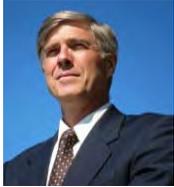




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Message From the Chair

By Dustin P. Ordway



The Council held a retreat in Lansing on March 5, 2013, to discuss the work of our committees and how they help us provide value to Section members. We want the committees to provide a vehicle for all Section members to learn and to become involved more in the leadership of the Section—ideally in a way that works for each of you.

One way to keep the door open for all Section members to be involved is for each subject matter committee to let all Section members know (through the listserv) of planning and brainstorming conference calls as well as events of interest. Watch for those listserv announcements and feel free to call in—just as you can call in to or attend Council meetings.

If you have any questions or suggestions regarding our committees, please contact me. There is information about each committee on the Section’s website. And do not hesitate to contact a committee chair to become involved today.

Events/activities in recent months have included a webinar on *The Lender’s Perspective on Borrowers, Lawyers and Environmental Risks* and a conference co-sponsored with MMA on *Emerging Air Quality Laws and Policies: What’s on the Horizon in Michigan*. An additional webinar will have occurred on *The K.I.S.S. Principle in Environmental Litigation* by the time you see this, with another webinar planned to follow on June 11. Watch for more information on a Section conference on Energy and Sustainability at the Bengal Wildlife Conservancy in Bath Township, near Lansing, on June 21. Additional webinars and conferences will occur during the year. Our Membership Committee organized two successful mixers (in Ann Arbor and East Lansing) for Section members to gather, relax and meet with interested law students. Work continues on updates to the Deskbook and transitioning the Section-managed website that hosts it to the SBM website.

The Nominating Committee has been formed and begun its work to identify nominees for open Council positions. Contact Kurt Brauer with your input and/or interest.

As always, do not hesitate to contact me or any Council member with your expression of interest in becoming involved or with questions or feedback for us.

Dustin P. Ordway, Chair
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Message From the Editor

By Christopher J. Dunsky

Editor, Michigan Environmental Law Journal

This issue of the *Journal* features an article by two of our editors, Patricia Paruch and Kaitlyn Sundt, that summarizes how the Michigan Legislature revised natural resources and environmental protection laws in 2012. You probably already knew about many of the changes that affect underground storage tanks, but did you know that Public Act 190 provides alternative ways for a Part 201 cleanup of venting groundwater to comply with water quality standards, or that you may soon be permitted to go fishing with your crossbow instead of a rod and reel? Our law student essays include a “ripped from the headlines” essay by Nicholas Kyriakopoulos that explains why municipalities sometimes regionalize or privatize their municipal sewer and water supply services and explores whether the time is right to do so with the Detroit Water and Sewerage Department, considering that the City of Detroit is now operating under an emergency manager. A second essay by Edem Tsiagbey discusses whether CERCLA Unilateral Administrative Orders provide sufficient due process and suggests several things that EPA could do to lessen the pain and anguish to which recipients of UAOs are subjected.

We have a continuing need for articles about issues of interest to Michigan environmental lawyers. If you’d like to publish an article, please contact me at cdunsky@comcast.net.

Upcoming Events

Tuesday, June 11, 2013

Webinar: "Part 201 Update: Case Law Focus"

ELS will welcome Scott Hubbard and Scott Watson (author of the Deskbook Part 201 chapter) for a noontime presentation “Part 201 Update: Case Law Focus” to provide practical insights for the practitioner based on recent key judicial decisions under Part 201 of NREPA.

Friday, June 21, 2013

Summer Program: “Energy and Sustainability”

The ELS Summer Program will be held at the Bengal Wildlife Conservancy, in Bath, Michigan (NE of Lansing), following an ELS Council Meeting, with panels on the Water/Energy Nexus and on Michigan’s Response to Climate Change, with a high profile luncheon keynote speaker to be announced. The Program will be followed by a “happy hour” mixer with heavy hors d’oeuvres.

Thursday, September 19, 2013

Annual Business Meeting & Program (Topic TBA)

The ELS Annual Business Meeting & Program will be held Thursday, September 19, at Lansing Center, in conjunction with the State Bar’s Annual Meeting. Registration is requested for proper facilities planning. [Visit the Bar’s Annual Meeting pages.](#)

Wednesday, November 6, 2013

Joint program with Air Committee and Air and Waste Management Ass'n, location TBA.

Help Promote Section Events and Activity!

Watch the Section's web page for updates regarding these and other events currently in the planning stages!

Connect with the Environmental Law Section on Facebook and LinkedIn: Follow ELS on Facebook and LinkedIn. Join the Environmental Law Section (Like us) on Facebook and LinkedIn to stay informed of environmental law seminars, forums, education, and networking.

ELS/MMA Recap

A near capacity audience gathered on Thursday, April 11, 2013, at the headquarters of the Michigan Manufacturers Association in Lansing for the 4th Annual Conference cosponsored by the MMA and the Environmental Law Section of the State Bar of Michigan. The theme of this year's conference, "Emerging Air Quality Laws and Policies: What's on the Horizon in Michigan," presented an opportunity for representatives of all of the relevant constituencies to share ideas and concerns in an open exchange of viewpoints.

The first major segment of the conference brought everyone up to speed on the legal front, with an update of significant air cases and regulations, with a panel comprised of attorneys S. Lee Johnson, of Honigman Miller Schwartz & Cohn, and Paul Collins, of Miller Canfield Paddock & Stone, moderated by Emerson Hilton, of Bzdok, Olson & Howard. The PowerPoint presentations that provide the sum and substance of their discussion are available online, at the ELS website.



Panelists S. Lee Johnson and Paul Collins

"Recent and Upcoming Developments for the National Ambient Air Quality Standards" came next, as attorney Kurt Kissling, of Pepper Hamilton, moderated a panel comprised of Vince Hellwig, the chief of MDEQ's Air Quality Division and Chuck Hersey, the soon retiring leader of

planning and policy for the Southeast Michigan Council of Governments. The PowerPoint presentations from Mr. Hellwig and Mr. Hersey are likewise available on the ELS website.



Vince Hellwig, Chuck Hersey and Kurt Kissling

The third panel took up the “Challenges for Implementing Regulatory Reform in Michigan’s Air Program: An Update on the ORR Implementation Process.” The moderator, Andy Such, director of environmental and regulatory policy for host MMA, collaborated with panelists, Dave Fiedler, the Regulatory Affairs Officer for the Department of Licensing and Regulatory Affairs (LARA) Office of Regulatory Reinvention (ORR); Steven C. Kohl, of Warner Norcross & Judd; Greg Meyers, the director of air quality for CMS Energy; and James Clift, the policy director for the Michigan Environmental Council.



Steven C. Kohl

Shortly after noon, the assembled group broke for a buffet lunch sponsored by Civil & Environmental Consultants, and enjoyed the keynote address from Greg White, a commissioner of the Michigan Public Service Commission, who gave “A PSC Perspective on Air Regulations and Their Impact on Energy Supply and Reliability.”



Andy Such, Greg White, and Mike Johnston.

Membership Committee Events Recap

The Environmental Law Section Membership Committee recently held two law student mixers and networking events.

On March 13, 2013, law students from the University of Michigan and Cooley Law School gathered in Ann Arbor for professional networking with members of the Environmental Law Section. The networking event was followed by a career panel hosted by the University of Michigan Law School. The panel focused on bringing together students and environmental law practitioners and giving students an idea of the range of opportunities and career paths available in the environmental law field. Professor David Uhlmann, the head of the Environmental Law and Policy Program at the University of Michigan Law School moderated the panel, which included Richard Barr, partner at Honigman, Miller, Schwartz and Cohn, Todd Adams, retired environmental attorney with the Michigan Attorney General's Office, Nick Schroeck, Executive Director of the Great Lakes Environmental Law Center and professor at Wayne State Law School, and Sara Gosman, professor at the University of Michigan Law School. The panel shared career insights, advice, and stories with students in attendance. Students were able to ask questions about practicing as an environmental attorney, working as a lawyer, and maintaining a work-life balance.

The Section's Membership Committee also hosted a "happy hour" mixer on April 8, 2013, at Beggars Banquet in East Lansing. In contrast to the Ann Arbor mixer the prior month, which preceded a career panel, the East Lansing mixer immediately followed a career panel event that included several Environmental Law Section members and had been hosted by the Michigan State University Law School's Environmental Law Society. The Beggars Banquet soiree was well-attended by the panelists, numerous students from the MSU Law School and from the Lansing campus of the Thomas M. Cooley Law School, as well as by ELS members and Section leaders.

2012 Michigan Public Acts—Environment and Natural Resources

Patricia Paruch, Kemp Klein Law Firm

Kaitlyn Sundt, AlixPartners LLC

The Michigan Legislature approved a number of significant changes to the Michigan Natural Resources and Environmental Protection Act (MNREPA) during the 2012 legislative session. Noteworthy legislation includes a series of public acts that modify the procedures for addressing leaking underground storage tank issues under Part 213. Later in the year, the Legislature approved further changes to Part 201 and Part 213 to make consistent the remediation of facilities which include underground storage tanks with those that do not. Most of these changes codify the recommendations of the Michigan Environmental Advisory Council composed of a number of representatives of the regulated community including utilities and other industries. Like the amendments to Part 201 that the Legislature approved in 2011, these amendments shift a significant portion of regulatory authority away from state agencies.

The Legislature also modified a number of statutes regulating hunting and fishing. Generally, the changes reflect a willingness by the Legislature to broaden hunting and fishing rights and to reduce government regulation of these activities. The most controversial of these public acts was the approval of a statute that adds gray wolves to the list of game animals that can be hunted in Michigan. Since the U.S. Fish and Wildlife Service removed the gray wolf from the endangered species list two years ago, wolf populations in northern states have rebounded. Five other states have authorized wolf hunting. A 2008 Michigan statute allows a property owner to kill a wolf if it attacks livestock or pets. Wolves are notoriously hard to catch, however, and wolf hunt advocates insist that the overall numbers of wolves should be reduced to diminish wolf problems. Opponents such as the Humane Society of the U.S. have apparently gathered enough signatures to place the repeal of this amendment on the November, 2014 statewide ballot.

The Legislature also significantly broadened the scope of activities that can be awarded grants from the Michigan Natural Resources Trust Fund (MNRTF) to include forestry and mineral extraction projects. As stipulated in an amendment to the Michigan Constitution in 1976, the MNRTF is funded by state revenue from oil and gas leases on state land. Prior to the 2012 changes, the MNRTF Board could only approve grants for development or acquisition projects for state, county, or local parks and recreation programs. The 2012 amendments also impose more legislative oversight of the MNRTF grant process and the sale of state lands by MDNR. A number of these changes seem especially designed to benefit the forestry and mineral extraction industries in the state, including the burgeoning natural gas extraction industry.

The Legislature established a new Clean Corporate Citizens (C3) program within MNREPA. The program is voluntary and can be beneficial for the environment and corporations that choose to participate. The C3 program allows a corporation to make certain environmental stewardship efforts in exchange for benefits such as fewer governmental inspections and priority permit and application processing.

Several sand dunes protection provisions were amended to make them less protective. In the past, the State offered a great deal of protection for critical dunes areas and provided the appropriations that were necessary to effectuate such protections. Although there are many safeguards still in place, the changes that were made in 2012 relax several standards related to dunes protection and significantly limit the public funds that were previously appropriated to serve this purpose.

On December 31, 2012 the Governor approved an important water quality initiative to make funding available for more projects. The Strategic Water Quality Initiatives Loan Program was expanded to make funding available for a broader range of projects that are designed to protect water quality; projects such as the construction of sewage treatment plants and wetland mitigation banks are eligible for funding. An additional water quality initiative effort led to the formation of a wetland mitigation bank funding program that will award grants and loans to municipalities so that they can establish a wetland mitigation bank.

The following is a summary of the 2012 Public Acts pertaining to environmental and natural resource issues.

1. Environmental Protection

PA 41: This Act amends MNREPA Part 117 “Septage Waste Servicers” by adding new requirements for septage waste receiving facilities. If a local unit of government requires that all septage waste be disposed of in a facility permitted to accept such waste or prohibits, or effectively prohibits, the disposal of such waste on land (such as in a septic tank or septic field), the receiving facility service area must include the entire governmental unit, must have the capacity to accept all the waste from the entire governmental unit, and must be required by contract to accept all such waste within that governmental unit if the facility is not owned by the governmental unit. [MCL 324.11715](#). Immediate effect.

PA 102: This Act amends MNREPA Part 115 “Solid Waste Management” by imposing further restrictions on open burning of household waste in municipalities having a population of 7,500 or more. The old statute prohibited the open burning of leaves and grass clippings. The amendment adds plastic, rubber, foam, chemically treated wood, textiles, electronics,

chemicals, and hazardous materials to the prohibited list. The amendment adds civil penalties for violations. The following are permitted with conditions: open burning of untreated wooden fruit or vegetable bins for pest control, and burning of an unserviceable U.S. flag by a congressionally chartered patriotic organization. [MCL 324.11522](#). Immediate effect.

PA 108-113: This series of public acts approved in May, 2012 amended a number of sections of MNREPA Part 213 “Leaking Underground Storage Tanks.” The amendments require the use of Risk-Based Corrective Action (RBCA) procedures developed by the American Society of Testing & Materials (ASTM) for addressing contaminated sites. The amendments also modify time frames for reports documenting corrective actions submitted to the Michigan Department of Environmental Quality (MDEQ) and provide that if MDEQ does not audit a report, it is considered approved. This legislation also amends Part 215 “Refined Petroleum Fund (RPF)” by repealing MDEQ’s obligation to annually provide a list of consultants qualified to perform UST site remediation work. The new law also requires that MDEQ establish an Underground Storage Tanks Cleanup Advisory Board to recommend how RPF monies can be used to finance corrective actions; the Board issued a report in May, 2012. For a detailed discussion of PA 108-113, see K. Vermeulen and T. Helminski, [Michigan Environmental Law Journal](#), “Significant Changes to Leaking Underground Storage Tank Program,” Summer, 2012. The Legislature subsequently approved a number of the Board’s recommendations in PA 446 described below.

PA 164: This Act amends MNREPA Part 13 “Permits” by extending the processing period at the request of the applicant for any of the 40+ types of permits issued by the MDEQ and the Department of Natural Resources (MDNR). Such an extension usually allows an applicant additional time to provide required information to the department before the expiration of the application period. The extension generally cannot exceed 120 days. [MCL 324.1307](#). Immediate effect.

PA 190: This Act amends MNREPA Part 201 “Environmental Remediation” by providing alternative methods by which a remediation plan for a facility can comply with water quality standards when contaminated groundwater from the facility vents to a surface water body (groundwater-surface water interface, or GSI). Prior to the amendment, many facilities with GSI issues never came to closure due to failure to meet high surface water quality standards. In 2009, the MDEQ Environmental Advisory Council recommended that the state adopt a new “sustainable” model for managing the GSI issue that is protective of the environment and that promotes economic growth and recovery. Clean-up standards for a facility can now be based on surface water quality standards, mixing-zone based GSI criteria, site-specific criteria including biological criteria, an ecological demonstration, or a modeling demonstration. [MCL 20120e](#). Immediate effect.

PA 446: This Act, signed by Governor Snyder in December, 2012 for immediate effect, amends a number of sections of MNREPA and adopts a number of the recommendations of the Michigan Environmental Advisory Council. Most of the changes involve Part 196 “Clean Michigan Initiative,” Part 201 “Environmental Remediation” and Part 213 “Leaking Underground Storage Tanks” by modifying the clean-up procedures and funding for contaminated sites. The amendments to Part 213 follow the earlier amendments approved by the Legislature in May, 2012. The changes affect [numerous sections of MCL 324](#). The key provisions:

Part 201

- * Clarify that both liable and nonliable persons may submit a “No Further Action” Report. An NFA Report may address one or more releases, hazardous substances, or environmental media, the entire facility or a portion of a facility, or any combination of these.
- * Authorize MDEQ to issue a certificate of completion confirming that MDEQ considers the response activity completed in compliance with Part 201.
- * Clarify and streamline the regulation of relocation of contaminated soil at Part 201 sites and exempts the relocation of soil from creating a “facility under Part 201 or solid waste under Part 115.
- * Broaden the use of site-specific criteria to include non-numeric and numeric criteria in evaluating the toxicity and exposure risk for sites.
- * Add owners and operators of residential condominiums to the exemption from liability as long as the contamination in the unit is from use of a hazardous substance consistent with residential use or contamination of any common areas where the person has an ownership interest or right of occupancy.
- * Extend the deadline for the development of cleanup criteria to December 31, 2013, and rescind a number of Part 201 rules.

Part 213

- * Add an option to use Part 201 in lieu of Part 213 for evaluation and corrective actions for venting groundwater.
- * Clarify the terminology for owner and operator throughout Part 213 for liability, due care analysis, BEA, and corrective action purposes.

Part 201 and 213 Due Care Compliance

- * Provide new procedures under both Part 201 and Part 213 to enable a person to submit due care documentation to MDEQ for approval. MDEQ has 45 days to review and respond to the request.

2. Natural Resources

A. State Lands

PA 240: This Act amends MNREPA Part 5 “Department of Natural Resources” by limiting with certain exceptions the number of acres MDNR can own and acquire before May 1, 2015 to 4,626,000 acres of land. The Act also prohibits the state from acquiring “surface rights” to land north of the Mason-Arenac line beginning May 1, 2015 if MDNR owns surface rights to more than 3,910,000 acres of land north of that line. In counting the acres it holds, MDNR does not need to include any parcel smaller than 80 acres, rights-of-way, conservation easements, trails, land acquired by gift or through litigation, or commercial forestland. The amendment also requires the MDNR to develop and submit to the Legislature a strategic plan to guide the acquisition and disposal of state lands managed by MDNR, and once the plan is in place to notify the Legislature of any proposed acquisition or sale and to provide an analysis of how the transaction will achieve the goals set forth in the strategic plan. The amendment also states that it is the intent of the Legislature to further amend the statute to remove the above acreage limitations once the strategic plan is in place. The amendment also modifies the procedures for MDNR disposal of surplus lands by requiring notification of Legislative committees, a comment period, and public notice periods. [MCL 324.503 and MCL 324.2132](#). Immediate effect.

PA 619: This Act modifies the procedures used by the Michigan Natural Resources Trust Fund (MNRTF) to select projects for acquisition and/or development using MNRTF funds. The amendment provides that the MNRTF Board shall not include an acquisition of land on its recommended list if the Board determines that the seller of the land was harassed, intimidated, or coerced into selling the land by MDNR, a local unit of government, or a “qualified conservation organization” as that term is defined in the General Property Tax Act. [MCL 324.1902, 1905, 1907, and 1907a](#). Immediate effect.

PA 622: This Act provides that MDNR may sell surplus state land that is under the control of MDNR and dedicated for public use if the sale of the land will promote the development of forestry, the forest products industry, or the mineral extraction and utilization industry in Michigan. [MCL 324.2131 and 2132](#). Immediate effect.

B. Hunting and Fishing

PA 65: This Act amends MNREPA Part 401 “Wildlife Conservation” to allow MDNR to issue “deer damage shooting permits” if MDNR determines that deer have caused damage to emerging, standing, or harvested crops or to properly stored feed. Each permit application may authorize up to fifteen specific shooters to implement the provisions of each permit. [MCL 324.40114](#). Immediate effect.

PA 81: This Act amends MNREPA Part 435 “Hunting and Fishing Licensing” by adding a requirement that MDNR use monies from wild turkey hunting license fees: 1) to create and

manage wild turkey habitat on state land, national forestland and private land, 2) to take annual wild turkey hunter surveys, and 3) to test turkeys for disease. [MCL 324.43524](#). Immediate effect.

PA 241: This Act further amends Part 435 by adding a requirement that MDNR establish a “Hunters Helping Landowners Program.” The new program will allow an individual who is willing to harvest antlerless deer to submit an application to MDNR each year to participate in the program. Each individual will be limited to registration in not more than two counties. Landowners may request a list of registered hunters from MDNR. [MCL 324.43526A](#). Immediate effect; repealed effective January 1, 2017.

PA 245: This Act amends MNREPA Part 487 “Sport Fishing” to allow the fishing in Michigan waters with crossbow, in addition to the currently allowed spears and bows and arrows. [MCL 324.48703](#). Immediate effect.

PA 246: This Act amends MNREPA Part 401 “Wildlife Conservation” by adding provisions to permit disabled persons to transport and possess a firearm in certain vehicles on a state licensed game bird hunting preserve and to discharge that firearm to take an animal in the preserve if the vehicle is not moving. [MCL 324.40111](#). Immediate effect.

PA 337: This Act amends MNREPA Part 487 “Sport Fishing” to allow a person holding a valid permit to export minnows, wrigglers and crayfish that were harvested from waters outside of Michigan and imported wholesale into Michigan. Such fish taken from Michigan waters shall not be exported. Minnows, wrigglers and crayfish imported into Michigan must be held separately from any taken from Michigan waters. [MCL 324.48729](#). Immediate effect.

PA 339: This Act amends MNREPA Part 435 “Hunting and Fishing Licensing” to allow any disabled veteran to obtain free of charge any resident hunting or fishing license issued by the state. [MCL 324.43537](#). Immediate effect.

PA 340: This Act amends MNREPA Part 401 “Wildlife Conservation” to allow a person to transport or possess an unloaded firearm in or upon a vehicle on a sporting clays range. [MCL 324.40111\(4\)](#). Immediate effect.

PA 471: This Act further amends MNREPA Part 487 “Sport Fishing” by repealing all of the detailed prohibitions and limitations within the statute on netting certain types of fish in Michigan waters. The amendment adds that MDNR “may issue an order” regulating the taking of fish with nets in state waters. [MCL 324.48703](#). Immediate effect. On February 7, 2013, MDNR

issued Fisheries Order 229 “Netting Regulations.” The regulations specify: 1) the season (in months or portions of months) that certain fish can be netted, 2) the permissible type of nets that may be used, 3) the waters of the state where such netting is permissible for each type of fish (Great Lakes, inland lakes, rivers, and/or streams, and 4) the species of fish which can be netted in each location. The replacement of the statutory restrictions with the regulations within FO-229 generally increases the netting opportunities for Michigan fisherman.

PA 520: This Act further amends MNREPA Part 401 “Wildlife Conservation” by adding “wolf” to the list of almost forty game animals and birds (from badgers to woodcocks) that may be hunted in the state. The statute also “authorizes the establishment of the first open season for wolf” since Michigan began regulating hunting on private and public land in the 1920’s. The amendment also sets fees for wolf hunting licenses. The Act establishes a “wolf management advisory council” to annually submit a report to the agriculture commission and the Legislature that makes nonbinding recommendations as to the proper management of wolves in the state. [MCL 324.40103](#), [40110B](#), [40118](#), [43528B](#), and [43540E](#). Immediate effect. MDNR is currently updating its wolf census (700 in the last census) and gathering other data, and expects to present a wolf management plan to the Michigan Natural Resources Commission in May or June, 2013. MDNR may include a wolf hunt in a limited portion of the Upper Peninsula if it believes that a hunt is necessary to reduce wolf/human contact where other control methods have not worked. If a ballot issue to repeal this amendment ends up on the 2014 ballot, the implementation of this amendment including the first wolf hunt will be put on hold until after the election.

C. Clean Corporate Citizens

PA 554: This Act adds a new part to MNREPA. Part 14 “Clean Corporate Citizens” (C3) establishes steps that facilities can take in order to qualify as a Clean Corporate Citizen (C3). The C3 title makes numerous benefits available to corporate entities that commit to certain environmental stewardship efforts. Any facility that is located in Michigan and is subject to any state or federal environmental requirement(s) can choose to earn the C3 title; this title is available to public institutions, municipal buildings and business establishments, among others. C3s are entitled to several benefits including priority permit processing and license renewal applications, extended permit terms, fewer governmental inspections and, a qualifying facility will not be subject to civil fines for a violation of an applicable state environmental requirement if prompt reporting and remediation efforts occur. In order to obtain the C3 designation, a facility must adopt and maintain a written environmental policy and an accompanying program that establishes environmental goals and maintains progress reports to demonstrate advancement toward those goals. [MCL 324.1401-324.1429](#). Immediate effect.

PA 556: This Act makes Public Health Code Part 135 “Radiation Control” and Part 138 “Medical Waste” subject to the Part 14 “Clean Corporate Citizens” standards that fall within MNREPA and are addressed by PA 554, above. [MCL 333.13537 and MCL 333.13832 subject to MCL 324.1401 and MCL 324.1429](#). Immediate effect.

PA 557: This Act makes the Safe Drinking Water Act subject to the Part 14 “Clean Corporate Citizens” standards that fall within MNREPA and are addressed by PA 554, above. [MCL 325.1023 subject to MCL 324.1401 and 324.1429](#). Immediate effect.

D. Other

PA 297: This Act amends MNREPA Part 353 “Sand Dunes Protection and Management” by eliminating several provisions and adding others. The Act eliminates a provision that previously allowed local zoning ordinances in critical dune areas to be more restrictive of development than the model zoning plan set forth by the MDEQ. The changes also require that, in order for the MDEQ or local governments to deny a permit, variance or special exception to an ordinance, they must be able to prove that the request would, more likely than not, result in harm to the environment that would significantly damage the public interest or deplete or degrade the diversity, quality or functions of the critical dune area. This change makes it more difficult for the MDEQ and local governments to deny permits under the critical dunes program because the burden of proof is shifted from the applicant and to the government. The right to request a formal hearing to address a certain use of a critical dune area is now limited to the applicant and owners of adjacent properties. Furthermore, the right to request an action to address a violation of a model zoning plan or local zoning ordinance related to a critical dune area is limited to the MDEQ or a local unit’s governing body. The changes state that the MDEQ and local governments may not require an environmental site assessment or environmental impact statement as part of a permit or variance application unless it is for a special use project. The conditions that trigger the variance requirement for particular uses in a critical dune area have also changed. The time that a local unit has to review an application for a special exception under the model zoning plan and the time that the MDEQ has to review that local unit’s decision is reduced from 60 days to 30 days. The section that previously provided for appropriations to departments in order to implement and enforce Part 353 and to soil conservation districts to comply with this Part was repealed. [MCL 324.35301-324.353.23](#). Immediate effect.

PA 56: This Act amends MNREPA Part 301 “Inland Lakes and Streams” by imposing a criminal fine for misuse of a public road end that ends at an inland lake or stream. Unless a recorded instrument, such as a deed or easement, expressly authorizes such uses, it is a misdemeanor offense to construct boat hoists or anchoring devices, dock a boat between midnight and

sunrise or any other activity that would impede ingress or egress for an inland lake or stream. The offense is punishable by a fine that can be as much as \$500. There are exceptions for seasonal public docks or wharfs that a municipality authorizes. [MCL 324.30111b](#). Immediate effect.

PA 247: This Act amends MNREPA Parts 13 “Permits,” 303 “Wetlands,” 325 “Great Lakes Submerged Lands” and 414 “Aquatic Invasive Species Advisory Council” to eliminate a permit requirement and allow certain activities between the ordinary high-water mark and the water’s edge. More specifically, the amendments forego the permit that was previously required to mow or remove vegetation between the ordinary high-water mark and the water’s edge and provide that certain other activities are no longer subject to Part 303 or 325. The amendments also require the Aquatic Invasive Species Council to review and make recommendations for ways to control *phragmites australis*, an aggressive weed that looks like tall grass and is commonly found in wetlands. This Act affects [numerous sections of MCL 324](#). Immediate effect.

PA 251: This Act amends MNREPA Part 751 “Dark Sky Preserve” by designating additional areas as dark sky preserves (areas that are free of any artificial light pollution) and prohibiting the establishment of dark sky preserves in the Upper Peninsula. [MCL 324.75101](#), [MCL 324.75102](#) and [MCL 324.75104](#). Immediate effect.

PA 574-578: These Acts modify the Michigan Civilian Conservation Corps Act by amending Chapter I (Michigan Civilian Conservation Corps State Program) and adding Chapter II (Michigan Civilian Conservation Corps Partnership). Both chapters provide for the “Michigan Civilian Conservation Corps”; however, Chapter I applies to the MDNR administered Corps and Chapter II applies to a Corps operated by a separate entity. The changes to Chapter I include a limit on the compensation of a Corps member to two times minimum wage and an expansion on the defined environmental purposes that the Corps aims to serve. The new chapter “Michigan Civilian Conservation Corps Partnership” was developed to create the Michigan Civilian Conservation Corps Partnership Steering Committee within the MDNR and to define its duties, work experience criteria and member eligibility requirements. If the director of the MDNR determines that benefits from the Corps can more reasonably be achieved by utilizing an entity, Chapter II enables the MDNR to cease operating under Chapter I and to enter into an agreement with the chosen entity to provide corps members to the MDNR for work training programs on State-owned lands under the MDNR’s control. Both chapters establish the same eligibility criteria and two year employment cap for Corps members. [MCL 409.302-409.304](#). Immediate effect.

PA 411: This Act establishes the Rural Development Fund, which is a fund within the State Treasury, and creates a Rural Development Fund Board within the Department of Agriculture and Rural Development (MDARD). The Board will develop criteria that will be used to evaluate project proposals for money from the Fund. The criteria must provide a preference for projects that address the expansion and sustainability of land-based industries; worker training related to those industries; and energy, transportation, communications, water, and wastewater infrastructure to benefit rural communities. [MCL 286.942–286.947](#). Immediate effect.

PA 412-414: These Acts amend the General Sales Tax Act, the Use Tax Act and Part 2 “Corporate Income Tax” of the Income Tax Act to provide tax breaks for mining-related activities. The sale of personal property for use at a producing mine or facility where beneficiation of minerals occurs can be excluded from the computation of the associated sales tax. The Use Tax no longer applies to the storage, use or consumption of personal property sold for use at a producing mine or facility where beneficiation of minerals occurs. The Corporate Income Tax amendment states that a taxpayer who is subject to the mineral severance tax under the Nonferrous Metallic Minerals Extraction Severance Act can deduct any income derived from a producing mine, beneficiation of minerals, or both. [MCL 205.54dd](#), [MCL 205.94aa](#) & parts of [MCL 206](#). Immediate effect.

PA 488: This Act amends MNREPA Part 527 “Municipal Forests” to include recreational use as an approved use of municipal forestland. Part 527 states that a municipality may acquire land or provide land already in its possession for a forestry purpose. The Act now permits municipalities to use such land for forestry and/or recreational purpose so long as the recreational use does not interfere with any forestry use. “Municipal forestland” was previously defined as homestead, tax, swamp, or primary school land that certain State departments and officers could sell to a public agency for a *forestry purpose*; this Act expands the definition to approve sale and use for *forestry and/or recreational purposes*. When State land that is distributed for forestry and/or recreational purposes is no longer used for either purpose, it will revert to the State. [MCL 324.52702 and MCL 324.52706](#). Immediate effect.

3. Water and Water Quality

PA 43: This Act repeals Section 3111 of MNREPA which required anyone doing business in the State to file an annual report with the MDEQ if the person discharged any wastewater containing waste in addition to sanitary sewage into State waters or to any sewer system. As of the date of publishing, this Act is not available in MCL format. Immediate effect.

PA 511: This Act amends MNREPA Part 52 “Strategic Water Quality Initiatives” (SWQI) which addresses the SWQI Loan Program. The Act adds construction activities related to sewage

treatment plants, stormwater treatment, wetland mitigation banks and nonpoint source pollution projects to the list of activities that are eligible for a loan through the Program, so long as the activity being funded is designed to protect water quality. The Act also states that SWQI funds may be used to grant money to municipalities for sewage collection and treatment systems and wetland mitigation banks. The MDEQ is now required to provide an annual report that explains the use of funds under the SWQI that are received from the Great Lakes Water Quality Bond Fund. [MCL 324.5201-324.5204](#). Effective January 2, 2013.

PA 559: This Act amends MNREPA Part 52 “Strategic Water Quality Initiatives” to establish a wetland mitigation bank funding program (WMBFP). The WMBFP will provide grants and loans to eligible municipalities. Grants awarded under the WMBFP will provide assistance to municipalities so that they have the ability to complete loan application requirements that are necessary to receive funding from the WMBFP or for a different source of funding. Loans under the WMBFP will provide assistance to municipalities to establish a wetland mitigation bank. The MDEQ must provide an annual report that outlines the number of applications received, the name of each municipal applicant, the amount of local match for each grant awarded and the individual and annual cumulative amount of grant and loan funds awarded. [MCL 324.5204f](#). Effective January 2, 2013.

PA 560: This Act amends MNREPA Part 53 “Clean Water Assistance” so that the MDEQ is required to award a maximum of 50 points to proposed sewage treatment works, stormwater treatment, or nonpoint source projects in disadvantaged communities when developing its project funding priority list. In order to be labeled as a “disadvantaged community” the municipality must show that users who will benefit from the project will be directly assessed for the associated construction costs and either (i) >50% of the area served by the proposed project is identified as a poverty area by the U.S. Census, or (ii) the median household income of the area served by the proposed project does not exceed 120% of the statewide median annual household income. [MCL 324.5301 & 324.5303](#). Effective January 2, 2013.

PA 561: This Act amends MNREPA Part 54 “Safe Drinking Water Assistance” to provide that formal action points awarded to a proposed project in the MDEQ’s development of a list to prioritize public water supply funding projects should be included in total points. This Act also adopts the revised definition of “disadvantaged community” addressed by PA 560, above. However, for purposes of PA 561, the updated definition of “disadvantaged community” applies to public water supply projects rather than sewage or stormwater treatment projects. [MCL 324.5402, 324.5406 & 324.5411](#). Effective January 2, 2013.

PA 562: This Act amends MNREPA Part 197 “Great Lakes Water Quality Bond Implementation” to revise the allocation of money from the Great Lakes Water Quality Bond Fund in order to increase the amount deposited in the Strategic Water Quality Initiatives Fund and decrease the amount deposited to the State Water Pollution Control Revolving Fund. [MCL 324.19708](#). Effective January 2, 2013.

PA 563: This Act amends MNREPA Part 31 “Water Resources Protection” to make numerous exceptions to management and reporting rules that address the land application of biosolids. Bulk biosolids and derivatives can be used for landscaping purposes in certain locations so long as one can demonstrate that the material is stable, presents minimal nuisance, is of exceptional quality and that the material will be used for its nutrient value in accordance with the generator’s approved residuals program. [MCL 324.3131](#). Effective January 2, 2013.

PA 602: This Act establishes MNREPA Part 317 “Aquifer Protection and Dispute Resolution.” The Act permits an owner of a small-quantity well to file a complaint with the MDEQ or the Michigan Department of Agriculture and Rural Development (MDARD) if the owner’s well fails to produce its typical supply or does not provide potable water and the owner believes that the problems are caused by a high-capacity well. When a complaint is filed, the director of the department with which the owner filed the complaint must make a diligent effort to resolve the issue; if the issue cannot be resolved and an investigation indicates a legitimate claim, then the MDEQ Director must declare a groundwater dispute. When a dispute is declared, the owner of the high-capacity well can refuse to participate in the dispute resolution process, in which case the dispute must be resolved as otherwise provided by law; if they agree to participate then they may be required to provide the owner of the small-quantity well reasonable and timely compensation. An “Aquifer Protection Revolving Fund” shall be developed to support the implementation of this section. [MCL 324.31701-324.31712](#). Effective January 9, 2013.

Should the Detroit Water and Sewerage Department be Privatized?

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I. Introduction

In an effort to combat budget deficits, escalating costs, and deteriorating infrastructure, some municipalities are exploring the controversial option of allowing private companies to provide drinking water and sewage treatment services to the public. Water infrastructure in many communities has already reached advanced stages of decay, and if investment (public or private) does not reverse this trend soon, many of the water quality gains made by the Clean Water Act, 33 USC 1251 *et seq.*, in the past three decades may be compromised.

[†] The author thanks Kirk Meadows and Christopher Dunsky for their assistance editing this article and helping the author to update it to reflect recent legal developments affecting the Detroit Water and Sewerage System

Proponents of private participation in the water sector stress that public-private-partnerships are necessary and more than just financial transactions. Of paramount importance is the fact that they facilitate a transfer of compliance, investment, and risk away from the public sector and onto its private partner. The argument is that government is inherently risk averse—and thus reluctant to introduce innovative management and operational techniques—when innovation is precisely how operational costs can be reduced, energy efficiencies achieved and financial partnerships forged. Opponents of privatization, however, believe that a city’s duty to deliver safe drinking water to the public may not be abdicated and that private corporations should neither profit from nor control a vital resource such as drinking water.

The water system in Detroit, Michigan, where for the past decade support to privatize or regionalize the Detroit Water and Sewerage Department (the DWSD) has gained momentum, is a prime example of the debate. Two recent events have reignited this issue. First, Michigan governor Rick Snyder has appointed an Emergency Manager to oversee the finances of Detroit. Second, after more than thirty-five years, federal court oversight of the DWSD has abruptly concluded. These two events have not only reignited the privatization debate but also refocused the discussion from a debate about the public versus the private sector to a debate about whether leveraging the DWSD and its assets will provide Detroit, both short and long term, with necessary city funding.

II. DWSD Background

A. History of Conflict

Understanding the political and legal history of the DWSD is critical to understanding its current status and the drivers for the increased interest in privatizing the DWSD. It is one of the largest water and sewer utilities in the United States.¹ The DWSD provides drinking water, and wastewater collection, treatment and disposal for approximately four million people in Detroit and neighboring Southeast Michigan communities.² The major components of the sewerage system include the wastewater treatment plant, a collection system within the City of Detroit (including approximately 3,800 miles of trunk and lateral sewers), 14 pumping stations, 4 major interceptors within the City, and 39 miles of interceptors outside the city limits.³ The DWSD has provided service to an increasing number of surrounding communities since 1940 when the newly constructed Wastewater Treatment Plant was put into operation. Currently, DWSD has contracts for wastewater service with a number of customers outside the City. Many of these

¹ DWSD, [About DWSD](#) (accessed Apr 1, 2013).

² *Id.*

³ Interceptors collect wastewater transport to the wastewater treatment plant.

customers are county agencies, sewer districts or authorities, which in turn have contracts with individual communities.⁴

The DWSD is a department of the City government, albeit managed as a separate enterprise fund. Pursuant to the City of Detroit Charter, the DWSD is headed by a seven member board of water commissioners.⁵ The Board appoints, with the mayor's approval, a director and a deputy director of the department. The Board also has the authority to establish water and sewage rates charged to customers and to direct the supply of water, drainage and sewage services within and outside the City.⁶

However, a conflict exists between Detroit and its suburbs over the management of the DWSD. This conflict is a microcosm of broader tensions that have existed since the proliferation of suburban development after the 1967 Detroit riots. The exodus out of Detroit, coupled with the near-collapse of the automotive economy, has left the City with a diminished tax base and devastating economic and social problems. The Detroit metropolitan area has been described as one of the most racially, economically, and geographically polarized regions in the United States.⁷ Among the nation's major cities, Detroit is at or near the top in unemployment, poverty, and infant mortality.⁸

DWSD's history of environmental violations is another source of stress. In terms of drinking water quality, Detroit's tap water contains relatively few contaminants. It has earned good ratings for quality and compliance.⁹ However, Detroit's watershed is extremely vulnerable to contamination from its sewage plant and storm sewer system. Despite lawsuits against the City by various environmental agencies, Detroit continues to struggle with compliance as it lacks the resources for necessary capital improvements and maintenance.

B. The DWSD Litigation, Attempts to Reform the System and the Conclusion of Federal Court Oversight

In 1977, the United States Environmental Protection Agency (EPA) initiated an action against the City of Detroit, the DWSD, and the state of Michigan alleging violations of the Clean Water Act.¹⁰ The EPA alleged that the City discharged pollutants from sewage treatment facilities into the Detroit River. Within a few months, all suburban communities with wastewater treated by

⁴ See DWSD [Practices and Policies](#), (accessed Apr 1, 2013).

⁵ See [Detroit Charter](#), sec 7-1201.

⁶ *Id.*, sec 7-1202.

⁷ Zeemering, Guiding Regionalism and Reform from the Court: Judge John Feikens, 70 *Pub Admin Rev* 792, 794 (2010).

⁸ Michigan Department of Community Health, [Michigan Infant Death Statistics](#) (Lansing, 2012).

⁹ See Natural Resources Defense Council, [What's on Tap?: Grading Drinking Water in U.S. Cities](#) (New York, 2003) (accessed Apr 1, 2013).

¹⁰ 33 USC 1251 *et seq.*

the DWSD were joined as parties to the litigation. Rather than having a trial, a Consent Judgment, entered by then U.S. District Judge John Feikens, mandated compliance by the DWSD in such matters as staffing, maintenance, repair-part procurement, sludge disposal and, most important, effluent limitations.¹¹ Specific dates for compliance in each area were incorporated into the Consent Judgment, but it became clear early that compliance would not be achieved easily or quickly. Indeed, in 1978, testing at DWSD's Waste Water Treatment Plant revealed that the DWSD had failed to comply with the terms of the 1977 Consent Judgment, including failing to comply with staffing requirements.

During the next three decades, the DWSD oscillated between compliance and noncompliance with the Consent Judgment. To combat violations, Judge Feikens issued an order in 1978 appointing then Detroit mayor, Coleman A. Young, as Special Administrator of the DWSD. Judge Feikens gave the Special Administrator very broad powers to take various actions that "otherwise would have been prohibited" by the City Charter, including bypassing the DWSD Board and the Detroit City Council on "matters relating to the procurement of materials and services" that DWSD needed in order to comply with the 1977 Consent Judgment.¹² Since 1978, each subsequent Detroit mayor has inherited the role of Special Administrator, a position ripe with allegations of political corruption and favoritism.¹³

Overall, reasonable minds may differ as to whether Feikens' Consent Judgment actually improved the DWSD's political or environmental conditions. However, one thing is uncontested regarding the DWSD-EPA litigation: it lasted for more than thirty-five years. On November 29, 2010, Judge Feikens retired and the case was reassigned to U.S. District Judge Sean Cox. Within three months, Judge Cox made three major changes in the oversight of DWSD. First, he removed F. Thomas Lewand, who served as the "special master" under Feikens.¹⁴ Second, Judge Cox required, via a Stipulated Order, that the DWSD create a regional board to

¹¹ Judge Feikens's association with this case earned him the nick-name "the sludge judge."

¹² *United States v. City of Detroit*, slip op, No 77-71100, at 11 (ED Mich, Sep 09, 2011) (Cox, J).

¹³ In December 15, 2010, a federal Grand Jury issued a thirty-eight count indictment against former Mayor and DWSD Special Administrator, Kwame Kilpatrick, along with the former DWSD director, Victor Mercado. It alleged that Kilpatrick and Mercado extorted and rigged municipal contracts awarded to their friends. Mercado eventually pleaded guilty to conspiracy charges and Kilpatrick was ultimately convicted of 24 counts of extortion, mail fraud, tax violations and racketeering. This was not the first instance of corruption related to DWSD contracts. See e.g. *United States v. Bowers*, 828 F2d 1169 (6th Cir, 1987) (involving convictions and guilty pleas of a former DWSD Director related to illegal sludge-hauling contracts).

¹⁴ Special Master Overseeing Water Dept. Fired, *The Detroit News*, Feb 4, 2011, at p 1. (The firing occurred after Lewand failed to detect the alleged contracting scandal created by former Mayor Kilpatrick and former DWSD Director Victor Mercado).

help comply with the Clean Water Act.¹⁵ Third, on March 27, 2013, Judge Cox ordered the termination of the Consent Judgment and closed the case.¹⁶

After finding that the DWSD was in substantial compliance with the Clean Water Act, the judge retained limited jurisdiction for the purpose of enforcing previously issued orders, but otherwise closed the case.¹⁷ The conclusion came after Judge Cox had previously issued orders for the Mayor of Detroit, Dave Bing, and the Board to remedy the root causes of the City's non-compliance with the Consent Judgment. Judge Cox then ordered implementation of the Mayor's plan and required the City to submit to the court 90-day updates on its progress.¹⁸ The plan aimed to fix the systemic problems that have afflicted the DWSD for years. These problems are discussed below.

C. Systemic Problems of the DWSD

Four basic problems, several of which appear to have been corrected, hinder or hindered the operation of the DWSD. First, aging and deteriorating wastewater treatment infrastructure still prevents adequate dewatering of solids. The Detroit sewage treatment plant, which discharges into the Detroit River, is "one of the biggest in the world and is the largest single polluter of the river."¹⁹ An investigative report ordered by Judge Feikens in 2008 found that environmental violations were caused by the failure to replace and maintain sludge dewatering facilities and the inability to remove and dispose of these solids.²⁰ These violations impact the upper Lake Erie Basin by causing excess discharges of dissolved phosphorus which nourishes toxic blue-green algae—algae now prevalent enough to be seen from space as it clogs parts of the western half of the lake. While it is estimated that Southeastern Michigan contributes about half of the point-source phosphorus that ends up in Lake Erie, Michigan remains a relatively minor player in the drive to combat the problem.²¹ It is estimated that upgrading the water system to address this issue will cost roughly \$20 billion.²²

¹⁵ Seven years of experience in a regulated industry, a utility, engineering, finance or law is required of Board Members.

¹⁶ *United States v. City of Detroit*, [slip op, No 77-71100](#), at 33 (ED Mich, Mar 27, 2013) (Cox, J). *See, generally*, [Judge Closes Out 1977 Federal Pollution Case Against Detroit Water Department](#), *Detroit Free Press* (Mar 27, 2013).

¹⁷ *Id.*

¹⁸ *See United States v. City of Detroit*, slip op, No 77-71100, at 10 (ED Mich, Nov 04, 2011)

¹⁹ Natural Resources Defense Council, n 9.

²⁰ Sludge is a semi-solid material that is left after wastewater is treated. The failure to adequately remove these solids causes a backup of solids in wastewater treatment plant processes. Ultimately, this accumulation of solids became so great that it was relieved via the plant's effluent outfalls to the receiving waters. This results in excessive concentration of the solids in the plant's effluent and leads to the violations of permitted discharge limits.

²¹ Massive Algae Blooms Threaten Lake Erie, *The Detroit News*, Oct 10, 2009.

²² Kaffer, [Detroit Shrinking Population Deepens Water Department Problems](#), *Crain's Detroit Business*, May 02, 2010 (accessed Apr 1, 2013).

Second, bureaucratic hurdles prevented DWSD from operating efficiently. This in turn diminished the ability of the DWSD to treat wastewater effectively. The City of Detroit Human Resources Department, which has faced its own staff reductions, previously controlled the hiring process for the DWSD.²³ This resulted in significant delays in filling critical DWSD positions. The City's personnel policies, civil service rules, union rules and agreements restricted the compensation, recruitment, and prompt hiring of necessary personnel at the wastewater treatment plants.²⁴ However, the DWSD now has its own fully functional, in-house human resources department and is meeting staffing requirements.

Third, because the DWSD had to go through the City's Purchasing Department to buy necessary replacement parts for wastewater treatment equipment, rigid bidding and purchasing procedures prevented timely maintenance work. Following new effluent violations in 2009, the Engineering Society of Detroit (ESD) was asked to assess and identify corrective measures. ESD found that only 50% of the 350-400 new maintenance work orders each week could be completed by DWSD staff, often due to lack of parts.²⁵ Because the City had to approve each DWSD purchase exceeding \$25,000, there were often delays in the delivery of parts and services. This changed, however, in late 2011, when Judge Cox ordered that the DWSD implement a streamlined procurement policy. The policy provides for three different levels of approval authority for various kinds of purchases. Contracts for goods that do not exceed \$100,000, can now be approved by the Director of the DWSD without the approval of the Detroit City Council.²⁶

Finally, Detroit's poor economic conditions generally inhibit its ability to update and repair its infrastructure or to hire the requisite number of employees to operate the system effectively. Like many of Detroit's woes, the causes of DWSD's problems relate to the City's dwindling population and revenue. Detroit's population has shrunk by more than half since it reached its apex in the 1950s as the country's fourth-largest city. As Judge Feikens explained, "[w]hen you reduce revenue from that number of people, it doesn't diminish costs. It costs almost as much to make 500,000 gallons of water as 2 million."²⁷ Furthermore, Detroit's economic instability damages its ability to raise bond revenue to pay for water and sewage improvements.²⁸ Although one way to increase revenue is to increase the water rates charged to customers, City

²³ Judge Cox ordered in 2011 that the DWSD set up an independent Human Resources, Legal, Finance, and Procurement functions. *United States v. City of Detroit*, slip op, No 77-71100 (ED Mich, Nov 04, 2011)

²⁴ Union Fights Detroit Water Dept. Policy Changes, *The Detroit News*, Nov 11, 2011 (reporting that the DWSD employees have worked in "deplorable conditions for decades").

²⁵ See *United States v. City of Detroit*, slip op, No 77-71100, at 27 (ED Mich, Sep 09, 2011) (Cox, J).

²⁶ See *United States v. City of Detroit*, slip op, No 77-71100, at 26 (ED Mich, Mar 27, 2013) (Cox, J).

²⁷ Kaffer, *supra* n 22.

²⁸ In 2010, Moody's Investor Service lowered its rating on \$4.6 billion of water and sewer bonds issued by the Detroit Water and Sewerage Department. Moody's cited the risk of Detroit's inability to service its debt as the cause.

officials are reluctant to do so. Aside from the political consequences attendant to utility and tax increases, 36% of Detroit residents live in poverty.²⁹

III. Attempts to Regionalize the DWSD

Unfortunately, no panacea exists to solve all of DWSD's problems. One state representative argues that the solution is to grant suburban communities regional control over Detroit's water and wastewater system and to replace the DWSD with a private company.³⁰ State Representative Kurt Heise has pushed for his bill, the "Regional Water Quality Authority Act," to become Michigan law.³¹ As of April 1, 2013, the bill was pending in the House Natural Resources Committee. This is not the first time lawmakers have attempted to create a regional authority, as legislation was introduced in 1999 and again in 2003.³² Others advocate for regional control of Detroit's water system, as well. In April, 2010, the Citizens Research Council of Michigan issued a report that detailed the financial benefits to the City of selling the DWSD to a regional authority.³³ Editorials in the Detroit Free Press have also argued for Detroit to sell the DWSD.³⁴ Additionally, the Mackinac Center for Public Policy, a conservative think tank, advanced the idea in 2000.³⁵

A key feature of the "Regional Water Quality Authority Act" is the creation of a controlling "authority" governed by a board of directors.³⁶ The board would have one seat for Detroit, one for each of the three counties served by the authority, and five more seats for the 126 communities served by the DWSD. The power of the authority would be vested in an executive committee comprised of the mayor of a "qualified city," an elected water commissioner from each county, and five members elected by the board of directors.³⁷ The executive committee would make decisions by a majority vote of its members. Through this structure of governance,

²⁹ United States Bureau of the Census, [State and County QuickFacts](#) (accessed Apr 1, 2013).

³⁰ Often discussed in tandem with privatization, or conflated with privatization, is the concept of regionalization. Regionalization is the administrative and/or physical combination of two or more community water systems with the goal of improving planning, operation, and management of the system. Theoretically, regionalization seeks to integrate or coordinate the physical, economic, social, informational, or personnel structure of a public water system. The important distinction between privatization and regionalization is that public systems may consolidate or regionalize without necessarily pursuing any of the previously described privatization schemes or entering into contracts with private companies. However, many of the forces underlying the growing interest in privatization, such as concerns regarding economic efficiency and water quality, also drive the interest in regionalization.

³¹ See HB 4009 (2013).

³² See SB 0781 (1999) and HB 4206 (2003), respectively.

³³ Peter J. Cavanaugh, [DWSD Update—Digesting the Detroit Water Department, Detroit Water Blog](#) (accessed Dec 7, 2011).

³⁴ See e.g. Dump the Myths and Sell the Water Dept, *Detroit Free Press*, Apr 12, 2010, p A9.

³⁵ Wolfram, [Don't Waste Water Treatment Privatization Opportunities](#), Mackinaw Center for Public Policy (Dec 1, 2000) (accessed Apr 1, 2013).

³⁶ See HB 4009, § (4)(1).

³⁷ The bill defines a qualified city as a city that owns a regional system, presumably Detroit. See *Id* § (2)(j)

the authority would approve a private operator, bid out and approve all contracts, and set water and sewer rates.

In essence, the bill aims to supplant Detroit's control over its water system with representatives from its suburban customers. One of the greatest concerns for Detroit residents is undoubtedly that this type of regionalization operates as a disenfranchisement or loss of a meaningful voice in how the City controls its assets and how local water resources are managed. Not surprisingly, one of the greatest concerns of suburban customers is that the DWSD does not adequately address the legitimate needs of the suburban communities to participate in water resource decision making, i.e., they are paying too much money for water and sewage services without sufficient input into the management of the system. Both sides seek autonomy.

In the beginning, the DWSD paid for the service lines to extend to the burgeoning suburbs, as expansion was profitable. Today, the suburbs have either built their own pump stations, water works, etc., or paid what they perceive to be more than their fair share of the cost of the DWSD's infrastructure. Because they feel that the system is now as much theirs as it is Detroit's, they seek an operational voice. Over the years, the suburban communities argue that their position has shifted from simply customers to that of shareholders due to the equity that they have invested in the system. Nevertheless, the strong desire of Detroit to maintain local control remains a significant barrier to regionalization. These political barriers to regionalization are as real and important as technical or economic barriers, if not more so.

IV. Appointment of an Emergency Manager and the Specter of Privatization:

Over protests from residents and city officials, in March 2013, Governor Snyder appointed an Emergency Financial Manager (EM) to oversee the finances of the City of Detroit. Under the polarizing emergency manager law, the EM stands in for the Mayor and City Council and assumes their powers, in addition to other powers enumerated under the emergency manager act.³⁸ The law bestows upon the EM the power to negotiate labor contracts and deal with vendors.³⁹ He can also sell City assets to raise money and cut the salaries of elected officials to reduce the City's debt, which is estimated at \$14 billion in long term liabilities.⁴⁰ Importantly, he is not constrained by the Detroit City Charter.⁴¹ MCL 141.1552(1)(r), expressly authorizes an EM to sell, lease, or transfer assets and responsibilities of a local government. But this authority is subject to MCL 141.1559, which gives the Detroit City Council a chance to make an alternative

³⁸ See MCL 141.1552(2)

³⁹ See *Id* at § 12(1)(j).

⁴⁰ Lawyer Outlines Challenges in New Job Fixing Detroit, *The New York Times*, Mar 26, 2013, p A12.

⁴¹ MCL 141.1552(2).

proposal before the asset is sold.⁴² This provision may make it difficult for an EM to sell or transfer the DWSD.

It is unclear how the appointment of the EM will affect the DWSD. Interestingly, the DWSD previously asked Judge Cox for an order creating a regional authority and transferring the DWSD's assets to a regional authority.⁴³ Cox denied the request, stating that the Court lacked the authority for such action.⁴⁴ Nevertheless, because of the EM's broad powers, many speculate that the EM will take steps to either regionalize or privatize the DWSD. The following sections of this article address the difference between regionalization and privatization and outline the various models of privatizing wastewater services.

A. Types of Privatization⁴⁵

The term "privatization" encompasses a variety of water utility operations, management, and ownership arrangements. There are four common types of privatization arrangements. First, a public water department may "outsource" responsibility for one or more specific services, such as laboratory work, meter reading, or chemical supply. Contracting with private providers for specific services is "privatization" at the most limited level and is quite common among public water suppliers. For example, in Detroit, most system construction is performed by independent contractors. The City's water department is unable to maintain a large enough staff to perform large-scale construction, and the retention of a high-volume specialized staff that would be used infrequently would make no economic sense.

Second, a public water department may contract with a private company to manage, maintain, and operate all or a portion of a city's water system for a fixed period of time, generally ranging from three to twenty years. This is known as an operation, maintenance and management, or "OMM" contract. Buffalo, New York, Evanston, Indiana, Jersey City, New Jersey and dozens of smaller cities have entered into OMM contracts. This type of management contract places at least part of the revenue risk associated with day-to-day operation of the system with a private enterprise. Payment may be tied to performance of the private company, theoretically incentivizing operational efficiency. Under shorter-term OMM contracts, cities typically remain responsible for major capital investments such as system upgrades and repairs. However, cities

⁴² Under MCL 141.1559, the governing body of the local government has 10 days to approve or disapprove the action proposed by the EM. If the governing body disapproves, it has 7 days to submit an alternative proposal that would yield substantially the same financial result for possible approval by the emergency financial assistance loan board.

⁴³ See *United States v. City of Detroit*, slip op, No 77-71100, at 3 (ED Mich, Mar 27, 2013) (Cox, J).

⁴⁴ *Id.*

⁴⁵ For discussions of the types of privatization of municipal water services and systems, see National Research Council, [Privatization of Water Services in The United States: An Assessment of Issues and Experience](#) (accessed Apr 6, 2013).

and private companies may agree that the private operator will bear both the commercial risk as well as the responsibility for most or all capital investments and improvements over a period of time. Longer-term OMM contracts typically bind parties for a longer time period (20 years or more) than a basic OMM contract because a private enterprise requires the opportunity to recover its capital investments.⁴⁶

Third, design-build-operate (DBO) contracts are a form of privatization in which a city negotiates with a private company to design, construct, and operate water supplies facilities. The legal rights and allocation of risks associated with DBO contracts vary, and may be established by service contracts, licenses, or leases. Generally, DBO contracts shift the burden of infrastructure investment to the private sector, requiring that the private firm provide the capital investment for construction or rehabilitation of physical assets. While either OMM leases or other agreements generally include an entire water system, DBO contracts are usually limited to a single facility, the ownership of which is retained by or transferred to the city. Indeed, in all types of privatization forms discussed thus far, the city or other public entity retains ownership of its physical water supply and/or treatment system.

Finally, the purest form of privatization involves the sale or lease of an existing municipal water system, or some of its assets, to a private company. Although asset sales and leases provide the largest up-front payments to a city, there are very few instances of this kind of privatization. Not only do cities fear losing effective control over their water, but legal and political barriers often restrain the sale of municipal water systems or system assets. These barriers, however, may be less of an issue with an EM currently in place in Detroit.

Although the Detroit Charter forbids the sale or privatization of the water department's essential assets without a general vote of Detroit's citizens,⁴⁷ the EM's power supersedes the

⁴⁶ Davis, [Private-Sector Participation in the Water and Sanitation Sector](#), 30 *Ann Rev Env't Resources* 144, 148 (2005)

⁴⁷ See Detroit Charter, *supra* n 5, sec 7-1204, which provides:

The following limitations shall apply relative to water and sewerage:

1. The City shall not sell or in any way dispose of any property needed to continue the operation of any city-owned public utility furnishing water and sewerage service, unless approved by a majority of city voters voting on the question at a regular or special election.
2. The City shall not grant any public utility franchise for water and sewerage services which is not subject to revocation at the will of the City Council unless the proposition is first approved by three-fifths (3/5) of city voters voting on the question at a regular or special election.
3. All contracts, franchises, grants, leases or other forms of transfer in violation of this section shall be void and of no effect against the city.

City Charter.⁴⁸ Furthermore, the emergency manager law expressly allows the EM to sell or transfer municipal assets, which includes DWSD assets.⁴⁹ However, because the EM's powers do not override state law, state laws that restrict the ability to increase water rates without a public hearing likely remain effective.⁵⁰ Public support for or opposition to privatizing the DWSD may also be very relevant to the EM's decision. There are a number of arguments for and against privatization.

B. Pros and Cons

First, numerous forces lead municipalities to consider privatizing their water supplies and wastewater treatment systems, but the most prominent reason for the increased interest in privatization is money. Unable to make the capital improvements necessary to meet new or existing regulatory requirements for drinking water and the treatment of wastewater, cities see privatization as a means to finance these costs. In 1999, the EPA estimated that nationally \$140 billion needed to be spent by water suppliers over the next twenty years to meet the standards of the Safe Drinking Water Act, 42 USC 300(f) *et seq.* Many cities currently lack the revenue for large-scale infrastructure to improve their existing water systems. Elected officials either cannot or do not want to raise the necessary funds for these improvements via bond financing—often because of debt limitations or poor credit ratings. Moreover, it is politically untenable to increase water rates by the amount necessary to replace old and failing infrastructure to meet the mandates of the federal Clean Water Act and Safe Drinking Water Act.

Second, both theoretical and empirical increases in efficiency are often cited to support privatization. Proponents of privatization argue that smaller cities operating their own water supply systems do not generally have the expertise or economies of scale from which large cities or private water suppliers benefit.⁵¹ Proponents argue for the reallocation of risks between the private and public sectors. Essentially, in exchange for a fee, private companies rather than municipalities bear the financial risks associated with infrastructure construction, system maintenance, and changes in water regulations and standards. This risk transfer can purportedly help ensure stable water rates that are politically and commercially attractive.⁵² While private companies may contractually assume operating risks, , elected or appointed officials remain ultimately responsible for any failures that affect health, safety, and other public concerns.

⁴⁸ MCL 141.1552(2).

⁴⁹ See MCL 141.1552(4), which prevents EM from selling or transferring a public utility furnishing “light, heat, or power” without approval but does not list water or wastewater treatment.

⁵⁰ See MCL 117.5e(b).

⁵¹ J. Sax, R. Abrams, B. Thompson, J. Leshy, *Legal Control of Water Resources* (West Group 2006) p 716.

⁵² *Id.* at 717.

The growing interest in the privatization of municipal water supply systems is also aligned with a broad trend in the United States for an increased role for private enterprise and a decreased role for government. Many Americans believe that government enterprises are often bureaucratic, inefficient and economically complacent, while private entities, in contrast, have the advantages of specialization and competitive markets. The reduction of government involvement across a variety of sectors may be driven by a “deficit-induced imperative to limit government spending” and a “renewed cultural enthusiasm for private enterprise.”⁵³ Further, in the last thirty years the decreased power of labor unions, which generally oppose privatization for a number of reasons, including fear of job reduction, has reduced the political and legal obstacles to privatization.

Although a leading argument for privatization is that private management can reduce water prices through increased operational efficiency, one of the greatest concerns for communities is that privatization may “lead to *higher* cost for water and water services.”⁵⁴ The studies have pointed in both directions.⁵⁵ The evidence on efficiency—comparing private versus public-sector performance—appears contingent upon the “discipline of the market.”⁵⁶ For example, a review of 100 studies comparing the efficiency of state-owned and private companies concluded that in competitive markets public enterprises rarely outperform private enterprises. In highly regulated industries, however, such as drinking water and wastewater treatment, the public sector’s “performance is relatively better,” and “occasionally outperforms the private sector.”⁵⁷

This phenomenon may be due to the fact that private water treatment providers typically operate as local monopolies, experiencing little or no competition. Thus, privatization is not the same as competition. Competition in urban water utilities is, for the most part, limited to the competitive bidding process for a service contract. However, the bidding process is often accompanied by allegations of political favoritism, which can subvert competitive bidding and increase the cost of water to consumers.

Beyond saving a few dollars a month on water bills, one of the great public concerns about private water companies relates to water quality. The fear that profit-seeking companies will cut costs and consequently reduce water quality is not unfounded. For example, in 1998, the City of Atlanta entered into a 20-year contract with United Water Services and transferred its

⁵³ Davis, *supra* n 46, at 154.

⁵⁴ Sax, *supra* n 51, at 717.

⁵⁵ See Davis, *supra* n 46, at 158.

⁵⁶ *Id.*

⁵⁷ *Id.*

entire water system to private management.⁵⁸ Atlanta expected to save around \$400 million over the term of the contract.⁵⁹ The move was heralded by advocates of privatization. However, Atlanta's tap water "regularly ran a rusty brown color, and United Water had to issue numerous 'boil orders' due to insufficient water pressure leaving the water unfit for human consumption without boiling."⁶⁰ By 2003, Atlanta retook control of its water systems after public complaints about water quality, maintenance backlogs, and rate increases.⁶¹

Communities are also concerned about the possible loss of openness and transparency of utility policies and practices. Public entities, such as the DWSD, are subject to numerous statutes and ordinances that require open meetings and records.⁶² For private companies, transparency safeguards may or may not be required in a service contract. Individual citizens may find it difficult and expensive to enforce such contractual rights against a private firm. Privatization of a public water supply may therefore reduce opportunities for community participation in the governance of a public resource, and, in the event of public dissatisfaction with water quality or rates, the public's only redress may be to protest to public officials or an appointed EM.

There is another pricing issue for which privatization and/or regionalization offers, at the moment, no satisfactory answer: whether an EM will ensure below-cost water service to lower income households. Residents of Highland Park, Michigan, an economically devastated community (surrounded by the City of Detroit) under the oversight of its own EM, face water shut-offs when they are unable to pay large water bills.⁶³ Potable water may never be free of charge, but access to it can be enhanced through social policies and through careful water pricing. For example, the rate-setting authority can, and very often do, charge higher rates to large-quantity residential users (who often have bigger lawns, larger houses, swimming pools), and, for low-income and/or low-quantity users, set lower late-payment fees and offer multiple options regarding payment plans. These types of solutions would be financially less burdensome on lower-income communities.

Currently at the DWSD, the farther a suburban community is from the five water plants, the more the community will pay because the water has to be pumped a longer distance.⁶⁴

⁵⁸ Committee on Privatization of Water Services in the United States, National Research Council, National Academy of Sciences, *Privatization of Water Services in the United States: An Assessment of Issues and Experience* (National Academies Press 2002) p 64.

⁵⁹ Thompson, Jr., *Privatization of Municipal Water Supplies*, 30 Looking Ahead 1 (1999).

⁶⁰ Arnold, *Privatization of Public Water Services: The States' Role in Ensuring Public Accountability*, 32 Pepp L Rev 3 569 (2005).

⁶¹ *Id.* at 573.

⁶² See 1976 PA 267 (Open Meetings Act)

⁶³ Sands, *Highland Park Water Bills Anger Residents Hit With Huge Back Charges*, Huffington Post, Jan 23, 2013.

⁶⁴ Detroit residents pay rates based on usage rather than geographic location. A detailed outline of water rates is published by the DWSD. See [Rate Scales and Related Information](#) (accessed on Apr 7, 2013).

Moreover, although the DWSD sets rates for communities based on their projected usage and transmission costs, each individual municipality determines the final bill for each of its customers. Suburban customers pay additional charges levied by their communities to fund their local water system, which includes funding assets such as pumping stations and above-ground storage tanks to dispense water during hours of peak use. The DWSD's rates represent about "half the actual bill a residential customer receives, with individual communities adding fees."⁶⁵ Suburban customers who bemoan rate increases reflexively condemn the City of Detroit without fully understanding that half their bill reflects charges imposed by their local, suburban communities.

Finally, the privatization and/or regionalization of water services implicates larger, systemic land management and urban planning issues. In Detroit, and in metropolitan areas across the United States, policies that promote the extension of water and wastewater infrastructure have been criticized as instruments of suburban sprawl.⁶⁶

V. Conclusion

For the first time in over thirty-five years the DWSD is no longer under federal court oversight. It is operating efficiently, and more importantly is no longer in violation of the Clean Water Act. However, with the advent of the EM, there is a public concern that the City will be stripped of its assets, including the DWSD—arguably the City's jewel. A sale of the DWSD would transfer decision-making authority to either a private company or a regional board comprised of or controlled by suburban communities. Understandably, Detroiters are reluctant to transfer the management of City assets that were built, paid for, maintained, and operated by the City. However, because of Detroit's depopulation, the majority of DWSD customers are no longer Detroit residents. Suburban communities are in the precarious position of relying on the City of Detroit to provide a vital service without being able to effectively direct the management of the DWSD.⁶⁷ Most DWSD customers live in the suburbs, and many suburbanites do not want to depend on Detroit for anything, even a final destination to a toilet flush.

Regional control of the DWSD is sensible and may be inevitable. The political opposition that once impeded regionalization appears less of an obstacle with an EM in power. Because the EM possesses broad powers to sell city assets and enter into, terminate or modify contracts on behalf of the City, the EM has the power to redefine the DWSD and possibly the City itself. He has the potential to restructure the DWSD, either through regionalization or privatization.

⁶⁵ Brace for Water Rate Boost, *Detroit Free Press*, Feb 17, 2012.

⁶⁶ Zeemering, *supra* n 7, at 799 (internal citation omitted).

⁶⁷ In April 2013, the state of Michigan approved Genesee, Lapeer and Sanilac counties' plan to detach from the DWSD. The three counties, which include the city of Flint, MI, one of the DWSD's largest customers, plan to build a pipeline that would tap Lake Huron and enable independence from the DWSD. The counties seek to reduce water cost. See Pardo, Michigan OKs Flint Plan to Secede From Detroit Water System, *The Detroit News*, April 12, 2013.

Doing so would not only acknowledge the reality that the DWSD is already a regional system rather than citywide system but may also play a critical role in restructuring Detroit's finances so that Detroit will be able afford to staff its schools, police its neighborhoods, plow its streets, and provide other essential services to Detroit residents.

Balancing the Good With the Right: Challenging the EPA's Issuance of UAOs

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Introduction

General Electric Co. v. Jackson,¹ is a fairly recent case where the United States Court of Appeals for the D.C. Circuit found that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, or Superfund) did not violate the Due Process Clause of the Fifth Amendment. This ruling was issued despite an often used argument that the only way a potentially responsible party (PRP) can contest an Environmental Protection Agency (EPA) issued unilateral administrative order (UAO) to clean up a site is by blatantly violating that order. This is because of CERCLA's prohibition of pre-enforcement judicial review.² A violation of that order exposes the PRP to daily fines and triple punitive damages in the event that it eventually loses a challenge in federal court. This paper provides a background of the case, an analysis of the burdens faced by both sides and recommended solutions to the issue.

Background

This case stems from General Electric's (GE) challenge to the constitutionality of UAOs under CERCLA, which allows the EPA to issue orders to companies to clean up hazardous waste sites. CERCLA was enacted by Congress "in response to the serious environmental and health risks posed by industrial pollution."³

The case began when in 2000, GE filed a suit in the United States District Court for the District of Columbia challenging CERCLA's UAO regime after receiving over 68 UAOs.⁴ Among GE's initial allegations were that there was a Fifth Amendment violation because CERCLA "deprive[d] persons of their fundamental right to liberty and property without . . . constitutionally adequate procedural safeguards."⁵ GE further added that, "[t]he unilateral orders regime . . . imposes a classic and unconstitutional Hobson's choice" which meant that if a PRP refused to comply, it faced "severe punishment."⁶ GE alleged that the safest route for companies to take was to "comply . . . before having any opportunity to be heard on the legality and rationality of the underlying order."⁷ GE sought "[a] declaratory judgment that the provisions of CERCLA relating

[†] The author thanks Brad Sysol for his work editing this article.

¹ *General Electric Co. v. Jackson*, [610 F.3d 110, 116 \(D.C. Cir. 2010\)](#), cert. denied, 131 S. Ct. 2959 (2011).

² 42 U.S.C. §§ [9606](#), [9613\(h\)](#) (2006).

³ *United States v. Bestfoods*, 524 U.S. 51, 55 (1998).

⁴ See *General Electric Co. v. Jackson*, 595 F.Supp.2d 8, 17 (D.D.C.2009).

⁵ *General Electric Co.*, 610 F.3d at 116 (quoting Am. Compl. ¶ 2).

⁶ *Id.* (quoting Amended Complaint, ¶ 4).

⁷ *Id.*

to unilateral administrative orders . . . are unconstitutional.”⁸ The district court dismissed GE's amended complaint for lack of jurisdiction, concluding that Section [113\(h\)](#) of CERCLA prohibits “broad, pre-enforcement due process challenge[s] to the statute . . . until EPA seeks enforcement or remediation is complete” on a particular UAO.⁹ [Section 113\(h\)](#) states that “No Federal court shall have jurisdiction . . . to review any order issued under [section \[106\]](#)”¹⁰ The Court of Appeals reversed and remanded, holding that [Section 113\(h\)](#) was inapplicable because GE did not challenge “any particular action or order by EPA.”¹¹ On remand, the district court granted EPA's motion for summary judgment on GE's facial due process challenge, holding that because a PRP can eventually challenge a UAO in court after refusing to comply, [Section 113\(h\)](#) is constitutional.¹² The court also found that the fines and potential treble damages were not severe¹³ because a PRP could always avoid them if he could show sufficient cause for not complying with the UAO.¹⁴ The district court applied the *Salerno* doctrine,¹⁵ which states that a statute cannot be found to be facially invalid unless the statute “is unconstitutional in every application.”¹⁶ The fact that fines and damages can be applied constitutionally in emergency situations made the statute constitutional.¹⁷

In its appeal, GE argued that the use of UAOs under CERCLA is unconstitutional because it violates the Due Process Clause of the Fifth Amendment.¹⁸ The Due Process Clause ensures that the government does not deprive persons of their property or liberty without first providing an opportunity to challenge the government's action, usually through a court trial or similar process.¹⁹

GE asserted that UAOs deprived PRPs of two types of protected property: (1) the money PRPs must spend to comply with a UAO or the daily fines and treble damages they face should they refuse to comply; and (2) the PRPs' stock price, brand value, and cost of financing, all of which, GE contends, are adversely affected by the issuance of a UAO.²⁰ GE argued that the penalties for violating UAOs were so enormous that they intimidated PRPs from seeking subsequent judicial review. GE relied on *Ex Parte Young*, which held that a statute violates due process if “the penalties for disobedience are by fines so enormous . . . as to intimidate the [affected

⁸ *Id.* (quoting Amended Complaint, ¶ 1).

⁹ *Id.* (quoting *General Electric Co. v. Whitman*, 257 F. Supp. 2d 8, 31 (D.D.C. 2003) *rev'd and remanded sub nom. General Electric Co. v. E.P.A.*, 360 F.3d 188 (D.C. Cir. 2004)).

¹⁰ [42 U.S.C. § 9613\(h\)\(3\)](#) (2006).

¹¹ *General Electric Co.*, 610 F.3d at 116 (quoting *General Electric Co. v. E.P.A.*, 360 F.3d 188, 191 (D.C. Cir. 2004)).

¹² *Id.* (quoting *General Electric*, 362 F. Supp. 2d 327, 342 (D.D.C. 2005) *aff'd sub nom. General Electric Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010)).

¹³ *See id.*

¹⁴ *See id.* §§ [9606\(b\)](#), [9607\(c\)\(3\)](#) (2006).

¹⁵ *General Electric Co. v. Johnson*, 362 F. Supp. 2d 327, 343 (D.D.C. 2005) *aff'd sub nom. General Electric Co.*, 610 F.3d 110 (D.C. Cir. 2010)

¹⁶ *United States v. Salerno*, 481 U.S. 739, 745 (1987).

¹⁷ *Id.*, at 344 (D.D.C. 2005) *aff'd sub nom. General Electric Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010).

¹⁸ *Gen. Elec. Co.*, 610 F.3d at 122.

¹⁹ U.S. Const. amend. V.

²⁰ *See General Electric Co.*, 610 F.3d at 117.

party] from resorting to the courts to test the validity of the legislation [because] the result is the same as if the law in terms prohibited the [party] from seeking judicial [review]" at all.²¹

Analysis

The EPA has the authority to issue UAOs as a result of the delegation of authority by the President.²² Under CERCLA, the EPA may conduct or order a PRP to engage in two types of "response actions": (1) removal actions which are short-term remedies "designed to cleanup, monitor, assess, and evaluate the release or threatened release of hazardous substances," and (2) remedial actions which are "longer-term, more permanent remedies to 'minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.'"²³ CERCLA imposes a strict liability standard on PRPs which can potentially include current and former property owners and operators.²⁴

After determining that a cleanup is necessary, the EPA may: (1) negotiate a settlement with PRPs,²⁵ (2) conduct the cleanup with "Superfund" money and then seek reimbursement from PRPs by filing suit,²⁶ (3) file an abatement action in federal court to compel PRPs to conduct the cleanup,²⁷ or (4) issue a UAO instructing PRPs to clean up the site^{28, 29}. The constitutionality of the last option is the focus of GE's litigation and this article.

For the EPA to issue a UAO, there must be a determination "that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility."³⁰ After making such a determination, the EPA must compile an administrative record and select a response action.³¹ For both the longer-term remedial action and short-term removal action, CERCLA requires that the EPA provide the PRPs and other affected persons notice of and a chance to comment on the proposed plan.³²

A recipient PRP has two choices: (a) comply with the UAO and seek reimbursement from EPA after completing the cleanup³³ or (b) refuse to comply with the UAO and wait for EPA to bring

²¹ *General Electric Co.*, 610 F.3d at 118 (quoting *Ex Parte Young*, 209 U.S. 123, 147 (1908)).

²² See Exec. Order No. 12,580, 52 Fed.Reg. 2923 (Jan. 23, 1987).

²³ See *General Electric Co. v. EPA*, 360 F.3d 188, 189 (D.C.Cir.2004) (quoting [42 U.S.C. § 9601](#) (2011)); see also [42 U.S.C. § 9604](#) (2006).

²⁴ *Id.* [§ 9607](#) (2006).

²⁵ *Id.* [§ 9622](#) (2006).

²⁶ *Id.* §§ [9604\(a\)](#), [9607\(a\)\(4\)\(A\)](#) (2006).

²⁷ *Id.* [§ 9606](#) (2006).

²⁸ *Id.*

²⁹ See *General Electric Co.*, 610 F.3d at 114.

³⁰ *Id.* [§ 9606](#) (2006).

³¹ *Id.* [§ 9613\(k\), \(l\)](#) (2006).

³² See *id.* [§ 9617\(a\), \(b\)](#) (2006) (requiring public notice of all remedial actions); See 40 C.F.R. §§ 300.415(n) (requiring community notice of removal actions), 300.810–300.820 (describing contents of administrative record and mandating public comment period for remedial and removal actions).

³³ *Id.* [§ 9606\(b\)\(2\)\(A\)](#) (2006).

an enforcement or cost recovery action in federal court.³⁴ If the PRP chooses the first option but the EPA refuses reimbursement, the PRP may sue the agency in federal court to recover its costs on the grounds that (1) the PRP was not liable³⁵ or (2) it was liable, but EPA's selected response action was "arbitrary and capricious or . . . otherwise not in accordance with law."³⁶ If the PRP chooses the second option and the court finds that the PRP willfully failed to comply with an order without sufficient cause, the court may impose fines (currently \$37,500/day) which accumulate until EPA brings an action against the PRP (a period up to six years).³⁷ In addition, if EPA undertakes the cleanup, the district court may impose punitive damages of up to three times the amount of EPA's response costs.³⁸

Perhaps the most interesting part of CERCLA, and one which has given rise to constitutional challenges, is [Section 113\(h\)](#) which bars PRPs from obtaining immediate judicial review of a UAO.³⁹ That section provides that "No Federal court shall have jurisdiction . . . to review any order issued under [section \[106\]](#)" until the PRP completes the work and seeks reimbursement,⁴⁰ or until EPA brings an enforcement action or seeks to recover fines and damages for noncompliance.⁴¹ This section is often looked at as taking UAO challenges from the purview of the courts.

With regard to one of GE's other arguments, the court held that the stigma attached to recipients of UAOs alone was insufficient to support a due process challenge.⁴² In addition to the reputational harm, there had to be (1) a deprivation by the government of a benefit to which the PRP had a legal right, such as "the right to be considered for government contracts," or (2) the government-imposed stigma had to be so severe that it precluded the PRP from pursuing "a chosen trade or business."⁴³

Consequential effects resulting from the issuance of a UAO, such as plummeting stock price, damaged brand value, and reduced credit rating, are not the kind of property interest protected by the due process clause of the Fifth Amendment.⁴⁴ The court held that there was no deprivation of a legal right or an imposition of a burden so severe that it "broadly precludes" GE from "pursuing a chosen trade or business" as GE stayed in business and did not go under.

Even if there was a deprivation of a protected property right, the court explained that under the *Ex Parte Young* test the availability of the defense that permits violation of the UAO for "sufficient cause" means that UAOs are not coercive.⁴⁵ However, "sufficient cause" is not

³⁴ *Id.* §§ [9606\(b\)\(1\)](#); [9607\(c\)\(3\)](#) (2006).

³⁵ *Id.* § [9606\(b\)\(2\)\(B\)-\(C\)](#) (2006).

³⁶ *Id.* § [9606\(b\)\(2\)\(D\)](#) (2006).

³⁷ *See* 73 Fed. Reg. 75,340, 75,340-46 (Dec. 11, 2008); [28 U.S.C. § 2462](#); [42 U.S.C. § 9613\(g\)\(2\)](#) (2006).

³⁸ *Id.* § [9606\(c\)\(3\)](#) (2006).

³⁹ *Id.* § [9613\(h\)](#) (2006).

⁴⁰ *Id.* § [9613\(h\)\(3\)](#) (2006).

⁴¹ *Id.* § [9613\(h\)\(1\), \(2\)](#) (2006).

⁴² *See General Electric Co.*, 610 F.3d at 121

⁴³ *See id.* at 121.

⁴⁴ *See id.* 124.

⁴⁵ *See id.* at 128.

defined in the statute. Several courts have held, and the D.C. Circuit agreed, that an objective good faith standard is used to determine “sufficient cause.”⁴⁶ This standard is not always clear. For example courts have held that reasons such as a PRP’s financial inability to comply⁴⁷ or a partial clean-up of an overbroad order⁴⁸ would not suffice as sufficient cause. Because the parameters of “sufficient cause” have not yet been clearly defined, the safest route a recipient of an EPA cleanup order can take is to comply.⁴⁹

UAOs are not inherently bad. They serve as a powerful negotiating tool that enables the EPA to get companies to clean up hazardous properties. *GE v. Jackson* is the latest in a long line of cases upholding the constitutionality of UAOs despite the deprivation before a hearing.⁵⁰ However, under the guise of “clean first ask questions later,” and because of the the lack of pre-enforcement judicial review, CERCLA’s UAOs conceivably give the EPA a way to strongarm companies such as GE into serving its own interests.

Recommendations

An alternate route to Congress amending [§106](#) and expressly permitting pre-enforcement judicial review of UAOs is for the EPA to create a speedy administrative hearing procedure where PRPs or companies have a certain number of days to come in and defend or justify their actions before the UAOs are enforced. These hearings would be presided over by a mutually agreed upon neutral mediator. Both the EPA and the PRP would be required submit their arguments along with any supporting documents before the hearing and brief oral arguments would be held in front of the mediator. The mediator’s determination would be binding and the losing party would bear the cost of the mediator. This would prevent arbitrary orders from the EPA and abuse of the process by PRPs. This speedy hearing procedure, which would be devoid of traditional complex litigation procedures, would satisfy advocates of UAOs who have argued that pre-enforcement review, if allowed, would defeat the primary purpose of CERCLA, which is to clean up contaminated sites as soon as possible.

Another solution would be to adopt the approach the Eleventh Circuit took in *Tennessee Valley Auth. v. Whitman*.⁵¹ In that case, the court held that the section that authorizes compliance orders under the Clean Air Act (CAA) was unconstitutional because severe penalties were imposed for violation of the compliance order as opposed to a violation of the statute itself.⁵² Accordingly, because of due process concerns, unless the EPA is able to prove an actual CAA violation, parties are free to violate the CAA orders without legal consequence.⁵³ If courts were to construe [Section 106](#) of CERCLA in the same manner as the Eleventh Circuit interpreted [Section 113\(a\)](#), a violation of a UAO would be legally inconsequential if the EPA could not prove

⁴⁶ *Id.*

⁴⁷ *U.S. v. Parsons*, 723 F. Supp. 757, 763 (N.D. Ga. 1989).

⁴⁸ *Employers Ins. of Wausau*, 52 F.3d at 664.

⁴⁹ Patricia Lindauer, *The CERCLA's Daily Penalty and Treble Damages Provisions: Is Any Cause "Sufficient Cause" to Disobey an EPA Order?*, [11 Pace Envtl. L. Rev. 657](#), 670 (1994).

⁵⁰ *See Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 391–92 (8th Cir. 1987); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 316 (2d Cir. 1986); *Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 664 (7th Cir. 1995).

⁵¹ *Tennessee Valley Auth. v. Whitman*, 336 F.3d 1236 (11th Cir. 2003).

⁵² *See id.*, at 1260.

⁵³ *Id.*

that a PRP violated CERCLA itself. Even more importantly, this approach would avoid the possibility of accruing fines and potential treble damages that can be caused by failing to comply with an order.

Finally, a way to prevent the EPA from issuing UAOs to owners or operators who did not cause the property to become contaminated is to adopt Michigan's unique liability law and incorporate it into CERCLA. Under Michigan law,⁵⁴ except for "due care" obligations, an owner or operator of a contaminated property⁵⁵ who is not responsible for that contamination has 45 days from the time he or she becomes an owner or operator to conduct a Baseline Environmental Assessment (BEA),⁵⁶ submit the results to the Michigan Department of Environmental Quality (MDEQ) within the required timeframe,⁵⁷ and disclose the results to any subsequent purchasers or transferees.

Although very similar to the Bona Fide Prospective Purchaser (BFPP) defense already available under CERCLA⁵⁸ which permits knowing acquisition of contaminated sites, Michigan's law differs from the BFPP defense in several ways. The two major differences between CERCLA's BFPP defense and Michigan's law are that: (1) while the BFPP defense requires post-acquisition compliance with due care requirements to maintain liability protection, the BEA program does not impose retroactive liability for most pre-existing contamination on owners who fail to comply with due care requirements⁵⁹ and (2) CERCLA's BFPP protection is available only if the due diligence is completed *before* acquisition of the property, while Michigan's BEA program allows the due diligence and BEA to be conducted up to 45 days after the date of acquisition.⁶⁰ If Michigan's law is adopted, the lack of retroactive liability that would otherwise result from failure to comply with due diligence requirements, and a post-acquisition grace period to complete an environmental assessment, would provide PRPs more leverage in dealing with the EPA's UAOs.

What About Sackett?

⁵⁴ [M.C.L. § 324.20101](#) *et seq.*

⁵⁵ This is assuming the owner or operator acquired the site on or after June 5, 1995 (or March 6, 1996 for Part 213 sites). If the site was before, then there is no liability.

⁵⁶ A Michigan Baseline Environmental Assessment (BEA) allows people to purchase or begin operating at a facility without being held liable for existing contamination. BEAs are used to gather enough information about the property being transferred so that existing contamination can be distinguished from any new releases that might occur after the new owner or operator takes over the property. *See* [BEAs and Due Care](#).

⁵⁷ The BEA must be submitted to the DEQ within six months of the date of purchase, occupancy, or foreclosure, whichever comes first.

⁵⁸ A 2002 Amendment allows some owners or operators who meet a specified criteria to assert the bona fide prospective purchaser defense (BFPP) and escape liability even if they are aware of the contamination prior to the purchase. *See* 42 U.S.C. §§ [9601\(40\)](#) and [9607\(r\)](#).

⁵⁹ This does not include costs to remedy environmental damage caused by the failure to comply with the Part 201 due care requirements including exacerbation of the existing contamination and taking reasonable precautions against foreseeable acts or omissions of a third party. *See* Michigan Department of Environmental Quality Part 201 [Citizen's Guide, What You Need .to Know if You Own or Purchase Property With Environmental Contamination](#), (Revised 2011).

⁶⁰ *See* Richard A. Barr, *MDEQ Seeking Major Overhaul of Michigan's Key Environmental Remediation and Brownfield Laws*, [88 Mich. B.J. 32, 33-34](#) (October 2009).

In [Sackett v. E.P.A.](#),⁶¹ the petitioners, who were homeowners, received a unilateral compliance order from the EPA which stated that they had violated the Clean Water Act (CWA) because the construction project on their residential lot was on navigable waters.⁶² The CWA prohibits “the discharge of any pollutant by any person”⁶³ without a permit, into “navigable waters.”⁶⁴ If the EPA suspects that a party has violated the CWA, it can either issue a unilateral compliance order or initiate a civil enforcement action.⁶⁵ While the statute says that a civil penalty may “not exceed [\$37,500] per day for each violation,”⁶⁶ the government contended that the amount doubles to \$75,000⁶⁷ when the EPA prevails against a person who has been issued a compliance order but has failed to comply, because EPA may collect one penalty for violating the statute plus a second penalty for violating the order.

Like the defendants in *General Electric Co.*, the Sacketts argued that the compliance order was “arbitrary [and] capricious” under the Administrative Procedure Act (APA),⁶⁸ and that it deprived them of due process in violation of the Fifth Amendment.⁶⁹ The Ninth Circuit affirmed the district court dismissal for lack of subject matter jurisdiction, concluding that the CWA precluded pre-enforcement judicial review of compliance orders and that this preclusion did not violate the Due Process Clause of the Fifth Amendment.⁷⁰ The Supreme Court held that contrary to the EPA’s view, the Sacketts may bring a civil action under the APA to challenge the issuance of the EPA’s order.⁷¹ The Court reasoned that the compliance order issued by the EPA under the CWA constituted a final agency action subject to pre-enforcement judicial review under the APA. The question now is how much does this affect CERCLA? It will likely have little impact.

Very telling is Justice Scalia’s noting in his *Sackett* opinion that “nothing in the Clean Water Act expressly precludes judicial review under the APA or otherwise.”⁷² Unlike Section 309(a) of the CWA, [section 113\(h\)](#) of CERCLA expressly provides that “No Federal court shall have jurisdiction . . . to review any order issued under [section \[106\]](#)” until the PRP completes the work and seeks reimbursement,⁷³ or until EPA brings an enforcement action or seeks to recover fines and damages for noncompliance.⁷⁴ This means that while recipients of CWA orders are entitled to

⁶¹ [Sackett v. E.P.A.](#), 132 S. Ct. 1367 (2012).

⁶² *Id.* at 1368.

⁶³ [33 U.S.C. § 1311](#).

⁶⁴ *Id.* [§ 1344](#).

⁶⁵ *Id.* [§ 1319\(a\)\(3\)](#).

⁶⁶ *Id.* [§ 1319\(d\)](#).

⁶⁷ *Id.* [§ 1370](#) (up to \$37,500 for the statutory violation and up to an additional \$37,500 for violating the compliance order). *Id.*

⁶⁸ 5 U.S.C. § 706(2)(A).

⁶⁹ 33 U.S.C. [§ 1368](#).

⁷⁰ See *Sackett v. U.S. E.P.A.*, 622 F.3d 1139, 1147 (9th Cir. 2010) *cert. granted in part*, 131 S. Ct. 3092 (U.S. 2011), and *rev'd sub nom.* *Sackett v. E.P.A.*, 132 S. Ct. 1367 (U.S. 2012).

⁷¹ *Sackett*, 132 S. Ct. at 1371-1374.

⁷² *Id.* at 1372.

⁷³ See *General Electric Co.*, 610 F.3d at 114 (quoting [42 U.S.C. § 9613\(h\)\(3\)](#)).

⁷⁴ *Id.* (quoting [42 U.S.C. §§ 9613\(h\)\(1\), \(2\)](#)).

preenforcement judicial review, recipients of CERCLA orders must either comply and seek review or wait for the EPA to begin judicial proceedings.

Conclusion

In summation, UAOs are powerful tools that the EPA uses to protect our environment. However, improper or arbitrary use can lead to dire consequences especially for UAO recipients who are not able or willing to comply with the order. Each of the three approaches discussed above would provide some reasonable protection to a PRP who has been issued a UAO before the PRP is deprived of property. The EPA has an important task in balancing its interests in protecting the environment with the interests of property owners and businesses in maintaining their properties and turning a profit. The EPA's actions in issuing UAOs have the potential to either scare or attract business to or from entire regions; this is a responsibility that should not be taken lightly especially in light of today's economic challenges.

Additionally, the *Sackett* decision hints that while the Supreme Court does not favor the EPA's use of UAOs to force the "little guy" into compliance, it will likely allow the EPA to do so because section 106 of CERCLA expressly precludes pre-enforcement judicial review.