's Environmental Law Essay Prize Competition. He is also a past Chairperson of the Surface Water/Groundwater Committee, he made a presentation on water permitting at an Environmental Law Section Update Seminar, and he has authored two articles in the Environmental Law Journal.

Christopher J. Dunsky
Honigman Miller Schwartz and Cohn, LLP
660 Woodward Avenue, Suite 2290
Detroit, MI 48226

Chris Dunsky has been active in the Section for several years, during which time he has served as both Chairperson and Vice Chairperson of the Superfund/Hazardous Substances & Brownfields Committee, and he has been a speaker at Section programs. Chris also authored an article in the Section's environmental law theme issue of the State Bar Journal.

Scott D. Hubbard
Warner Norcross & Judd, LLP
111 Lyon Street, N.W.
900 Fifth Third Center
Grand Rapids, MI 49503

Scott Hubbard has also been active in the Section for several years, during which time he has served as Chairperson of the Surface Water Committee, and he has been a speaker at Section programs.

Timothy J. Lozen
Jaffe, Raitt, Heuer & Weiss, PC
901 Huron Ave, Suite 4
Port Huron, MI 48060

Tim Lozen has been active in the Section since 1986, during which time he has served on the Program and Superfund Committees, and he has served as Chairperson and Vice Chairperson of the Real Estate Committee.

Charles E. Barbieri
Foster, Swift, Collins & Smith, PC
313 S. Washington Sq.
Lansing, MI 48933

Chuck Barbieri is currently completing his first three-year term as member of the Council. He has served for many years on the Superfund Committee, and he is a past Chairperson and Vice-Chairperson of that Committee. Chuck has also been a speaker at Section programs.

S. Lee Johnson
Honigman Miller Schwartz and Cohn, LLP
2290 First National Building
660 Woodward Avenue
Detroit, MI 48226-3583

Lee Johnson, also completing a three-year term on the Council, has served multiple terms as Chairperson and Vice-Chairperson of the Air Committee; served as a speaker at several Environmental Law Section Programs; assisted in the organizing and planning of the Section's Annual Meeting program; co-authored an article in the Section's environmental law theme issue of the Michigan Bar Journal and co-authored several updates to the Air Quality Chapter of the Michigan Environmental Law Deskbook, published by the Section in conjunction with ICLE.

Thomas C. Phillips
Miller, Canfield, Paddock & Stone, PLC
One Michigan Avenue, Suite 900
Lansing, MI 48933

Tom Phillips is a former Vice Chairperson and Chairperson of the Superfund Committee. He is currently completing a three-year term on the Council. He is with the Miller, Canfield firm where he heads the Environmental and Regulatory Practice Group and he is also a Managing Director of the firm.

Kenneth J. Burgess
Great Lakes Gas Transmission Co.
5250 Corporate Drive
Troy, MI 48097

Ken Burgess, a current member of the Council, was appointed last year to fill a vacancy created by the resignation of a former Council member. Ken has chaired the Air Committee for the past two years, and he served as Vice-Chairperson for two years prior to that. As Vice-Chairperson of the Air Committee, Ken, together with Kyle Jones, organized a very successful program sponsored by the Air Committee in 2001.

William T. Burton, Jr.
15387 Minock
Detroit, MI 48223

Bill Burton, like Ken, is a current member of the Council, who was appointed last year to fill a vacancy that opened up mid-term. He has been active in the Program Committee, where he coordinated arrangements for the DEQ Roundtable programs in 1999-2001, and he also served as a speaker.

MICHIGAN ENVIRONMENTAL CASENOTES

These casenotes include Michigan state and federal decisions and agency decisions rendered from November 1, 2002 through July 11, 2003.

Preserve the Dunes, Inc v Dept of Environmental Quality, 253 Mich App 263; 655NW2d263 (2002).

<http://www.michbar.org/opinions/appeals/2002/100402/16552.pdf>

In 1994, Defendant Technisand applied to the Department of Natural Resources (DNR) for an amended permit to mine sand from critical and noncritical dune areas in Berrien County. The DNR rejected its application because it found that Technisand did not qualify under a statutory exemption that would permit it to mine in a critical dune area as an expansion of an existing mining operation. In 1996, after the regulatory authority to issue permits was transferred from the DNR to the Department of Environmental Quality (DEQ), the DEQ requested that Technisand submit a modified application, which it did. The application included a list of adverse impacts. Without explanation of how Technisand qualified for a statutory exemption, the DEQ issued the amended permit. Plaintiff, a group of local citizens, then filed suit under the Michigan Environmental Protection Act (MEPA) and the Sand Dune Protection and Management Act. The trial court dismissed plaintiff's claim challenging the issuance of the permit because it found that the claim was time barred, or if not time barred, that it was not well founded. And, following a bench trial, it found that, although the plaintiff had stated a prima facie case under the MEPA, the DEQ had rebutted it; or alternatively, that Technisand qualified for the statutory exemption to mine in the critical dune area. Plaintiff appealed.

The appellate court held that plaintiff's claim was not time barred and that the DEQ improperly issued the amended permit to Technisand. The appellate court stated that plaintiff was not time barred because it was not required to exhaust administrative remedies before it filed its MEPA claim. The court also stated that an alleged MEPA violation must be evaluated by using the environmental standard appropriate to the specific, violation alleged in this case, the

statutory exemption that would permit the mining. The court reasoned that because Technisand did not qualify under any exemption, it was not entitled to the amended permit. The court specifically noted that the DEQ's and Technisand's arguments were inconsistent with each other as to which exemption applied to Technisand, but found neither argument persuasive. The court reversed and remanded for entry of an order granting summary disposition in favor of plaintiff.

- Patricia Wilson, Cooley Law School

Silver Creek Drain Dist v Extrusions Div, Inc, ___ Mich __; 663 NW 2d 436 (Mich, 2003).

Defendant Extrusions Division, Inc. (Extrusion) applied to the city of Grand Rapids in 1992 for a permit to build a warehouse on eight acres it owned. The city denied the permit because Silver Creek Drain District (Drain District) had already identified the land as a desired site for a storm-water retention pond. Extrusion brought an inverse-condemnation action against the city and the Kent County Drain Commissioner under the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 et seq. The trial court considered environmental contamination in determining the fair market value of the land. The Court of Appeals held that the UCPA gave no authority for the court to consider contamination in the establishment of fair market value. The Michigan Supreme Court reversed the judgment of the Court of Appeals, holding that a court may consider environmental contamination in establishing the fair market value of land under the UCPA. The Court reasoned that, although the meaning of the term "just compensation" as used in the UCPA could not be determined by analyzing its plain language, its meaning could be construed through case law and judicial interpretation as the value of the land including all elements and circumstances. The court determined that because the UCPA is not intended to assign liability for environmental contamination, the question of whether or not the owner is responsible for the contamination is irrelevant.

- Aaron Ostrovsky, University of Michigan

Hitachi Magnetics Corp v Home Township-Montcalm, Nos. 190507 & 247733, 2003 Mich Tax LEXIS 9 (Mich Tax Trib, Apr 4, 2003).

A hearing was held to resolve a dispute between petitioner Hitachi Magnetics Corporation (“HMC”) and respondent Home Township (Montcalm County) regarding the true cash value, assessed value, and resulting taxable value of petitioner’s real property for tax years 1993-2000, and to what extent environmental contamination on the property affected the determined value. Both parties suggested a “sales comparison” method of valuation, assuming the property was uncontaminated, with a subsequent adjustment in value for the level of contamination. HMC argued that there was no market for contaminated sites, and alternatively that no potential buyer would pay for the property since the cost of remediation would exceed its true cash value. Thus, HMC contended that the taxable value should be zero. Respondent disagreed.

The Tax Tribunal found both parties’ valuation methodology lacking, but found that petitioner’s use of comparable sales data for contaminated sites eviscerated the claim that there was no market for such sites. Moreover, the Tribunal found that “the market has taken into consideration the contamination” in the price/value determination. The Tribunal gave no weight to the valuations of the respondent’s expert witness, having found him “evasive, unresponsive, and not credible”. The Tribunal ordered the property values corrected according to a table it provided, the results reflected in the County’s tax assessment rolls, and the corresponding tax liabilities or refunds paid with interest.

- Murl Wesley Smith, University of Michigan

Order, Michigan Public Service Commission, 2003 Mich PSC LEXIS 114 (2003).

The Michigan Public Service Commission held a public hearing on January 7, 2003 and solicited written comments from interested parties regarding the regulation of the construction and operation of sour gas (H₂S) pipelines beyond the minimum federal safety standards.

Subsequently, the Commission approved a revised version of the Michigan Gas Safety Standards including recommendations made by Paul Proudfoot, Supervisor of the pipeline safety program for the Commission Staff. Proudfoot recommended modifying the formula in Rule 407 for calculating the amount of H₂S in a sour gas pipeline,

to make the rule easier to apply, and suggested clarifying Rule 409 by adding language that would provide for the non-destructive testing of all pipeline welds. However, the Commission declined to incorporate the recommendations of the Michigan Consolidated Gas Company, which proposed a formula that states the amount of H₂S in a section of pipe on a parts per million basis instead of pounds per mile of pipe, and proposed amending Rule 413 to reduce the minimum clearance between sour gas pipelines and all other underground structures from 48 to 24 inches. The Commission reasoned that calculating the amount of sour gas in parts per million would misrepresent the danger of a breach.

The Commission ordered: (a) the approval of the revised version of the Michigan Gas Safety Standards and submission to the Legislative Service Bureau and the Office of Regulatory Reform for their formal approval; and (b) upon approval of the revised version of the Michigan Gas Safety Standards by the Legislative Service Bureau and the Office of Regulatory Reform, its transmittal to the Joint Committee on Administrative Rules.

- Sean Whalen, University of Michigan

United States v Detroit, 329 F3d 515 (CA 6, 2003).

To bring the City of Detroit into compliance with its NPDES permit under the Clean Water Act (“CWA”), the State of Michigan entered into a consent decree with Detroit which required the City to dredge and dispose of 146,000 cubic yards of sediment from Conner Creek. Detroit expressed interest in disposing of the contaminated sludge at a facility operated by the Army Corps of Engineers. Negotiations reached a stalemate when the Corps insisted that the state obtain EPA and US Fish and Wildlife approval, and the state refused. Because of this stalemate, and in response to other project needs of the State and City, in 2000 the State and Detroit filed a motion in district court seeking an order that the Corps accept the sediment. The district court ordered the Corps to accept the sediment and found no environmental assessment necessary. After an appeal to the three-judge panel, in which the majority concluded that the district court lacked the authority to compel the Corps to accept the dredged materials, the full court voted in favor of rehearing the case en banc.

First, the full court rejected the Corps’ claim of sovereign immunity, holding that the waiver of sovereign immunity embodied in APA § 702 applies in cases brought under

statutes other than the APA. Specifically, because Detroit and the State were not seeking monetary damages, the § 702 waiver applied.

Second, the court addressed whether the lower court should have relied upon the APA, rather than the All Writs Act, 28 USC 1651(a), as the basis for its jurisdiction. The All Writs Act authorizes a federal court to issue commands necessary to effectuate its prior orders, including commands to non-parties, *if* that party is in a position to frustrate the prior order and *if* the court is acting pursuant to “legal authority.” Because the lower court had not addressed the question, the court remanded to determine whether Detroit could have brought suit under the APA, and if so, whether this case presents the type of “exceptional circumstances” that would render the APA inadequate, and thus allow the use of the All Writs Act.

Third, the court addressed the Corps’ contention that the district court abused its discretion in ordering the acceptance of the dredged material. The court applied the four-factor test from **United States v New York Tel Co**, 434 US 159 (1977), and found that as applied to four of the Corps’ claims, the lower court had not abused its discretion. The court reasoned that the Corps was not “so far removed from the controversy that its assistance could not be permissibly compelled,” found no evidence that suggested it would suffer a “substantial burden” by assisting Detroit, and concluded that the district court acted within its discretion when it determined that Detroit had considered all feasible alternatives. However, the court found that the district court had not properly analyzed the Corps’ argument that some sort of environmental study was required by NEPA. The court remanded to the district court to apply the narrow “arbitrary and capricious” standard of review to the Corps’ determination that more study was necessary.

Judge Moore wrote separately, concurring in part and in the judgment, to explain that the scope of the remand was overly broad. In her view, the district court’s order was appropriate but should have included a mandate for expedited NEPA analysis. Five judges dissented to the use of the **New York Telephone** factors and felt that no remand was necessary. The dissenters found **New York Telephone** distinguishable and instead encouraged reliance on **Syngenta Crop Protection, Inc v Hensen**, 537 US 28 (2002), in which the Court implied that the All Writs Act may not be applied to situations where other procedures are adequate. Furthermore, the dissenters felt that an environmental assessment was required by the situation, and if not required, that the court

should defer to the Corps’ expert judgment. In conclusion, the Sixth Circuit, albeit by a deeply divided court, confirmed that the All Writs Act gives district courts the authority to bind nonparties to avoid frustration of consent decrees that determine parties’ obligations under the law.

- Andrea Delgadillo, University of Michigan

Thomas v Intercounty Drain Bd For Crapeau Creek Drain, No. SC 122336, 2003 Mich LEXIS 1195 (Mich, Jun 13, 2003).

The Michigan Supreme Court denied application to appeal a decision by the lower court. The appellate court determined that the plaintiff had standing to bring a claim under the Michigan Environmental Protection Act (MEPA) and that the trial court erred in granting summary disposition of plaintiff’s MEPA claims based on MCR 2.116(C)(8) and (C)(5). Summary disposition under MCR 2.116(C)(8) may be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. The appellate court rejected the defendant’s argument that mere failure to obtain or issue permits cannot provide a basis for MEPA claims. In this case the plaintiff’s complaint sets forth claims under the MEPA for which relief can be granted. In denying appeal the Michigan Supreme Court declined to express an opinion as to what constitutes the basis of a MEPA claim.

- Sara Bickler, University of Michigan

Thomas v George Jerome & Co, __ Mich __;661 NW2d 582 (2003).

The Michigan Supreme Court denied the Plaintiff’s application to appeal a decision by the appellate court regarding the posting of bonds. The appellate court found that the trial court did not abuse its discretion in relying on MCR 2.109(A), a Michigan court rule, rather than MCL 324.1702, a statutory provision, when the two provisions directly conflicted. The plaintiff had appealed the trial court’s order that the plaintiff post a bond for \$169,000.

MCR 2.109(A) is a Michigan court rule allowing the court to order the party bringing a claim to post a surety bond of unlimited amount to cover costs and other recoverable expenses that may be awarded by the trial court or the appellate court on appeal. MCL 324.1702 is a statutory provision that limits the amount of the bond to \$500 if the court questions the solvency of the plaintiff. Having found the two provisions in direct conflict, the court determined that the court rule applied. In Michigan, rules of practice set

forth in statutes are superseded by rules adopted by the Michigan Supreme Court. The appellate court determined that the situation involved practice and procedure, not substantive law, and therefore MCR 2.109 controlled. The appellate court also rejected the plaintiff's argument based on *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999), that the statute set forth a substantive rule and thus, controlled.

- Sara Bickler, University of Michigan

**Office of the Attorney General of the State of Michigan,
Opinion No. 7132, Mich. Atty. Gen. Op. 7132, 2003
WL 21236808 (May 1, 2003).**

The Attorney General stated that property owned by the State of Michigan is not subject to forfeiture, foreclosure, or sale if the state fails to make the payments in lieu of property taxes required under Part 21, subpart 14 of the Natural Resources and Environmental Protection Act (NREPA). State lands are immune to forfeiture, foreclosure and sale in the absence of a statute specifically abrogating that right, and the specific language of the General Property Tax Act does not abrogate that right.

The Attorney General further stated that sections of three appropriations acts for the Department of Natural Resources, section 404 of 2002 PA 525, section 1002 of 2001 PA 44, and section 1002 of 2000 PA 267, violate Const 1963, art 4, § 25 and are therefore invalid. Those acts purport to change the disposition of the proceeds of sales of state land.

Finally, the Attorney General opined that the money which had been incorrectly distributed to a certain source under these laws in the fiscal years 2000-2003 does not now have to be redirected to the correct source. In other words, the nullification of those laws applies only prospectively.

The consequences of the second and third parts of this opinion are confined to the treasuries of local units of government and the State. Increased amounts of money from sales of state land must be distributed to local units of government in the future, but the State does not have to give those units of government money from past sales that they should have received.

- Gregg Severson, University of Michigan

**Bestway Recycling, Inc v Bean, No. 239440, 2003 Mich
App LEXIS 1187 (Mich Ct App, May 20, 2003)
(unpublished).**

After six years of litigation with several waste management companies, the State of Michigan dropped the suits in June 1997. Bestway filed a gross negligence suit against the State in April 2000, claiming that tests on its wells had been grossly negligent and fraudulent, causing serious economic injuries during the litigation period. The trial court granted summary disposition to the State because the three-year statute of limitations for gross negligence had run. The appellate court affirmed the summary disposition.

Bestway argued that the statute of limitations only begins to run when the plaintiff discovers the injury, and that it had not discovered the injury until the court proceedings of June 1997. Bestway also argued that it had to wait until the original litigation ended before bringing this suit. The appeals court dismissed both these arguments because Bestway had evidence as early as 1990 or 1991 when its related company, Oakland, contested a cease and desist order by showing that one of the tests was suspicious and had contradictory results. Bestway's own expert testified in 1992 that a test of the same well was invalid and had been questionably conducted. Bestway either knew or should have known by 1992 that it had a cause of action. Satellite disputes arising from complex landfill litigation are not excused from the statute of limitations. Bestway's argument that it had to wait until the underlying landfill litigation was resolved is without merit because a favorable resolution to the underlying litigation is not a necessary element to this cause of action.

- Sue Wang, University of Michigan

**Preserve the Dunes, Inc v Michigan Dep't of Env'tl
Quality, TechniSand, Inc, 661 NW2d 581 (Mich, 2003)
(table decision).**

Plaintiff Preserve the Dunes sued co-defendant DEQ for declaratory and injunctive relief after the DEQ provided co-defendant TechniSand with a permit to mine a critical sand dune area in November 1996. The Berrien Circuit Court granted partial summary judgment to defendants and entered a judgment of no cause of action in December 2000. The Michigan Court of Appeals reversed and remanded (253 Mich App 263; 655 NW2d 291 (2002)) in December 2002, concluding that plaintiff's claim was not time-barred, that TechniSand did not qualify for an exception to the prohibition on sand mining in critical dune areas under MCL

324.63702, and thus, the DEQ erred in granting the permit. The Michigan Supreme Court granted TechniSand's motion for immediate consideration of appeal, and granted a motion allowing TechniSand to mine sand from parts of the parcel in question that are not designated as critical dune areas.

- Murl Wesley Smith, University of Michigan

United States v Michigan, Nos 77-71100 & 87-70992, 2003 US Dist LEXIS 8370 (ED Mich, May 12, 2003).

Plaintiff United States, through the United States Environmental Protection Agency (EPA) filed two major cases against defendants, the Detroit Water and Sewerage Department (DWSD) and the communities served by the DWSD. After consent decrees were entered in the case, the court assumed oversight responsibility over the water quality and pollution problems in the greater Detroit metropolitan area. In conformance to the consent decrees, the court issued an order defining the role of the Southeast Michigan Consortium for Water Quality. The mayor of the City of Detroit was appointed special administrator of the DWSD, and the court invited forty civic and governmental leaders involved in the region to become part of the consortium. The governor requested, and the court ordered, that the consortium address the efficient operation and management of the DWSD and that any complaints or concerns that could not be addressed by the City should be referred to the consortium. In this most recent order, the court directed the Southeast Michigan Consortium for Water Quality to become an integral means in assisting the court in the solution of regional water quality problems, pursuant to the court's oversight capacity under the various orders and consent judgments entered in the litigation.

- Gregory Rickman, University of Michigan

Isle Royale Boaters Ass'n v Norton, 330 F3d 777 (CA 6, 2003)

A group of motor boat users challenged the National Park Service's General Management Plan, which called for dock modifications that would limit the boaters' access to certain parts of Isle Royale National Park. The boaters relied on the Isle Royale Wilderness Act, which contemplates the continued maintenance of docks at the Park. The district court granted summary judgment against the boaters because the relevant statutes did not specify that every existing dock should be maintained. The circuit court affirmed. Applying

the **Chevron** test, the court first found that the relevant statutes made no reference to the placement of docks, and then that the National Park Service did not abuse its broad discretion to promulgate and enforce regulations concerning boating. Comments made by Congressional committees on their preference for existing docks could not undermine the discretion granted by the Wilderness Act.

- Rebecca Day, University of Michigan

Tawas Lake Improvement Ass'n v Iosco County Bd of Commissioners, 2003 Mich App LEXIS 1598 (Mich Ct App, June 26, 2003) (per curiam) (unpublished)

In 1959, the Iosco County Circuit Court set the level of Tawas Lake at 582.5 feet above sea level, and allowed departures from the set level only if the Department of Conservation deemed it necessary and the court granted a petition for departure. No steps were taken to bring the lake to the required level until 1994, when the plaintiff Association petitioned the court for an order requiring the County to construct a dam. The court issued that order, but the DEQ refused to grant the necessary Natural Resources and Environmental Protection Act ("NREPA") permit because of the harm a dam would do to floodplains and wetlands. The plaintiff alleged that no permits were needed because the court had ordered the lake level, and the court agreed. The appellate court reversed, because sidestepping the permit requirements violated several NREPA provisions. Although NREPA does grant the courts authority to set and maintain lake levels, it also explicitly does not abrogate the requirements of other state statutes.

- Rebecca Day, University of Michigan

MINUTES ENVIRONMENTAL LAW SECTION COUNCIL MEETING

Saturday, November 16, 2002

Call to Order at 10:00am

Present:

(*in person*) Tom Wilczak, John Tatum, Paul Bohn, Ken Burgess, Charles Toy, Bill Burton, Steve Kohl, Chuck Barbieri, Pat Paruch, Sharon Newlon, Bob Schroder, Tom Phillips, Todd Dickinson; (*by phone*) Charlie Denton, Susan Topp, Chris Dunskey, Peter Holmes, Chris Bzdok, John Byl, Steve Huff, Craig Hupp.

Absent:

Sharon Feldman, Susan Johnson, Michael Leffler, S. Lee Johnson, Saulius Mikalonis, Joseph Quandt, Dustin Ordway, Mike Ortega.

Minutes:

The meeting was opened by Section Chair Wilczak introducing new Council member Bill Burton, who was warmly received.

Nominating Committee Report:

Wilczak reported on the recommendation of the Committee that Ken Burgess be appointed to fill the vacancy left by Jeff Magid's resignation, and the recommendation was unanimously adopted on the motion of Tatum, seconded by Bohn.

Program Committee Report:

Byl reported that the program co-sponsored by the Section jointly with the Real Estate Section in conjunction with the annual meeting in September drew 50-60 attendees, and that Committee was committed to increasing the number of joint programs co-sponsored with other Sections.

Byl further reported on the noon program held the day before, regarding federal environmental enforcement issues, that was co-sponsored with the Federal Bar Association for the Eastern District of Michigan, which drew 35-40 attendees, including attorneys, consultants, and clients. Tom

Phillips served as Program Host, and the speakers were David Uhlmann, Chief of the DOJ Environmental Crimes Section, who spoke on enforcement trends and priorities, and Assistant U.S. Attorney Kris Dighe, who spoke on corporate officer liability and the impact of the 9/11 events.

Byl further reported on the Committee's planning for a 1 ½ day program at the Treetops Resort in Gaylord, on February 20-21, 2003. The Thursday program is expected to include environmental topics of interest for experienced environmental lawyers, including the new Part 201 Rules, the new MDEQ Division Chiefs, and the prerogatives of the new administration of Governor Granholm. The Friday program is expected to include topics to be presented jointly with another State Bar Section, and may include an "Environmental Law Boot Camp" presentation for novices, permitting issues (to be presented jointly with the U.S. Army Corps of Engineers), and possibly **Daubert** issues regarding expert testimony. Tatum suggested that the Litigation Section might be interested in jointly sponsoring such a program. Kohl suggested that an interesting topic might be the recent decision of the Michigan Court of Appeals in **Save Our Dunes v Fairmont**, in which a plaintiff successfully challenged and overturned a permit under MEPA. Kohl reported that past Section Chair Jeff Haynes represented the defendant, and plans to seek leave to appeal to the Michigan Supreme Court, and that numerous *amici curiae* briefs are expected.

Byl further reported that the Committee expects its MDEQ Roundtable programs to resume after the Granholm administration begins its departmental reform process, and Gotthelf will be coordinating with MDEQ. The ICLE has expressed interest in participating in a program on mold issues.

Secretary/Treasurer's Report:

Dickinson presented the minutes of the June 26 and September 26 Council meetings. The minutes of both meetings were accepted on the motion of Newlon, seconded by Toy. Dickinson reviewed the financial statements prepared for the Section by the State Bar for the fiscal year ending 9/30/02, which showed a negative fund balance of \$126, and

noted that annual membership dues would begin to be received this month and would bring the fund balance back to a positive number.

Discussion followed on the need to develop a budget for the Section, and plans were made to begin work on the budgeting process at the next Council meeting.

Discussion followed on conference call procedures for Section functions, and it was agreed that all persons using the Section's conference call facility should adopt a practice of using the area code 312 number, rather than the 800 number, which will reduce the Section's costs for conference calls by shifting the major portion of the per minute charges to the individual participants.

Membership Committee Report:

Holmes reported that he is working with Trigger on a report on the recently completed Membership Survey to be published in the Journal.

Holmes moved that the Council continue the Essay Contest for articles to be submitted for Journal publication, on the same terms as last year, with the winner receiving a \$500 cash prize and free student membership in the Section. The motion was supported by Wilczak, and unanimously approved. Holmes will begin work on publicizing the Essay Contest, and Bohn volunteered to assist in involving Canadian law schools.

Journal Report:

[The report set forth below was prepared by Journal Committee Chair Linda Blais and posted on the Council's listserv. Blais also posted notice on the listserv of the impending November 30 deadline for submissions for publication.]

In lieu of attendance, I am writing to provide you with the MELJ report for the Council meeting this Saturday. Currently, for the next issue which is due out by the end of the month, I have three articles. They include: (1) article on directional drilling by law student John Walus (he won the essay contest); (2) article on CERCLA amendments and developments by Chris Dunsky; and (3) mercury article by an attorney at Pepper Hamilton. In addition, students at the University of Michigan Environmental Law Society have offered to assist us with publication of the Journal in any way we need. We will be working with them to define the extent of this assistance, which I envision will involve possible article preparation and regulatory and administrative

updates. I have set forth below the content of an email recently received from the UM-ELS. Additionally, if the Council has any suggestions on how the UM-ELS may assist the Section or the Journal, please let me know.

--- Linda Blais

The UM-ELS Journal Committee met today to discuss our conversations, and there was enthusiastic support in several areas:

Student Articles

- All of us are interested in publishing our work, and at least one of us would like to do so this year. We understand the relevant deadlines are November 30th 2002 and mid-March 2003: realistically, November is too soon for us, but March may work.

Soliciting Scholarly Articles

- The Journal Committee includes law students, School of Natural Resources & Environment students, and joint degree students. As a result, we are in touch with a number of SNRE professors who are interested in publishing articles on, among other things, urban planning and environmental justice in Detroit.
- We are also happy to do some of the "legwork" of soliciting articles from other sources, if that would be helpful.

Regulatory/Agency Rulings

- Students are interested, but unsure what form these would take. Would they be similar to casenotes, or more like articles? Linda Blais offered to send back-issues: would there be examples in those?

Casenotes

- A great deal of student interest in this, especially from 1Ls not yet ready to write a whole article, but I understood from John Tatum that other law schools already contribute in this area. Is there room for more student involvement?

Cite Checking

- Is there a need for this sort of work?

I understand there is a Counsel Meeting this Saturday, and I would be very pleased to hear the Counsel's comments and suggestions regarding this informal proposal. The entire Journal Committee is excited to be involved with the State Bar, and we look forward to working with you.

Thank you for your time,

Rebecca Day
Chair, Journal Committee
Environmental Law Society
University of Michigan Law School

Technology Committee Report:

Tatum reported on the new Section home page on the State Bar Website, which now features a graphic image of the Section's 20th Anniversary painting by Russell Cobane. The Journal and Casenotes have also been moved to a single page, and the Committee is exploring the possibility of making that page searchable. There is also a separate page for ordering reproductions of the Cobane painting, with a graphic image keyed to explain the symbolism in the painting.

Tatum reported that the Committee is also working with the Program Committee to investigate the feasibility videoconferencing.

Tatum further reported that the new Section membership roster was now available, and on the need for automatic updating of the Section listserv.

Tatum further reported on the County Geographical Information System that is available on the World Wide Web, and may be of value to Section members for locating Part 201 and UST sites.

Finally, Tatum reported that the Committee had determined not to pursue a possible renewal of the Section's WIMS legislative update service subscription, based upon the low level of interest reflected in the membership survey and cost considerations.

Deskbook Committee Report:

[Jeff Haynes posted the following report on the Council listserv.]

Dear Council,

Neither Gene nor I can attend the council meeting on November 16. We submit this update in lieu of our attendance. ICLE has decided not to support a second edition of the Deskbook. However, it appears that the state bar is willing and able to offer publishing support. ICLE will release copyright and subscriber lists to us. Accordingly, we will be going forward with the second edition, to be published in 2004. We plan to include some form of electronic supplementation. For those of you concerned about the section's fisc, we aim to make the second edition a money-maker for the section. Authors, get your pencils ready!

--- Jeff Haynes and Gene Smary

Air Committee Report:

Burgess reported that the Committee is working on arranging a tour of the new Consumers Power plant in Essexville, probably after the weather begins to warm up.

Environmental Ethics Committee Report:

Newlon reported that the Committee had no programs this Fall, but was working on generating new topics.

Environmental Litigation Committee Report:

Huff reported that the next issue of the Journal should feature an article on the *Save Our Dunes* MEPA case, and will discuss this with Kohl. Committee members at Dickinson Wright are working on a point/counterpoint article on *Daubert* issues in mold litigation. Huff further reported on a phone conversation with Dr. Ernie Chiodo regarding an article attributable risk, addressing the logical inconsistencies in medical monitoring remedies in fear-of-cancer cases. Huff further reported that the Committee is considering a possible program or Journal article on environmental class actions.

Natural Resources Committee Report:

Wilczak reported that Joe Quandt has agreed to chair, and Matt Zimmerman to vice-chair this newly reconstituted Committee. Its subject matter will include wetlands, oil & gas, forestry, and fisheries law.

Real Estate Committee Report:

Wilczak reported that this Committee has been disbanded, and with its functions to be rolled into other subject matter committees as appropriate.

Waste and Hazardous Substances Committee Report:

Dunsky reported that the Committee had no meeting currently planned, but was working on an article on the Superfund amendments. Dunsky further reported that he had discussed with Tatum the expansion of the Committee's subject matter responsibilities to include brownfields and other real estate transaction-related issues. Dunsky proposed that the Committee's name be changed to the Hazardous Substances and Brownfields Committee, and that issues relating to non-hazardous waste be dropped from its charter. No action was taken on the proposal. Discussion ensued on the need to recruit new members for the Committee, and Burgess mentioned that he had used the Section listserv to recruit members for the Air Committee. Wilczak suggested that was a good approach for all committees to adopt.

Paruch mentioned that comments were being sought from our Section by Vicky Harding, the new Real Estate Section Chair, on a proposed Uniform Environmental Covenant, drafted by the Uniform Law Commissioners (the organization that drafted the UCC). Wilczak related that Smary had advised him that the ABA has been reviewing and commenting on drafts of the Uniform Environmental Covenant. Dunsky agreed to have his Committee review and comment on the current draft, and to relay those comments to Paruch. Individuals with comments are advised to route them to Dunsky. January 11, 2003 was established as the deadline for getting the comments to Paruch. Paruch indicated she would advise Vicky Harding of our Section's intention to submit comments.

Water Committee Report:

Wilczak reported that Gotthelf and Ken Gold were working on a half-day program in the first quarter of 2003, to be held at the State Bar of Michigan Building on Part 4 and Part 8 Rules, TMDL's, Water Quality Trading, Stormwater Issues, and other hot topics.

State Bar Commissioners Liaison Report:

Toy reported that SBM had a \$400,000 surplus this year, after having a \$600,000 deficit last year, and is considering increasing bar dues. Toy further reported on discussions regarding the new format for the SBM annual meeting. It has been proposed that SBM hold a 1-day business meeting in Lansing, on September 12 or 19, with the Sections having the option to hold their annual meeting in conjunction. An alternate proposed format would involve a 1 ½ day meeting, that would allow more time for Representative Assembly activities. An increased role for the Bar Leadership Forum, consisting of Section Chairs and representative of bar affinity groups, is also proposed. Further, Toy reported that the Commissioners had passed a resolution authorizing all the SBM Sections to vary the timing of their annual meetings, regardless of any inconsistent provisions in their Section bylaws. Finally, Toy reviewed the agenda for the Commissioner's board meeting scheduled for November 22, and noted that it needed to be amended to include the proposal to increase our Section dues.

Real Estate Section Liaison Report:

Paruch reported that the Real Estate Section Council meets monthly during the school year, and has hired a lobbyist to whom matters of common interest with our Section can be referred. The Real Estate Section's Program Committee is planning a half-day program on the draft Uniform Environmental Covenant.

Administrative Law Section Liaison Report:

No report was given.

Representative Assembly Liaison Report:

Wilczak reported that Dustin Ordway is the Section's new Representative Assembly Liaison, but had no report.

Chairperson's Report:

Wilczak reported that he is considering either September 12 or 14, 2003 for the Section's annual meeting. Wilczak further reported that he was constituting an *ad hoc* Section Bylaws Review Committee, to address issues such as electronic voting, and updating Committee descriptions. Schroder, Newlon, and Burgess volunteered to work on the Bylaws Review Committee. Wilczak also reported on the SBM Justice For All Report, the new Chairperson's Handbook, and the MDOT Website listserv. Bohn volunteered to investigate the possibility of the Section preparing a public service announcement regarding improper motor oil disposal for posting on the MDOT Website.

Vice Chair's Report:

Dickinson pledged that he would contribute help on either the Section's budget planning process, or the Bylaws Review Committee, or both, as soon as he is able to pass on the recording secretary responsibilities to Trigger.

Old Business:

Toy reported that both the MDNR and the MDEQ had accepted Cobane 20th Anniversary prints from the Section, and that the Attorney General's office had agreed to accept a print for display in the Frank Kelley Law Library.

New Business:

Tatum reported on the activities the SBM Section Summit Advisory Group. It has been proposed that SBM would in the future provide such core services as accounting and website maintenance to the Sections free of charge, but would begin charging for extra services such as listserv maintenance, enhancements to Section web pages, and perhaps more. Tatum reported further that SBM spends less than 1% of its budget on support services for the Sections.

Tatum reported that he and Hupp will be teaching a course on Environmental Dispute Resolution through the School of Urban Affairs at Wayne State University, and promised to publish details on the Section listserv.

Adjourned at 12:00 noon.

MINUTES ENVIRONMENTAL LAW SECTION COUNCIL MEETING

Saturday, February 1, 2003

Call to Order at 10:00 a.m.

Present:

(*in person*) Tom Wilczak, John Tatum, Chris Dunsky, Ken Burgess, Mike Leffler, Chuck Barbieri, Sharon Feldman, S. Lee Johnson, Charles Toy, Todd Dickinson, Tom Phillips, Bob Schroder; (*by phone*) Beth Gotthelf, Sue Topp, Sharon Newlon, Charlie Denton, John Byl, Peter Holmes, Grant Trigger, Craig Hupp, John Quandt.

Absent:

Susan Johnson, Saulius Mikalonis, Dustin Ordway, Mike Ortega, Bill Burton.

Minutes:

Section Chair Wilczak opened the meeting. The minutes of the Council's November 16, 2002 meeting were distributed and read. Wilczak suggested that the minutes be amended by: (1) adding Grant Trigger to the list of Council members not present at the November 16, 2002 meeting; (2) deleting the letter from Rebecca Day of the University of Michigan Environmental Law Society; (3) changing the sentence "no action was taken on the proposal" to "action was taken on the proposal" in the Hazardous Substances and Brownfield Committee Report, and (4) revise the minutes to refer consistently to the "Model Uniform Environmental Covenants Act." Ken Burgess suggested that the minutes be corrected by revising the Air Committee Report to state that the committee is working to arrange a tour of "new construction at the Consumers Power plant in Essexville . . ."; Barbieri moved to accept the minutes with the amendments proposed by Wilczak and Burgess and Tatum seconded. The Council accepted the motion by voice vote.

Membership Committee Report:

Committee Chair Holmes reported that he or Dustin Ordway would work with Grant Trigger to prepare an article for publication in the Michigan Environmental Law Journal reporting on the results of the membership survey.

Program Committee Report:

Committee Chair Byl reported that the Section will hold a seminar at the Treetops Resort in Gaylord on February 21, 2003. MDEQ Division Chiefs Jim Sygo and Vinson Hellwig (Remediation and Air Quality Divisions) will be the luncheon speakers. The Program Committee is planning a series of "roundtable" meetings in the Detroit, Lansing, and Grand Rapids areas, at which MDEQ Director Steve Chester, Skip Pruss or Bill Richardson will be invited to speak. Trigger suggested that the committee consider working with the Air and Waste Management Association on the proposed roundtables. The Program Committee will discuss these issues further in its next conference call on February 19, 2003 at 5:30 p.m.

Secretary/Treasurer's Report:

Secretary/Treasurer Trigger reported that in about two weeks he will attend a meeting, sponsored by the State Bar, of treasurers of the various State Bar Sections. He would like to prepare an annual budget to present to the Council at its April meeting, and requested that committee chairs tell him what their budgetary needs are. As of December 31, 2002, the Section has a balance of \$13,685.72. The increase in Section dues will be effective next year. The new State Bar 800 telephone number for use in attending committee meetings and Council meetings by phone will cost the Section 12¢ per minute per caller, with no charge to the person placing the call. Karen Williams of the State Bar is familiar with details.

Journal Report:

Wilczak reported on behalf of Committee Chair Linda Blais that she is still in discussions with the University of Michigan Law School Environmental Law Society concerning how the Society may be able to work on preparing digests of MDEQ Administrative Law Judge ("ALJ") opinions. Wilczak observed that the Council will need to find a replacement for Steve Chester, who served as assistant editor of the Journal until his recent appointment to serve as Director of MDEQ. There is a \$500 stipend for that position.

Technology Committee:

Committee Chair Tatum reported that the committee continues to track down and make corrections in obsolete or incorrect e-mail addresses on the listserv. The library of MDEQ ALJ opinions is 80% complete, but has stopped due to lack of funding. There is still plenty of space on the website for additional opinions. The committee needs someone to work on digesting another box of ALJ opinions. Denton reported that the committee wants to use video conferencing for meetings of the Section Council or committees. Phillips noted that video conferencing is very expensive if more than one firm is involved in the conference, although it is not expensive for conferences involving only one firm.

Deskbook Committee Report:

Wilczak and Tatum reported that the Deskbook Committee expects to assign chapters soon to be updated and/or rewritten as appropriate.

Air Committee Report:

Committee Chair Burgess reported that the Air Committee has distributed information on the listserv concerning several recently proposed and/or promulgated rule makings. The committee is also arranging a tour of new construction at the Consumers Powers plant in Essexville, Michigan for some time this spring.

Environmental Ethics Committee Report:

Committee Chair Newlon reported that the committee is looking into several homeland security issues, and plans to discuss with the Program Committee the possibility of sponsoring one or more brownbag luncheon programs.

Environmental Litigation Report:

No report.

Natural Resources Report:

Committee Chair Joe Quandt reported that the committee is relatively new, and is looking for ideas to work with the Program Committee on. Wilczak suggested that the committee might assist with digesting MDEQ ALJ opinions.

Hazardous Substances and Brownfield Committee Report:

Committee Chair Dunsky reported that the committee will meet in Lansing on March 1, 2003. The program will include: (1) discussion of committee plans for the year; (2) presentation by Bob Reichel concerning the reorganization of the Attorney General's office; (3) discussion of Part 201 rules by Craig Hupp; (4) report on Model Uniform Environmental Covenants Act ("MUECA") by Chris Dunsky. Dunsky also reported that at the request of the Council, he and Hupp reviewed and prepared a memo with comments on the MUECA. Dunsky briefly explained some of the background of MUECA and summarized the committee's comments on it. Dunsky and Wilczak pointed out that some members of the Section expressed strong feelings that the Council should not take advocacy positions on such topics. Sharon Feldman noted that the State Bar Board of Commissioners was to have considered at its January 17, 2003 meeting a proposal to revise Article IX of the State Bar Bylaws regarding the extent to which Sections may advocate positions on policy issues. Feldman said the proposed bylaw revision has an expansive definition of "policy." Dunsky expressed his belief that nothing in the memo that he and Hupp prepared for the Council advocates any particular policy position. Leffler reported that he and other attorneys in the Attorney General's office are reviewing the MUECA and may have comments on it later. Wilczak noted that the National Conference of Commissioners on Uniform State Laws will meet again to discuss the MUECA on February 28, 2003, before the next Council meeting on April 19, 2003. Dunsky suggested that he send a letter on his firm's stationery to the head of the MUECA Drafting Committee of the National Conference, so that it can have the benefit of the comments without the Council expressing its opinion on them. This will allow the Council to take whatever action it may consider appropriate at its April meeting or later.

Water Committee Report:

Gotthelf reported that there was no news from the Water Committee.

State Bar Commissioners Liaison Report:

Toy reported that the commissioners approved a proposed increase in membership dues. Hearings on the proposed dues increase will be held in different cities throughout the state. The Bar's annual meeting will be held in Lansing on September 11 and 12, 2003. Some space and

time will be reserved for Section meetings. The Environmental Law Section meeting is scheduled for September 11, 2003 at 3:00 p.m. to 4:00 p.m. The Environmental Law Council dinner this year will be held in conjunction with the annual meeting. Toy and Phillips will work together with Wilczak to make arrangements for the Council dinner.

Real Estate Section Liaison Report:

Wilczak summarized the written report submitted by Pat Paruch.

Administrative Law Section Liaison Report:

Sharon Feldman reported that the next meeting will be February 18, 2003. She mentioned again that the State Bar Commissioners is considering a proposal to amend the State Bar Bylaws regarding whether sections may take policy positions. The Administrative Law Quarterly will be published soon.

Chairperson's Report:

Chair Wilczak reported that he has prepared a redline version of proposed changes to the Section Bylaws to be reviewed by the ad hoc Bylaw Committee. Wilczak expects to bring proposed new bylaws to the Council meeting on April 1, 2003. Wilczak also reported that on June 13-14, 2003, he, Todd Dickinson, and Grant Trigger will attend a State Bar – sponsored Section leadership meeting on Mackinac Island. Wilczak and Tatum will post descriptions of the various committees of the Section on the Section's website. Wilczak circulated information from the State Bar Commissioners concerning an "open justice" program.

New Business:

Craig Hupp asked that the Council send a letter to Governor Granholm supporting in general terms the increased use of alternative dispute resolution ("ADR") to resolve environmental disputes to which the State of Michigan is a party. Hupp reported that Michigan is at the "middle or back of the pack" in implementing ADR in disputes involving the State. Wilczak noted that Mike Leffler, Bill Burton and Sally Churchill, among others, have objected to the Council advocating the increased use of ADR. Leffler clarified that he personally is not generally opposed to ADR, but opposes its use on certain technical issues and opposes its use to replace the decisionmaking responsibility of state agencies. Wilczak appointed an ad hoc committee consisting of Craig Hupp, Mike Leffler, Bill Burton, Bob Schroder, and Sally Churchill to discuss the proposal further and report back to the Council at its April 19, 2003 meeting.

Old Business:

None.

Adjournment:

Wilczak adjourned the meeting at 12:10 p.m.

PROPOSED BY-LAW AMENDMENTS

By Tom Wilczak
Chairperson, Ad-hoc Bylaws Committee

At the November 22, 2002 meeting of the Section Council, an Ad Hoc Committee was appointed to review the Section Bylaws and determine whether to recommend updates or other amendments. At that meeting, Ken Burgess, Sharon Newlon, Todd Dickinson, Robert Schroder and Tom Wilczak volunteered to serve on the Ad Hoc Bylaws Committee, which was chaired by Tom Wilczak. The Committee met on several occasions by telephone conference to review and discuss the current bylaws. Out of that process, several amendments were suggested by the Committee in order to make the Bylaws more reflective of current State Bar, Section and Council procedures and practices.

The proposed Bylaws revisions were submitted to the Council by the Ad Hoc Committee during the Council meeting on June 21, 2003. The Council considered the proposed amendments and recommends that they be adopted by the members of the Section at the September 11, 2003 Annual Meeting of the Section. The complete text of the proposed amendments are published below. To facilitate your review, a redlined version of the proposed amendments to the current Bylaws is also published below.

The major revisions to the Bylaws include amendments to Articles IV, VI, VII, VIII and IX to allow for electronic or video conferencing and the distribution of Section notices and publications via the Section Listserv or similar electronic message system. Additionally, proposed amendments to Article X would allow for amendments to the Bylaws to be considered by the Council at a regular or special meeting prior to the annual meeting at which such amendments are to be voted upon by the Section, in addition to the two current methods provided for in the Bylaws. Article VII has been amended to allow for the annual meeting of the Section to be held either at the annual meeting of the State Bar or at another time selected as voted by the Council. This change has been made to make the Section Bylaws consistent with the revised State Bar Bylaws which now allow annual meetings of Sections to take place at times other than the Annual Meeting of the State Bar. Finally, there have been some minor modifications to various sections to reflect the current committee structure of the Section.

Section members are encouraged to attend the Annual Meeting at the Lansing Center on Thursday, September 11, 2003. Watch for further meeting details in the State Bar Journal and on the State Bar and the Section web sites.

BYLAWS OF THE ENVIRONMENTAL LAW SECTION OF THE STATE BAR OF MICHIGAN

ARTICLE I Name and Purposes

Section 1. This Section shall be known as the Environmental Law Section of the State Bar of Michigan.

Section 2. The purposes of the Section shall be to review those laws and regulations dealing with the conservation and development of the natural resources of this State and its environment and to promote the fair and just administration of those laws and regulations which implement the mandate of Article IV, Section 52, of the 1963 Constitution of Michigan. The Section shall endeavor to accomplish these purposes by examining proposed legislation and regulations concerning natural resources and environmental law; promoting the education of members of the Bar and the general public in those areas pertaining to natural resources and environmental law; and by sponsoring institutes and conferences and the publication of legal writing devoted to those issues. [amended 9/17/87]

ARTICLE II Membership

Section 1. Each member of the Section shall pay annual dues of ~~Twenty~~ ^{thirty} Dollars (\$~~20~~³⁰). Any member of the State Bar of Michigan, upon request to the Executive Director of the State Bar of Michigan and upon payment of dues for the current fiscal year, shall be enrolled as a member of the Section. Thereafter, the annual Section dues shall be paid in advance each year beginning on the first day of the fiscal year next succeeding such enrollment. Members so enrolled and whose dues are so paid shall constitute the membership of the Section. Any member of the Section whose annual dues shall be more than six (6) months past due shall thereupon automatically cease to be a member of the Section. [amended 9/17/87, 9/13/90]

Section 2. Newly admitted members of the State Bar of Michigan, upon written request, shall become members of the Section for the balance of the fiscal year in which application is made, without payment of dues to the Section, if such written request is made during the first year of membership in the State Bar of Michigan.

Section 3. Law student members of the State Bar of Michigan may become non-voting members of the Section upon payment of annual dues of Two Dollars (\$2) each.

Section 4. It is a desirable goal of the Section to increase efforts to recruit women and racial/ethnic minority members. [added 9/26/91]

ARTICLE III Officers and Council Members

Section 1. The officers of this Section shall be a Chairperson, Chairperson-Elect and Secretary-Treasurer. Except as provided in Article V, Section 2, no person shall serve as Chairperson or Chairperson-Elect for two (2) consecutive terms. [amended 9/17/87]

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

Section 3. There shall be a Section Council consisting of twenty-two (22) voting members, including the Chairperson, Chairperson-Elect and Secretary-Treasurer, all of whom shall be members of the Section, together with nineteen (19) other members, eighteen (18) of whom shall be elected by the Section as hereinafter provided. A retiring Chairperson shall remain a voting ex-officio member of the Council for one (1) year and a non-voting ex-officio member for the next four (4) years immediately following the expiration of his or her term as Chairperson. This additional five-year term shall not be considered a second consecutive term for the purposes of Section 4 of this Article. ~~Three~~**Two** (32) additional members of the Council shall be appointed (one each) from the ~~Oil and Gas Committee, the Real Property Law Section and the Administrative Law Section~~ of the State Bar of Michigan by the Chairperson of each of those respective entities. These ~~threetwo~~ (32) appointed Council members shall serve no more than three (3) consecutive one-year terms **unless otherwise approved by Council**, and they shall be non-voting members and shall not be eligible to serve as officers of the Section or Council. [amended 9/17/87, 9/13/90; renumbered 9/26/91; amended 9/21/95]

Section 4. The Chairperson-Elect and Secretary-Treasurer shall be elected at each annual meeting of the Section to hold office for a term beginning at the close of the annual meeting at which they shall have been elected and ending at the close of the next succeeding annual meeting of

the Section (and until their successors shall have been elected and qualified). At the end of his or her term in office, the Chairperson-Elect, provided he or she is still in office and still a member of the Council, shall automatically succeed to the position of Chairperson for a term of one (1) year. [amended 9/17/87, 9/13/90; renumbered 9/26/91]

Section 5. With the exception of officers, no person shall be eligible for reelection to again serve as a member of the Council if that person is then serving a three (3) year term as a member of the Council and has immediately prior to that term served another such three (3) year term. [amended 9/17/87; amended and renumbered 9/13/90; renumbered 9/26/91]

Section 6. At each annual meeting of the Section, prior to election of Council members, one (1) member of the Section shall be elected to serve as Chairperson-Elect for a term of one (1) year; and one (1) member of the Section shall be elected to serve a Secretary-Treasurer for a term of one (1) year. [amended 9/17/87; amended and renumbered 9/13/90; renumbered 9/26/91]

ARTICLE IV Nomination and Election of Officers

Section 1. ~~Nomination On or before March 31~~**No later than two (2) months prior to the Council meeting before the annual meeting** of each year, the Chairperson, with the advice of the Chairperson-Elect, shall appoint a Nominating Committee consisting of **at least** three (3) members of the Section. The Nominating Committee shall make and report nominations to the Section for the offices of Chairperson-Elect, Secretary-Treasurer and members of the Council, to succeed those whose terms will expire at the close of the next annual meeting and to fill vacancies then existing for unexpired terms. The Nominating Committee shall solicit suggestions **from the members of the Section** for nominations for officers and Council members in the Michigan Environmental Law Journal and/or the Section listserv or similar electronic message system. The Nominating Committee shall publish a written report of its proceedings, including without limitation the names, qualifications and addresses of all nominees selected by the Committee, in the issue of the Michigan Environmental Law Journal published immediately **prior to the annual meeting and/or via the Section listserv or similar electronic message system at least four (4) weeks** prior to the annual meeting. Other nominations for the same offices may be made from the floor at the annual meeting. A statement of the qualifications of the Nominating Committee's selections for nominees shall be presented at the annual meeting. With respect to nominations made from the floor at the annual

meeting, nominees, or those making the nominations, shall present a statement of the nominee's qualifications. [amended 9/17/87, 9/13/90, 9/21/95]

Section 2. Qualifications. In selecting nominees, the Nominating Committee shall consider the need for representation on the Council of members with differing responsible legal viewpoints and who reside in various geographic areas of the State. The Nominating Committee shall also consider the need for representation on the Council of women and racial/ethnic minority members. The Section has a tradition of recognizing the contributions of its members to the Section when nominating officers and Council members. The Nominating Committee shall also consider the prior contributions of a member to the work of the Section in areas such as publications, programs, committee activities and Council work. In addition to the above considerations, a nominee shall have the following qualifications:

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

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

Section 3. Elections. All elections shall be by written ballot at the annual meeting of the Section unless otherwise ordered by resolution duly adopted by the Section at the annual meeting at which the election is held or unless otherwise directed by the Council at the Council meeting prior to the annual meeting that another balloting method be used such as electronic ballots. [amended 9/13/90; renumbered 9/26/91]

ARTICLE V Duties of Officers

Section 1. Chairperson. The Chairperson shall preside at all meetings of the Section and of the Council. The Chairperson shall formulate and present at each annual meeting of the State Bar of Michigan a report of the work of the Section for the then past year. The Chairperson shall perform such other duties and acts as usually pertain to the office.

Section 2. Chairperson-Elect. The Chairperson-Elect shall assist the Chairperson in the performance of his or her duties as the Chairperson may request. Upon the death,

resignation or disability of the Chairperson, or upon his or her refusal to act, the Chairperson-Elect shall perform the duties of the Chairperson for the remainder of the Chairperson's term or, in the case of the Chairperson's disability or refusal to act, for the duration of such disability or refusal to act. The Chairperson-Elect shall preside at all meetings of the Section and of the Council in the absence of the Chairperson. In the event of a vacancy in the office of Chairperson, the Chairperson-Elect shall become the Chairperson and shall serve in that capacity for the term of both the vacancy and the period of time he or she normally would have served as Chairperson. [amended 9/17/87, 9/13/90]

Section 3. Secretary-Treasurer.

(a) The Secretary-Treasurer shall be the custodian of all books, records, papers, documents and other property of the Section. He or she shall keep a true record of the proceedings of all meetings of the Section and of the Council, whether assembled or acting under submission. With the Chairperson, he or she shall prepare the Section's Annual Report. In the absence of both the Chairperson and Chairperson-Elect, the Secretary-Treasurer shall preside at meetings of the Council. The Secretary-Treasurer, in conjunction with the Chairperson, as authorized by the Council, shall attend generally to the business of the Section.

(b) The Secretary-Treasurer shall keep a true record of all monies received and disbursed and shall report thereon to the Council whenever requested. Annually he or she shall submit a financial report for presentation to the membership of the Section. Consistent with the Bylaws of the State Bar of Michigan, he or she shall be responsible for forwarding all monies of the Section which come into his or her hands to the bookkeeping department at State Bar Headquarters in Lansing for deposit and credit to the account of the Section. Further, unless waived on a meeting-by-meeting basis by vote of the Council, the Secretary-Treasurer shall present a current financial report at each meeting of the Council. [amended 9/17/87, 9/13/90]

ARTICLE VI Duties and Powers of the Council

Section 1. The Council shall have general supervision and control of the affairs of the Section, subject to the provisions of the Bylaws of the Section and the Bylaws of the State Bar of Michigan. It shall specifically authorize all

commitments or contracts which shall entail the payment of money, and shall authorize the expenditure of all monies appropriated for the use benefit of the Section. It shall not, however, without prior approval of the State Bar Board of Commissioners, authorize commitments or contracts which shall entail the payment of more money during any fiscal year than the total of: (a) the amount received in Section dues for such fiscal year; and (b) any unexpended funds remaining in the Section treasury from prior years.

Section 2. The Council, during the interim between annual meetings of the Section, may fill vacancies in its own membership (other than the members appointed by ~~the Oil and Gas Committee~~, the Real Property Law Section and the Administrative Law Section) or in the office of Secretary-Treasurer, or--in the event of a vacancy in both the office of Chairperson and Chairperson-Elect--then in the office of Chairperson. Members of the Council and officers so appointed shall serve until the close of the next annual meeting of the Section; at that meeting the vacancies shall be filled for the remainder of their respective terms by a special election conducted concurrently with the regular elections as provided in Article IV herein. Vacancies in any of the three (3) appointed committee or Section seats on the Council shall be filled by the respective appointing entities. [amended 9/17/87; renumbered 9/13/90]

Section 3. Regular meetings of the Council shall be held at times and locations to be determined by the Chairperson, who shall submit the schedule of regular meetings for each fiscal year to be published in the first issue of the Michigan Environmental Law Journal following each annual meeting of the Section and/or by Section listserv or similar electronic message system. At least one regular meeting of the Council shall be held in each fiscal year. [amended and renumbered 9/13/90]

Section 4. Special meetings of the Council may be called by the Chairperson or a majority of the voting members of the Council at such times and places as either may determine. [renumbered 9/13/90]

Section 5. Nine (9) voting members of the Council ~~physically present~~ in person or via a real time electronic or video conferencing method shall constitute a quorum at both regular and special meetings of the Council. [renumbered 9/13/90]

Section 6. The Council shall act pursuant to a majority of those present in person or via a real time electronic or video conferencing method at regular and special meetings of the Council; or pursuant to the provisions of Section 7 of

this Article. [amended and renumbered 9/13/90]

Section 7. The Chairperson of the Section at any time may, and upon the request of any three (3) voting members of the Council shall, submit or cause to be submitted in writing or by the Section Listserv or other similar electronic message system, to each of the members of the Council, any proposition upon which the Council may be authorized to act; and the members of the Council may vote upon such proposition or propositions so submitted by communicating their vote thereon in writing over their respective signatures to the Secretary-Treasurer or by the Section Listserv or other similar electronic message system, who shall record upon the minutes each proposition so submitted; when, how, and at whose request it was submitted; and the vote of each member of Council thereon; and he or she shall retain on file such written and signed votes. Action supported by a majority of the entire Council with respect to a proposition submitted in that manner shall constitute binding action of the Council. [amended and renumbered 9/13/90]

ARTICLE VII Committees

Section 1. Standing Committees. The standing committees of the Section shall be the Journal Committee, Program Committee, Technology Committee and Membership Committee. The Council may authorize the creation of additional standing committees. Each standing committee shall consist of a Committee Chairperson, Vice Chairperson and such Section members as are appointed in accordance with this section and shall perform such duties and exercise such powers as the Council may direct, subject to the limitations of these Bylaws and the Bylaws of the State Bar of Michigan. The Chairperson shall appoint the members of each standing committee and shall appoint a Chairperson and Vice Chairperson of each standing committee. The Chairperson may remove, and upon direction from the Council shall remove, the Chairperson or Vice Chairperson of any standing committee. The Chairperson shall have the authority to appoint a Section member to fill any vacancy occurring on a standing committee. When appointing the Standing Committees, the Chairperson shall consider the need to increase the number of women and racial/ethnic minorities serving on such committees and as chairpersons of such committees. At the time of appointment of the Standing Committees (Journal, Program, Technology, Membership), the Chairperson shall ~~provide copies of~~ request that the Committee members review the Report of the Supreme Court Task Force on Racial/Ethnic and Gender Issues that is available on the State Bar web site and ask each committee to conduct its business consistent with the Task Force recommendations. [added 9/13/90; amended 9/

21/95; amended 9/18/97]

Section 2. The Membership Committee's assignment shall include, but not be limited to, the following:

(a) Reviewing the Section's long-term plan for implementation of the Supreme Court Task Force ~~1990~~ Report on Racial/Ethnic and Gender Issues ~~in the Courts~~ referenced in Article VII, Section 1 above, monitoring the Section's compliance with the plan, and making recommendations for updating or revising the plan.

(b) Gathering information concerning women and racial/ethnic minorities practicing environmental law from organizations such as the State Bar, Wolverine Bar Association, Women Lawyer's Association of Michigan and other appropriate sources.

(c) Providing information identifying women and racial/ethnic minorities practicing environmental law to the Chairperson, the Council and the Nominating and Program Committees for consideration as candidates for Section officers, Council members, Committees and program speakers.

(d) Investigating potential new approaches to increase women and racial/ethnic minority representation in the Section.

(e) Compiling and presenting to the Council statistical information regarding the gender and racial/ethnic composition of the Section, and of the State Bar. [added 9/26/91; amended 9/18/97]

Section 3. Subject Matter Committees.

(a) The Committee Chairperson shall have the authority to create subject matter committees, such as air, ~~surface water/groundwater, wetlands~~ natural resources, etc., for such purposes as the Chairperson may determine appropriate, subject to the authority and control of the Council. The officers of a subject matter committee shall consist of a Committee Chairperson and a Vice Chairperson appointed by the Section Chairperson. Committee members shall be solicited and a list maintained by the Committee Chairperson. Committee Chairpersons and Vice Chairpersons shall serve a two year term and may serve more than one two year term so long as the

terms are not consecutive. At the end of his or her term, the Committee Vice Chairperson shall, provided he or she is still in office, automatically succeed to the position of Committee Chairperson. In appointing subject matter committee officers, the Chairperson shall consider only those Section members who have actively participated in Section Committee activities for at least one (1) year.

(b) The Chairperson may remove, and upon direction from the Council shall remove, the Committee Chairperson or Vice Chairperson of any subject matter committee. In the event that a vacant Committee Chairperson position results from death, disability, resignation, refusal to act or removal, the Vice Chairperson shall become Committee Chairperson and shall serve in that capacity for the term of both the vacancy and the period of time he or she otherwise would have served as Chairperson. [added 9/21/95; amended and renumbered 9/18/97]

Section 4. Ad Hoc Committees. The Chairperson shall have the authority to create ad hoc committees for such limited and temporary purposes as the Chairperson may determine appropriate, subject to the authority and control of the Council. The members and officers of an ad hoc committee shall consist of a Committee Chairperson, Vice Chairperson and such Section members as the Chairperson may designate and appoint. The Chairperson may remove, and upon direction from the Council shall remove, the Committee Chairperson or Vice Chairperson of any ad hoc committee. The Chairperson shall have the authority, subject to the authority and control of the Council, to abolish any such committee. [added 9/13/90; renumbered 9/26/91; amended 9/21/95; renumbered 9/18/97]

Section 5. Procedure. A standing, subject matter or ad hoc committee created pursuant to this Article shall have the authority, subject to the provisions of these Bylaws, to establish meeting schedules and rules of procedure to govern its operations. On or before June 30 of each year, each standing or subject matter committee shall prepare and submit to the Council a report of the committee's activities during the preceding year and proposed budget for the ensuing year. After review and approval by the Chairperson, such report and proposed budget shall be published in the issue of the Michigan Environmental Law Journal and/or the Section Listserv or similar electronic message system published immediately prior to the annual meeting of the Section. [added 9/13/90; renumbered 9/26/91; amended 9/21/95; renumbered 9/18/97]

ARTICLE VIII Section Meetings

Section 1. The annual meeting of the Section ~~shall~~may be held during and at the same place as the annual meeting of the State Bar of Michigan ~~and shall~~or at another time selected as voted by the Council. The annual meeting may include such programs and order of business as may be arranged by the Council.

Section 2. Special meetings of the Section may be called by the Chairperson or by a majority of the voting members of the Council at such times and places as either may determine.

Section 3. ~~Twenty~~Fifteen (2015) members of the Section ~~physically present~~ in person or via a real time electronic or video conferencing method at any Section meeting shall constitute a quorum for the transaction of business.

Section 4. All actions of the Section other than the amendment of the Bylaws shall be taken pursuant to a majority vote of the members present in person or via a real time electronic or video conferencing method. [Article renumbered 9/13/90]

ARTICLE IX Miscellaneous Provisions

Section 1. The fiscal year of the Section shall be the same as that of the State Bar of Michigan.

Section 2. All debts incurred by the Section, before being forwarded to the Secretary-Treasurer or to the Executive Director of the State Bar of Michigan for payment, shall first be approved by the Chairperson or the Secretary-Treasurer; or, if the Council shall so direct, by both of them.

Section 3. No salary or compensation of any kind shall be paid to any officer, Council or committee member as such; provided, however, that the Council may compensate the editor of the Environmental Law Journal in such amount as the Council may determine. [amended 9/13/90]

Section 4. Any action by this Section must be approved by the Board of Commissioners or the Representative Assembly of the State Bar of Michigan before it becomes effective as an official act of the State Bar of Michigan. Any resolution adopted or action taken by the Section may, on request of the Section, be reported by the Chairperson of the Section to the Board of Commissioners or Representative Assembly of the State Bar of Michigan for action.

Section 5. These Bylaws shall become effective upon their adoption by the Section and the approval thereof by the Board of Commissioners of the State Bar of Michigan. [Article renumbered 9/13/90]

ARTICLE X Amendments

Section 1. These Bylaws may be amended at any annual meeting of the Section by a two-thirds (2/3) vote of the members of the Section ~~physically present~~ in person or via a real time electronic or video conferencing method and voting, provided there is a quorum; and provided further that no amendment so adopted shall become effective until approved by the Board of Commissioners of the State Bar of Michigan. [amended 9/21/95]

Section 2. Any proposed amendment of these Bylaws shall first be submitted in writing to the Council in either of the following forms: (1) a petition signed by at least ten (10) members of the Section and considered by the Council at a regular or special meeting prior to the annual meeting of the Section at which it is to be addressed; or (2) an amendment proposed by a duly adopted resolution of the Council or considered by the Council at a regular or special meeting prior to the annual meeting of the Section at which it is to be addressed. The Council shall consider the proposed amendment at such a meeting and shall prepare recommendations thereon; and those recommendations, together with a complete and accurate text of said proposed amendments, shall be published in the Michigan Bar Journal or Michigan Environmental Law Journal published immediately prior to the annual meeting of the Section at which the amendment is to be considered or distributed by Section listserv or similar electronic message system at least four (4) weeks in advance of the annual meeting of the Section at which the amendment is to be considered. [Article renumbered 9/13/90; amended 9/21/95]

~~June 8, 1998~~April, 2003 Thomas Wilczak, Todd Dickinson & ~~Jeff Haynes~~, Sharon Newlon, Kenneth Burgess and Robert Schroder

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