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Message From Chair Dennis J. Donohue

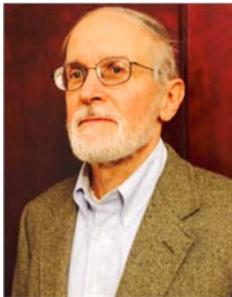


Welcome to Issue Number 102 of the *Michigan Environmental Law Journal*. I understand this will be the last issue produced by our chair of the Environmental Law Section's *Journal* Committee, Chris Dunsky. Chris has done a remarkable job with the *Journal* for many years. As part of the strategic planning process, we recently completed a survey of Section members that confirmed the high value members place on the *Journal* which is a testament to Chris' efforts. He will be missed.

And speaking of transitions, I look forward to leading the section this year and working with the Section Council and members in continuing to provide value to our membership. Mary Anne Parks has returned to the section as the Section administrator and will be an important part of that effort. Key areas of focus this year will be increasing our presence on social media, increasing the number of webinars, working with our counterparts in the Ontario Bar to develop a joint program, and updating our bylaws. Please check out our section [website](#) and follow our section on [Twitter](#) and [LinkedIn](#) to keep up with the latest developments.

Dennis J. Donohue, Chair

Message From the Editor



A new administration in Washington often marks the beginning of interesting times for environmental lawyers, especially when it changes from Democrat to Republican. When Ronald Reagan replaced Jimmy Carter, the Reagan administration distrusted nearly all EPA staff and gave those of us in enforcement very little to do. I remember spending many idle hours reading in the EPA library as an enforcement lawyer at EPA headquarters at the time. But after Congressional hearings regarding alleged sweetheart Superfund settlements and significant public criticism, President Reagan appointed Bill Ruckelshaus as administrator and gave him free rein to run the Agency without interference. Although the early Reagan EPA would have been happy to deep-six CERCLA, which a Democratic Congress had enacted just a month before the election, the later Reagan and Bush years proved to be the golden age for environmental lawyers. CERCLA

litigation proliferated not only in the D.C. Circuit, but in U.S. district courts everywhere, and of course each defendant had to hire a lawyer.

Will our experience with the Donald Trump administration follow suit? Although the new administration has been thoroughly and frequently criticized for numerous gaffes, missteps, and “alternative facts,” there isn’t yet a unified public outcry over plans to reverse President Obama’s environmental initiatives. Unlike the Carter administration, which prudently codified its cleanup program in statutory form (CERCLA), the Obama administration had to rely on administrative rules for most of its key initiatives. Many of these rules, including the Waters of the United States Rule, the Clean Power Plan, and more stringent automobile mileage standards, were not promulgated until late in Obama’s second term. Unlike statutes, these rules are vulnerable to being revoked by the new EPA administrator as long as he gives a rational explanation for doing so. Just when we thought we knew where environmental law was going, American voters and the Electoral College gave us a surprise ending worthy of American author O. Henry (see [The Ransom of Red Chief](#)). These will be interesting times, indeed, but I do not think they will follow the Reagan script.

While we’re talking about endings, this is the last issue of MELJ that I will edit. After five and one-half years and 20 issues, it’s time for someone else to take over as editor of MELJ and chair of the *Journal* Committee. I sincerely thank everyone who has contributed to the success of the *Journal*, especially our numerous authors who shared their experiences and insights into the law, and our assistant editors who unselfishly spent many hours making other authors look good and who often wrote many articles when other authors were scarce. I thank my friend Charlie Denton who invited (challenged?) me to take over as editor when he became chair of the Section. And I thank all our readers. May you all enjoy the interesting times to come in the ever-changing practice of environmental law.

Christopher J. Dunsky
Editor, *Michigan Environmental Law Journal*

Upcoming Events

Clearing the Air in 2017 Spring Air Program, co-sponsored by the Environmental Law Section and the Michigan Manufacturers Association, is scheduled for **Thursday, April 13, 2017**, from 8:30 a.m. to 2:00 p.m. The program will take place at the MMA offices in Lansing. Registration and agenda details are available at www.mimfg.org.

Environmental Lawyers’ Next Frontier: Vapor Intrusion Webinar, will be held **Thursday, March 30, 2017**, from Noon to 1 p.m., presented by the Hazardous Substances & Brownfields Committee.

Register at: <https://attendee.gotowebinar.com/register/5946336285703426051>

There will be a **second Vapor Intrusion** webinar in mid-April, focusing on current vapor intrusion issues in transactional due diligence and due care. Watch for an e-mail announcement soon providing details.

Past Events

The Natural Resources, Energy, & Sustainability Committee of the Section recently hosted an Endangered Species Act & Land Use webinar. A recording of the webinar is available [on the Section's website](#).

The Joint Environmental Conference between the Section and the East & West Chapters of the Air & Waste Management Association was held on December 1. Materials from the conference are available [on the Section's website](#).

New Energy Legislation in Michigan Effective in April 2017

Charles M. Denton and Lydia Barbash-Riley, Barnes & Thornburg LLP

Significant Michigan energy legislation will become effective April 20, 2017, after Governor Rick Snyder signed Public Acts [341](#) and [342](#) into law in late December. Many years of heated discussions, legislative drafting and re-drafting, negotiations among the various stakeholders, and other activities resulted in this comprehensive new Michigan energy legislation, totaling almost 250 pages of text. The energy policy overhaul establishes a new long-term planning process for traditional utilities as they aim to retire power plants and consider replacements for coal; increases renewable energy portfolio and efficiency expectations; addresses the Michigan Public Service Commission (MPSC) contested case procedures; and retains much of Michigan's electric choice program.

Some of the key changes and compromises accomplished by this legislation are highlighted below.

Electric Choice

The current 10% electric choice program continues under the new legislation, but there are additional requirements which must be met by alternative electric suppliers which could potentially increase costs for suppliers and thereby reduce savings for customers. There is also a potential Midcontinent Independent System Operator (MISO) capacity charge that may be assessed against energy providers (therefore also likely on the electric choice customers); however, the final version of the legislation establishes an MPSC process to determine this MISO capacity charge. This correlates with the MPSC requirements for each electricity provider to have adequate capacity for its projected load with a reserve margin.



Charles M. Denton



Lydia Barbash-Riley

Integrated Resource Planning & Certificate of Necessity

Evaluating future energy needs and planning for electric generation will be part of the new Integrated Resource Planning (IRP) process, which involves various stakeholder representatives. IRP requirements include electricity sales and peak demand forecasts; projected renewable energy capacity produced or purchased; generation technology and fuel costs; and more. The Michigan Department of Environmental Quality advises MPSC on air emissions as part of this IRP review process. Increased accountability for cost-effective utility investments is the goal of the improved Certificate of Necessity (CON) process contained in the new law for projects of \$100 Million or more or greater than 225 MW generation. Although not exactly a competitive bidding process, feasible alternatives will need to be considered, cost overruns presumed not reasonable or prudent, and interested stakeholders may intervene in MPSC proceedings. Judicial review of final MPSC rulings will be by the Michigan Court of Appeals.

Renewable/Alternative Energy

The new law sets a “goal” that 35% of the state’s electric needs should be met by renewable energy sources and energy efficiency or energy waste reduction, with 2008 as the baseline for calculating this percentage. The current renewable portfolio standard of 10% is extended to 2018 and increased to 12.5% by 2019 and 2020 and to 15% by 2021. Renewable energy facilities qualifying for the Renewable Portfolio Standard must still be located within the State of Michigan (with limited exceptions for Indiana, Ohio, and Wisconsin non-profit renewable energy suppliers). Revised renewable energy plans will be reviewed in MPSC contested case hearings. Renewable Portfolio Standard calculations may include new and expanded waste-to-energy facilities. The renewable fuels definition is also expanded to include other municipal solid waste such as non-recyclables plastics. Energy efficiency will now be known as “energy waste reduction,” and will be addressed in utility Renewable Energy and Energy Waste Reduction Plans to be reviewed in MPSC contested case hearings.

Co-generation facilities that produce both electricity and thermal energy (heat or steam) are encouraged by including them in the renewable energy program (at kWh equivalent) if they are more efficient than separate production of those forms of energy. Utilities must include these resources in their future planning processes.

MPSC Ratemaking Process

Ratemaking cases are shortened from 12 to 10 months and utilities can no longer “self-implement” rate increases after 6 months. Moreover, a study will be conducted of “performance-based regulation” whereby utility rates would not be based solely on the amount of their investment, but could also consider performance metrics. Revenue decoupling—where utility profits could be protected regardless of reduced consumption (e.g., due to conservation)—was considered but rejected in this legislation, except for energy waste reduction by very small electric utilities.

Energy Ombudsman

An “energy ombudsman” will be established within the Michigan Agency for Energy (MAE) as a liaison on energy issues between businesses and individuals and MPSC/MAE. The energy ombudsman will facilitate dispute resolution by making sure problems are addressed by the appropriate entity and also will convene regular meetings for sharing of energy information.

Implementation Challenges Ahead

Due to the history of Michigan’s energy program and the vicissitudes of drafting contested legislation, many issues remain unresolved and will need to be addressed. Those implementation challenges on the near-term horizon include:

Impact of FERC Denial of MISO Proposal on Electric Choice

The Federal Energy Regulatory Commission (FERC) denied MISO’s proposed “Competitive Retail Solution,” which sought to establish a three-year forward capacity auction.¹ The Commission specifically took issue with MISO’s proposal “bifurcate[ing] the MISO capacity market into two distinct market clearing mechanisms held at different points in time” because this could result in “unnecessary price volatility in both the Forward and the Prompt Auction[,]” and that MISO had not provided sufficient explanation demonstrating that its “[p]roposal would reasonably allocate transmission capability across capacity zones and across sub-regions”² FERC’s order may ultimately limit the electric choice opportunities available to Michigan customers, and given the brevity of the order, it is unclear exactly how MISO will proceed.

Net Metering

The new legislation did not determine how customer-generated renewable energy will be priced for sale back into the grid. Instead, PA 341 tasks the Commission with conducting a study within one year after the effective date of the amendments to determine an appropriate tariff for new customers participating in the state’s net metering and distributed generation programs. Existing customers who continue to participate in the programs will not be subject to the tariff.

Performance-Based Standards

PA 341 also requires the Commission to study performance-based regulation, “under which a utility’s authorized rate of return would depend on the utility achieving targeted policy outcomes[,]” and make recommendations to the Legislature and governor no later than one year after the effective date of the act.³ Interested parties should consider the potential impact of the report’s recommendations on ratemaking.

Smart Meters

[House Bill 4220](#), introduced by Representative Glenn (R-Midland) on February 15, 2017, would allow utility customers to choose between a traditional meter and a “smart meter,” and would prohibit utilities from charging customers more than a \$5 per month opt-out fee. The proposed

¹ [Midcontinent Independent System Operator, Inc.](#), 158 FERC ¶ 61,128 (2017).

² *Id.* at paras. 8–10.

³ MCL 46.6u.

law would also allow customers to self-report usage and avoid the monthly fee entirely. If HB 4220 is enacted, it may hamper innovation in the energy utility sector, including demand response and other energy efficiency efforts.

IRP Incorporated into New CON Process

It is unclear how the interplay between CON and IRP will impact utility plans to propose new or substantially expanded power plants as this new legislation is implemented. Utilities may try to apply for CONs before the IRP requirements take effect, but will ultimately need to find a way to adapt the IRP process to the longer-term planning required for a CON application. However, CON applications may be more frequent given the lower cost threshold for projects.

This new Michigan energy legislation is significant because its passage follows a lengthy and hotly-contested legislative process. The full significance of this new energy regime will not be felt by utilities and consumers until well into 2017 and beyond.