

Michigan Environmental Law Journal

ENVIRONMENTAL LAW SECTION

State Bar of Michigan

Vol. 18, No. 2, 2000

Summer 2000

Issue 58

Beth S. Gotthelf, Chairperson
Seyburn, Kahn, Ginn, Bess, Deitch & Serlin
2000 Town Center, #1500
Southfield, Michigan 48075-1195
(248) 353-7620

Linda L. Blais, Editor
Johnson McNally, P.L.L.C.
222 Franklin Ave.
Grand Haven, Michigan 49417
(616) 842-1661

Steven E. Chester, Assistant Editor
Miller, Canfield, Paddock &
Stone, P.L.C.
One Michigan Ave., Ste. 900
Lansing, Michigan 48933-1609
(517) 483-4904

Table of Contents

Articles: State of the Law:	
Recent Developments in Environmental Law	3
Committee Reports:	
Nominating Committee	57
Michigan Environmental Casenotes	58
Environmental Law Section Council Meeting Minutes, April 15, 2000	61
Environmental Law Section Council Meeting Minutes, June 10, 2000	63

Cite this publication as 18 *Mich Env L J*, No 2, p (2000)

The text of the *Journal* is also at the Environmental Law Section's page at www.michbar.org. The views expressed in the *Michigan Environmental Law Journal* are those of the authors and do not necessarily reflect the position of the State Bar of Michigan, the Environmental Law Section, or any governmental body. The publication in the *Journal* of articles, committee reports and letters do not constitute an endorsement of opinions or legal conclusions which may be expressed. The *Journal* is published with the understanding that the Environmental Law Section is not engaged in rendering legal or professional services.

Readers are invited to submit articles, comments or opinions to the editors. Publication and editing are at the discretion of the editors. Because of time constraints, galley or proofs are not forwarded to the authors.

The *Journal* is published three times per year, to inform members of Section activities and other matters of interest to environmental lawyers. Subscription is without charge to members and law student members of the Environmental Law Section. Subscription price is \$40.00 (U.S.) per year for non-members. Single issues, as available, may be purchased for \$14.00 per issue. To subscribe or purchase single issues please remit funds directly to: State Bar of Michigan, *Michigan Environmental Law Journal*, Michael Franck Building, 306 Townsend Street, Lansing, Michigan 48933-2083. Copyright © 2000 by the Environmental Law Section of the State Bar of Michigan. All rights reserved.

STATE OF THE LAW

2000

Recent Developments in Environmental Law

By: Joseph M. Polito, Esq.
and Jeffrey L. Woolstrum, Esq.
Honigman Miller Schwartz and Cohn
Detroit, Michigan

Table of Contents

INTRODUCTION

I. JUDICIAL DEVELOPMENTS

- A. Federal Developments 4
 - 1. Clean Air Act 4
 - 2. Clean Water Act 9
 - 3. Comprehensive Environmental Response, Compensation, and Liability Act 14
 - 4. Resource Conservation and Recovery Act 27
 - 5. Toxic Substances Control Act 29
 - 6. Insurance 31
 - 7. Miscellaneous 33
- B. State Developments 36
 - 1. Inland Lakes and Streams 36
 - 2. Environmental Response 37
 - 3. Michigan Environmental Protection Act 40
 - 4. Hazardous Waste 41
 - 5. Water Quality 42
 - 6. Solid Waste 43
 - 7. Miscellaneous 44

II. STATE LEGISLATION 50

III. ADMINISTRATIVE RULEMAKINGS

- A. EPA Final Rulemakings 53
- B. State Final Rulemakings 56

STATE OF THE LAW 2000

INTRODUCTION

The following summarizes selected Michigan environmental judicial decisions from May 1999 through May 2000, and statutory and regulatory developments from June 1999 through June 2000. While not encompassing every environmental decision, statute or rule during these periods, the intent was to include those developments having significant import to environmental law practitioners.

I. JUDICIAL DEVELOPMENTS

A. Federal Developments

1. Clean Air Act

Michigan v EPA, 213 F3d 663 (CA DC, 2000).

In a 2-1 decision rendered on March 3, 2000, the United States Court of Appeals for the District of Columbia Circuit denied most of the challenges that had been filed by Michigan and several other states and industry groups against a United States Environmental Protection Agency's ("EPA") regulation concerning emissions of nitrous oxides ("NOx").

In October 1998, EPA issued a regulation, known as the "NOx SIP Call," requiring Michigan and 21 other states and the District of Columbia to reduce NOx emissions in an attempt to alleviate ozone smog pollution in the northeastern United States. NOx is believed to form ozone smog after exposure to sunlight and other atmospheric conditions. EPA found that NOx emissions were carried by the wind from Michigan and other midwestern and southern states to the northeastern United States and contributed to poor air quality in the northeast. Consequently, EPA issued the NOx SIP Call to require Michigan and the other states to reduce NOx emissions. A "SIP Call" is a regulation by EPA directing one or more states to make revisions to the State Implementation Plan ("SIP"), which implements the Clean Air Act ("CAA"), 42 USC 7401 *et seq.*, in each state.

Michigan and other challengers opposed the NOx SIP Call, arguing that EPA did not have a valid scientific basis for concluding that the midwestern and southern states contributed to poor air quality in the northeast and that EPA lacked statutory authority to issue the NOx SIP Call. Most of these arguments were rejected by the court.

The court first considered the argument that EPA was not authorized by the CAA to issue a rule like the NOx SIP Call without first convening a "transport commission" to study the issue, as provided for in the CAA. Section 176A of the CAA, 42 USC 7506a, allows EPA to designate an interstate air pollution transport reason whenever EPA believes that the interstate transport of air pollution contributes significantly to violations of national air quality standards and to establish a transport commission to make recommendations concerning interstate pollution transport. Furthermore, Section 184 of the CAA, 42 USC 7511c, designated an ozone transport reason for the northeast and required EPA to convene a transport commission for that region. The court ruled that EPA was not limited by the CAA to employing the transport commission procedure to address interstate air pollution issues. Accordingly, the court held that EPA has authority to issue rules such as the NOx SIP Call without first convening a transport commission to address the issue.

The court next considered arguments that EPA had failed to evaluate each state affected by the NOx SIP Call adequately. The court ruled that additional air dispersion modeling performed by EPA to simulate the transportation of pollutants from each state after objections were raised when the NOx SIP Call was first proposed by EPA were adequate to support the EPA rule.

Several arguments were raised to the effect that EPA had inappropriately determined that the southern and midwestern states contributed "significantly" to the ozone air quality problems in the northeast, which is a prerequisite for EPA to issue a regulation such as the NOx SIP Call. First, the states argued that EPA had deviated from past precedent as to what constituted "significant" contribution to air pollution, but the court found that the states failed to demonstrate that EPA had adopted a prior precedent for making such determinations. Therefore, the court ruled that EPA had not deviated from past precedent in determining that the midwestern and southern states contributed significantly to ozone air quality problems in the northeast.

Second, several parties claimed that EPA improperly considered the cost of air pollution control when determining that emission sources in the midwestern and southern states contribute "significantly" to the air quality

problems in the northeast. The parties pointed out that EPA supported the specific emission reductions that were required for each state by arguing that the necessary emission reductions could be achieved in a “highly cost-effective” manner. The states and other parties argued that the cost-effectiveness of available controls bore no relation to whether emissions from the southern and midwestern states “contribute significantly” to air quality problems in the northeast. Therefore, EPA’s reliance on the alleged cost-effectiveness of NOx emission reduction control technology, it was argued, was not consistent with the CAA. The court rejected this argument, finding that the word “significantly” in the CAA did not clearly preclude EPA from considering cost-effectiveness when issuing a rule such as the NOx SIP Call. The court found that its conclusion that the word “significantly” was ambiguous was supported by the fact that the states and the industry groups that raised this argument made several changes to their arguments and their interpretations of the CAA in various documents filed with the court.

Third, several parties argued that EPA improperly required each state subject to the NOx SIP Call to achieve approximately the same degree of NOx emission reductions even though some states farther away from the northeast, such as Indiana, would be expected to contribute less to air quality problems in the northeast than closer states, such as Virginia. The court held that EPA’s analysis that a non-uniform approach to regulating NOx emissions from the various states provided neither a significant improvement in air quality nor a substantial reduction in costs supported EPA’s decision to adopt a uniform approach.

Fourth, the states argued that EPA’s interpretation of the CAA in issuing the NOx SIP Call violated the non-delegation doctrine, which limits the extent to which Congressional authority can be delegated to an administrative agency. The states relied largely on the D.C. Circuit’s recent decision in the **American Trucking Associations v EPA**, in which the court struck down significant portions of a 1997 EPA regulation establishing new national ambient air quality standards for ozone and particulate matter. The court ruled against the states on this point, noting that, although EPA’s authority under the SIP Call provision is very broad, it is not as broad as EPA’s interpretation of its authority to set national ambient air quality standards that was struck down in the **American Trucking Associations** case. The court found that EPA’s powers to issue SIP Calls is limited by three

requirements: (1) EPA must find that there is emissions activity within a state; (2) EPA must show with modeling or other evidence that such emissions are migrating to other states; and (3) EPA must show that the interstate emissions are contributing to a failure to attain compliance with national ambient air quality standards. Because EPA’s authority is limited by these three requirements, the court ruled that EPA’s authority to issue the NOx SIP Call did not violate the non-delegation doctrine.

Several states raised individual arguments that were unique to those states. The court agreed with Wisconsin that EPA had failed to produce any evidence directly linking pollutant emissions in Wisconsin to air quality problems in any other state and, therefore, Wisconsin should be removed from the NOx SIP Call rule. The court rejected a similar argument by South Carolina that its contribution to air quality problems in other states was “miniscule.” The court found that EPA had provided sufficient evidence that South Carolina emission contributed to air quality problems in other states to justify including South Carolina in the NOx SIP Call rule.

Industry representatives from two states, Missouri and Georgia, argued that EPA improperly included the entire states of Missouri and Georgia in the NOx SIP call even though the air emission modeling data relied upon by EPA demonstrated only that emissions from the eastern portion of Missouri and the northern portion of Georgia contributed to air quality problems in other states. The court agreed that the underlying modeling data did not support including the entire states of Missouri and Georgia in the NOx SIP Call. Therefore, the court overturned the NOx SIP Call rule with respect to Missouri and Georgia and directed EPA to reconsider that rule.

The court rejected arguments that the NOx SIP Call impermissibly intruded on the states’ authority to decide how to achieve compliance with the CAA, ruling that the NOx SIP Call left the states free to determine how to achieve the emission reductions mandated by the NOx SIP Call by regulating various industries and/or other sources on NOx emissions, such as automobiles. The court also concluded that EPA properly determined that the Regulatory Flexibility Act did not require EPA to assess the impact of the NOx SIP Call on small businesses because the NOx SIP Call does not directly regulate any small business. Rather, the states are directed to develop regulations to achieve the goals set by the NOx SIP Call and it is the state rules implementing the NOx SIP Call,

not the NO_x SIP Call itself, that may impact small businesses.

The court ruled against several additional technical challenges to the NO_x SIP Call rule, except that the court agreed that EPA improperly changed the definition of “electric generating unit” in the rule without providing adequate opportunity for public notice and comment on the change. Therefore, the court directed EPA to reconsider its definition of “electric generating unit.”

Judge Sentelle dissented from the majority opinion in this case. Judge Sentelle disagreed that it was proper for EPA to consider the cost-effectiveness of emission controls in determining whether emissions “contribute significantly” to air quality problems in other states. Judge Sentelle argued that nothing in the statute indicated cost-effectiveness was a relevant consideration in determining whether emissions from one state contribute “significantly” to poor air quality in another. Judge Sentelle would have struck down the NO_x SIP Call on this basis, but this view was not supported by the other two judges on the panel. Therefore, the court ruled against most of the challenges to the NO_x SIP Call.

United States v Shurelds, 173 F3d 430 (CA 6, 1999).

Barri Shurelds was an employee of I.E.S. Lead Paint Division, Inc. (“IES”). IES was hired to remove materials containing asbestos from an abandoned department store. After state inspections revealed asbestos violations, the Kentucky State Division for Air Quality issued a cease and desist order requiring IES and Shurelds to terminate all work at the site.

The United States indicted Shurelds, IES, and other employees of IES for one count of improper removal of asbestos and one count of improper disposal of asbestos. IES and the other employees pled guilty, while Shurelds pled not guilty and proceeded to trial. The jury found Shurelds guilty on both counts, and sentenced him to 51 months in prison. Shurelds appealed.

On appeal, Shurelds argued that the criminal liability provisions of the CAA were unconstitutionally vague. Shurelds claimed that 42 USC 7413(c)(1) and 42 USC 7413(h) specify conflicting mental state standards for criminal liability because subsection 7413(c)(1) criminalizes “knowing” violations and subsection 7413(h) refers to “knowing and willful” violations. The court rejected this argument because subsection 7413(h)

provides an exception to the criminal provision of subsection 7413(c)(1), and an exception from a criminal prohibition is generally considered an affirmative defense, which Shurelds did not invoke. The court stated that a “knowing” violation establishes criminal liability, unless the defendant establishes that he was an “employee who is carrying out his normal activities and who is acting under orders from his employer,” which Shurelds did not allege. If the defendant were to establish the defense, the government would then have to show a “knowing and willful” violation by the defendant in order to establish criminal liability. Therefore, the court found that there was no conflict in the mental states referred to in the two subsections.

Shurelds next argued that the district court mistakenly admitted evidence of “other bad acts.” Specifically, the district court allowed the government to introduce evidence that Shurelds had revealed to a colleague that he had attempted to bribe a state air quality inspector. This testimony was offered to show that Shurelds had knowingly violated the CAA. The appeals court found that the government had identified four purposes for admitting the evidence: “intent, plan, opportunity and knowledge.” Shurelds claimed that the district court had not followed the proper procedures in identifying the limited purposes for admitting the evidence because the district court did not specify for which of these purposes the evidence was admitted. The appeals court found that all four of the aforementioned purposes concerned Shurelds’ mental state, which was at issue in the case because Shurelds’ defense was that he had no knowledge of the violations at the work site. The statement regarding the attempted bribery that Shurelds made to his colleague shows that Shurelds was aware of violations at the work site, and that he intended to deal with them in an illegal manner. Therefore, the court found that the district court had indeed followed the proper procedures in admitting the evidence.

Shureld’s next argument was that the government had not submitted sufficient evidence to show that he had knowingly violated the CAA because all the evidence of his violations came from witnesses who were not credible. The appeals court did not consider this argument because, “in assessing the sufficiency of the evidence, ‘we do not weigh the evidence [or] assess the credibility of the witnesses.’” **United States v Jackson**, 55 F3d 1219, 1225 (CA 6, 1995). The Sixth Circuit did find, however, that numerous witnesses provided testimony sufficient to show

that Shurelds was aware that removal and disposal violations were taking place at the site. Therefore, the Sixth Circuit affirmed Shureld's conviction.

United States v Tennessee Air Pollution Control Bd, 185 F3d 529 (CA 6, 1999).

After the United States Army ("Army") violated the Tennessee Air Quality Act ("TAQA") by failing to give notice of its intent to remove certain piping containing asbestos insulation and by failing to comply with Tennessee's asbestos handling rules, the Technical Secretary of the Tennessee Air Pollution Control Board ("TAPCB") imposed a civil penalty of \$2,500 against the Army. After an administrative appeal, the TAPCB issued a final decision and order rejecting a defense of sovereign immunity and upholding the assessment. The United States filed a declaratory judgment action in federal court, arguing that, although sovereign immunity had been waived to the extent that a state may seek injunctive relief against the United States for a present violation of state air pollution standards, and may impose a fine incident to the injunction to secure prospective compliance, civil monetary penalties may not be imposed against the United States for past violations. The district court rejected this argument, however, and entered summary judgment in favor of the TAPCB.

Basing its argument on a Clean Water Act ("CWA"), 33 USC 1251 *et seq.*, case decided by the United States Supreme Court (**United States Dep't of Energy v Ohio**, 503 US 607 (1992)), the United States argued that a civil monetary penalty could not be imposed against the United States for past violations – that instead the federal government's sovereign immunity had only been waived to the extent that a state could seek injunctive relief against the United States for a present violation and impose a fine incident to the injunction to secure prospective compliance. The Sixth Circuit rejected this argument, however, because the waiver of sovereign immunity under the CWA is not as extensive as the waiver under the CAA.

In analyzing the CAA provisions, the court applied the standards that (i) a waiver of sovereign immunity must be unequivocally expressed in the statute; and (ii) such a waiver must be strictly construed in favor of the United States. The court first noted that any person may bring a "citizen suit" under the CAA to enforce the CAA against "any person," which includes the United States. 42 USC 7604(a). The court then analyzed the "state suit"

provision of the CAA, 42 USC 7604(e), which provides in part:

Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from —

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality, against the United States. . . under State or Local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States. . . in the same manner as nongovernmental entities, see section 7418 of this title.

The court held that § 7604(e) is a "clear waiver of sovereign immunity" – that the statute's use of the phrase "any other law" obviously includes the law of sovereign immunity, so this sentence tells us that nothing in the law of sovereign immunity shall be construed to prohibit any state from obtaining any administrative remedy or sanction against the United States."

The district court also interpreted the "federal facilities" provision (Section 7418 referenced in the section quoted above) to constitute a waiver of sovereign immunity applicable to the penalty in question; however, the Sixth Circuit found it unnecessary to decide that question in light of its holding in relation to the "state suit" provision.

The court then addressed the United States' arguments based upon the Supreme Court's interpretation of the CWA in the **Dep't of Energy** case, which the Sixth Circuit found to be unpersuasive. The court first noted that the CWA did not contain a provision similar to the "state suit" provision of the CAA. Further, the CWA's "federal facilities" provision contains additional language not found in the CAA, which provides that "the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court." The court stated that the CWA thus contained an express limitation on the

liability of the United States for civil penalties that is not found in the CAA. It was this provision, that has no equivalent in the CAA, that the Supreme Court found to limit the liability of United States and to contemplate only “forward-looking orders.”

In view of the significant differences between the provisions of the CWA and CAA, the Sixth Circuit held that the **Dep’t of Energy** case was not controlling and that the CAA contains a waiver of sovereign immunity sufficiently broad to encompass the administrative civil penalty assessed by Tennessee against the United States.

American Trucking Ass’n v EPA, 175 F3d 1027 (CA DC, 1999).

The United States Court of Appeals for the District of Columbia Circuit ruled that the EPA’s revised air quality standards for ozone were “unenforceable” and vacated the EPA’s revised standards for particulate matter (“PM”). The decision came in a case that consolidated challenges to the revised standards that had been filed by several states and numerous industry groups. Other states and some environmental and industry organizations intervened in the case to support EPA’s position. Some environmental organizations also filed challenges to the revised standards arguing that the revised standards were too lenient. The standards, known as National Ambient Air Quality Standards (“NAAQS”), were issued by EPA under the CAA in July 1997 (the “1997 Standards”).

Under the CAA, “primary” NAAQS are air quality standards that, “allowing an adequate margin of safety, are requisite to protect the public health.” EPA is also directed to set “secondary” NAAQS at a level “to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air.” The 1997 Standards included revisions to the primary and secondary NAAQS for ozone and PM.

The D.C. Circuit held that EPA exceeded its authority in promulgating the 1997 Standards because EPA had failed to articulate a “determinate criterion” for setting the 1997 Standards. The court noted that EPA considered ozone definitely, and PM likely, to be non-threshold pollutants; that is, pollutants that have some potential to cause adverse health impacts at any exposure level above zero. Thus, the only concentration of ozone or PM that would pose no risk to the public health, according to

EPA, is zero. The court faulted EPA, however, for not identifying any determinate criteria for setting the 1997 Standards:

EPA’s explanations for its decisions amount to assertions that a less stringent standard would allow the relevant pollutant to inflict a greater quantum of harm on public health, and that a more stringent standard would result in less harm. Such arguments only support the intuitive proposition that more pollution will not benefit public health, not that keeping pollution at or below any particular level is “requisite” or not requisite to “protect the public health” with an “adequate margin of safety,” the formula set out [in the CAA].

Without such a determinate criterion for setting NAAQS, the court found that EPA would be free to set NAAQS at any level between, on the low end, zero pollution, and, at the high end, “a hair below the concentration yielding London’s Killer Fog” of 1952 in which 4,000 people died in one week. With such discretion, the court said, EPA could set standards so stringent as to send industry hurtling “over the brink of ruin,” or so high as to be close to doing nothing at all to protect air quality. The court found that giving EPA such broad discretion to set NAAQS standards would amount to an unconstitutional delegation of Congress’s legislative authority. Therefore, the court remanded the case to EPA with instructions to develop a method for securing “reasonable coherence” for setting ozone and PM NAAQS or, if that effort fails, to report the results to Congress and seek legislation to ratify EPA’s decisions. The court suggested that EPA might adopt an approach to setting NAAQS that takes into account the number of people who could be adversely affected by pollution in the atmosphere, the severity of harm to the affected population, and the likelihood that the adverse effects would occur at particular levels of pollution.

The court’s decision focused on the primary ozone and PM standards, but because of the connections between the primary and secondary NAAQS, the court remanded both the primary and secondary NAAQS to EPA.

The court also ruled that, because Congress had enacted a specific schedule in the CAA for areas to achieve compliance with the ozone NAAQS established as part of

the CAA Amendments of 1990, EPA does not have authority to establish a more stringent schedule for areas to comply with the 1997 Standard for ozone. In the 1990 CAA Amendments, Congress set a schedule for areas to comply with the ozone NAAQS with deadlines that ranged from November 15, 1993 for areas with “marginal” ozone nonattainment to November 15, 2010 for “extreme” ozone nonattainment areas. This schedule was intended to allow states with more severe air pollution problems adequate time to come into compliance with the ozone NAAQS. The court found that EPA does not have authority to require Los Angeles, for example, which is an “extreme” ozone nonattainment area with a deadline of November 15, 2010 to comply with the 1990 CAA ozone NAAQS, to comply with the new, more stringent 1997 Standard for ozone by November 15, 2010 or earlier. The court found that to allow EPA authority to do so would vitiate the schedule for ozone compliance established by Congress. Therefore, the court found that EPA could enforce and implement any revised ozone NAAQS only in a manner consistent with the specific schedule for states to comply with the ozone standard set forth in the CAA.

The court struck down a portion of the new PM NAAQS on entirely different grounds. The 1997 Standards set separate standards for “coarse” PM and “fine” PM. EPA had concluded that two standards were necessary because of evidence that fine PM and coarse PM could cause separate health consequences. EPA defined fine PM as particles with a nominal diameter of 2.5 microns or less (PM-2.5) and coarse PM as particles with a nominal diameter of 10 microns or less (PM-10). Because PM-10 was defined in a way that includes all particles 10 microns or smaller, including PM-2.5, the court found that using PM-10 as an indicator for coarse PM was arbitrary. For example, under the 1997 Standards, in an area in which the PM-2.5 concentration was 15 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$), the maximum concentration of PM-2.5 allowed under the 1997 Standards, only 35 $\mu\text{g}/\text{m}^3$ of particulate matter larger than 2.5 microns but smaller than 10 microns (PM10-2.5) would be allowed to maintain compliance with the 50 $\mu\text{g}/\text{m}^3$ standard for PM-10. But in an area with only 5 $\mu\text{g}/\text{m}^3$ of PM-2.5, the area could have up to 45 $\mu\text{g}/\text{m}^3$ of PM10-2.5 and still comply with the PM-10 NAAQS. Because EPA had found fine PM and coarse PM to be related to separate and independent health problems, the court ruled that EPA must set a coarse PM

NAAQS using a definition of coarse PM that does not include fine PM or PM-2.5.

The court rejected several other objections that had been raised against the 1997 Standards. The court rejected arguments that EPA should have considered the economic cost of complying with the NAAQS when developing the 1997 Standards. The court also ruled that EPA did not violate the National Environmental Policy Act (“NEPA”), the Unfunded Mandates Reform Act, or the Regulatory Flexibility Act in promulgating the 1997 Standards. The court did rule, however, that EPA must consider the beneficial health effects of ozone in the atmosphere, potentially including beneficial effects of ozone as a shield from the harmful effects of ultraviolet radiation, when setting NAAQS standards.

The court also rejected arguments by environmental organizations that EPA was required to set the secondary PM NAAQS at a level low enough to eliminate impairment of visibility due to PM in the atmosphere. The court found that Congress had anticipated that impairment of visibility might still persist even after all NAAQS had been complied with and, therefore, Congress granted authority to EPA under Section 169A of the CAA, 42 USC 7491, to establish a regional haze program to address such visibility problems.

Thus, the court remanded all the 1997 Standards to EPA for further consideration. The court vacated the standard for coarse PM, but did not vacate the ozone standard because it had determined that the ozone standard, as promulgated, was unenforceable. The court invited the parties to submit briefs as to how the court should address the fine particulate matter standard.

2. Clean Water Act

Friends of the Earth, Inc v Laidlaw Environmental Services (TOC), Inc, 120 S Ct 693 (2000).

Laidlaw Environmental Services (TOC), Inc. (“Laidlaw”) began to discharge treated wastewater from a treatment plant in 1987 under authority of a National Pollutant Discharge Elimination System (“NPDES”) permit issued by the South Carolina Department of Health and Environmental Control (“DHEC”). The facility repeatedly discharged higher concentrations of mercury than the permit allowed. In 1992, Friends of the Earth and others (“FOE”) notified Laidlaw of their intention to

file a citizen suit against it under Section 505(a) of the CWA after the expiration of the required 60-day notice period.

Before the expiration of the notice period, Laidlaw asked DHEC to file suit against it for the alleged violations. The DHEC did so, and the parties quickly entered into a settlement requiring Laidlaw to pay \$100,000 in civil penalties and to make “every effort” to comply with its permit obligations (in fact, the violations continued until January 1995). On June 12, 1992, FOE filed its citizen suit, alleging noncompliance with the NPDES permit and seeking declaratory and injunctive relief and an award of civil penalties. Laidlaw moved to dismiss the action on the ground that the citizen suit was barred under CWA Section 505(b)(1), 33 USC 1365(b)(1), which bars citizen suits where the United States or a state “has commenced and is diligently prosecuting a civil or criminal action” to require compliance. The federal district court held that DHEC’s action had not been “diligently prosecuted” and, therefore, FOE’s action was not barred by Section 505(b)(1) of the CWA.

Laidlaw also moved for summary judgment on the ground that FOE lacked “standing” to bring its suit because FOE’s members had not suffered any “injury in fact” from the violations. The district court denied this motion also, finding that FOE had standing to bring the suit based on affidavits from FOE members alleging harm to their interests. The court then rendered its decision, imposing a civil penalty of \$405,800 for the violations.

Both FOE and Laidlaw appealed to the Court of Appeals for the Fourth Circuit. FOE claimed that the civil penalty was inadequate, and Laidlaw argued, among other things, that FOE lacked standing to bring the suit and that DHEC’s action qualified as diligent prosecution precluding FOE’s litigation. The court assumed without deciding that FOE had standing to bring the action, but then held that the case had become moot. The court stated that the elements of standing – injury, causation, and redressability – must exist at every stage of review, or else the action becomes moot. The court noted that the Supreme Court’s 1998 decision in **Steel Co v Citizens for a Better Environment** meant that the “redressability” element of the standing test does not exist where the only remedy available to the citizen suit plaintiff would be civil penalties payable to the government, because such penalties would not redress any injury that the citizen has suffered. Because FOE could not receive money under

the CWA for its injuries, the court held, the action was moot. The court vacated the district court’s order and remanded with instructions to dismiss the action.

The United States Supreme Court reversed the Fourth Circuit’s decision. The Court first observed that, although the Fourth Circuit had assumed that FOE had standing, the Court had an obligation to assure itself that FOE had standing at the outset of the litigation. The Court noted that, to have “standing” to bring an action in federal court, a plaintiff must show that: (1) it has suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Laidlaw contended that no “injury in fact” existed because there was no proof of harm to the environment from the violations – a claim that had been accepted by the district court. The Court, however, held that the relevant inquiry is not injury to the environment, but injury to the plaintiff. The Court held that “environmental plaintiffs adequately allege injury in fact when they [allege] that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.” The Court found that FOE members had demonstrated sufficient injury by claiming that they lived near Laidlaw’s facility and avoided recreating in or near the waters to which Laidlaw discharged and, that, in some cases, home values were lowered, because of concerns about pollution from the facility.

The Court distinguished its 1990 holding in **Lujan v National Wildlife Fed’n**, in which the Court had denied citizen suit standing to an environmental group that challenged a government decision that would open public lands to mining activities. The Court stated that the plaintiff in that case did not survive the government’s motion for summary judgment “merely by offering [claims] which state only that one of [the organization’s] members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action.” Similarly, in **Lujan v Defenders of Wildlife** (1992), the plaintiffs lacked standing because their claim of injury rested on “‘some day’ intentions” to visit endangered species in foreign countries.

In the case at hand, in contrast, the Court found “nothing ‘improbable’ about the proposition that a company’s continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms.” Because of the FOE members’ “reasonable concerns” about the effects of Laidlaw’s discharges, the Court held they had demonstrated an injury in fact.

Laidlaw next argued that, even if FOE had standing to seek injunctive relief, it lacked standing to seek civil penalties. Civil penalties offer no redress to private plaintiffs, Laidlaw argued, because they are paid to the government and, therefore, a citizen plaintiff can never have standing to seek them.

Although the Court agreed that a plaintiff must demonstrate standing separately for each form of relief sought, the Court disagreed with the argument “that citizen plaintiffs facing ongoing violations never have standing to seek civil penalties” because payment of penalties to the government cannot redress the plaintiffs’ injuries. Rather, the Court stated, “[t]o the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.” The Court deflected Laidlaw’s argument that its 1998 **Steel Co.** decision requires a different result by limiting that case to its particular facts: **Steel Co.**, the Court held, denies standing only where the citizen plaintiffs are seeking civil penalties for violations that have ended by the time of suit.

The Court did allow that, in some cases, the deterrent effect of a claim for civil penalties may be so insubstantial that it cannot support citizen standing, but, it held, that was not the case here.

Having found that FOE had standing to bring its action, the Court turned to the question of mootness. Laidlaw argued that the case was moot because it had achieved substantial compliance in 1992 and later shut down the facility in question. The Court observed that “a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” The Court was not

satisfied with Laidlaw’s claim that the closure of the facility permanently prevented future violations, noting that Laidlaw still retained its NPDES permit. Because “[t]he effect of both Laidlaw’s compliance and the facility closure on the prospect of future violations is a disputed factual matter,” the Court sent the case back to the district court for further consideration.

Jones v City of Lakeland, 175 F3d 410 (CA 6, 1999).

The City of Lakeland, Tennessee (“City”) had a NPDES permit to discharge wastewater from its wastewater stabilization lagoon into Oliver Creek (“Creek”) at a rate not to exceed 62,000 gallons a day. Prior to 1994, the Tennessee Department of Environment and Conservation (“TDEC”) issued two orders against the City for exceeding the authorized amount of discharge. In 1994, in response to continued excessive discharges, the City and TDEC entered into a third order under the Tennessee Water Quality Control Act (“TWQCA”) in which the City pledged to eliminate all discharge from its wastewater stabilization lagoon into the Creek by March 1, 1996. The City hoped that this third order would allow it enough time to construct a new stabilization basin that would allow it to better control its discharges.

Unforeseen problems, however, delayed construction of the new basin, and the deadline passed with the City still discharging from its stabilization lagoon. In August 1996, TDEC issued a fourth order requiring the City to cease all discharges by July 1, 1997 and fining the City \$4,000, with the possibility of additional fines totaling \$26,000.

In September 1996, three citizens (“Citizens”) filed suit against the City under the CWA, alleging that the City was discharging pollution into state waterways in violation of its NPDES permit. The City moved to dismiss, arguing that the CWA does not allow citizen suits when a state is diligently prosecuting a parallel action. Citing Section 505(b) of the CWA, the Citizens responded that the limitation applies only when the government is “diligently prosecuting” a claim in a “court.” They argued that TDEC’s repeated orders did not constitute “diligent prosecution” and that any action by TDEC was not pursued in a court but consisted only of administrative sanctions.

The district court dismissed the case, concluding that it lacked jurisdiction over the matter because TDEC was

diligently pursuing the City and the Citizens had not even alleged that TDEC was not a “court” within the meaning of Section 505(b) of the CWA.

The Sixth Circuit affirmed. The Court first observed that citizen suits “are merely intended to supplement, but not supplant, enforcement by state and federal government agencies.” It then examined whether TDEC’s actions in the case were sufficient to preclude the Citizens’ from bringing their citizen suit under the CWA.

The court agreed with the district court that TDEC’s actions satisfied the requirement of “diligent prosecution” against the City. The Plaintiffs had argued that TDEC’s “prosecution cannot be diligent if it continues to allow the [C]ity to dump impermissible amounts of waste into Oliver Creek and if its attempts to remedy the problem are limited to entering a series of ineffective administrative orders.” The court rejected this argument. It noted that TDEC had issued four orders against the City, that the City had attempted to comply, and that TDEC’s extensions of time to allow the City to comply were due to “practical difficulties” the City encountered in reaching full compliance. The court agreed with the district court’s recognition “that an enforcing agency must be accorded the latitude to respond to circumstances that delay remedial projects and warrant reassessment of compliance target dates.”

The court agreed with the Plaintiffs that TDEC’s administrative proceedings were not actions taken in a “court” under Section 505(b) of the CWA. This holding did not end the Court’s inquiry, however. The Court merely held that Section 505(b) did not bar the Plaintiffs’ citizen suit. The Court observed, however, that another provision of the CWA, Section 309(g)(6)(A), bars citizen suits when a state “is diligently prosecuting an action under a state law comparable” to Section 309(g), without requiring that the enforcement be undertaken in a court.

Having already decided that TDEC had “diligently prosecuted” its action against the City, the court turned its attention to “whether the requirements of [the] TWQCA are comparable to those found in [CWA] § 309(g).”

The court first set forth the standard by which it would decide the question. It reiterated “the fundamental principle that citizen suits are ‘meant to supplement rather than supplant governmental action.’” Therefore,

“deference” to an agency’s enforcement strategy should be favored because “a narrow, exacting interpretation of the word ‘comparable’ that requires one-for-one equivalency would be inappropriate when comparing § 309(g) with a state counterpart.”

The court then reviewed the provisions of both Section 309(g) and the TWQCA, and concluded “that the two are ‘comparable’ as the meaning of that term is contemplated in § 309(g)(6).” It noted that: the “overarching goals” of the CWA and the TWQCA are the same; both the CWA and the TWQCA proscribe “remarkably similar” conduct; and both provide similar procedures for punishment. The court also gave significant weight to the fact that both statutes provide interested citizens a “meaningful opportunity to participate” in the enforcement process and that both allow for the imposition of similar amounts of civil penalties for violations.

Accordingly, the court held that, “[b]ecause the TWQCA is a state law comparable to § 309(g), and the state is diligently prosecuting an action against the [C]ity under this state law,” the Citizens’ suit against the City was not allowed under the CWA.

United States v M/G Transport Servs, Inc, 173 F3d 584 (CA 6, 1999).

M/G Transport Services, Inc. (“M/G”) operated tow boats on the Mississippi and other rivers. Harschel Thomasee (“Thomasee”) was M/G’s marine superintendent with operational control of M/G’s transport vessels and was the company’s vice president of operations. M/G employees had regularly disposed of “bilge slop,” which is a combination of oil, water, grease and other materials, and other solid wastes, by dumping the wastes overboard into the rivers, at night and in remote areas to avoid detection. Thomasee had direct command over M/G’s vessels and was allegedly aware that dumping was occurring. The disposal occurred without any required permits.

The company, Thomasee and the boats’ captains were convicted by a jury of, among other things, discharging pollutants without a required permit. The district court, however, granted the defendants’ motions for judgment of acquittal on those charges.

The district court held that “principles of due process” precluded holding the defendants criminally liable for

discharging pollutants without a permit when no permit would ever have been issued for the defendants' dumping. The district court relied on a Tenth Circuit case, **United States v Dalton**, in which a defendant's conviction for failing to register an illegal firearm was reversed on the basis that, by law, that type of firearm could not have been registered under any circumstances. The district court reasoned that the prosecution of the defendants for discharging pollutants without a permit "placed them in a classic 'Catch 22' situation, because those defendants could never have received a permit for the very discharges that sparked the charges against them."

The Sixth Circuit, however, reversed the district court. The appeals court held that the reasoning of **Dalton** did not apply because, at trial, the government witnesses had not testified that permits could never be issued for any controlled discharge of pollutants into the nation's rivers. Instead, government officials testified only that "the sheer quantity of pollutants the defendants dumped would not have been allowed and that pollutants that are not processed properly will not be tolerated." "Such a scenario," the court stated, "is qualitatively different from that presented in **Dalton**."

The appeals court was also persuaded by the government's argument that the district court's due process reasoning would "seriously undermine all criminal enforcement of environmental regulations." The government noted, and the appeals court agreed, that, under the district court's holding, "[c]ompanies that obtain permits could be prosecuted for failing to comply with them, but those who choose not to apply for permits at all could only be prosecuted if a court determines, after the fact, that they could have received one." Thus, companies would have an incentive not to obtain permits prior to discharging, and then to discharge pollutants in such egregious magnitudes that no permit could ever be issued for them.

The district court had also held that there was insufficient evidence to prove that the defendants had committed the crimes with which they were charged on the dates they were alleged. The appeals court held that proof of the exact date of an offense is not needed when the government alleges only that they occurred "on or about" certain dates. The court found that there was sufficient evidence to conclude that illegal dumping had occurred "on or about" the dates specified in the indictments.

Finally, the district court had granted motions for judgments of acquittal in favor of the two boat captain defendants because, the district court held, even though they knew pollutants were being dumped from their vessels, the evidence was insufficient to establish the captains' ability to alter company policy regarding the dumping, their knowledge of the contents of the dumped materials, or their knowledge of the illegality of their actions. The appeals court, however, found that there was sufficient evidence to support the convictions of the captains. The court found that a reasonable trier of fact could find that the captains knew of the dumping and its illegality, and that they "could have insulated themselves from liability" simply by requesting Thomasee, as the responsible corporate officer, to provide them with "slop barges" or other vessels that could have taken the refuse for proper disposal. Their failure to do so, the court held, justified the jury's determination that they were criminally liable for the discharges.

Michigan Peat v EPA, No. 97-72336 (ED Mich, Apr 28, 1999).

Michigan Peat owns or controls two non-contiguous parcels of wetlands in Minden Township, Michigan. Michigan Peat had continuously mined peat from a part of "Minden North" since 1958. Peat mining involves removing the peat moss by clearing surface vegetation and allowing the peat moss to dry in the sun. The process involves the discharge of fill material into wetlands and is, therefore, regulated under the CWA. Although Michigan has been delegated authority to administer its own permitting program for the discharge of dredged or fill material, federal authority remains the final authority. If EPA objects to a permit issuance decision by the state, Michigan is barred from issuing the permit. If the state can not resolve EPA's objections, the authority to enforce Section 404 of the CWA, 33 USC 1344, reverts to the United States Corps of Engineers ("COE").

In 1991, the Michigan Department of Environmental Quality's ("MDEQ") predecessor agency, the Michigan Department of Natural Resources ("MDNR"), informed Michigan Peat that it needed a permit to continue to mine peat. Michigan Peat filed the application and also sought to expand its peat mining activities to "Minden South." Michigan Peat later withdrew this application so it could prepare a comprehensive environmental assessment, however, and filed a second application in 1994. After reviewing the assessment, EPA formally objected to the issuance of any permit. In 1995, MDNR

found that the Minden Bog was a rare and irreplaceable wetland ecosystem with significant ecological and scientific value and proposed a permit that only allowed peat mining of less acreage, shorter duration, and more minimized environmental impact than that requested by Michigan Peat. The permit proposed by MDNR: (1) acknowledged that 749 acres of Minden North were mined prior to 1980 and, therefore, neither the state nor federal governments had Section 404 jurisdiction over these areas; (2) classified 202 acres of Minden North as eligible for an “after-the-fact” permit because mining had occurred there prior to the effective date of the CWA; and (3) denied permit authority to mine peat on the remaining 1049 acres of Minden North and the entire Minden South parcel. EPA withdrew its objections and MDNR issued the permit. However, because Michigan Peat did not agree with all the terms of the permit, it did not sign it and the permit did not take effect. Michigan Peat filed an administrative appeal opposing the conditions imposed by the “after-the-fact” permit and filed a regulatory takings claim against the state in the Michigan Court of Claims.

Following transfer of authority from MDNR to MDEQ, MDEQ sought EPA’s approval to settle the takings claim but EPA rejected the proposal. In 1997, MDEQ issued a “state-only” permit stating that due to EPA’s continued objections, the state was precluded from authorizing the project under CWA Section 404 and permitting authority was, therefore, transferred from MDEQ to the COE. Michigan Peat subsequently sued the state and federal authorities to enjoin them from exercising oversight or enforcement authority over Michigan Peat’s attempts to mine peat.

The state and federal agencies filed motions to dismiss in the federal district court for the Eastern District of Michigan and the court accepted EPA’s argument that the court was without jurisdiction because there was no final agency action ripe for judicial review. The district court held that EPA’s only actions in the matter -- commenting upon and objecting to the proposed permit -- did not constitute reviewable actions and, therefore, the court was without subject matter jurisdiction. MDEQ argued that the Eleventh Amendment bars a suit against the state without its consent and that Michigan Peat failed to state a claim upon which relief could be granted. The district court also accepted MDEQ’s argument, holding that there was nothing in the record to indicate that the

state had waived its Eleventh Amendment immunity. Michigan Peat merely alleged that MDEQ adhered to federal law in the Section 404 permitting process. The district court, therefore, granted the agencies’ motions to dismiss. Michigan Peat appealed.

The Sixth Circuit Court of Appeals first held that EPA’s actions were final actions and were, therefore, reviewable. The court noted that EPA had voiced its objections throughout the application process but ultimately withdrew them and agreed to the proposed permit that MDEQ sent to Michigan Peat in 1995. Although the permit specifically stated that it was not final or valid until signed and accepted by Michigan Peat and returned to MDEQ, “the logical conclusion is that the EPA’s action was final. Statutorily, there was nothing left for the EPA to do once it signed off on the proposed permit.” In addition, if Michigan Peat had signed the permit, it would have waived its appellate remedies. The Sixth Circuit held that the district court had erred, then, in dismissing Michigan Peat’s action against the federal government.

The Sixth Circuit next held, however, that the district court had not erred in dismissing Michigan Peat’s action against the state because the Eleventh Amendment protects Michigan and MDEQ from Michigan Peat’s claims. Congress has not abrogated Michigan’s immunity and Michigan has not waived such immunity: “The fact that Michigan volunteered to involve itself in the Section 404 program does not constitute consent to be sued in federal court.” The Sixth Circuit, then, affirmed in part and reversed in part the district court’s ruling and remanded for further proceedings.

3. Comprehensive Environmental Response, Compensation and Liability Act

United States v 150 Acres of Land, 204 F3d 698 (CA 6, 1999). Approximately 150 acres of property located in Medina County, Ohio (“the Property”) had been owned for three generations by various members of the Bohaty family, who operated a farm equipment repair business at the very western edge of the Property. Five members of the Bohaty family, including Ethel Bohaty, who owns 37/45 of the Property, acquired their interests in the Property through an inheritance in 1982 and 1984, and through the purchase of other inherited interests. Aerial photographs indicated that drums had been placed

on the Property from the 1950s through the early 1970s, well before any of the current owners acquired their interest in the Property.

In 1987, the local fire department observed numerous fifty-five gallon drums on the Property, and notified the Ohio Environmental Protection Agency ("OEPA"). On a visit to the Property, the OEPA discovered approximately 300 abandoned drums containing paint waste, laboratory chemicals and red sludge. Toxicity tests on the waste were negative. Upon another, unrelated inspection by OEPA in 1989, Ethel Bohaty expressed a desire to have any toxic substances found on the Property removed. The inspectors found between 200-300 drums, some of which appeared to contain toxic chemicals, and five underground storage tanks. Ethel Bohaty stated that the inspectors did not inform her that any of the wastes were hazardous, and did not suggest that she remove the drums or take any other precautions.

In September 1991, the OEPA asked EPA to inspect the Property. EPA's inspectors identified approximately 400 drums. Soil samples taken from the Property revealed an ignitability hazard, as well as acidic wastes. In December 1991, the EPA sent John and Ethel Bohaty a notice of potential liability, asking them to remove the drums or pay for an EPA removal action pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 USC 9601 *et seq.* The Bohatys were given five days to respond to the notice, but did not do so.

In January 1992, the EPA began a removal operation on the Property. When the removal was completed in May of 1992, approximately 1000 drums had been removed, of which approximately half contained waste, and the other half were empty. The EPA's removal actions were confined to Parcel 1 of the Property. EPA scrutinized Parcels 2 and 3 but found nothing there to remove. The district court determined EPA's costs were \$854,426.87.

In May 1995, the government commenced a civil action against Glidden Company and the Bohatys' three parcels of land to recover the costs of the removal activities. The government settled the claim against Glidden for \$60,000.00, leaving the Bohatys as the only remaining defendants in the action. The government and the Bohatys both moved for summary judgment.

The government presented evidence that Ethel Bohaty's deceased husband may have known about the dumping on the property and may have even profited from it. The Bohatys, however, presented un rebutted evidence that they were not aware of the drums on the property, other than any that were used in their farm equipment repair business which was confined to the very western edge of the Property. Except for this western portion of the Property, the land was heavily vegetated, particularly the areas in which the drums had been placed, supporting the Bohaty's claims that they never knew the drums were there.

The district court granted the government's motion and denied the Bohatys', entering a judgment for the government before trial. EPA recorded a notice of lien on the Property for the amount of the cleanup, and the district court ordered the land sold to satisfy the lien. The Bohatys appealed. The main issues on appeal were: (1) whether the Bohatys qualify for the "innocent landowner" defense; (2) whether Parcels 2 and 3 were part of the "facility"; and (3) whether the costs of disposing of the empty barrels were properly part of the removal costs.

On appeal, the Bohatys argued that they qualify for the "innocent landowner" defense of Sections 9607(b)(3) and 9601(35) of CERCLA. Under these sections, the current owners of a "facility" are not liable for the costs incurred in removing hazardous substances from the facility if: (1) they can establish by a preponderance of the evidence that the "release" of the substances and the damages resulting from the release were caused solely by an act or omission of a third party who was neither (a) the present owners' employee nor (b) someone who was in a contractual relationship with the owners; and (2) the owners (a) exercised due care with respect to the substances, in light of all relevant facts and circumstances, and (b) took precautions against the foreseeable actions and omissions of third parties. To establish the "innocent landowner" defense, the Bohatys were required to prove that "all spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . was caused solely by the acts or omissions of third parties who were neither employees nor persons in a contractual relationship with the Bohatys."

In the absence of any evidence that there was human activity involved in whatever movement of hazardous substances occurred on the Property since the Bohatys owned it, the appeals court found that the Bohatys had not “disposed” of hazardous substances on the Property. The court also found that the Bohatys raised genuine issues of material fact as to the other important issues of CERCLA liability. For instance, the only evidence presented by the government that the Bohatys released hazardous substances were photographs of what might have been hazardous substances on the ground near rusted drums. The court found that this was not sufficient evidence to show that the release of hazardous substances had been “ongoing” or to show the absence of a genuine issue of material fact. The Bohatys presented evidence that: (1) after both the 1987 and 1989 inspections they had asked OEPA to advise them if anything needed to be done; (2) that the toxicity tests performed in 1987 were negative; and (3) the OEPA never told them that any action on their part was necessary. The Court of Appeals held that this raises a genuine issue of material fact as to whether they exercised the required degree of care. The government showed that the Property was accessible to third parties, and argued that the Bohatys did not take precautions against the “foreseeable acts of third parties.” However, the Court of Appeals found that there was no evidence in the record that any third party had ever compromised the integrity of the drums or in any way caused the release of their contents. Once again, the government did not show the absence of a genuine issue of material fact.

Consequently, the Court of Appeals found that the Bohatys showed a genuine issue of material fact as to each element of the CERCLA innocent landowner defense, and were entitled to proceed to trial in an effort to prove their defense.

The Bohatys’ next argument was that the lien on the Property was appropriate for parcel 1 only, because no releases occurred on parcels 2 or 3. As defined under CERCLA, a “facility” is “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise comes to be located.” The government argued that the three parcels were all “subject to or affected by” the removal. Although there was no evidence that any hazardous materials had been released on parcels 2 or 3, the evidence showed that the three parcels had historically been transferred together by the same instruments and never considered as separate parcels

at any time. Therefore, the Court of Appeals held that the lien properly applied to all three parcels.

The Bohatys’ next argument was that they should not be held liable for certain removal costs. Specifically, the Bohatys claimed that the EPA should not have removed or disposed of the empty drums found on the Property at all, because they presented no environmental hazard. The Bohatys claimed that the empty drums could have been disposed of for less cost in a standard landfill rather than in a hazardous waste landfill. The court found that there was no evidence on record that removing the empty drums raised the removal costs significantly, nor was there any evidence showing that the empty drums would have been accepted by a standard landfill, or that it would have even been less costly to dispose of them in one. Based on these findings, the appeals court affirmed the decision of the district court as to cleanup costs.

Therefore, the judgment of the district court with respect to the innocent landowner defense was reversed, and the case was remanded to the district court for further proceedings. The judgment of the district court was affirmed in all other respects.

United States v Meyer, No. 1:97-CV-526 (WD Mich, Aug 26, 1999).

Robert W. Meyer, Jr. (“Meyer”) was an officer and shareholder of R.W. Meyer, Inc. (“RWMI”), a family-owned business, between the years of 1964 and 1982, as well as an employee, shareholder, and board member of a second family business, R.W. Meyer Construction Company (“MCC”). RWMI owned a parcel of land in Cadillac, Michigan (the “Property”), and intended to develop it as a mini-industrial park. Consequently, MCC constructed a private perimeter sewer line along the boundary of the Property, which connected to the municipal sewer system. Meyer supervised and assisted with the construction and maintenance of the perimeter sewer line. Because the sewer joints were loosely sealed, some of the waste water in the perimeter sewer line regularly leaked into the ground. Meyer was aware of this regular leakage.

In the early 1970’s, RWMI built a factory building on the Property for use by RWMI’s lessee, Northernair Plating Company (“Northernair”). As part of the lease agreement, MCC was contracted by RWMI to provide water, sewer, plumbing and heating for the building leased by Northernair. Meyer supervised construction of the

Northernnaire building, as well as a sewer line connecting sinks and a bathroom within the building to the perimeter sewer line. Additionally, floor drains that were designed to drain directly into the ground were installed in the building. Later, a second sewer line was added from the area around the floor drains to the perimeter sewer line. Meyer denied installing either of these two drainage systems, but admitted that they were both in place when he poured the concrete floor for the Northernnaire building. During the lease term, Meyer maintained and repaired the entire sewer system, as well as built a manhole to assist with the upkeep of the system.

Northernnaire used these floor drains to dispose of wastewater from its electroplating process. The United States alleged that Northernnaire had told Meyer of its plans to dispose of rinse water through the floor drains and into the sewer. Meyer denied this and claimed that Northernnaire had agreed to dispose of all wastes off site.

By 1978, the City of Cadillac water treatment plant informed Meyer that the contaminant levels in the effluent from Northernnaire were unacceptably high, and consequently barred Northernnaire from using the municipal sewer system and blocked the connection between the Northernnaire building and the municipal sewer. In 1982, the MDEQ began investigating the Property. By 1983, EPA had joined the investigation, which turned up elevated levels of cyanide, lead, nickel, chromium, copper and zinc in the soil at the site. As a result, the Property was placed on the National Priorities List, and EPA began cleaning up the Property. The United States succeeded in cost-recovery proceedings against RWMI, and then filed a second suit naming Meyer individually. Both the United States and Meyer filed cross-motions for summary judgment regarding Meyer's liability.

To prove CERCLA liability on the part of Meyer, the United States had to show that there had "been a release or threatened release of a hazardous substance from a facility which caused the United States to incur response costs and that Meyer met the definition of a potentially responsible party." There was no question that Northernnaire had discharged waste water containing hazardous substances into the sewer lines leading from its building and that those substances had in turn been deposited in the adjoining sewer lines. Therefore, the sewer lines on the Property collectively and individually qualified as a CERCLA facility. Additionally, the United

States provided sufficient evidence that it had incurred response costs as a result of the Northernnaire releases, because its remediation work on the Property included removing a sewer line and floor drains, excavating and disposing of contaminated soils and sewer sediments, and installing a groundwater extraction and treatment system. Determining whether Meyer was an "operator" under CERCLA was the sole remaining issue to be decided concerning Meyer's liability.

Under CERCLA, "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of" may be liable for response costs. 42 USC 9607(a)(2). Citing **United States v Bestfoods**, 118 S Ct 1876 (1998), the District Court noted that operator liability under CERCLA extends to any person who "directs the workings of, manages, or conducts the affairs of a facility," and whose authority extends to "operations having to do with the leakage or disposal of hazardous wastes, or decisions about compliance with environmental regulations."

In accordance with the **Bestfoods** decision, the United States was required to show either that the corporate veil could be pierced in accordance with state law or that Meyer was personally involved in the operation of the sewer system. Based upon Meyer's heavy, personal involvement in the construction and maintenance of the sewer system, the court found Meyer to be an operator of the system, and, thus, held Meyer liable for the releases of chemicals from the system.

In his defense, Meyer claimed that, because he was unaware of Northernnaire's generation and disposal of toxic chemicals, he should not be held liable for the environmental harm that resulted. The court treated Meyer's argument as an "innocent landowner" defense, requiring Meyer to show that Northernnaire was the "sole cause" of the releases, that Northernnaire did not cause the releases in connection with a contractual, employment or agency relationship with the Meyer, and that Meyer had exercised due care and guarded against the foreseeable acts or omissions of Northernnaire. The court found that, although the Northernnaire lease agreement might not have been with Meyer personally, the facts in this case clearly showed that Northernnaire's hazardous substance releases were foreseeable, and that Meyer did not exercise due care to prevent the releases. For example, when he first installed the perimeter sewer line, although Meyer was

aware that the Property was an industrial park and that tenants such as Northernair would be generating industrial waste water, he did not build the sewer line to accommodate such wastes. Meyer also apparently knew that Northernair would be generating hazardous wastes and that the City of Cadillac intended to sample Northernair's sewer effluent to test for hazardous chemicals. Meyer failed to act to prevent such releases by, for example, requiring Northernair to agree in the lease agreement to dispose of hazardous wastes off-site, to restrict Northernair's access to the sewer lines, or to take any action to prevent releases after finding out from the City of Cadillac about their discovery of toxic chemicals in sewer line. Moreover, Meyer did nothing to physically prevent the releases from the sewer lines by fixing the leaks or closing off the sewer to prevent the release of these wastes. Meyer's inaction in the face of known toxic chemical releases indicated a lack of due care as required under CERCLA's innocent landowner defense. Accordingly, the court found that Meyer was personally liable under CERCLA as an operator of the sewer lines, granted the United States' motion for summary judgment, and denied Meyer's motion.

IBC Mfg Co v Velsicol Chem Corp, No. 97-5340, 1999 WL 486615 (CA 6, 1999).

Chemwood Corporation ("Chemwood") was a producer and seller of pentachlorophenol ("penta") pesticides. The stock in Chemwood was sold to Bankhead Forest Industries in 1973. Chemwood arranged for penta wood preservative products to be formulated and packaged at a blending and packaging site in Arlington, Tennessee, which eventually led to Chemwood's alleged liability under CERCLA for releases of hazardous substances at the Arlington site. In 1976, Chemwood moved its office to Alabama and ceased production at the Arlington site. In 1978, Chapman Chemical Company ("Chapman") believed it could use Chemwood's product line to boost its own market share and, therefore, purchased all of Chemwood's stock, becoming aware shortly thereafter of the environmental hazards associated with the Arlington site. A year later, IBC Manufacturing Company ("IBC") acquired certain of the assets of Chapman, including the Chemwood stock.

In 1983, after investigating the Arlington site, EPA determined that immediate response action was necessary and instituted a CERCLA action against several defendants, including Velsicol Chemical Corporation ("Velsicol") and Terminix International, Inc. ("Terminix") seeking

reimbursement of funds EPA had expended in cleaning up the site.

Chemwood ceased its operations in 1988, leaving a net worth of \$282,502 in accounts receivable. Most of the money was owed to Chemwood by IBC as a result of internal transfers, mostly payments by IBC for Chemwood's remaining inventory and a separation of the joint Chemwood/IBC accounting system. In 1990, Velsicol and Terminix filed a third-party complaint against several companies, including Chemwood, seeking contribution under Section 113(f)(1) of CERCLA, 42 USC 9613(f)(1). EPA issued an order against those defendants, including Chemwood, requiring them to conduct response activities to clean up the Arlington site. The defendants in that action entered into a Site Participation Agreement to establish a framework for funding the actions required by EPA. Chemwood advised the other parties at that time that its assets would likely be depleted before the defendants completed the required work. Those assets were depleted in 1995. IBC filed the instant action at that time for declaratory judgment, asserting that it was not liable for Chemwood's activities.

The district court applied Tennessee law and held that IBC was not liable for the CERCLA liability, either under a corporate veil piercing theory or under a successor liability theory. The court found that Chemwood's corporate veil could not be pierced because there had been no showing of fraud by IBC and, with respect to successor liability, there was no proof of a merger because IBC had not purchased all of Chemwood's assets. The district court also found no successor liability under the "mere continuation" theory of successor liability. Velsicol and Terminix appealed.

Under CERCLA, successor corporations are potentially liable for cleanup costs under certain circumstances. The first issue the Sixth Circuit Court of Appeals faced was whether IBC was a successor of Chemwood. A corporation purchasing the assets of another corporation can become liable for the obligations of the seller under four circumstances: (1) where the purchasing corporation expressly or implicitly agrees to assume the selling corporation's liabilities; (2) where the transaction amounts to a *de facto* consolidation or merger of the two corporations; (3) where the purchasing corporation is a mere continuation of the selling corporation; and (4) where the transaction is entered into fraudulently, in order to escape liability for the obligations of the selling

corporation. Velsicol and Terminix argued that the second and third circumstances applied in this case.

A *de facto* merger has occurred when there is a sale of substantially all of one corporation's assets in exchange for the stocks and bonds of the purchasing corporation. In this case, however, the Sixth Circuit held that there was "scant evidence" in the record that IBC purchased all of the assets of Chemwood. Furthermore, because Chemwood remained in business, selling its products in its own name, the court concluded that IBC did not purchase Chemwood's intangible assets, such as goodwill or Chemwood's customer list. Therefore, the court held, a *de facto* merger had not been established.

An acquiring corporation will be considered a "mere continuation" of the old corporation, and thus liable for its obligations, if: (1) a corporation transfers its assets; (2) the acquiring corporation pays less than adequate consideration for the assets; (3) the acquiring corporation continues the selling corporation's business; (4) both corporations share at least one common officer who was instrumental in the transfer; and (5) the selling corporation is left incapable of paying its creditors. The Sixth Circuit agreed with the district court's conclusion that all of Chemwood's assets had not been transferred and that those that were transferred were done so for adequate consideration. Therefore, the "mere continuation" exception did not apply and IBC was not a successor to Chemwood.

A parent corporation cannot be held liable for a subsidiary's CERCLA liability unless the corporate veil of the subsidiary can be pierced. The Sixth Circuit held that the application of Tennessee law was appropriate and, after reviewing applicable state law, held that Tennessee requires an element of fraud in order to pierce a corporate veil. Therefore, Velsicol and Terminix must prove that IBC's actions with regard to Chemwood were conducted for the purpose of defrauding Chemwood's creditors. The Sixth Circuit determined that IBC's control and ownership of Chemwood was not intended to defraud creditors. Chemwood ended its operations in 1988, before IBC was aware of Chemwood's potential liability. At that time, Chemwood still had more than \$282,000 in net worth and its assets were not completely depleted until seven years after it ceased operations. Because Velsicol and Terminix failed to prove fraudulent intent on IBC's part, the court held that the district court's refusal to pierce the corporate veil was not in error. The Sixth Circuit,

therefore, held that IBC could not be held liable under CERCLA for Chemwood's actions and affirmed the district court's ruling.

Freeport-McMoran Resource Partners Ltd Partnership v B-B Paint Corp, 56 F Supp 2d 823 (ED Mich, 1999).

Freeport-McMoran Resource Partners Limited Partnership ("Freeport") was a member of a group of potentially responsible parties ("PRPs") that remediated the Forest Waste Superfund site located in Genesee County, Michigan ("Forest Waste Site"), under a consent decree with EPA. The wastes included some drummed wastes which, according to Freeport, had been sent to the Forest Waste site by Berlin & Farro, which operated a liquids incinerator, also located in Genesee County. According to Freeport, during the period from January 30, 1975, through July 19, 1975, Berlin & Farro sent 12,297 drums containing solids, sludges, or other residues from materials intended to be incinerated, to the Forest Waste site for disposal. Freeport obtained Liquid Industrial Waste Act manifests from MDEQ that showed that the 15 defendants had sent waste to Berlin & Farro during the first half of 1997.

Although Freeport had no direct evidence that any particular wastes from any of the 15 defendants were among the 12,297 drums that Berlin & Farro transhipped to the Forest Waste Site, Freeport attempted to prove that wastes from each of the defendants had been disposed of at the site by presenting an affidavit from a proposed expert witness, Eugene Meyer. Mr. Meyer's affidavit stated that he had experience in dealing with hazardous substances and Superfund sites; that the waste streams from each of the 15 defendants would have contained some solid materials; and that some of these solid materials would have been left in drums and not incinerated at the Berlin & Farro incinerator, based on his assumption that Berlin & Farro employees intentionally decanted only the liquid, and left the solids in the drums.

Twelve of the 15 defendants filed motions for summary judgment. As part of their motion, the 12 defendants asked the court to disregard completely Mr. Meyer's proposed expert testimony because: (1) the testimony did not meet the standards for admissibility of scientific evidence; and (2) his testimony was based on a misconception of the facts concerning how Berlin & Farro handled and emptied drums of liquid waste sent to it for incineration. Federal Rule of Evidence 702 provides that

a court may consider testimony from “a witness qualified as an expert by knowledge, skill, experience, training, or education” to assist the court in understanding the evidence or to determine a fact in issue. An expert witness is allowed to base his opinions on facts or data provided to him by others, but such facts and data must be of “the type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” Fed. R. Evid. 703. In **Daubert v Merrell Dow Pharm, Inc.**, 509 US 579 (1993), the Supreme Court established guidelines that federal judges must follow in deciding whether to admit or exclude testimony of a proposed expert witness. In **Daubert**, the Supreme Court indicated that a trial judge should consider the following: (1) whether a scientific theory can be, or has been, tested; (2) whether a scientific theory has been subjected to peer review in scientific journals; (3) whether the scientific theory has a high potential rate of error; (4) whether there are standards that control the operation of the scientific technique discussed by the expert; and (5) whether the scientific theory or technique to be discussed by the proposed expert enjoys “general acceptance” within the relevant scientific community.

Keeping these guidelines in mind, the district court held that Mr. Meyer’s proposed testimony failed to qualify as acceptable expert testimony, because: (1) he did not follow any published professional standards in reaching his opinions; (2) there are no peer reviewed standards for the analysis he performed; (3) he did not perform any scientific tests to confirm whether his conclusions were correct; and (4) he did not evaluate any margin of error for the analysis he performed. Freeport had argued that it is very difficult to determine with scientific validity the characteristics of numerous waste streams from a variety of industrial plants 20 years after the fact. Freeport also argued that the United States Court of Appeals for the Second Circuit had accepted expert testimony in the form of an affidavit concerning the probable composition of municipal and commercial wastes in **BF Goodrich v Betoski**, 99 F3d 505 (CA 2, 1996). The court held, however, that the expert affidavit considered in **Betoski** was distinguishable from Mr. Meyer’s affidavit, because: (1) Mr. Meyer had conducted no research or literature search; and (2) Mr. Meyer offered nothing except his own general “experience” with hazardous substances to support his conclusions that some solids must have remained in the defendant’s drums. The court concluded that Mr. Meyer’s self-proclaimed “experience,” unsupported by any

scientific publications, was not enough to qualify him as an expert under the standards in **Daubert**.

As a second reason for rejecting Mr. Meyer’s testimony, the court agreed with defendants’ argument that Mr. Meyer’s testimony was founded on the incorrect factual premise that the Berlin & Farro employees poured out only the liquid content of drums, and always left any solid material in them. Defendants had presented unrebutted testimony from Berlin & Farro employees to the effect that they had always emptied drums of liquid waste, and had even added solvents when necessary to be sure that sludges were removed and sent to the incinerator.

After ruling that Freeport could not use Mr. Meyer’s proposed expert testimony, the court proceeded to consider the motions for summary judgment that the 12 defendants had filed. The court discussed the evidence concerning each of the 12 defendants separately. Most of the defendants presented affidavits by their employees or affidavits by Berlin & Farro employees indicating that the wastes they sent to Berlin & Farro were generally liquid and capable of being incinerated. Several of the defendants presented evidence that their waste was especially desirable for incineration because of its high BTU content, or that they took particular efforts to make sure that Berlin & Farro always incinerated all of their wastes. Berlin & Farro employees also testified that they frequently added solvents or other liquids to drums to make sure that solids and sludges would not be left in the drums. Although the court considered the facts for each defendant separately, it reached the same result for each of them, and determined that without Mr. Meyer’s testimony, Freeport had no evidence to prove that any solids from any of the 12 defendants were left in drums, and, therefore, they could not have been transshipped to the Forest Waste site.

In contrast, the court found that “the record is replete with credible testimony” (independent of Mr. Meyer’s affidavit) to prove that the wastes from defendant U.S. Chemical Company (“U.S. Chemical”) had contained solids or sludges and did not “dump clean” from the drums at Berlin & Farro. U.S. Chemical did not present any contrary evidence. Therefore, the court concluded that Freeport was entitled to summary judgment on liability against U.S. Chemical. It also entered summary judgment by default against defendant Chemical Recovery Systems, a defunct company that had not defended the case.

Finally, the court considered Freeport's motion for summary judgment against William Greenway, in his individual capacity. Mr. Greenway had been an officer of U.S. Chemical. The court held that Mr. Greenway could not be held individually liable by "piercing the corporate veil" because there was no evidence that he had arranged for disposal of hazardous wastes on behalf of U.S. Chemical at the Forest Waste site, because he had no role in arranging the alleged transshipment of drums from Berlin & Farro to the Forest Waste site.

Great Lakes Container Corp v Columbus Steel Drum Co 54 F Supp 2d 706 (ED Mich, 1999).

The Mallinckrodt Group, Inc. ("MGI") is a defendant in an action brought by the State of Michigan and others under CERCLA and the Michigan Environmental Response Act, now codified as Part 201 of the Michigan Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.20101 *et seq.*, seeking cleanup costs incurred in relation to a contaminated property formerly owned and operated by MGI. MGI subsequently brought a third party action against approximately 130 parties, asserting claims of: (1) response cost recovery under Section 107 of CERCLA; (2) indemnification; and (3) contribution. The court dealt with only the CERCLA Section 107 cost recovery claim in the case discussed herein.

In reaching its holding, the court relied upon a 1998 decision by the United States Court of Appeals for the Sixth Circuit which addressed the right of a PRP to seek joint and several cost recovery under CERCLA Section 107. In **Centerior Serv Co v Acme Scrap Iron & Metal Corp**, 153 F3d 344 (CA 6, 1998), the Sixth Circuit held that PRPs were precluded from seeking joint and several cost recovery under CERCLA Section 107.

MGI argued that **Centerior** was not controlling because the plaintiff in **Centerior** never contested its liability, while, in this case, MGI has not expressly admitted liability. In taking this position, MGI relied on the Sixth Circuit's statement in **Centerior** that the court was expressly leaving "open the question of whether volunteers, or parties who are truly innocent, may seek joint and several cost recovery, thereby encouraging voluntary cleanups." Because it was undisputed that MGI had not undertaken a voluntary cleanup of the site, the court analyzed whether MGI could prove that it was "truly innocent."

The court began its analysis by first noting that "CERCLA only recognizes a small class of 'truly innocent' PRPs, specifically, those who meet the 'innocent landowner defense.'" The court then stated:

To avail itself of this defense, MGI must demonstrate: 1) that another party was the "sole cause" of the release of hazardous substances and the damages caused thereby; 2) that the other responsible party did not cause the release in connection with a contractual, employment, or agency relationship with MGI; and 3) that MGI exercised due care and guarded against the foreseeable acts or omissions of the responsible party.

In light of this demanding standard, the court concluded that it was not persuaded that MGI could establish that it was "truly innocent." The court further reasoned that if MGI was found "truly innocent" it would have no liability in the action brought by the state and it would, therefore, have no response costs to recover under CERCLA. The court, therefore, concluded that MGI was not entitled to seek joint and several cost recovery under CERCLA Section 107, but that it was entitled to seek contribution.

Datron, Inc v CRA Holdings, Inc, 42 F Supp 2d 736 (WD Mich, 1999).

Datron, Inc. ("Datron") and International Controls Corporation ("ICC"), corporate predecessor to CRA Holdings, Inc. ("CRA"), entered into a stock purchase agreement ("Agreement") under which ICC sold to Datron all outstanding shares of stock in its two subsidiaries, All American Industries, Inc. ("AAI") and Datron Systems, Inc. ("DSI"). As part of the transaction, Datron acquired five properties owned by AAI and DSI. In the Agreement, ICC made certain representations and warranties as to the environmental conditions at the properties. The Agreement also contained an indemnification provision, whereby ICC agreed to hold Datron harmless at all times from and after the Closing Date against "any and all damages, losses, liabilities . . . costs and expenses resulting from any misrepresentation, breach of warranty, or nonfulfillment of any covenant or agreement" on the part of ICC under the Agreement. This indemnification provision was in effect for a period of five years after the closing date, until May 20, 1993. The Agreement contained an exception to the five-year indemnification provision for "proceedings" that have been initiated

within the five-year period but not yet completed. Datron brought suit against CRA as a corporate successor to ICC, alleging that CRA failed to disclose that each of the properties had certain environmental conditions for which clean up was required. Datron sought an award of all indemnifiable amounts and a declaratory judgment that CRA is obligated to indemnify Datron for all expenses with respect to indemnifiable items under the Agreement. CRA sought a declaratory judgment that it had no duty to indemnify Datron for any costs incurred after May 20, 1993.

Datron argued that the costs for which it sought indemnification fell within the "proceedings" exception to the five-year period, under which representations and warranties made with respect to environmental matters would survive until the conclusion of proceedings initiated before the end of the relevant limitations period. Datron received notices from EPA advising it that it was a PRP for contamination of certain sites. Datron notified CRA of EPA's actions within the five-year period. Datron contended that these letters constituted "proceedings" and that, therefore, CRA is liable on its environmental indemnification provision for costs incurred through the conclusion of the EPA investigation. Datron also argued that the PRP letters constituted proceedings because they were the commencement of an investigation and negotiations in which EPA would seek to hold Datron liable for the remediation costs of the affected sites. Relying on **Michigan Millers Mutual Ins Co v Bronson Plating Co**, 519 NW2d 864 (Mich, 1994), Datron contended that if PRP letters can be held to constitute a "suit" by other courts, the term "proceedings" should be even more capable of such an interpretation because "'suit' more strongly indicates a legal action than the term 'proceedings.'" The court held, however, that **Michigan Millers** analyzed the meaning of "suit" in the context of triggering an insurance company's duty to defend, but the duty to defend is distinct and separate from any duty to indemnify. "[A] duty to defend is construed more broadly than the duty to indemnify." The court held that the ordinary meaning of "proceeding" is one of actions before judicial tribunals and that, therefore, the PRP letters, which were not actions before tribunals, did not constitute "proceedings."

Datron argued next that the Agreement did not require that the costs actually be incurred within the five-year period to be indemnifiable, that the Agreement provided that liability remained with ICC as long as the matter

arose or was discovered before the end of the five-year period. The court agreed with CRA, however, that CRA's potential indemnification obligations were limited to: (1) a loss paid by Datron; or (2) a liability paid or judicially determined in a final judgment, order or decree, within the five-year period. Therefore, because the period of indemnity expired in 1993, costs incurred or liability determined after the expiration of that period fell outside the ambit of the Agreement. "[I]t is well established that the duty to indemnify is triggered when the liability is *fixed*." The court, then, denied Datron's motion for summary judgment as to the indemnification agreement and granted CRA's motion for summary judgment.

With respect to one property in particular ("Tech Systems property"), under the Agreement, ICC agreed to assume additional financial obligations: "To the extent that [Datron] . . . shall incur or pay more than \$100,000 for [the cost of implementation of the Remedial Actions], regardless of whether such incurrence of payment is prior to or after the Closing, [ICC] shall reimburse and shall indemnify [Datron] . . . for the cost in excess of \$100,000." Datron argued that post-closure monitoring and posting of financial assurance for post-closure monitoring are included within the definition of "remedial actions," and that, therefore, CRA must indemnify Datron for such costs spent in excess of \$100,000. Because resolution of this issue was outside the case management order, however, the court denied Datron's motion for summary judgment.

CRA argued that it should be granted summary judgment on Datron's CERCLA claims because: (1) it was not an "operator" of the facilities for purposes of CERCLA; and (2) Datron, as a PRP, cannot bring a Section 107 action but is limited to bringing a contribution action under Section 113 of CERCLA. CRA claimed that each of the subsidiaries in question was operated as an independent business, with environmental compliance and hazardous waste decisions made by personnel employed at each facility. The court agreed with CRA that Datron failed to show that ICC's involvement with the facilities fell outside the parameters of normal oversight by a parent corporation over its subsidiaries.

Organic Chem Site PRP Group v Total Petroleum, Inc, 58 F Supp 2d 755 (WD Mich, 1999).

Mid-West Refineries ("Mid-West") owned twenty acres of industrial property in Grandville, Michigan ("Site"), and used the property as a petroleum refinery

and a petroleum transport and storage facility. Leonard Refineries, Inc. acquired the assets of Mid-West, including the Site, and continued using the Site for petroleum storage until it sold the Site to Cutler Oil Company. Shortly thereafter, the Site was reacquired by McClanahan Refineries, a direct subsidiary of Leonard Refineries. In 1968, McClanahan Refineries sold the land to Spartan Chemical Company, with the contract completed in 1979 and legal title to the Site transferred at that time. Organic Chemicals, Inc. ("OCI"), a subsidiary of Spartan Chemicals, operated a solvent reclamation and chemical manufacturing facility on the Site between 1968 and 1980. In 1983, EPA determined that the groundwater under the Site was contaminated and placed the Site on the National Priorities List pursuant to CERCLA. OCI and many of its customers formed a PRP group to respond to EPA actions at the Site. Total Petroleum, Inc. ("Total"), as successor in interest to Leonard Refineries, participated in the PRP meetings for a while but did not contribute. In response to a unilateral administrative order ("UAO") issued by EPA, certain identified PRPs undertook specific cleanup actions at the Site and various remediation activities, spending an estimated \$1,000,000 to comply with the EPA's UAO. In addition, several de minimis PRPs deposited another \$1,457,375 into a trust fund to pay for additional remediation and to compensate EPA for its remediation expenses. Total did not, however, contribute to this fund. The PRP group filed a complaint against Total under CERCLA, the Resource Conservation and Recovery Act ("RCRA"), 42 USC 6901 *et seq.*, and NREPA, alleging that Total owned or operated the Site when releases of hazardous materials occurred and is jointly and severally liable for and/or liable for contribution towards the expenses incurred by the PRP group in remediating the Site. The PRP Group filed a motion for summary judgment on Total's liability under CERCLA, RCRA, and NREPA. Total also sought summary judgment on its liability under those statutes and sought partial summary judgment on the PRPs CERCLA claims because they were inappropriately framed or premature.

As a preliminary matter, the court denied the PRP group's motion to strike the reply briefs that Total filed in opposition to the group's motions for summary judgment. "Even if Total's reply briefs were technically late, the PRP Group has not shown bad faith on Total's part, prejudice from the delay or any other justification for imposing sanctions. The Court will not participate

in the parties' bickering and declines to strike Total's reply briefs."

Turning to Total's motion for partial summary judgment, in which Total argued that PRPs are only entitled to contribution under CERCLA, the court noted that the Sixth Circuit has determined that PRPs cannot bring cost recovery actions under CERCLA to impose joint and several liability on other PRPs. Therefore, the court granted summary judgment to Total on the PRP group's claim for joint and several liability under CERCLA. Total also argued that a contribution claim under either CERCLA or Michigan common law is premature, because the PRP group has not established the full amount of its response costs or demonstrated that it will be forced to pay more than its share of the costs. The court held that although soil remediation has not yet begun on the Site, the PRP group is certain to incur future response costs and, therefore, declaratory judgment on Total's CERCLA liability is appropriate.

The court also held that, under Michigan law, contribution is available to persons who become jointly or severally liable in tort for the same injury and who pay more than their pro rata share of the joint or several liability. A plaintiff must allege that common liability exists and that the plaintiff is exposed to greater liability for damages than would be its pro rata share. In this case, the court held that the PRP group submitted evidence suggesting that Total is partially responsible for the contamination at the Site and, because Total has not contributed money to or participated in remediation at the Site, the PRP group is exposed to greater liability than its pro rata share. Therefore, the court denied Total's summary judgment motion on this claim. The court declined to enter a partial summary judgment to limit the PRP group's recovery to its demonstrated damages, as requested by Total, because any contribution award will, by definition, be limited to that portion of the group's proven response costs properly allocated to Total. Lastly, Total sought an order declaring that the PRP group was not entitled to attorney fees and costs. The court held, however, that because such costs and fees may be awarded as the prevailing party's damages under either CERCLA or RCRA and neither party had yet prevailed, this motion was premature.

On Total's motion for summary judgment on the PRP group's suit as a whole, Total argued: (1) that for the releases between 1968 and 1979, Total was not liable

under CERCLA or NREPA because it held only a security interest in the site during that period; (2) that for the releases before 1968, it was not liable because any such releases would fall under CERCLA's petroleum exclusion; (3) that the PRP group failed to prove that the Site created an imminent and substantial danger to human health or the environment, as required by RCRA; and (4) that the RCRA claim is barred by EPA enforcement efforts.

To prevail on its security interest argument, Total must show that it held indicia of ownership primarily to protect its security interest in the Site and that it did not participate in the management of the Site. The court held that Total satisfied the first element by showing that it held title to the Site as a land contract vendor and, under Michigan law, a land contract vendor holds legal title to the subject property only as a security interest to ensure payment on the land contract. Although the PRP group argued that Total had the opportunity to participate in the management of the Site, the court stated that the mere fact that Total held lease rights to the Site is insufficient to defeat Total's motion for summary judgment. There was no evidence submitted that Total exercised any rights under the lease. Therefore, Total was entitled to summary judgment that it was not liable under CERCLA for releases occurring after 1968 under the security interest exception. In addition, because NREPA contains a similar security interest exception from owner/operator liability, which explicitly includes "a vendor's interest under a recorded land contract" as an exempt security interest, Total was entitled to summary judgment that it was not liable under NREPA for releases occurring after 1968.

CERCLA contains an exception to liability for "petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated." 42 USC 9601(14). Total argued that it was eligible for this exception because the only evidence of pre-1968 releases related to releases of petroleum products. In this case, however, the court found that the PRP group had provided evidence suggesting that Total or its predecessors released other hazardous substances on the Site prior to 1968. The court found this evidence sufficient to create a genuine issue of material fact and, therefore, denied Total's summary judgment motion as to this portion of the PRP group's claim.

Private enforcement actions may not be brought under RCRA if EPA has obtained a court order or issued an

administrative order under Section 106 of CERCLA, 42 USC 9606, or Section 7003 of RCRA, 42 USC 6973, and a responsible party is diligently conducting remedial action pursuant to that order. For this reason, Total sought summary judgment on this portion of the PRP group's claim. The court, however, held that private enforcement actions are barred under the cited sections only as to the scope and duration of the administrative order. Because the only UAO issued by EPA for the Site and the only remediation initiated at the Site addressed groundwater contamination exclusively, while the PRP group's RCRA claim was brought for both groundwater and soil contamination, the claim was not barred. Summary judgment on the RCRA claim was, therefore, denied.

Finally, Total argued that it was entitled to summary judgment on the PRP group's public nuisance claim. Total argued that it could not be held responsible for any public nuisance created by the disposal or release of hazardous substances while it held title to the Site as a land contract vendor. The court held, however, that the alleged release by Total of petroleum and other hazardous substances may constitute a public nuisance by unreasonably interfering with the public's right to be free from exposure to such materials and by violating CERCLA or NREPA. The court, therefore, denied summary judgment to Total on this count.

The court denied the PRP Group's motions for partial summary judgment as to Total's CERCLA and NREPA liability after 1968, and for any claims seeking a declaration of joint and several liability under CERCLA, for the reasons stated above. With respect to the CERCLA claim for liability before 1968, the court held that, although the PRP group provided evidence that Total released refinery wastes prior to 1968 that were arguably not covered by the petroleum exclusion, the group did not present sufficient evidence to prove that the non-petroleum releases contained hazardous substances. Therefore, summary judgment on the pre-1968 CERCLA claims was denied.

While the PRP group presented some evidence that disposal of solid or hazardous materials on the Site might present an imminent and substantial endangerment to public welfare, human health, or the environment, and that Total had released petroleum and other hazardous wastes at the Site, the imminent and substantial endangerment evidence was linked to OCI's release of solvents, not Total's petroleum releases. Although the

evidence was sufficient to defeat Total's motion for summary judgment, it was not sufficient to establish Total's liability. Therefore, summary judgment on the RCRA claim was denied.

Under NREPA, the former owner or operator of a facility is liable for hazardous substance releases at the facility if the party owned or operated the facility when the release occurred and was responsible for an activity causing a release or threat of a release. Although CERCLA considers a "facility" to be any site on which hazardous substances have been released, NREPA more narrowly defines "facility" as only those sites on which the concentration of hazardous substances released exceeds criteria established by MDEQ. The court held that, with respect to the PRP group's summary judgment motion as to Total's NREPA liability, the group had not presented any evidence showing that the more stringent standards of NREPA had been met. The group merely asserted that because Total was liable under CERCLA, it was also liable under NREPA. The court, then, denied the group's motion for summary judgment on its NREPA claim.

White Consolidated Indus v Westinghouse Elec Corp, 179 F3d 403 (CA 6, 1999).

Westinghouse Electric Corporation ("WEC") owned and operated an appliance manufacturing facility in Edison, New Jersey ("facility"), from approximately 1950 through 1974. In 1969, WEC began manufacturing dehumidifiers and air conditioners at the facility, and began using a hazardous solvent, trichloroethylene ("TCE"), as a cleaning agent. In 1970, a 2,000 gallon TCE tank ruptured and leaked, causing WEC to evacuate and close off that area of the facility. The area was then aired out with opened windows and fans, allowing the TCE to evaporate until there was no observable contamination.

In 1975, White Consolidated Industries ("WCI") purchased WEC's major appliance manufacturing business, including the Edison facility. The terms of the purchase were outlined in a purchase agreement, in which WEC stated that "to the best of [its] knowledge and belief," there were no "existing facts or conditions which might give rise to any claim, litigation, proceeding or investigation," and that "none of the operations conducted on the [property] . . . presently violate any applicable . . . anti-pollution . . . requirement (under interpretations currently in effect)." Subsequently, WEC agreed to indemnify WCI for "any and all damages and liabilities

whatsoever resulting from any misrepresentation of [WEC]." WEC did not disclose to WCI the fact that a TCE tank had ruptured and leaked at the facility in 1970.

Approximately fifteen years after WCI purchased WEC's business, WCI discovered TCE contamination at the facility. WCI alerted the New Jersey Department of Environmental Protection ("NJDEP") of these findings, and subsequently entered into a Memorandum of Agreement with NJDEP, in which WCI agreed to initiate remediation activities to clean up the soil and groundwater at the facility. Through evidence and environmental studies, WCI eventually determined that the 1970 TCE spill was the most likely cause of the contamination, and subsequently sent a letter to WEC, asking them to assume liability for the contamination and indemnify WCI for its remediation costs. Despite admitting to the TCE spill, WEC refused to accept liability for cleanup costs at the facility.

WCI filed suit against WEC in the district court for the Northern District of Ohio, seeking response costs under CERCLA, the New Jersey Spill Compensation and Control Act, NJ Stat Ann 58:10-23 ("Spill Act"), and other common law claims. The district court granted summary judgment to WEC, finding that in 1975, WEC could not have known that the TCE spill could later lead to liability claims, because the laws that created this potential liability (such as CERCLA and the Spill Act) were not yet in existence at the time. Additionally, the court found that WCI had provisionally assumed responsibility for future liabilities, and that WEC had not concealed a defect, as it had not been aware of the contamination or any existing liabilities. WCI appealed.

The purchase agreement stated that WEC agreed to "indemnify and save WCI harmless from . . . any misrepresentation of [WEC] contained herein or in any agreement . . . from any breach of warranty or covenant or obligation of [WEC]." The purchase agreement further stated that WCI assumed "all obligations and liabilities of the Business, contingent, or otherwise, which are not disclosed or known to [WEC] on the Closing Date and are not discovered by WCI within a period of one year from the Closing Date."

WCI's appeal was based on its belief that WEC was liable for the remediation costs under the purchase agreement's assumption of liability and indemnification clauses. WCI alleged that WEC's failure to disclose the

1970 TCE spill constituted a material breach of the purchase agreement, therefore obligating WEC to indemnify WCI for the remediation of the facility. Thus, the court had to decide whether “the terms of the Purchase Agreement address the allocation of future environmental liabilities associated with the Edison facility, and if so, whether WCI expressly or impliedly assumed responsibility for future remediation costs.”

Upon review of WCI’s breach of contract claim, the Sixth Circuit found that WEC did not breach any warranties in its purchase agreement with WCI, as any environmental liability relating to the contamination did not exist at the time of the spill or at the date of the sale. Any laws that would create that liability in the future, such as CERCLA and the Spill Act, did not exist, and, therefore, WEC could not have known that the TCE spill might lead to any kind of remediation claims. Although there were some anti-pollution state and township statutes in effect at the time of the sale, none of them stated that TCE was a regulated substance, or that a spill of TCE would represent a violation of the aforementioned statutes.

Furthermore, because WCI could not show any proof by evidence or testimony that WEC knew of the contamination or even knew that the spill could possibly lead to any future liability that might harm the business, the Sixth Circuit found that WEC did not breach the purchase agreement. Because WCI had agreed to assume all potential unknown liabilities related to the business, the court found that, pursuant to the purchase agreement, WCI assumed the risk of CERCLA losses after the one-year grace period. Therefore, the district court’s decision was affirmed.

United States v Township of Brighton, No. 94-75289 (ED Mich, Mar 13, 2000), on remand from 153 F3d 308 (CA 6, 1998).

From 1960 until 1973, Brighton Township (“Township”) contracted with Vaughan Collett, and his son Jack (collectively, Collett), to allow Township residents to dispose of waste at a dump operated by Collett on three acres in the southwest corner of Collett’s property in exchange for a monthly fee paid by the Township. The Colletts also accepted waste from other commercial, industrial and non-resident sources; however in 1967 the Township negotiated a new contract with Collett that provided for the exclusive use of the dump by Township residents. The contracts between Collett and the Township required that the dump “meet specifications

of and be under the supervision of the [Township’s] Board of Appeals.” Further, the Township Board often made special appropriations for the dump, such as bulldozing and other maintenance activities, when Collett failed to perform those activities to the Township’s satisfaction. The Township also took responsibility for correcting conditions at the dump when it came under the scrutiny of state regulators. The Township eventually paid for the final closure of the dump in 1973 under increasing pressure from state officials to bring the dump into compliance with applicable solid waste regulations.

In 1989, an EPA inspection team discovered a cluster of 200 deteriorating drums on the parcel that had released hazardous substances to the surrounding soil and groundwater. After spending over \$490,000 to clean up the dump, the United States sued Collett and the Township to recover those costs under Section 107 of CERCLA.

In an earlier decision, the district court had held that the Township’s level of participation in the dump made it an “operator” of the facility, as that term is defined under CERCLA. The Sixth Circuit, however, reversed that decision because the district court had not developed sufficient facts to determine whether the Township was an “operator” of the dump and remanded the case back to the district court to consider whether the Township exercised “actual control” over the dump. On remand, the district court reviewed the Township’s participation in the establishment, design, operation and closing of the dump and concluded that the Township was an “operator” of the dump within the meaning of CERCLA. In particular, the district court noted that the Township regularly approved resolutions regarding the operation of the dump, paid for improvements to it, and met with State regulators regarding compliance issues. Accordingly, the district court held that the Township exercised actual control over the operation of the dump.

The Township argued that, if it was liable as an operator of the dump, it should only be liable for the 3-acre portion where Township residents disposed of waste or, alternatively, it should only be liable to the extent Township residents contributed to the disposal of the leaking drums discovered at the dump. In the earlier district court decision, the court had held the Township failed to demonstrate that there was a reasonable basis to conclude that the harm was divisible. On appeal, the Sixth Circuit held that the district court had applied the

wrong standard for determining divisibility. The “proper standards for divisibility come from the Restatement (Second) of Torts, which seeks a reasonable basis for determining the contribution of each cause to a single harm,” the Sixth Circuit stated. Accordingly, the Sixth Circuit remanded the matter back to the district court to reconsider the possible bases of dividing cost between the Township and Collett. On remand, the district court again held that the Township had not demonstrated any geographic, volumetric, or temporal basis for dividing the damages among the liable parties. The district court therefore imposed joint and several liability on the Township for the entire amount of the cleanup costs.

4. Resource Conservation and Recovery Act

United States v Williams, 195 F3d 823 (CA 6, 1999).

Johnnie James Williams (“Williams”) operated W&R Drum, a company that reconditioned previously used metal drums and sold them for reuse in Memphis, Tennessee. In 1997, Williams was sentenced to 41 months in prison, together with a two-year supervised release, on two counts of violating RCRA relating to the illegal storage and disposal of hazardous waste at the W&R Drum site, which contained up to 2000 times the regulatory limits for heavy metals, acids, organic materials and solvents. Williams appealed his conviction on the grounds of insufficiency of evidence, ineffective assistance of counsel, failure to order a new trial and violation of due process in sentencing.

Williams argued that there was insufficient evidence to show he knew the substances in the drums at the facility had the potential to be harmful to others or the environment to support his conviction even though the trial provided evidence that Williams was frequently at the site, that he had been told his activities violated environmental statutes, that there were noxious fumes at the facility and that there was discolored runoff from drums at the facility. Williams argued that the jury could not have known his state of mind to show he knew the substances were harmful. The court held that the jury did not have to believe Williams’ protestations of innocence and could conclude on its own based on the evidence presented at trial that Williams had the requisite state of mind to have known the substances were harmful.

Williams also argued that he had ineffective counsel because his counsel pursued a risky trial strategy, failed to make a post-trial motion for acquittal, reserved his

opening statement, made Williams testify outside the jury’s presence that he would not testify on his own behalf, failed to make a motion to dismiss for selective prosecution, overstated the future testimony of a potential witness, and made a damaging statement in his opening statement. The court recited the United States Supreme Court’s holding in **Strickland v Washington**, 466 US 668, 687 (1984), requiring a defendant must prove its counsel’s performance was deficient by showing counsel made errors so serious that defendant was not afforded the right to counsel under the Sixth Amendment of the United States Constitution. **Strickland** also held that the defendant must show that counsel’s deficient performance prejudiced the defendant. The court held that Williams’ counsel did nothing unusual and that Williams’ counsel’s arguments and trial strategy did not appear to prejudice the jury.

One of Williams’ other arguments was that a juror failed to disclose the fact that she had realized she was familiar with the W&R Drum facility. The court held that the fact a juror did not disclose familiarity with the site did not result in improper influence on a jury and that the court was bound by existing law to not disturb a district court’s finding of impartiality absent a showing that prejudice is manifest. The court found no abuse of discretion on the part of the trial judge for failure to order a new trial.

Williams also argued that his sentence was enhanced, thereby violating due process. The court followed the holding in **United States v Bogas**, 920 F2d 363, 369 (CA 6, 1999), wherein a cleanup costing in excess of \$100,000 is considered a substantial expenditure. Under the United States Sentencing Guidelines § 6 2Q1.2(b)(3), an increase of 4 levels is allowed for a cleanup requiring a substantial expenditure. The cleanup of the W&R Drum site cost the government \$1.5 million, and Williams argued that if he had been able to pay for it, the sentence would not have been increased. The court held that the sentencing guidelines require the enhancement for a substantial expenditure, regardless of who pays for it. Finding no basis for Williams’ allegations, the court affirmed his conviction and sentence for two counts of violating RCRA.

Pape v United States Army Corps of Engineers, 188 F3d 508 (CA 6, 1999).

Dale K. Pape, Sr. had sued the COE under the citizen suit provisions of RCRA, claiming that the COE had

improperly disposed of hazardous waste at a former military site near Racó, Michigan, thus damaging “the wildlife in the area around the Racó Site and the area’s beauty.”

The district court had dismissed Pape’s lawsuit in a June 5, 1998 decision on the grounds that he did not have “standing” to bring the suit in the first instance. The doctrine of standing arises from the provision of the United States Constitution authorizing the federal courts to decide only “cases” and “controversies.” Federal courts have interpreted this provision to mean a plaintiff has standing to bring a lawsuit only if the plaintiff shows, among other things, that he or she has suffered a concrete and particularized injury caused by the defendant’s action. The district court had held that Pape failed to satisfy this requirement for standing because his injury was only hypothetical and conjectural.

Pape had claimed that he was injured by the COE’s disposal activities because he regularly visited the “area around” the Racó Site and had made plans to camp near the site in October of 1998, and that those visits “have and will continue to be negatively affected, as both the number of wildlife sightings and the beauty of the area have diminished.” Although the district court recognized that “the desire to use or observe an animal species, even for purely esthetic purposes,” may confer standing, the court held that Pape’s claimed injury was too speculative. The district court held that Pape’s “vague expression of an intention to vacation at this campground in October 1998, where he anticipates that the number of wildlife sightings and scenic beauty may be diminished, does not suffice to establish a concrete and particularized injury,” which is necessary for standing. Accordingly, the district court dismissed Pape’s lawsuit.

On appeal, the Sixth Circuit upheld the district court’s ruling. The Sixth Circuit first noted that there was no clear error in the district court’s factual findings regarding the two-mile distance separating the Racó Site from the campground that Pape intended to visit, or the lack of evidence regarding any contamination at the Racó Site. Next, the Sixth Circuit held that the district court properly applied these facts to the law on standing to sue in federal court. “Even if Pape’s plan to visit [the campground] in October 1998 were considered a real and immediate injury-in-fact,” the Sixth Circuit held, “Pape did not establish a link between the alleged pollution at Racó and the alleged decline in wildlife or scenic beauty in any

area he had visited or planned to visit.” Accordingly, the Sixth Circuit upheld the district court’s dismissal of Pape’s lawsuit for lack of standing because Pape had not demonstrated an injury that was fairly traceable to the COE’s alleged unlawful conduct.

Rowlands v Pointe Mouille Shooting Club, 182 F3d 918 (CA 6, 1999).

Pointe Mouille Shooting Club (“PMSC”) has operated a shooting range in Monroe County since 1970. Visitors to the range fire shotguns, pistols, and other firearms at various targets. The soil in the range has, over time, accumulated lead from bullets and target debris and MDNR identified PMSC as an environmentally impacted site. MDNR, acting on behalf of the state, purchased the land to regulate its use, undertaking remedial activities and leasing the range to PMSC for continued operation of the range. Roy Rowlands (“Rowlands”) lived approximately one mile from PMSC for about a year and then moved to a distance of six miles from the range to avoid what he considered to be the hazards of the range: noise, unsuitable water, and poisoned fish. Rowlands claimed that, while he didn’t use the range itself, he did use the land and water within the 100-acre safety zone of the range for fishing, boating, hiking, photographing, and driving. Rowlands brought suit against PMSC and MDNR under the citizen suit provision of RCRA and Michigan law, alleging that lead pellets and target debris at the range constituted hazardous toxic waste that contaminates surrounding soil and groundwater and nearby Lake Erie. Rowlands claimed that he and other Michigan citizens were subjected to health, recreational, aesthetic, and environmental harm as a result of the range and, therefore, sought declaratory and injunctive relief, the imposition of civil penalties, and the award of attorneys’ and expert witnesses’ fees. MDNR filed a motion to dismiss Rowlands’s complaint and the district court granted the motion because it did not have subject matter jurisdiction over a RCRA suit against Michigan. The district court noted that Congress did not abrogate the states’ sovereign immunity when it enacted RCRA and Michigan did not expressly waive its Eleventh Amendment immunity in this matter. Because the district court dismissed Rowlands’s RCRA suit, it also dismissed his state claims. Rowlands appealed to the United States Court of Appeals for the Sixth Circuit.

The Eleventh Amendment provides that “the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or

prosecuted against one of the United States by Citizens of another state or by Citizens or Subjects of any Foreign State.” In addition, unconsenting states are immune from suits brought in federal courts by their own citizens as well as by citizens of another state. The bar extends to suits against agencies, such as MDNR, that are arms or alter egos of the state. There are three instances in which a state is not entitled to Eleventh Amendment immunity: (1) where the state has consented to suit; (2) where the application of **Ex parte Young** and its progeny is appropriate; and (3) where Congress has abrogated the state’s immunity. Because Rowlands did not bring suit against any state official in his or her official capacity, there is no **Ex parte Young** issue. Rowlands argued, however, that the State of Michigan consented to suit and that Congress abrogated the state’s immunity in this matter.

Rowlands’ first argument was that Michigan legislatively disposed of common law and statutory sovereign immunity. A state waives its Eleventh Amendment immunity only through express consent, however, not through negative implication, and because Rowlands did not provide any evidence that Michigan had *expressly* waived its immunity, the court rejected this argument.

The court characterized as “nonsensical” Rowlands’ next argument: “If Michigan can be a plaintiff in a federal statutory citizen’s suit, why should it not also be amenable to suit as a Defendant? Defendant should be estopped to assert immunity to federal environmental statutory citizen’s suits.” The court held that “it is black letter law that only in very specific circumstances can states be liable against citizen suits in federal court.”

Rowlands’ third argument was equally invalid, the court ruled. Rowlands claimed that his suit was tantamount to a *qui tam* claim, in which he was acting as a surrogate EPA and, therefore, was authorized to sue the State of Michigan. A *qui tam* action is an action brought by private citizens on behalf of the United States under a statute that establishes a penalty for the commission or omission of a certain act. Part of any penalty in such cases may be recovered by the individual who brought the action with the remainder of the penalty to go to the government or some other institution. While a *qui tam* suit is not barred by the Eleventh Amendment, in such a suit, an individual is suing in the name of the government and, therefore, must provide the government with the information upon which the allegations are based prior

to any public disclosure. This allows the government an adequate opportunity to fully evaluate the private enforcement suit and determine whether it is in the government’s interest to intervene and take over the civil action. In this case, however, Rowlands failed to follow this procedural requirement. In addition, a *qui tam* suit is, by definition, a Civil False Claims Act suit. Rowlands failed, though, to allege that PMSC or MDNR had engaged in any fraudulent conduct, let alone submitted false claims. The court ruled, then, that *qui tam* was an inappropriate basis for this suit.

Rowlands’ final claim was that when Congress passed RCRA it abrogated Michigan’s sovereign immunity, making it subject to civil suits such as the one at hand. The Sixth Circuit held, however, that RCRA expressly states that it operates “to the extent permitted by the Eleventh Amendment.” In addition, Congress passed RCRA pursuant to the Commerce Clause, which is no longer a valid source of power for Congress to abrogate state sovereignty pursuant to the Eleventh Amendment. The Sixth Circuit, therefore, affirmed the district court’s dismissal.

5. Toxic Substances Control Act

Charter Township of Van Buren v Adamkus, 88 F3d 506 (CA 6, 1999).

Wayne Disposal, Inc. (“WDI”) has operated a hazardous waste disposal facility in Van Buren Township (the “Township”), Michigan since 1980. In May of 1995, WDI applied to EPA for permit approval under the Toxic Substances Control Act (“TSCA”), 16 USC 2601 *et seq.*, to begin a polychlorinated biphenyl (“PCB”) disposal operation at its facility. As part of its investigative process, EPA published notice of WDI’s application and a draft permit, allowed four months for public comment on the draft permit, and conducted public hearings in the Township. Additionally, EPA organized a review panel comprised of scientists and independent experts to review all aspects of the investigative process. Nearly two years after WDI filed its application, EPA granted WDI a TSCA permit, authorizing it to dispose of non-liquid wastes containing PCBs at concentrations of 50 parts per million or more at its facility.

Two days after EPA granted WDI’s permit, the Township filed a complaint pursuant to the Administrative Procedures Act (“APA”), alleging that EPA’s decision to grant WDI a permit to dispose of PCBs

at its facility was arbitrary and capricious and an abuse of discretion. The Township subsequently filed a motion to halt EPA's action pending judicial review, which was denied by the district court.

In October of 1997, the Township filed a motion for summary judgment. Two months later, EPA and WDI, who had joined the case as an intervenor, filed cross-motions for summary judgment. The district court granted the motions in favor of EPA and WDI, finding that the Township had failed to provide any evidence that the EPA's decision to grant WDI the TSCA permit was arbitrary and capricious. The Township appealed.

On appeal, the Township first argued that EPA had been "lobbied" to expedite the approval process for WDI's permit, as shown by a letter that EPA had received from MDEQ, urging EPA to quickly approve the WDI application. The court found that this letter was not an attempt to lobby EPA for approval of the application, but simply to request that EPA make its permit decision at approximately the same time that MDEQ made its decision on whether or not to approve WDI's hazardous waste operating license. Additionally, the Township pointed out a statement made by an EPA employee that "the money issue carries the most weight." The court found that this statement alone did not support the Township's allegation that EPA's decision was pre-determined, especially as this employee lacked decision-making authority. Moreover, the court felt that a two-year investigative process, resulting in an administrative record of over 10,000 pages, was not consistent with the Township's assertion that EPA had made its decision before the approval process even began.

Next, the Township contended that EPA abused its discretion throughout the approval process by improperly waiving a requirement that the site of PCB waste disposal be at least fifty feet above the historic high water table. The Township argued that the waiver was improper because: (1) the planned disposal site was in a groundwater recharge zone; and (2) there was a hydrologic connection between the planned disposal site and a nearby lake. The court disagreed because the administrative record indicated that EPA had considered a report that indicated that two monitoring wells near the planned disposal site contained low levels of tritium, which indicated that the groundwater monitored by those wells did not include water that had recently been on the surface. EPA found that these low levels of tritium could not support an

assertion that the site was located in a recharge zone, as groundwater in recharge zones usually has significantly higher levels of tritium from rainwater and other surface water. Furthermore, the court found that there was substantial technical evidence in the record to support EPA's finding that there was no "hydraulic communication" between the planned disposal site and the nearby lake. As a result, the court found that EPA's decision was not arbitrary or capricious, and that the waiver of the fifty foot requirement was within EPA's discretion.

The Township also alleged that, during the approval process, EPA overlooked evidence showing that WDI's parent company, the Environmental Quality Company ("EQ"), had an extensive history of failing to comply with environmental standards. The court found, however, that the record indicated that not only did EPA consider EQ's compliance history, but also stationed a compliance monitor at the WDI site to guarantee future compliance.

Next, the Township claimed that EPA did not follow the legislative directive set forth in TSCA by failing to "consider the environmental, economic and social impact of any action" taken under the statute, specifically by failing to consider fully the impact of the PCB waste disposal site and the increased health risks to the community. The court disagreed, noting that EPA had organized a special comment and response session to address citizens' concerns about the facility, and pointing out that the record included more than 200 pages of EPA responses to community concerns on the waste disposal issue.

Lastly, the Township contended that EPA's decision to grant the permit should be overturned, as it had relied on "stale" evidence, specifically a report from 1983. The court was unpersuaded, finding that the record indicated that EPA had relied on much more than this particular report to make the approval decision. Accordingly, the court found that none of the Township's allegations provided a basis for overturning EPA's approval of WDI's permit application, and, furthermore, that EPA's approval process was substantially supported by evidence in the record. The district court's grant of summary judgment to EPA was, therefore, affirmed.

6. Insurance

City of Albion v Guaranty Nat'l Ins Co, 73 F Supp 2d 846 (WD Mich, 1999).

The City of Albion ("City") owned and operated the Albion-Sheridan Township Landfill ("Landfill") from 1966 through 1981. During that period, the City accepted for disposal industrial sludge that contained high concentrations of heavy metals, such as chromium zinc, nickel, and lead. In 1981, EPA began investigating the Landfill and, in 1989, placed it on the Superfund National Priorities List because of the significant volume of toxic chemicals and industrial sludge contained in the Landfill. EPA eventually sued the City under CERCLA to clean up the Landfill. EPA and the City settled that lawsuit by entering into a consent decree that required the City to conduct certain cleanup activities and reimburse EPA for its past costs.

The City had requested its insurers to defend it in the suit brought by EPA and to indemnify it for any liability arising from releases of hazardous substances from the Landfill; however, all of the insurers denied the City's request, claiming that the policies excluded coverage for such releases of pollutants. After the City settled the suit with EPA, the City sued its insurers for a declaration that they were liable under the policies for the City's damages.

In the City's suit against its insurers, the City moved for summary judgement regarding the interpretation of the "pollution exclusion" clauses contained in the policies. These clauses excluded coverage for releases of pollutants to the environment, with the exception of releases that were "sudden and accidental." The City acknowledged that the initial placement of waste into the Landfill was neither sudden nor accidental; however, the City argued that the "sudden and accidental" exception to the pollution exclusion clauses should be applied to the discharge of pollutants from the Landfill, rather than the initial placement of the waste. Further, the City argued that, whether a release from the Landfill to the environment is "sudden and accidental" should be based on the City's subjective intent or expectation, rather than on an objective standard. The insurers argued that, because the initial placement of the waste into the Landfill was neither sudden nor accidental, the pollution exclusion clauses excluded coverage under the policies without regard to when the pollutants actually leaked from the Landfill.

Relying on prior decisions by the Michigan Court of Appeals, the federal district court agreed with the City's interpretation of the "sudden and accidental" exception to the pollution exclusion clauses, provided that the City could demonstrate that the Landfill was properly constructed to prevent releases and that the any releases were from discrete, identifiable events. That court stated:

Based upon the **Kent County** and **South Macomb** cases, the Court concludes that for purposes of the "sudden and accidental" exception, the relevant release in this case will be the release from the Landfill into the environment if the City is able to establish that the Landfill was licensed by the State of Michigan and designed and constructed in accordance with then-contemporary standards in order to contain the contents that were to be placed in the Landfill. Moreover, in order to demonstrate that the discharge from the Landfill comes within the "sudden and accidental" exception, the City must present evidence of isolated discharges "apart from the overall continuous leaking of the [L]andfill."

The federal district court distinguished an earlier Michigan Appellate Court case that held that the initial placement of waste in an abandoned gravel mine constituted the relevant point of release for purposes of applying a pollution exclusion clause because that waste was placed directly into the environment and was not initially confined to an engineered landfill cell. The federal district court, however, declined to rule on whether the releases from the Landfill were covered under the City's insurance policies because discovery was not complete regarding the design of the Landfill and whether there were any discrete releases from the Landfill.

With respect to the determination of whether a release from the Landfill was "sudden and accidental," the court disagreed with the City's interpretation that such determination should be based on the City's subjective intent regarding the waste. The court held that "an objective standard [is] appropriate under the 'sudden and accidental' language because the language focuse[s] on the release rather than on the knowledge, intent, or expectation of the insured." Accordingly, the court denied the City's motion with respect to its contention that a subjective standard should be used in applying the "sudden and accidental" exception to the pollution exclusions contained in the insurance policies.

Meridian Mut Ins Agency v Kellman, 197 F3d 11708 (CA 6, 1999).

Skender Bajrami owned a painting company doing business as Kopliku Painting Company (“Kopliku”). Kopliku’s general liability insurance policy was issued by Meridian Mutual Insurance Company (“Meridian”). In November of 1994, Kopliku contracted with the Detroit Board of Education to perform painting and drywall sealing at Cass Technical High School. A teacher at the School, Roslyn Kellman, claimed that fumes from chemicals used by Kopliku in sealing a floor in the room above her classroom caused her severe and disabling respiratory injuries. Kellman sued Kopliku for her injuries in February of 1997.

Upon receiving a claim from Kopliku for defense of the personal injury lawsuit, Meridian denied coverage on the basis of a total pollution exclusion in its policy with Kopliku, which stated that:

This insurance does not apply to... “[b]odily injury” or “property damage” which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time.

Pollutants means any solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste. Waste includes material to be recycled, reconditioned or reclaimed.

Meridian then sued in federal district court for a declaration that there was no duty under the insurance policy to defend or indemnify Kopliku in Kellman’s lawsuit. Meridian contended that the sealant that caused Kellman’s injuries was a pollutant, and was, therefore, excluded from coverage under the policy. Although both sides agreed that the sealant that caused Kellman’s injuries was a pollutant, they disputed before the trial court whether the sealant fumes had been a “discharge, dispersal, seepage, migration, release or escape” of pollutants, so as to bring Kellman’s injuries within the policy’s pollution exclusion. The trial court found that Meridian’s pollution exclusion was intended to protect the insurer from liability for environmental pollution. The trial court found that:

The pollution exclusion clause is intended to protect the insurer from liability for the

enforcement of environmental laws. The exclusion contains environmental terms of art because it is intended to exclude coverage only as it relates to environmental pollution. When a toxic substance is confined to an area of intended use it does not come within the exclusion clause.

The trial court found that the sealant used by Kopliku was confined to its area of intended use and was used in its intended manner, and, therefore, it did not fall under Meridian’s pollution exclusion clause as environmental pollution. The trial court concluded that Meridian had a contractual obligation under the insurance policy to defend Kopliku in the Kellman lawsuit. Meridian appealed.

The only issue on appeal was whether the release of fumes from a chemical sealant in the course of regular business constitutes “discharge, dispersal, seepage, migration, release or escape” within the terms of Meridian’s pollution exclusion, when those fumes cause injury to an employee of the business for which the sealant is being applied. The appeals court noted that no Michigan court cases had ever addressed this issue. As a result, the federal appeals court attempted to ascertain how a Michigan court would rule in such a case. The court used three general principles of insurance policy interpretation under Michigan law as a guideline:

First, although the court cannot create an ambiguity in an otherwise clear policy, any ambiguity must be construed in favor of the insured and in favor of coverage. . . . Second, exemptions to coverage are strictly construed against the insurer. Third, under the rule of reasonable expectations, the court grants coverage if “the policyholder, upon reading the contract language is led to a reasonable expectation of coverage.”

Upon application of these guidelines, the appeals court found that Meridian’s pollution exclusion did not bar insurance coverage for Kellman’s injuries. The appeals court determined that no reasonable person could find that Meridian’s policy *unambiguously* excluded coverage for injuries suffered by an employee who was legitimately only a few feet from where the chemicals were being properly used. The court noted that the Sixth Circuit has adopted a clear rule that a pollution exclusion does not protect an insurer from liability for injuries caused by toxic

substances released within the area of the chemicals' intended use.

Meridian then argued that the pollution exclusion clause should exempt it from having to provide coverage because, in another Sixth Circuit case, the exclusion clause applied only to the discharge of pollutants "into or upon land, the atmosphere, or any watercourse or body of water," while the clause in the Meridian policy did not contain a similar limitation. The court replied by noting that in dozens of other reported court cases where the policy language did not contain such limitations, the pollution exclusion coverage language still did not shield insurers from liability for injuries caused to workers by toxic fumes confined within the area of the chemicals' use.

Meridian then argued that other cases holding that a pollution exclusion policy does not shield insurers from workplace exposure claims are limited to injuries to workers who work with the toxic chemicals. Kellman was not the actual user of the sealant, and did not personally apply it. The Sixth Circuit disagreed, and noted, "the fact that the injured party was not the direct user of a harmful product does not change a localized injury into the 'discharge, dispersal, seepage, migration, release or escape of pollutants' under the policy, where the injured third party was in the immediate vicinity of the harmful product at the time of injury." Because the Sixth Circuit determined that the language of the policy did not clearly and unambiguously exclude coverage for such injuries, it ruled in favor of coverage and affirmed the trial court's decision.

United States Fidelity & Guar Co v Jones Chems, Inc, No. 98-4018 (CA 6, Sept 27, 1999).

Bret Myers, a worker for High Test, Inc., an Ohio tank cleaning and reconditioning company, was assigned to work on a pressurized chlorine tank sent to High Test by Jones Chemicals, Inc. ("Jones"). When Myers removed a plug in the tank, pressurized liquid chlorine spewed all over him. Myers was severely burned by the liquid chlorine. The chlorine gas released from the tank damaged Myers' lungs and injured nineteen other workers. In addition, the High Test property became contaminated with chlorine.

When Myers sued Jones for his injuries, Jones' insurer, United States Fidelity and Guaranty Co. ("USF&G"), refused to indemnify Jones. USF&G then asked the district court to declare that it was not liable to Jones because of a pollution exclusion provision in the insurance

policy. The district court granted the motion, relying on the plain language of the pollution exclusion language that read, "This insurance does not apply to . . . 'Bodily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants." The district court granted USF&G's motion and Jones appealed.

The Sixth Circuit, reviewing the lower court's decision de novo, considered Jones' argument that this case was similar to a previous case in which a worker had been exposed over a long time period while at work. In the previous case, the Sixth Circuit found that the workplace exposure was not the type of injury envisioned in a pollution exclusion provision, which was intended primarily exclude insurance coverage for releases that cause liability to neighboring landowners or government agencies. The Sixth Circuit rejected Jones' argument because Myers' injuries resulted from a sudden release rather than long-term workplace exposure.

The Sixth Circuit insisted on looking to the plain, unambiguous language in the insurance policy, which referred to bodily injury arising out of a release or escape of pollutants. This language was in no way limited to claims asserted by neighboring landowners or the government. In conclusion, the Sixth Circuit held that the district court correctly interpreted the pollution exclusion clause in accordance with its plain and ordinary meaning, and affirming the District Court's judgment.

7. Miscellaneous

Norpak Corp v Eagle-Picher Indus, 235 BR 876 (CA 6, BAP 1999).

Norpak Corporation ("Norpak") filed a claim against Eagle-Picher Industries, Inc. ("Eagle Picher"), a Chapter 11 bankruptcy debtor allegedly responsible for environmental contamination resulting from lead processing operations on property currently owned by Norpak. Norpak sought contribution or reimbursement for any future liability that it might incur to remediate the contamination that resulted from Eagle-Picher's past ownership and use of the property. The bankruptcy court sustained Eagle-Picher's objection to the claim because: (1) Norpak's claim was a contingent claim; (2) Norpak is co-liable with Eagle-Picher to EPA and the New Jersey Department of Environmental Protection and Energy ("NJDEPE"); and (3) Norpak's claim was for contribution or reimbursement. The district court and the Sixth

Circuit affirmed the conclusion that Norpak's claim was for contribution or reimbursement. After it learned of a settlement agreement entered into between EPA and Eagle-Picher during the pendency of the appeal, the Sixth Circuit held that the terms of the agreement and the circumstances surrounding its negotiation were bound to be relevant, remanding the case to the bankruptcy court for a determination of the continued viability of any claims by EPA or the NJDEPE against Eagle-Picher in light of the agreement. The Sixth Circuit directed the bankruptcy court to determine whether excusable neglect existed which would justify a late claim by EPA or NJDEPE. The Sixth Circuit specifically instructed the bankruptcy court to determine "the continued viability of any claims by the EPA or NJDEPE against Eagle-Picher, taking into account the consent agreement between Eagle-Picher and the EPA." The court stated that it was not clear "whether such a late filing should have been allowed or whether the bankruptcy court necessarily made the right decision under then existing circumstances. Nor can either of those questions be answered without an analysis of the Pioneer/Dix factors." In **Pioneer Investment Servs v Brunswick Assoc Ltd Partnership**, 507 US 380 (1993), the Supreme Court, adopting the approach of the Ninth Circuit in **Dix v Johnson**, 95 BR 134 (CA 9, 1988), held that the excusable neglect exception applies to late filings of proofs of claim in Chapter 11 proceedings. The Court listed several factors to be considered in determining whether the neglect is excusable: (1) the danger of prejudice to the debtor; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; (4) whether the delay was within the reasonable control of the late party; and (5) whether the late party acted in good faith. On remand, however, the bankruptcy court in the instant case did not conduct the **Pioneer/Dix** analysis directed by the higher court.

On appeal to the United States Bankruptcy Appellate Panel of the Sixth Circuit, the court held that the bankruptcy court had erred in disallowing Norpak's claim without conducting the analysis mandated by the appeals court. Therefore, the Sixth Circuit panel ruled that the case must be remanded for such an analysis. The Sixth Circuit directed the bankruptcy court to "exercise its considerable equitable powers to apply the **Pioneer** standards to provide a creative resolution that will: (1) enforce Eagle-Picher's responsibilities under applicable environmental laws and its settlement agreement with the EPA; (2) protect Eagle-Picher from the double liability that [Section 502(e)(1)(B) of the Bankruptcy Code] was

designed to prevent; and (3) protect against a possible windfall to Norpak." The Sixth Circuit vacated the bankruptcy court's order disallowing Norpak's claim and remanded to the court with instructions to conduct the analysis mandated by the court of appeals.

Ramik v Darling International, Inc, 60 F Supp 630 (ED Mich, 1999).

Darling International, Inc. ("Darling") operates a rendering plant in Melvindale, Michigan, which involves the use of heat and pressure to reduce dead animals and unused animal parts from slaughtering houses into ingredients used in consumer, medical, and industrial processes. Two actions were brought against Darling. One was brought by residents of Melvindale, the other was brought by the City of Melvindale ("City"). The residents alleged that exposure to noxious odors and pollutants had interfered with the use and enjoyment of their property and decreased the market value of their property, asserting claims for nuisance, trespass, and negligence. The residents also claimed they had suffered mental anguish, anxiety, embarrassment and humiliation as a result of the odors from the plant. The City also claimed damages for nuisance, trespass, and negligence. The City further claimed that Darling had violated a city ordinance.

Darling moved for dismissal of the residents' claims for exemplary and punitive damages, trespass, and negligence. Darling sought a holding that the residents' damage claims were partially barred by the applicable statute of limitations. Similarly, Darling sought dismissal of the City's trespass and negligence claims and also claimed that the City's damage claims were partially barred by the statute of limitations. Darling also argued that the City's claims on behalf of its residents should be dismissed because the City lacked standing to sue on their behalf.

Punitive and exemplary damages are intended to serve a deterrent purpose by awarding an injured party damages greater than the damages which would fully compensate for the injury (i.e., "compensatory" damages). The residents conceded that punitive damages are not available in Michigan and, therefore, the court dismissed their claims for punitive damages. The court stated that in order for the residents to establish that they are entitled to exemplary damages, they must establish that the act causing the damages was voluntary, and that the act inspired feelings of humiliation, outrage, and indignity,

and that the conduct was malicious or so willful and wanton as to demonstrate a reckless disregard of their rights.

The court held that the residents were not entitled to recover exemplary damages under their nuisance claim because the Michigan nuisance statute did not expressly provide for the recovery of exemplary damages. The residents' negligence claim also was not brought pursuant to any statute which authorized exemplary damages. Relying on Michigan case law, the court held that the residents could not separately recover both compensatory and exemplary damages for pain, suffering, mental anguish, humiliation, and outrage. The court noted that the residents had included in their pleadings allegations of conduct which, if proven, a jury could reasonably conclude showed that Darling acted with a reckless disregard of the residents' rights. The court stated that this presented the residents with the option of either requesting a jury instruction on compensatory damages which included elements of pain, suffering, and mental damages or requesting an instruction on compensatory damages that did not include mental injury. Under the latter option, the residents could then request a separate instruction on exemplary damages.

Similar to the Michigan Court of Appeals' decision in **Adams v Cleveland-Cliffs Iron Co**, 602 NW2d 215 (Mich App, 1999), the court rejected the residents' argument that the court should adopt the "modern" trend in trespass cases, which does not require a physical invasion interfering with the landholder's right to exclusive possession of his or her land. The residents argued that "microscopic airborne particles" were emitted by Darling's facility, thus giving rise to an actionable trespass. The court distinguished the cases cited by the residents in support of their argument by observing that all of those cases involved some substantial actual damage to the property itself. The court accordingly found that odor alone, without some actual damage to the property itself did not constitute interference with the residents' right to exclusive possession sufficient to state a trespass claim:

In this case, plaintiffs' complaint includes claims that "pollutants, including animal by-product air contaminants, [have] entered, settled and physically invaded plaintiffs' . . . property . . ." Such claims may be sufficiently broad to state a claim for trespass under Rule 12(b)(6), but plaintiffs have never pursued before this court any

argument related to any alleged damage they suffered other than the "Darling Odor." Nor have plaintiffs' discovery responses to this point alleged any actual damage to their homes or property. There is no claim that any particles or filmy substance has settled on or within plaintiffs' homes. There is no allegation of any actual intrusion of foreign matter. There is no allegation of any structural damage to any of the plaintiffs' homes. Rather, plaintiffs' have merely alleged that the foul and noxious odor emanating from defendant's facility makes it impossible for them to fully use and enjoy their property. The "particles" alleged to give rise to plaintiffs' claims of trespass are "noxious odor particles." Under the authority set forth above, such allegations amount to a claim of nuisance, rather than a claim of trespass.

In contrast to the **Adams** case, which held that dust particles physically settling on property did not interfere with a possessory interest, but constituted a nuisance claim only, the court left open the possibility that the residents could revive their trespass claim if subsequent discovery revealed some physical invasion.

Darling argued that the residents' negligence claim should be dismissed as redundant with the residents' nuisance claim because the standards of proof to establish both claims are virtually identical. The court rejected Darling's argument because the negligence claim was somewhat broader than the nuisance claim. The court observed that "[t]he negligence analysis requires the court to address the reasonableness of the *defendant's conduct*, while the nuisance analysis requires the court to address the reasonableness of the *interference* with the plaintiffs' property *irrespective of the reasonableness of the defendant's conduct in creating or maintaining the interference*." (Emphasis in original.)

Darling argued that the residents' recovery was partially barred by the three-year statute of limitations applicable to the action under Michigan law, asserting that the residents could not recover damages for any injuries they incurred more than three years prior to the date the complaint was filed. Under the "continuing wrong" doctrine, a recovery is not barred when the wrongful act began outside the limitations period, but continues during the period within the statute of limitations. Darling supported its position with several

Michigan Court of Appeals cases that relied on long-standing Michigan Supreme Court cases. The residents argued, however, based upon a recent Michigan Supreme Court employment discrimination case that the remedy must make them whole for the injury they suffered, covering even periods outside of the limitation period.

The court observed that Michigan and United States Court of Appeals for the Sixth Circuit case law on the continuing wrong doctrine appeared to be contradictory. The Sixth Circuit had held in an unpublished 1997 nuisance case that the continuing wrong doctrine in Michigan allowed the damages to be recovered for only those injuries occurring within the period of limitations. The court sided with Darling, distinguishing the case relied upon by the residents as only applicable to discrimination cases under Michigan's Elliot-Larson Civil Rights Act.

The court handled issues in the City's case the same as in the residents' case, that is, it dismissed the City's trespass claim without prejudice, it allowed the City's negligence claim to stand, and held that the City's recovery would be limited to only the three year limitations period.

The only issue present in the City's case that was not present in the residents' case was whether the City had standing to assert claims on behalf of the residents of Melvindale. The court agreed that the City did not have standing to sue for damages on behalf of its residents. The City had also agreed on this point at oral argument. The City instead argued that it had brought the case on its own behalf – that it has substantial claims that the odors constituted unreasonable interference with the City's use of its own property and that it had suffered a loss of tax revenue from declining property values due to the odors emitted by Darling. The court thus allowed the City's case to continue.

B. State Developments

1. Inland Lakes and Streams

Attorney General v Chalet du Paw Paw Condominium Assn, No 205384 (Mich App, Aug 3, 1999).

Beachfront Development, Inc. ("Beachfront") had developed the Chalet du Paw Paw Condominiums ("Chalet") on the shores of Paw Paw Lake. The development included a network of docks placed in the lake from spring until fall each year for use by

condominium owners. Although the docks were generally serviced and maintained by a single company retained by the Chalet du Paw Paw Condominium Association ("Association"), the docks themselves were individually owned by the condominium owners. MDEQ had sued Beachfront and the Association, arguing that the boat docks constituted a "marina," as defined under Part 301 of NREPA, and, therefore, required a permit in order to maintain the docks. The trial court agreed with MDEQ's interpretation of Part 301 and ordered Beachfront and the Association to obtain the necessary permits in order to maintain the docks; however, the trial court declined to impose any penalty against Beachfront or the Association for the past violations. Both parties appealed the trial court's ruling.

On appeal, the court reversed the trial court's interpretation of the term "marina" under Part 301 of NREPA. Part 301 defines the term "marina" as "a facility that is owned or operated by a person, extends into or over an inland lake or stream, and offers service to the public or members of the marina for docking, loading or other servicing of recreational watercraft." The appeals court held that, under the plain meaning of this definition, "the term 'marina' . . . does not include the docks like those located in front of Chalet that belong to individual condominium owners with riparian rights to the property that exist for the owners' private, noncommercial, recreational use." Rather, the court held that the "marina operating permit requirements are clearly directed toward entities such as commercial marinas and yacht clubs." The appeals court held that Beachfront's construction of several docks for unsold condominium units was inconsequential because the docks were included with the units when they were sold. Further, the appeals court held that Beachfront's prior attempts to lease docking privileges that were not associated with condominium ownership "is not controlling of Beachfront's current status under the NREPA." Finally the court held that the Association's actions related to the docks, which included arranging for dock maintenance, establishing a "beach and dock committee," obtaining liability insurance for the docks, and approving dock configuration, "did not support the conclusion that the Association is operating a marina."

Accordingly, the court reversed the trial court and held that neither Beachfront nor the Association was operating a "marina" in violation of Part 301 of NREPA. In addition, because the court held that Part 301 did not apply to the docks, the court dismissed MDEQ's appeal

of the trial court's decision not to impose a penalty against Beachfront and the Association.

2. Environmental Response

Pierson Sand & Gravel, Inc v Keeler Brass Co, 596 NW2d 153 (Mich, 1999).

Pierson Sand and Gravel, Inc. ("Pierson") sued Keeler Brass Co. and several other parties (the "Contribution Defendants") in the United States District Court for the Western District of Michigan, seeking to require the Contribution Defendants to pay a share of the costs that Pierson had incurred in remediating a landfill located in Macomb County, Michigan. In its original complaint in federal court, Pierson asserted claims based on Section 107(a) and 113(f) of CERCLA, and also asserted claims based on the Michigan Environmental Protection Act ("MEPA"), now Part 17 of NREPA, and common law trespass. Pierson amended its complaint several times, and its third and final amended federal complaint, filed in 1992, asserted only claims based on CERCLA. Its third amended complaint did not include a claim for contribution under the former Michigan Environmental Response Act ("MERA"), now Part 201 of NREPA, even though the provisions in MERA that explicitly allowed private parties to sue for contribution had taken effect before Pierson had filed its third amended complaint.

After several years of discovery, an attempt to resolve the case by mediation, and the addition of many third-party defendants, Pierson and the Contribution Defendants both filed motions for summary judgment shortly before trial. The district court ruled in favor of the Contribution Defendants on the grounds that Pierson had not complied with the National Contingency Plan, which is a necessary condition for recovering under CERCLA (although it is not necessary for recovering under Part 201 or other state law). The United States Court of Appeals for the Sixth Circuit affirmed the District court's ruling.

After the Sixth Circuit affirmed the district court's dismissal of the CERCLA action, Pierson sued the Contribution Defendants again, this time in Michigan circuit court, based not on CERCLA, but instead on MERA and Michigan common law.

The Contribution Defendants asked the state trial court to dismiss the state case, based on the theory of *res judicata*. The Michigan trial court denied the motion to

dismiss, and the Michigan Court of Appeals affirmed the trial court's ruling. The Michigan Supreme Court agreed to review the decision of the Court of Appeals.

The Michigan Supreme Court (with one justice dissenting) held that the trial court had acted correctly in denying the Contribution Defendant's motion to dismiss. The Supreme Court held that, although Michigan law recognizes the principle of *res judicata*, there are certain exceptions to the rule that a party may not relitigate claims based on the same transaction or events. One of those exceptions is expressed in a comment contained in the *Restatement of Judgments, 2d*. The *Restatement* says that when a plaintiff sues a defendant in federal court based only on federal law, and the plaintiff loses after trial, the principle of *res judicata* prevents the plaintiff from suing the defendant in state court based on state law, "*unless it is clear that the federal court would have declined as a matter of discretion to exercise . . . jurisdiction*" over the state claim. The Court of Appeals had held that this exception applied to Pierson's case, because it was clear that once the federal district court had dismissed Pierson's claim under CERCLA before trial, it would not have exercised its discretion to hold a trial on any claims based on state law (assuming that Pierson had asserted any state law claims, which it did not).

The Michigan Supreme Court decided that it could "confidently surmise," based on a review of decisions in other federal cases, that most federal judges would have declined to exercise jurisdiction over state law claims after the federal claims had been dismissed before trial. The dissenting justice argued that the Supreme Court should not have adopted the exception stated in the *Restatement*, because it is inherently impossible for a state judge to determine whether or not a federal judge would have exercised jurisdiction over state claims, where it is completely within his discretion to do so. He criticized the exception in the *Restatement* on grounds that it requires state courts to engage in "pure speculation" and "prognosticative futility," and argued that the Supreme Court should not accept the comment in the *Restatement* as a part of Michigan law.

B & B Associates v Amoco Oil Co, No. 208588 (Mich App, Jan 4, 2000).

B & B Associates ("B & B") sued Amoco Oil Company ("Amoco") under MERA, now Part 201 of NREPA, for gasoline contamination on property owned by B & B that was formerly owned and operated as gas

station by Amoco. Amoco owned the property from 1967 through 1983 and operated a gas station on it throughout that period. The gas station contained underground storage tanks (“USTs”), piping, and dispensers. Amoco sold the property to a third party in 1983, which never operated any business on the property, but instead leased it back to Amoco. The third party sold the property to B & B in 1985, which operated a restaurant on the property until 1990. B & B removed the USTs in 1986. Environmental testing performed in connection with a proposed sale of the property in 1990 showed the presence of gasoline contamination in the area where the USTs and dispensers were formerly located.

B & B brought an action against Amoco under MERA seeking payment of the costs B & B would incur in the future to clean up the gasoline contamination. The trial court awarded B & B \$250,000 to cover future response activity costs. Amoco appealed, arguing that Section 12 of MERA did not provide for the recovery of future cleanup costs. The Michigan Court of Appeals agreed with Amoco.

The court analyzed the following subsections of MERA, which describe the damages recoverable under MERA from a liable party:

[2] A person described in subsection (1) shall be liable for all of the following:

(a) All cost of response activity lawfully *incurred* by the state relating to the selection and implementation of response activity under this act.

(b) Any other necessary *costs of response activity incurred* by any other person consistent with rules relating to the selection and implementation of response activity promulgated under the act.

(3) The *costs of response activity* recoverable under subsection (2) shall also include:

(b) Any other necessary *costs of response activity* reasonably *incurred* by any other person prior to the promulgation of rules relating to the selection and implementation of response activity under this act. A person seeking recovery of these costs has the burden of establishing that the costs *were*

reasonably *incurred under the circumstances that existed at the time the costs were incurred.*

MCL 299.612(2) and (3) (emphasis by the court).

The court emphasized that the Legislature used the past tense in referring to recoverable costs: “The term ‘incurred’ is past tense. Section 12 contemplates costs that have already been expended to clean up a site.” The court held that the clear language of MERA did not support awarding future cleanup costs. The court further opined that a reading of MERA to only encompass costs already incurred was consistent with the general intent of the statute and also was consistent with the cases that have interpreted the analogous provisions of the federal CERCLA. Therefore, the court ruled that B & B was entitled to only the costs it had already incurred and was not entitled to any award of future response activity costs.

Amoco next sought a ruling that the trial court’s finding that Amoco was responsible for the contamination was clearly erroneous. Amoco argued that the property could have become contaminated when B & B removed the USTs in 1986. B & B’s expert witness testified, however, that the contractor which performed the UST removal did so in a normal and acceptable manner. Further, the court observed that a report prepared by Amoco’s own consultant indicated that the gasoline contaminated soils around the USTs were removed and replaced with clean sand at the time the USTs were removed. Amoco also asserted that there were possible sources of the gasoline contamination other than Amoco’s gasoline station. B & B’s expert testified, however, that all gas stations have releases from the USTs, pipes, dispensers, customers spills, or from spills when product is delivered into the USTs. The court observed that Amoco never presented any evidence to support the existence of offsite sources of the contamination and that the report prepared by Amoco’s consultants likewise made no mention of a possible offsite source. Therefore, the court held that the trial court’s finding that Amoco was responsible for the contamination was not clearly erroneous.

Shields v Shell Oil Co, 604 NW2d 719 (Mich App, 1999).

In October, 1987, Shell Oil Company (“Shell”) sold a gasoline station in Oakland County to Daniel Shields. Daniel Shields required Shell to remove its gasoline storage tanks at the time of the sale. He later installed new

gasoline tanks in one of Shell's excavations. In October 1991, an environmental consultant for Daniel Shields discovered gasoline contamination on the property located outside the area that Shell had excavated. The consultant concluded that Shell was the source of the gasoline, because no contamination was present near the new tanks. Daniel Shields later sold the property to Harbhajan Singh ("Singh") in March, 1992, and then assigned his seller's interest in the land contract to his father, Edward Shields.

In January, 1994, Singh sued Daniel and Edward Shields to require them to remediate the gasoline contamination on the property. Daniel and Edward Shields settled that case in December, 1994 by giving Singh a credit of \$38,500.00 toward the amount payable under the land contract. In September, 1996, Edward Shields sued Shell under Part 201 to recover the \$38,500.00 credit.

Shell asked the trial court to grant it summary judgment, arguing that Shields had delayed too long before suing Shell. Shell argued that the case was governed by MCL 324.20140(2), which provides a deadline of July 1, 1994, for filing any action under Part 201 "for recovery of response activity costs and natural resource damages that accrued prior to July 1, 1991." Shields argued that the case was governed by MCL 324.20140(1)(a), which provides that actions to recover response activity costs and natural resource damages may be commenced within "6 years of initiation of physical on-site construction activities for the remedial action selected or approved" by MDEQ. Shields argued that he could not be required to file a lawsuit by July 1, 1994, because on that date he had not yet incurred any response activity costs, nor had he then agreed to give Singh a credit on the land contract. The trial court agreed with Shell, and dismissed Shields' lawsuit. Shields appealed to the Michigan Court of Appeals.

The Court of Appeals affirmed the ruling of the trial court. The court first considered the issue of when Shields' claim against Shell had accrued. The court did not discuss this issue in detail, but concluded that "all the elements of a NREPA claim would have accrued for Daniel Shields when he acquired the property in 1987 irrespective of when he discovered the contamination." The court rejected Shields' argument that his claim did not accrue until he had incurred costs in December, 1994, by having to give Singh a credit of \$38,500.00 on the land contract receivable. Shields also argued that his claim

against Shell did not accrue for purposes of the statute of limitations until he had discovered the harm, which he said did not happen until he discovered the gasoline contamination on October 17, 1991.

Shell argued that the gasoline contamination was present in 1987 when it sold the property to Daniel Shields, and that consequently his claim against Shell accrued before July 1, 1991, and was, therefore, covered by MCL 324.20140(2).

The Court of Appeals upheld the trial court's decision, but for slightly different reasons. The Court of Appeals held that MCL 324.20140(2) is a "statute of repose," rather than a statute of limitations. A statute of repose is different from a statute of limitations because a statute of repose prevents a claim from ever accruing, whereas a statute of limitations provides a limited period of time for someone to sue based on a claim that has accrued. Also, under a statute of limitations, the deadline for commencing a lawsuit may be extended under certain circumstances, such as when the plaintiff did not discover that he was harmed until after the time for filing suit had passed. In contrast, under a statute of repose, the deadline for filing a lawsuit may not be extended. The court ruled that MCL 324.20140(2) is a statute of repose, rather than a statute of limitations, because it specifies a calendar date (July 1, 1994) by which all actions to recover response activity costs and natural resource damages that accrued before July 1, 1991, must be commenced. In contrast, MCL 324.20140(1)(a) does not specify a fixed calendar date, but provides that any actions to recover response activity costs and natural resource damages must be commenced within 6 years after physical on-site construction activities for a remedial action were initiated.

The Court of Appeals next discussed when Shields' claim against Shell had "accrued." The court apparently considered this issue in order to determine whether Shields' claim was governed by the 6 year limitations period in MCL 20140(1)(a), or by the July 1, 1994 deadline in MCL 324.20140(2). The court held that Shields' claim against Shell accrued prior to July 1, 1991, because "Shell's allegedly negligent conduct must have occurred during or before 1987," when Shell sold the property to Shields. The court did not discuss the fact that MCL 324.20140(2) does not refer to *claims* that accrued prior to July 1, 1991, but instead to "*response activity costs . . . that accrued prior to July 1, 1991.*" Although Shields probably had a *claim* against Shell under

Part 201 or other legal theories which would have supported the filing of a lawsuit before July 1, 1991, Shields had not "incurred" any costs before July 1, 1991. The Court of Appeals did not discuss this distinction.

3. Michigan Environmental Protection Act

City of Jackson v Thompson-McCully Co, 608 NW2d 531 (Mich App, 2000).

The City of Jackson ("City") filed suit in 1998 against Thompson-McCully Company ("Thompson-McCully") seeking to block construction of an asphalt plant in nearby Blackman Township. The suit was filed three days after Thompson-McCully received an air use permit to install from MDEQ to authorize construction of the asphalt plant. The City was joined by Jackson Public Schools and a citizens group called Support to Oppose the Plant. Blackman Township joined the case on behalf of Thompson-McCully.

The City raised three claims before the trial court: (1) that the construction and operation of the asphalt plant would cause harm to the environment in violation of MEPA; (2) that the operation of the plant would create a nuisance or trespass by unreasonably interfering with the comfortable enjoyment of life and property; and (3) that the construction of the asphalt plant violated local zoning requirements. The trial court ruled that the City had failed to establish an adequate basis for the court to grant relief on any of these three theories; however, the court treated the case as an appeal of the air use permit to install issued by MDEQ and ordered MDEQ to modify the permit in response to some of the City's concerns. Thompson-McCully appealed the court's order to modify the air use permit to install and the City appealed the dismissal of its other claims.

The court of appeals first considered the trial court's dismissal of the City's MEPA claim. The court found that a claim under MEPA must be based on a showing that the "conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air water, or other natural resources." The court of appeals stated that trial courts are to determine whether adverse environmental effects are occurring and, if so, take appropriate action.

There was conflicting expert testimony before the trial court on the issue of dispersion modeling and the potential for harm from the asphalt plant. The appeals court ruled

that the trial court provided insufficient findings of fact to allow the appeals court to determine whether the trial court erred in finding that the plant would not cause environmental harm in violation of MEPA. Therefore, the court of appeals sent the case back to the trial court to state specifically its findings of fact.

The court of appeals also directed the trial court to make clear whether its decision was based on its own, original review of the evidence, rather than paying deference to MDEQ's determinations in granting the permit. The appeals court held that trial courts must be reversed on appeal if they defer to an administrative agency's determination regarding whether there has been or will be pollution, impairment or destruction of the environment, rather than making their own, original determinations. The court of appeals also directed the trial court to clarify whether the City had shown that there would be "probable damage to the environment," which the court of appeals ruled was sufficient to state a claim under MEPA.

Regarding the City's claim that the asphalt plant would create a nuisance, the court of appeals ruled that the trial court had an adequate basis to determine that the City had failed to demonstrate that the potential harms that might result from operation of the asphalt plant would be so great as to constitute a nuisance. The court of appeals concluded that the City had failed to provide evidence that an unreasonable and substantial interference with the use and enjoyment of property was "practically certain, strongly probable, or inevitable" from the operation of Thompson-McCully's asphalt plant. Therefore, the court of appeals affirmed the trial court's ruling on the City's nuisance/trespass claim.

On the zoning issues, the court of appeals held that the City's claims were barred by the doctrine of *laches* because it did not challenge the rezoning of the asphalt plant property for industrial use until ten years after the rezoning had taken place. The doctrine of *laches* prohibits courts from granting relief on a claim when the passage of time combined with a change in condition make it inequitable to enforce the claim. In this case, the court found that the passage of time and Thompson-McCully's substantial investment to construct the asphalt plant on its property in reliance on the rezoning made in inequitable to review the rezoning of the property ten years after the fact. Accordingly, the court of appeals affirmed the trial court's denial of the City's zoning claim.

Finally, the court of appeals held that the trial court erred in ordering the MDEQ to modify the air use permit to install for Thompson-McCully's asphalt plant even though it had ruled in favor of Thompson-McCully on all claims raised by the City. The appeals court held that it was improper for the trial court to convert the case from a MEPA claim to a permit appeal after the trial because a challenge to a permit is distinct from a MEPA claim and Thompson-McCully had no notice or opportunity to defend against a permit appeal. Accordingly, the court of appeals reversed the trial court's decision to require modifications to the air use permit to install.

4. Hazardous Waste

City of Romulus v Environmental Disposal Sys, Inc, No. 207850 (Mich App, Oct 15, 1999).

Environmental Disposal Systems, Inc. ("EDS"), a hazardous waste management company, acquired land in the City of Romulus and planned to build and operate a hazardous waste deep well injection system at the site. In 1993, EDS obtained the necessary state and federal permits to drill the well and obtained financing in the amount of \$5 million. With the informal support of city officials, including the mayor of Romulus, EDS proceeded to drill the well, spending over \$2 million in the process. Although EDS's planned use of the Romulus property was not a permitted use under the local M-1 (light industrial) zoning restrictions, both the City and EDS initially believed that state and federal law preempted the zoning ordinance.

In October of 1993, in the face of municipal elections to be held the following November, the Romulus City Council voted to sue EDS to stop the project. In the suit, the City claimed that the deep injection well was not a permitted use in a light industrial zoned area and that EDS had not obtained proper permits from the local planning commission. EDS responded by seeking a declaration by the court that the City could not regulate the proposed well site because state and federal law preempted the local zoning regulation. The trial court granted the City's motion for summary disposition and issued a preliminary injunction against EDS to stop the project, reasoning that the City's local control was not preempted.

Over the next three years, the City and EDS litigated the issue of whether EDS was in violation of the City's zoning regulations and whether EDS was entitled to a

use variance for the project. In 1997, the trial court ruled in the City's favor, permanently enjoining EDS from using the property for deep well injection of hazardous waste. EDS appealed the trial court's summary judgment in favor of the City, arguing that the trial court erred in not finding that the former Hazardous Waste Management Act ("HWMA"), now Part 111 of NREPA, preempted the City's zoning ordinance.

On appeal, EDS contended that the express preemption provided by Section 21 of the HWMA "unambiguously stood for the proposition that the construction of a hazardous waste disposal facility . . . was a matter outside the bounds of local control." Section 21 of the HWMA stated: "A local ordinance, permit requirement, or other requirement shall not prohibit the construction of a treatment, storage, or disposal facility."

The City then countered that there was no preemption because the facility was wholly exempt from the HWMA. The City contended that, because of rules promulgated by MDNR under Section 26 of the HWMA, MDNR was authorized to exempt a hazardous waste injection well from state operating license requirements if it determined that a facility was adequately regulated under other state or federal laws. The court observed that EDS's facility did in fact have federal permits for the well. Moreover, the court found that Section 26 clearly could exempt EDS from obtaining an operating license under HWMA. However, the court also found that EDS was not exempt from other portions of HWMA.

The court noted that, although an "operating license," which EDS might be exempt from obtaining, was required before a facility could conduct, manage, maintain or operate a treatment, storage or disposal facility, a "construction permit" was also required before a facility could be built. A complete site review, which would address local concerns related to siting, was required before MDNR could issue a construction permit. Thus, it was clear to the court that EDS was not exempt from the HWMA's construction permit requirements.

The court concluded that, because rules promulgated pursuant the HWMA expressly exempted EDS from only the operating license requirement and not from other sections of HWMA, the City's contention that EDS' facility was wholly exempt from regulation under HWMA was without merit. Because Section 21 of the HWMA gave exclusive authority for regulating EDS' facility to

the state, the court held that state law preempted the City's local control over the facility. The Court of Appeals, therefore, reversed the trial court's decision, and dismissed the City's lawsuit.

5. Water Quality

Commonwealth Power Co v MDNR, Nos. 204399; 210844 (Mich App, Mar 21, 2000).

Commonwealth Power Company ("Commonwealth") planned to discharge water into a Michigan river in connection with its operation of a hydroelectric power plant. Section 401 of the CWA provides that a hydroelectric facility may receive a federal permit to operate only after it obtains from the state a certification that the facility will comply with the state's water quality standards.

In 1994, Commonwealth applied to MDNR for such a "Section 401 certificate" for its power plant. MDNR denied Commonwealth's request because it had not complied with MDNR's order to perform a "fish entrainment and mortality study" to determine the potential for fish to be caught in the turbines of the hydroelectric facility and be harmed or killed.

Commonwealth challenged the denial, arguing that MDNR lacked the authority to require the fish study. The circuit court reversed the denial and required MDNR to pay Commonwealth's costs and legal fees, concluding that MDNR had no legal authority to require Commonwealth to complete such a costly study as a prerequisite to obtaining a Section 401 certificate.

On appeal to the court of appeals, MDNR argued that it had the authority to order the fish study under administrative rules granting it broad authority to protect rivers for fish and fish migration. MDNR cited the United States Supreme Court case of **PUD No. 1 of Jefferson County v Washington Dep't of Ecology** (1994), in which the Court held that the State of Washington could condition issuance of a Section 401 certificate on the applicant's maintenance of a particular stream flow level in order to protect fish habitat. Commonwealth argued, however, that because MDNR had no administrative rules specifically addressing the requirements for granting a Section 401 certificate, it could not order the fish study.

The court rejected Commonwealth's argument that MDNR needed specific rules before it could impose

conditions on the issuance of a Section 401 certificate. The court stated that "the relevant question is whether the [state's] water quality standards, or any other Michigan law relating to water quality, authorized [MDNR] to order" the fish study.

The court held that, although the **PUD No. 1** case seemed at first blush to support MDNR's position, the requirement in that case was based on the state's prior determination, "on its own, that a particular stream flow was necessary to maintain the fish species contained in the river in question." Accordingly, the state in that case ordered the applicant to comply with certain conditions "to protect the fish living in the river."

In the current case, in contrast, MDNR did not order Commonwealth to take specific measures to protect fish but, rather, "simply wanted [Commonwealth] to conduct an *exploratory study* regarding the number of fish killed." Because MDNR "did not know or did not express what level of fish kill was acceptable or what type of protective measures were necessary to maintain the proper 'use' of the particular river for particular species of fish," the court held that the circuit court did not clearly err "in determining that [MDNR] exceeded the bounds of its authority in ordering [Commonwealth] to conduct the fish studies."

The court then turned to the question whether the circuit court erred by requiring MDNR to pay Commonwealth's court costs and attorney fees for its "vexatious" actions against Commonwealth. The court stated that the lower court relied on the improper court rules for its award of sanctions. Under those rules, sanctions are warranted under the applicable court rules only for frivolous claims or defenses. Here, the court held, MDNR's defense to Commonwealth's action was not frivolous because it had at least arguable legal merit under the **PUD No. 1** case. The court held, however, that another court rule not considered by the circuit court was also relevant. Under that rule, sanctions would be available if, among other things, an "argument" was "grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court." Because this rule had not been considered by the circuit court, the appeals court reversed the order for sanctions and sent the question back to the circuit court for a determination whether sanctions under the additional rule were appropriate.

6. Solid Waste

Roy Smith Co v Aaro Waste Paper Co, No. 205640 (Mich App, July 2, 1999).

Aaro Waste Paper Co. ("Aaro") applied to the City of Detroit's Building and Safety Engineering Department ("B&SE") for a permit to construct a waste transfer and recycling facility. In a district zoned M-5, such facilities are permitted as of right. In Aaro's district, which is zoned M-4 (intensive industrial), the Detroit Zoning Ordinance specifies "permitted with approval use" for "usually objectionable" uses. When B&SE denied Aaro's request, Aaro appealed the decision to the Detroit Board of Zoning Appeals (BZA). The BZA reversed B&SE's decision. Smith, a property owner near the site of the proposed waste facility, appealed the BZA's decision to Wayne County Circuit court, which affirmed the BZA. On appeal to the Court of Appeals, the case was remanded to the BZA, requiring that the Board make the necessary findings required by the Detroit Zoning Ordinance for permitted with approval uses.

On remand, the BZA agreed with its prior decision and allowed Aaro to build its proposed waste management facility. Smith again appealed the BZA decision to the Circuit Court, which again affirmed the BZA. On appeal to the Court of Appeals, the Court reviewed the BZA's decision.

At issue in the appeal was whether the findings by the BZA were adequate to satisfy the ordinance's requirements. The Detroit Zoning Ordinance required the BZA to make six findings before it could approve a "permitted with approval use:" (1) the facility would not be detrimental to or endanger the social, physical or economic well-being of the neighborhood; (2) the facility would not be injurious to use and enjoyment of neighboring property nor substantially diminish property values; (3) normal and orderly development of surrounding property would not be impaired; (4) adequate necessary facilities (roads, utilities, etc.) were readily available; (5) traffic congestion would be minimized; and (6) the facility would otherwise conform to applicable district regulations. On remand, however, the Board relied on its determination that the circumstances, such as the nature of the district and the existing uses in the vicinity of the site, satisfied most of the required findings.

For example, the Board found that the fact that the district was zoned "intensive industrial" meant that the

city intended to permit usually objectionable uses, which then would not be detrimental. The BZA determined that the facility, which would be located inside a building, would consequently not interfere with use and enjoyment by neighbors of their properties or hurt property values. The existence of nearby dwellings in an M-4 zone was not of concern to the Board because they were located in a district where "usually objectionable" uses were already allowed, and the residences were buffered from the proposed facility by other industrial sites. The facility's plans for walls and landscaping were assumed by the BZA to ensure that development of the area would not be impeded. The Board assumed that by virtue of its M-4 zoning, the necessary utilities, access roads, and other facilities were already present. The BZA also determined that, by complying with the numerous permit conditions that would be imposed by the BZE, the Building and Safety Engineering Department, and the City Planning Commission, the proposed facility would not impair property values or endanger the physical, economic, or social well being of the surrounding neighborhood. Finally, by virtue of the numerous licensing requirements by various city, county, and state agencies, the BZA found that the facility would not endanger the safety, health, or well being of nearby residents.

In Smith's second appeal, the Court of Appeals found that except with respect to the BZA's finding that Aaro's facility was adequate to handle the increased traffic that would be created by the project, the Circuit Court erred in determining that the BZA had complied with the Detroit Zoning Ordinance. Relying on a prior decision in another case, the court stated, "The findings made by a zoning board are inadequate if they merely repeat the language of an ordinance Furthermore, . . . judicial review of a zoning board's decision should not require this Court to infer the board's findings from its ultimate decision."

In its review of the BZA's findings, the court noted that the city's own building and Safety Department stated that Aaro's proposed facility would create economic harm to the surrounding properties. Moreover, a real estate appraiser testified on Smith's behalf that the project would have an adverse effect on property values. No contrary evidence was offered by Aaro or relied upon by the BZA to justify the BZA's finding that there would be no economic harm. Instead, the BZA apparently relied on its belief that permit conditions placed on Aaro would prevent such harm.

In response to appellant Smith's presentation of an architectural and engineering specialist's report pointing to specific potential problems that would cause smells, noise, debris, dust, rodents, and a fire hazard, the BZA simply referred to the zoning ordinance, which required the facility to comply with applicable health, safety, pollution and other regulations to obtain the necessary permits and licenses for the facility. The court noted that the BZA did not base its findings on any evidence. Instead, the BZA's findings were based on "the hope" that Aaro's facility would be in compliance. The court also observed that the BZA in its decision did not even address the issue of whether the proposed waste management operation would be injurious to the use and enjoyment of surrounding properties.

Finally, in response to allegations by Smith that Aaro has a poor track record for compliance at another, similar facility, the court found that such allegations are not relevant to a Detroit Zoning Ordinance determination, asserting that "none of the criteria set forth in the ordinance concern themselves with the past performance of an applicant for a 'permitted with approval use.'" The court held that the Ordinance did not require the BZA to address the matter.

Therefore, the court vacated the Circuit Court's affirmation of the BZA decision and remanded the matter to the BZA to hold a public hearing as required under the ordinance to make an appropriate evidentiary record to support each of its findings.

7. Miscellaneous

Ahearn v Bloomfield Township, 597 NW2d 858 (Mich App, 1999).

Bloomfield Township (the "Township") was served by a sewer system that was constructed in the late 1920s and that carried both sanitary sewage and storm water runoff to a sewage treatment plant. During periods of heavy rainfall, the combined volume of sewage and storm water carried in the system occasionally exceeded the volume that could be discharged to the treatment plant. When that happened, the system discharged untreated sewage directly to the Rouge River in violation of the CWA. In order to comply with the requirements of the federal act, the Township and two other municipalities served by the system agreed to construct a combined sewer overflow retention basin (the "CSO Project"), which captures and holds the raw sewage so

that it can discharge to the treatment plant when the flow has subsided.

Construction of the CSO Project was financed through the sale of municipal bonds. In order to repay its allocated share of the bonded debt, the Township created a special assessment district, which includes over 2,000 residences served by the CSO Project, and levied rates ranging from \$35 per year to \$350 per year on each parcel within the district. A group of property owners within the district challenged the district's creation because it did not confer any special benefit on their property and did not increase their property values. Accordingly, the property owners argued that the assessment on their property was a tax that required voter approval before it could be imposed. The Oakland County Circuit Court dismissed the property owners' lawsuit and the owners appealed.

On appeal, the court first distinguished a special assessment from a tax. "Unlike a tax, which is imposed to raise revenue for general governmental purposes, a special assessment is designed to recover the costs of improvements that confer local and peculiar benefits upon property within a defined area." The court then stated the two requirements that must be met in order for a special assessment to be deemed valid. First, the "special assessment must confer a benefit upon the assessed properties beyond that provided to the community as a whole." Second, "the amount of the special assessment must be reasonably related to the benefits derived from the improvement."

The property owners argued that the only tangible benefit from the CSO Project was a cleaner Rouge River, which benefited the community as a whole, and, accordingly, the property owners within the district received no special benefit from the project. The appeals court disagreed, stating that the property owners had overlooked "the most direct and particularized benefit" conferred by the CSO Project: "It allows [the property owners] to continue receiving sewer service from [the Township]." The court noted that the Township was under no affirmative duty to provide sewer service to the property owners and could have elected to discontinue providing that service rather than construct the CSO Project. The court further noted that it was undisputed that the Township could have created a special assessment district to fund the construction of a new sewer system and that it would "defy logic to prevent [the Township] from using special assessments to fund the conversion of

a legally defective sewer system into a legally proper sewer system.”

The property owners also argued that the CSO Project had not increased the value of their properties. Although the court acknowledged that property values within the special assessment district had not changed appreciably since the construction of the CSO Project, the court held that the “essential question is not whether there was any change in market value, but rather whether the market value of the assessed property was increased as a result of the improvement.” In answering this question, the court examined the market values both with and without the CSO Project. Without the CSO Project, the court determined, “the market value of plaintiffs’ properties would undoubtedly have been substantially reduced” because the properties would not have been served by any sewer system. Accordingly, the court determined that the Township had properly created the special assessment district and affirmed the trial court’s dismissal of the lawsuit.

Burt Twp v MDNR, 593 NW2d 534 (Mich App, 1999).

MDNR obtained options on two lots on Burt Lake in Burt Lake Township (“Burt Lake”) to construct a boat launch facility for public access. After MDNR began construction of the boat launch without first submitting an application for Burt Lake’s approval, Burt Lake filed suit against MDNR, seeking a declaratory judgment that MDNR was required to comply with Burt Lake’s zoning ordinances. Relying on **Dearden v Detroit**, 269 NW2d 139 (Mich, 1978), (“legislative intent, where it can be discerned, is the test for determining whether a governmental unit is immune from the provisions of local zoning ordinances”), the trial court found that MDNR was required to conform with Burt Lake’s ordinances. MDNR appealed and the Michigan Court of Appeals affirmed the trial court’s holding that, while Burt Lake could not prevent MDNR from building the boat launch, MDNR was required to comply with Burt Lake’s zoning ordinance. MDNR appealed to the Michigan Supreme Court.

The Michigan Supreme Court first held that the case was subject to the court’s ruling in **Dearden** and that, therefore, an analysis of the Township Rural Zoning Act, MCL 125.271 *et seq.* (TRZA), and NREPA was required. The TRZA provides Burt Lake with the authority to regulate land use and development and NREPA governs

MDNR activities such as those in question in the present case. In addition, the court reviewed the Township Planning Act, MCL 125.321 *et seq.* (TPA), which provides that a basic zoning plan shall show the planning commission’s recommendations for the development of the township and include certain subjects pertinent to the future development of the township, including, among other things, the general location, character, and extent of waterways and water front developments. The court held that the TPA and the TRZA provide townships with extensive authority to regulate the use and development of land within their borders, including waterfront property, and that, therefore, the burden was on MDNR to show a clear legislative intent to exempt MDNR’s activities from the Burt Lake zoning ordinance.

To support its argument that it was not subject to regulation by local ordinances, MDNR relied on NREPA Sections 503, 78105, and 78110, which concern MDNR’s duties with respect to outdoor recreation and waterways. MDNR pointed to the legislature’s use of “shall” in these sections to demonstrate the mandatory nature of MDNR’s duties under these sections and the use of the phrase “power and jurisdiction” to manage and control lands under the public domain. MDNR claimed that these were evidence of a legislative intent that MDNR has absolute authority to provide public access facilities on inland lakes to the complete exclusion of municipal zoning interests. The supreme court, however, found no clear expression in NREPA of the legislature’s intent to provide MDNR with exclusive jurisdiction over its subject matter and, thus, to exempt MDNR’s activities from Burt Lake’s zoning ordinance. In addition, the court held that the TRZA’s failure to expressly stipulate that state agencies are subject to zoning ordinances does not mean that those agencies are immune from local zoning ordinances. The court noted that the TRZA expressly exempts from local regulation and control certain oil and gas operations and provides the exclusive jurisdiction over these operations with the state supervisor of wells. The court found that this demonstrated the legislature’s awareness of “overriding land-use issues that warranted specific exemption for [MDNR’s] activities. This fact provides additional assurance that there was no legislative intent to exempt [MDNR] here.” The court, therefore, affirmed the court of appeals.

Adams v Cleveland-Cliffs Iron Co, 602 NW2d 215 (Mich App, 1999).

The Empire Mine is operated by Cleveland-Cliffs Iron

Company and its subsidiary, Empire Iron Mining Partnership (collectively, "Cleveland-Cliffs"), year-round, 24 hours a day, near the village of Palmer in Marquette County, Michigan. The mine was originally dug in the 1870s and subsequently expanded, with a third pit added in 1990. Approximately three times a week, the mine engages in blasting operations. Extraction and processing of the iron ore results in a great deal of airborne dust, which, testimony at trial indicated, is fine, gritty, oily, and difficult to clean. Although the emissions from the mining operations were consistently within applicable air quality standards, the accumulation of dust in Palmer each month is four times greater than the amount that normally settles in surrounding communities.

A number of residents of Palmer and the surrounding area, brought suit against Cleveland Cliffs seeking damages in both trespass and nuisance. The residents complained that the blasting sends tremors through their property and that the dust accumulates inside and outside of their homes, requiring cleaning and repainting of their homes, replacement of carpets and drapes, repairs of cracks in masonry, replacement of windows, and resulting in plumbing leaks and broken sewer pipes. In addition, the residents complained that the vibrations from the blasts caused them to suffer shock, nervousness, and sleeplessness. Some residents alleged that the conditions diminished the value of their homes to the point of rendering them unmarketable.

After the trial court instructed the jury on both trespass and nuisance, the jury was unable to agree on a verdict on the nuisance claim but returned a verdict in favor of the plaintiffs on the trespass claim, awarding damages totaling \$599,199. The trial court denied Cleveland-Cliffs' post trial motions for a new trial or judgment notwithstanding the verdict, and Cleveland-Cliffs appealed to the Michigan Court of Appeals.

The sole issue raised on appeal was the propriety of the trial court's instruction to the jury concerning the trespass claim. The trial court had instructed the jury that:

Every unauthorized intrusion onto the lands of another is a trespass upon those lands, and it gives rise to a right to recover damages for the trespass, if any damages were caused by the trespass. So a landowner who causes emissions, dust, vibration,

noise from his property onto another [sic] property assumes the risk of trespass, if the dust, vibration, noise affects the neighbor's property, or if he causes by his actions, damages or invasion of his neighbor's land.

So again, to repeat. A trespass is an unauthorized intrusion into the lands of another.

The court of appeals began its inquiry by examining the history of trespass and nuisance under the common law and noted that the concept of "property" is comprised of a number of rights which have been characterized as "a bundle of sticks" and "the right to exclude others from one's land and the right to quiet enjoyment of one's land have customarily been regarded as separate sticks in the bundle." Violations of these rights lead to the causes of action of trespass and nuisance, respectively. Historically, to succeed under a nuisance claim, a landowner was generally required to prove actual and substantial injury and the disturbance complained of was usually balanced against the social utility of its cause. In comparison, recovery under a trespass claim required that the invasion of the land be direct or immediate, and in the form of a physical, tangible object. "[T]respass is an invasion of the plaintiff's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it."

Because a trespass violated the landholder's right to exclude others from his or her property, at least nominal damages were available even when the landholder could not show any other injury. In contrast, however, recovery under a nuisance theory required proof of an actual and substantial injury before damages could be awarded. The court noted that recent trends in trespass law in other jurisdictions have eliminated the requirements of a direct invasion by a tangible object, and have required proof of actual and substantial damage, weighed the plaintiff's damages against the social utility of the operation causing them, which are the same standards as are applied to traditional nuisance cases. The court stated that the effect of this has been that it has become difficult to differentiate between trespass and nuisance and the court preferred to "preserve the separate identities of trespass and nuisance."

Recovery under trespass generally was not available for dust, smoke, noise, and vibrations because they were not considered "tangible" or because they came to the

affected land by some intervening source such as wind or water. Instead, recovery for these types of irritants had to be sought under a nuisance theory.

The Palmer area residents sought recovery under trespass for invasions of their property by dust and vibrations, intangible things, and without regard for how those annoyances came to their land, asking the court instead to consider the nature of the interest harmed. The residents argued that the Michigan Supreme Court had impliedly eliminated the requirements that a trespass involve intrusions that are both direct and tangible in a decision in which the supreme court held that unfounded fears of contamination did not constitute a significant interference with plaintiffs' use and enjoyment of their property and, thus, did not rise to the level of an actionable private nuisance claim. The Palmer area residents argued that because the supreme court had compared nuisance and trespass, it was adopting the "modern view" of trespass allowing recovery for invasions of property such as those in the instant case. The court of appeals held, however, that the supreme court referred to a trespass case from another state merely to illustrate a point of law regarding nuisance and did not thereby intend to effect a merger of the two doctrines in Michigan.

The court held that noise and vibrations are not tangible objects and, therefore, they can not give rise to an action in trespass in Michigan. The court stated that dust particles, while tangible in a strict sense in that they can be touched and are comprised of physical elements, are not normally physical intruders, they simply become part of the ambient circumstances of the space upon which they settle. If the quantity and character of dust are such that they interfere substantially with the plaintiff's use and enjoyment of the land, recovery in nuisance is possible. Therefore, the court held that there was no tangible intrusion to support a trespass claim.

With respect to damages, the court held that "recovery in trespass is appropriate for any *appreciable* intrusion onto land in violation of the plaintiff's right to exclude, while recovery in nuisance is appropriate for only *substantial* and *unreasonable* interference with the plaintiff's right to quiet enjoyment." The court noted that the trial court's instruction to the jury as to damages would have been appropriate for nuisance but not for trespass. "A jury instruction [on trespass] should announce that because the violation of the right to exclude causes cognizable injury in and of itself, a plaintiff proving that violation is

presumptively entitled to at least nominal damages. The jury should be further instructed that beyond the presumed damages, the plaintiff may recover for any additional, actual damages proved."

Because Michigan does not recognize an action in trespass for airborne dust, noise, or vibrations, the court vacated the jury verdict and remanded the case to the trial court for further proceedings consistent with its opinion.

American Axle Mfg, Inc v City of Hamtramck, 604 NW2d 330 (Mich, 2000).

In 1984, the City of Hamtramck ("City") sold property to Freezer Services of Michigan, Inc. ("Freezer Services") under a redevelopment plan. Under the sale agreement, the City warranted that the site was not contaminated with toxic substances. After the sale, Freezer Services discovered the property was contaminated and sued the City. The City and Freezer Services settled the case for approximately \$3 million.

After the settlement, the City imposed a levy of 30 mills on property owners' 1994 tax bills. One property owner, American Axle & Manufacturing, Inc. ("American Axle") objected to the levy and petitioned the Michigan Tax Tribunal for a refund on the ground that the levy violated the Headlee Amendment to the Michigan Constitution. The Tax Tribunal agreed with American Axle and ruled that the City's levy was unconstitutional. On appeal, the Court of Appeals affirmed the Tax Tribunal's ruling. The City appealed to the Michigan Supreme Court.

The Supreme Court analyzed whether the Headlee Amendment prohibited the City's levy. The Headlee Amendment provides in part that:

Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when the section is ratified, without the approval of a majority of the qualified electors of that unit of local government voting thereon.

Thus, unless authorized prior to the December 1978 constitutional amendment, no new property tax may be levied unless approved by the affected voters. Nothing in

the City's charter authorized the challenged levy. American Axle argued that the City should not be allowed to levy additional taxes to pay for the settlement if the local voters had not approved the millage, pointing out that the millage was not part of the charter prior to December of 1978.

The court noted that for a tax levy to have been "authorized by law" before 1978, does not mean the tax had to actually be levied before December 1978. Rather, the Headlee Amendment requires only that a local government have the *power* to levy the tax before the Amendment was ratified, even if the local government had never before levied the tax.

The court then found that Section 6093(1) of the Revised Judicature Act ("RJA") provides for tax levies by municipalities to pay for judgments against them:

Whenever a judgment is recovered against any township, village, or city . . . the assessing officer shall. . . proceed to assess the amount thereof with the costs and interests . . . upon the next tax roll of such township, city or village . . . adding the total amount of the judgment to the other township, city, or village taxes.

Section 6093(1) of the RJA *requires* city assessors or township supervisors to assess taxes to pay judgments, even if the increased taxes exceed other tax limitations. Thus, the Supreme Court found that Section 6093 of the RJA, which was in effect when the Headlee Amendment was enacted, provided the requisite authority to the City to levy additional taxes to pay for the judgment against it, and reversed the Court of Appeals and the order of the Michigan Tax Tribunal.

Michigan United Conservation Club v Department of Treasury, 608 NW2d 141 (Mich App, 1999).

A number of Michigan environmental and conservation organizations and private citizens (collectively, the Citizens) challenged the constitutionality of Section 503(4) of NREPA, which authorizes MDNR to enter into contracts for the sale of the economic share of royalty interests the State of Michigan holds in hydrocarbons produced from devonian or antrim shale (i.e., oil shale) that qualifies for the federal nonconventional fuel tax credit under Section 29 of the Internal Revenue Code ("IRC"). Under Section 503(4)(a)

of NREPA, the net proceeds of the funds the State receives from the sale of the economic share of royalty interests allocable to the nonconventional fuel tax credit are deposited in the Environment Protection Fund.

The Citizens argued that the deposit of these funds in the Environment Protection Fund violated Article 9, Section 35, of the Michigan Constitution, which directs that "bonuses, rentals, delayed rentals, and royalties collected or reserved by the state under provisions of leases for the extraction of nonrenewable resources from state owned lands" be deposited in the Natural Resources Trust Fund. The Citizens brought suit against the Michigan Department of Treasury to compel the Treasurer to deposit the funds in the Natural Resources Trust Fund. The trial court held that Section 503(4)(a) of NREPA violated this constitutional direction and the State appealed the trial court's decision.

Congress enacted the nonconventional fuel tax credit in order to encourage taxpayers to develop nonconventional fuel resources, such as oil shale and tar sands, by allowing taxpayers who own an interest in facilities that produce fuels from such resources to claim a tax credit of \$3 per quantity of fuel produced equal to one barrel of oil. Given that a tax credit is available only to a taxpayer, i.e., not the State of Michigan, the State would not normally be able to claim the nonconventional fuels tax credit even though the State owns properties and facilities that produce nonconventional fuels. Thus, the Legislature enacted Section 503(4) of NREPA to establish a mechanism through which the State could take advantage of the nonconventional fuels tax credit and obtain funds which would not otherwise be available to the State.

Motor City Four, LLP ("Motor City") agreed to pay the State \$33,903,483.46 under a secured nonrecourse promissory note in exchange for the sale or assignment of the State's royalty interests to Motor City. The Citizens asserted that that these monies should have been deposited in the Natural Resources Trust Fund under Article 9, Section 35, not the Environment Protection Fund as Section 503(4)(a) directs. That is, the Citizens argued that the revenues produced under Section 503(4) constituted "bonuses, rentals, delayed rentals, and royalties" under Article 9, Section 35, and that deposit of the revenues in the Environment Protection Fund pursuant to Section 503(4)(a) violated the Constitution.

In beginning its analysis of the constitutionality of Section 503 of NREPA, the Court of Appeals noted that statutes are presumed to be constitutional and that the court has a duty to construe the statute as constitutional unless it is clearly unconstitutional. “To make a successful facial challenge to the constitutionality of a statute, the challenger must establish that *no circumstances exist under which the statute would be valid.*” The court analyzed the meanings of “bonuses,” “rentals,” “delayed rentals,” and “royalties” as used in Article 9, Section 35, finding that each term has a clear and unambiguous meaning. The court held that all of the terms were terms of art and technical terms which should be given their special meanings, but none of the terms described the payments that Motor City was making to the State:

A “lease bonus is the ‘cash consideration paid by the lessee for the execution of an oil and gas lease by the landowner Bonus is usually figured on a per acre basis.’” Here the money derived from tax credits that Motor City conveyed to the state was neither consideration for a lease nor calculated on a per acre basis. Moreover, as [the State] points out, [the Citizens] have not averred (for seemingly obvious reasons) that the credit is a rental or delayed payment.

The court next analyzed whether the tax credits qualified as “royalties.” Relying on two dictionary definitions of the term, the Court stated that a “royalty” has the following characteristics: “(1) it is a payment; (2) in the form of either the product itself or proceeds from the sale of the product; and (3) made in consideration for the use of the property.” The court held that the tax credit has none of these characteristics:

First, a tax credit to a taxpayer is not a payment. Rather a tax credit “is a direct reduction of the tax due. A credit arises because of a provision in the law” Second, [the Citizens] might argue that even if the credit due to Motor City was not an affirmative payment, Motor City’s transfer of funds back to the state *was* a payment, qualifying the transfer as a royalty. The transfer of funds back to the state was not in the form of the product or its proceeds, however. Rather the transfer of money from Motor City to the state was made in consideration for whatever tax benefits might accrue to Motor City pursuant to this transaction. Indeed, even assuming that the

promissory note to the state was calculated based on an estimate of the tax credits that Motor City could recover, and the amount of the tax credits was calculated according to the amount of gas produced, the tax credits do not constitute production payments, sale proceeds, or royalties. We find no authority requiring that these distinct sources of funding be lumped into one category. And third, Motor City never actually used the state’s land, but instead acquired an ownership interest in royalties derived from extracting natural gas from the land, and all royalty payments were transferred back to (or, in effect, remained with) the state in the form of a production payment.

The payment Motor City made to the State was calculated based on the estimated tax credit that Motor City would be entitled to receive under the nonconventional fuels tax credit, “*not* from the sale of the product extracted from state property.” The court observed that Motor City granted back to the State all royalty interests in the property and, therefore, the royalty payments remained with the State. Thus, because the money paid to the State by Motor City represented the value of the tax credits it would receive as a result of the agreement with the State, and the royalty interests would remain with the State, nothing in the transaction deprived the Natural Resources Trust Fund of monies it would have otherwise received before the enactment of Section 503(4)(a) of NREPA. The court held that Section 503(4)(a) “does not violate [Article 9, Section 35] by placing into the environmental protection fund the otherwise unavailable *proceeds* arising out of the transfer of the state’s royalty interest to a third party who can, unlike the state, generate additional income merely by holding the interest.” The court noted that the Natural Resources Trust Fund would be in the same position whether or not Section 503(4)(a) of NREPA was ever enacted.

Article 9, Section 35, was ratified as an amendment to the Michigan Constitution by the Michigan voters in 1984. The Citizens argued that the voters who ratified Article 9, Section 35, likely understood that all revenue derived from leases of state land for the extraction of nonrenewable resources would be deposited in the Natural Resources Trust Fund. The Citizens claimed that the Article 9, Section 35, came about in response to several “raids” on the Natural Resources Trust Fund where monies were diverted from the fund to pay for other

programs. Elevating the Natural Resources Trust Fund to constitutional status was intended to protect the Fund from such “raids” in the future. The court explained that, even accepting these explanations as true, the Citizens did not demonstrate how the transaction at issue qualified as a “raid,” because the monies involved would not have existed absent the enactment of Section 29 of the IRC and Section 503(4) of NREPA. That is, existing funds were not diverted, nor were monies removed, from the Natural Resources Trust Fund. Instead, this case

concerned where newly created revenue should be deposited. Thus, the court held that the motivations underlying Article 9, Section 35, were not offended by Section 503(4).

Based on the above rationale, the court held that the Citizens were not able to overcome the presumption of constitutionality afforded to Section 503(4) of NREPA and reversed the trial court’s finding of unconstitutionality.

II. STATE LEGISLATION

Michigan Public Act And Effective Date

Description

1999 Public Acts

PA 13 (HB 4059)
June 1, 1999

Amends MCL 324.1603 to increase the district and municipal court jurisdictional amounts in seizure proceedings under NREPA.

PA 30 (SB 0420)
May 27, 1999

Amends MCL 324.20129a to extend the sunset date for payment of a fee to MDEQ when submitting petitions for determination with respect to baseline environmental assessments.

PA 35 (HB 4470)
June 3, 1999

Amends Part 31 of NREPA (water resources) regarding collection of storm water discharge fees.

PA 106 (HB 4471)
July 7, 1999

Amends the sunset dates for certain provisions and fee collections under NREPA Part 31 (water resources), Part 301 (inland lakes), Part 323 (shorelands protection), and Part 325 (great lakes submerged lands).

PA 195 (SB 0462)
Dec 16, 1999

Adds MCL 324.2521 of NREPA to require the MDEQ and MDNR to biennially prepare a report that assesses the status of, and trends related to, the overall state of the environment in Michigan.

PA 196 (SB 0550)
Dec 17, 1999

Amends Part 201 of NREPA (environmental protection) to provide an exemption from liability for cleanup costs for certain secondary material sellers and transporters under MCL 324.20126.

PA 231 (HB 4814)
Dec 28, 1999

Amends Part 55 of NREPA (air pollution control) by repealing MCL 324.5534 (requiring a show of negligence or intent for violations under Part 55) to bring Part 55 into conformance with the federal Clean Air Act.

2000 Public Acts

PA 17 (SB 0515)
March 8, 2000

Amends Part 305 of NREPA (natural rivers) to provide that local units of government must conform to Township Zoning Act or County Zoning Act when establishing a zoning ordinance and requires the MDNR to promulgate a zoning rule to implement Part 305.

PA 24 (SB 0866)
July 1, 2000

Amends MCL 124.284b to increase the maximum civil fine from \$500 to \$1000 for violation of municipal sewage and water supply system rules.

PA 69 (SB 0180)
[91st day after sine die adjournment of Legislature]

Amends Part 439 of NREPA (nongame fish and wildlife trust fund) to require the MDNR to purchase and develop critical nongame wildlife habitats in the State.

PA 100 (SB 1063)
May 19, 2000

Amends Part 87 of NREPA (groundwater and freshwater protection) to postpone the sunset date on groundwater protection fees and to delete references to “nitrogen” in provisions concerning on-site evaluation systems for pesticides or nitrogen fertilizer use.

PA 143 (SB 0269)
June 6, 2000

Amends the Michigan Single Business Tax Act to allow an expansion of credits for eligible investment related to brownfield redevelopment and Michigan Economic Growth Authority projects.

PA 144 (HB 5443)
June 6, 2000

Amends the Michigan Economic Growth Authority Act to increase the number of agreements for tax credits each year for eligible businesses.

PA 145 (HB 4400)
June 6, 2000

Amends the Brownfield Redevelopment Financing Act to redefine “eligible property,” allow alteration of brownfield redevelopment zone boundaries, require public hearings before brownfield plan approval, and make other general amendments.

PA 146 (HB 5444)
June 6, 2000

Creates the “Obsolete Property Rehabilitation Act” to provide for establishment of obsolete property rehabilitation districts, exemption of certain taxes and provision for other taxes, and prescribes other powers and duties of local government officials.

PA 147 (HB 5316)
Oct 1, 2000

Creates the “Safe Drinking Water Financial Assistance Act” to provide authorization for certain governmental units to issue bonds or notes for a community or noncommunity water supply.

- PA 202 (HB 5670)
June 27, 2000
- Amends Part 401 of NREPA (wildlife conservation) to allow the MDNR to limit the number of rods, lines and hooks for harvesting certain salmon and trout.
- PA 206 (HB 5570)
[91st day after sine die adjournment of Legislature]
- Amends the Motor Fuels Quality Act to prohibit the use of gasoline additives containing methyl tertiary butyl ether (MTBE) beginning June 1, 2003.
- PA 229 (HB 5526)
June 27, 2000
- Adds Part 802 to NREPA (personal watercraft) by repealing the Personal Watercraft Safety Act and reenacting those provisions in Part 802, and revising certain provisions related to operation of personal watercraft by minors.
- PA 247 (HB 5767)
June 29, 2000
- Amends the Plant Rehabilitation and Industrial Development Districts Act to incorporate the definition of "high technology activity" under HB 5443.
- PA 248 (HB 5766)
June 29, 2000
- Amends the Local Development Financing Act to provide for the creation of certified technology parks, expend the use of tax increment financing and other general amendments.
- PA 254 (HB 5418)
June 29, 2000
- Amends Part 201 of NREPA (environmental response) to specify that for recovery of response activity costs and natural resource damages that accrued prior to July 1, 1991, the limitation period for filing actions under Part 201 would be July 1, 1994. The amendment specifies that it is curative and intended to clarify the original intent of the Legislature and would apply retroactively.
- PA 259 (SB 1251)
June 29, 2000
- Amends the Michigan Renaissance Zone Act to allow designation of up to 10 additional renaissance zones for agricultural processing facilities, prohibits a qualified local governmental unit from being part of more than one renaissance zone, deletes approval requirements for certain business relocations and allows designation of subzones and modifies zone boundaries.
- PA 262 (HB 5780)
June 29, 2000
- Creates a new Part 362 of NREPA (agricultural preservation fund) to assist in preserving farmland and the purchase of agricultural conservation easements.

III. ADMINISTRATIVE RULEMAKINGS

A. EPA Final Rulemakings

Federal Register Notice

Description

Clean Air Act, NESHAP
64 Fed Reg 29,420 (June 1, 1999)

Amends 40 CFR Part 63 to establish a NESHAP for new and existing plant sites that manufacture polyether polyols.

Clean Air Act, NESHAP
64 Fed Reg 29,490 (June 1, 1999)

Amends 40 CFR Part 63 to establish a NESHAP for new and existing sources in mineral wool production facilities.

Clean Air Act, NESHAP
64 Fed Reg 30,194 (June 4, 1999)

Amends 40 CFR Part 63 to establish a NESHAP for new and existing primary lead smelters.

Solid Waste Management, Permit Program
64 Fed Reg 30,434 (June 8, 1999)

Amends 40 CFR Part 239 to streamline the approval process for certain state permit programs for solid waste disposal facilities other than municipal solid waste landfills that receive conditionally exempt small quantity generator hazardous waste.

Clean Air Act, NESHAP
64 Fed Reg 31,358 (June 10, 1999)

Amends 40 CFR Parts 9 and 63 to establish a NESHAP for new and existing major sources of phosphoric acid manufacturing and phosphate fertilizer production plants.

Clean Air Act, NESHAP
64 Fed Reg 31,695 (June 14, 1999)

Amends 40 CFR Parts 9 and 63 to establish a NESHAP for new and existing sources in wool fiberglass manufacturing facilities.

Clean Air Act, NESHAP
64 Fed Reg 31,898 (June 14, 1999)

Amends 40 CFR Part 63 to establish a NESHAP for new and existing sources in the portland cement manufacturing industry.

Clean Air Act, NESHAP
64 Fed Reg 32,610 (June 17, 1999)

Amends 40 CFR Part 63 to establish a NESHAP for oil and natural gas production and natural gas transmission and storage facilities.

Clean Air Act, NESHAP
64 Fed Reg 33,202 (June 22, 1999)

Amends 40 CFR Part 63 to establish a NESHAP for hydrochloric acid process steel pickling facilities and hydrochloric acid regeneration plants.

Clean Air Act, NESHAP
64 Fed Reg 33,550 (June 23, 1999)

Amends 40 CFR Parts 9 and 63 to establish a NESHAP for the pesticide active ingredient production source category from existing and new facilities.

Clean Air Act, NESHAP
64 Fed Reg 34,854 (June 29, 1999)

Amends 40 CFR Part 63 to establish a generic maximum achievable control technology (MACT) standards program for setting NESHAPs for certain small source categories consisting of five or fewer major sources.

- Hazardous Waste Management, Universal Waste
64 Fed Reg 36,466 (July 6, 1999)
- Amends 40 CFR Parts 260, 261, 264, 265, 268, 270 and 273 by adding hazardous waste lamps to the federal list of universal wastes regulated under RCRA.
- Superfund, NPL Sites
64 Fed Reg 37,012 (July 8, 1999)
- Notice of availability of "Interim Policy on the Use of Permanent Relocations as Part of Superfund Remedial Actions" for residents and businesses living near or on NPL sites.
- Clean Air Act, NESHAP
64 Fed Reg 38,950 (July 20, 1999)
- Amends 40 CFR Part 63 NESHAP for off-site waste and recovery operations.
- Clean Air Act, Michigan SIP
64 Fed Reg 39,034 (July 21, 1999)
- Amends 40 CFR Part 52 and Michigan's SIP revisions submitted in 1998. Incorporates certain rules and removes certain rules.
- Clean Water Act, NPDES Program
64 Fed Reg 42,434 (Aug 4, 1999)
- Amends 40 CFR Parts 9, 122, 123, 124 and 501 permit application requirements and forms for publicly owned treatment works and other treatment works treating domestic sewage.
- Clean Air Act, Air Quality
64 Fed Reg 42,530 (Aug 4, 1999)
- Amends 40 CFR Part 68 by revising uniform air quality index used by states for daily air quality reporting to the public.
- Clean Water Act, Sewage Sludge
64 Fed Reg 42,552 (Aug 4, 1999)
- Amends 40 CFR Parts 403 and 503 requirements for land application, surface disposal and incineration of sewage sludge.
- Safe Drinking Water Act, Monitoring
64 Fed Reg 50,556 (Sept 17, 1999)
- Amends 40 CFR Parts 9, 141 and 142 criteria for monitoring unregulated contaminants for public water systems.
- Clean Air Act, Hazardous Waste Combustors
64 Fed Reg 52,828 (Sept 30, 1999)
- Amends 40 CFR Parts 60, 63, 260, 261, 264, 265, 266, 270 and 271 to revise standards for hazardous waste incinerators, hazardous waste burning cement kilns, and hazardous waste burning lightweight aggregate kilns.
- Clean Air Act, NESHAP
64 Fed Reg 57,572 (Oct 26, 1999)
- Amends 40 CFR Part 63 NESHAP for new and existing publicly owned treatment works.
- EPCRA, Toxic Chemicals
64 Fed Reg 58,666 (Oct 29, 1999)
- Amends 40 CFR Part 372 reporting thresholds for certain persistent bioaccumulative toxic chemicals subject to reporting under Section 313 of EPCRA and Section 6607 of the Pollution Prevention Act of 1990.
- Clean Water Act, Water Quality Standards
64 Fed Reg 61,182 (Nov 9, 1999)
- Amends 40 CFR Part 131 by revising human health water quality criteria for polychlorinated biphenyls.

Clean Water Act, NPDES Program
64 Fed Reg 68,722 (Dec 8, 1999)

Amends 40 CFR Parts 9, 122, 123 and 124 by expanding the NPDES storm water program to address storm water discharges from small municipal separate storm sewer systems.

CERCLA, Permitted Release
64 Fed Reg 71,614 (Dec 21, 1999)

Notice of availability of Interim Guidance on CERCLA Section 101(10)(H) Federally Permitted Release Definition for Certain Air Emissions.

CERCLA, Prospective Purchaser Agreements
65 Fed Reg 1381 (Jan 10, 2000)

Notice of streamlined process to evaluate and negotiate Prospective Purchaser Agreements ("PPA"), including a standard letter, checklist and model PPA.

Safe Drinking Water Act, Lead and Copper
65 Fed Reg 1950 (Jan 12, 2000)

Amends 40 CFR Parts 9, 141 and 142 national primary drinking water regulations for lead and copper.

Clean Air Act, Ozone Transport
65 Fed Reg 2674 (Jan 18, 2000)

Amends 40 CFR Parts 52 and 97 by taking final action on petitions filed by certain states under CAA Section 126 seeking to mitigate interstate transport of nitrogen oxides; stays indefinitely the affirmative technical determinations pending further litigation.

Clean Water Act, Effluent Limitations
65 Fed Reg 3008 (Jan 19, 2000)

Amends 40 CFR Parts 136 and 445 effluent limitation guidelines and pretreatment standards for wastewater discharges from certain landfills.

Clean Air Act, NESHAP
65 Fed Reg 3276 (Jan 20, 2000)

Amends 40 CFR Part 63 by establishing a NESHAP for existing and new facilities that manufacture amino or phenolic resins.

Clean Water Act, Effluent Limitations
65 Fed Reg 4360 (Jan 27, 2000)

Amends 40 CFR Part 444 to establish effluent limitation guidelines, pretreatment standards and new source performance standards for wastewater discharges from certain commercial hazardous waste combustion facilities.

Hazardous Waste, Accumulation Time
65 Fed Reg 12,378 (March 8, 2000)

Amends 40 CFR Part 262 regulations to allow large quantity generators of F006 sludges up to 180 days (or 270 days) to accumulate F006 waste without a hazardous waste storage permit or interim status under certain conditions.

Clean Air Act, Accidental Release Prevention
65 Fed Reg 13,243 (March 13, 2000)

Amends 40 CFR Part 68 requirements for chemical accident prevention to conform to the fuels provision of the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act, Pub. L. 106-40, and revises the list of regulated flammable substances to exclude when used as a fuel or offered for sale as fuel at a retail facility.

Clean Air Act, NESHAP
65 Fed Reg 15,690 (March 23, 2000)

Amends 40 CFR Part 63 to establish a NESHAP for new and existing sources at secondary aluminum production facilities.

Clean Air Act, Emission Standards
65 Fed Reg 24,268 (April 25, 2000)

Amends 40 CFR Parts 90 and 91 to control emissions from new nonroad spark-ignition handheld engines at or below 19 kilowatts (25 horsepower), i.e. lawn and garden tools.

B. State Final Rulemakings

Michigan Register Notice

Michigan Register Notice	Description
Land and Water Management Mich Reg (June 1999), p. 3	Amends MAC R 281.811, .813, .815, .842 and .844 and rescinds .839 and .841 (inland lakes and streams).
Water Quality Mich Reg (Aug 1999), p. 7	Amends MAC R 323.2201 - .2211 and adds .2212 - .2238 and .2240 (groundwater quality).
Storage Tank Mich Reg (Aug 1999), p. 55	Adds MAC R 324.21501 - .21516 (underground storage tank qualified consultants and certified professionals).
Air Quality Mich Reg (Sept 1999), p. 14	Amends MAC R 336.1109 and .1119 (definitions) to correct typographical errors.
Air Quality Mich Reg (Sept 1999), p. 18	Amends MAC R 336.1212 (air use approval) to correct typographical error.
Land and Water Management Mich Reg (Oct 1999), p. 20	Adds MAC R 299.6010 (establishment of DeTour Passage Great Lakes state bottomland preserve).
Land and Water Management Mich Reg (Oct 1999), p. 22	Adds MAC R 299.6011 (establishment of Southwest Michigan Great Lakes state bottomland preserve).
Water Quality Mich Reg (Oct 1999), p. 24	Adds MAC R 323.2401- .2418 (land application of biosolids).
Water Quality Mich Reg (Oct 1999), p. 53	Adds MAC R 324.8801 - .8810 (Clean Michigan Initiative nonpoint source pollution control grants).
Air Quality Mich Reg (Nov 1999), p. 3	Amends MAC R 336.1610, .1620, .1621 and .1624 to correct typographical errors.
Environmental Quality Mich Reg (Dec 1999), p. 44	Rescinds MAC R 323.1271- .1288 (construction grants for wastewater treatment works).
Environmental Assistance Mich Reg (Dec 1999), p. 45	Adds MAC R 324.14501 - .14508 (small business pollution prevention assistance loan).

Air Quality
Mich Reg (March 2000), p. 99

Adds MAC R 324.1501 - .1511 (clean corporate citizen) and rescinds MAC R 336.2401 - .2409, .2412 and .2420 (clean corporate citizen).

Water Quality / Waste Management
Mich Reg (March 2000), p. 107

Adds MAC R 323.2193, .2194 and .2195 (clean corporate citizen benefits).

Air Quality
Mich Reg (April 2000), p. 32

Amends MAC R 336.1101 and .1104 (definitions), .1602 (VOC emissions), .2701 and .2702 (hearings); rescinds .1320 (particulate matter) and .2703 (hearings).

Air Quality
Mich Reg (May 2000), p. 25

Adds MAC R 336.1801 (emission of oxides of nitrogen).

COMMITTEE REPORTS

NOMINATING COMMITTEE

After considering the selection criteria in the Section Bylaws, the Nominating Committee of Beth Gotthelf, Charles Toy and Mike Leffler, recommend:

Chairperson-Elect:	John L. Tatum
Secretary-Treasurer:	Thomas P. Wilczak
For positions on the Council:	S. Lee Johnson Charles E. Barbieri Joseph E. Quandt
Remaining One-YearTerm of Tom Wilczak:	Jeffrey A. Magid

The election for these positions will be held at the business meeting of the Environmental Law Section at 9:00 a.m.on September 20, 2000 in Detroit.

MICHIGAN ENVIRONMENTAL CASENOTES

These casenotes include Michigan state and federal decisions rendered from February 1, 2000 through May 2000.

United States v Locke , ___ US ___; 120 S Ct 1135; 146 L Ed 2d 69 (2000)

The International Association of Independent Tanker Owners challenged several State of Washington regulations and sought declaratory and injunctive relief claiming that the state's regulations were preempted by the Port and Tanker Safety Act of 1972. The district court and the Ninth Circuit Court of Appeals upheld all of the state's regulations except one. The United States Supreme Court granted certiorari and reversed.

In its reasoning, the Supreme Court analyzed Title I and Title II of the Port and Tanker Safety Act of 1972. The Court stated that under Title I, conflict preemption occurs only when it is impossible to comply with both state and federal law or when the state law hinders the application of Congress' intent. Under Title II, the Court reasoned that there was field preemption, which provides that only the federal government may regulate, unless a local regulation is justified by a condition that is unique to a particular port or waterway. The Court determined that several of the state's regulations were preempted under this Title II analysis. Regulations requiring crew training, English language proficiency, and navigation watch requirements were all preempted because they were in conflict with the federal law and were not justified by a condition that is unique to a particular port or waterway.

Another regulation, the Marine Casualty reporting requirement, was invalidated because it would destroy uniformity in reporting marine casualties and because Congress intended that the Coast Guard regulate reporting obligations. The Court remanded several other regulations to the lower court to determine if they were preempted under either a Title I or Title II analysis.

Michigan v Environmental Protection Agency, 213 F3d 663 (CA DC, 2000)

Plaintiffs, several states and industry groups, brought suit claiming that the Clean Air Act (CAA) required the Environmental Protection Agency (EPA) to convene a

transport commission before calling for State Implementation Plan (SIP) revisions. But the court held that the CAA does not require the EPA to establish a transport commission unless it creates a transport region pursuant to CAA § 176A (a). The states also claimed that the EPA should not use cost-effectiveness of emission reductions by various states to determine what contributions are "significant" under 42 USC 7410(a)(2)(D)(i)(I), which only applies to states that "contribute significantly" to non-attainment in a downwind state. The EPA had required states to reduce levels of nitrogen oxides (NOx) by the amount possible through "highly cost-effective controls." The states argued that only health concerns should be considered and that the EPA must mandate the same cutback for each state, regardless of cost differences. The court held that cost considerations were appropriate. The court concluded there was nothing in the text or legislative history of the section that precluded the EPA's consideration of costs.

Petitioners also claimed the EPA's NOx budget analysis intruded on the states' right to fashion their SIP submissions. The court stated that, although §110 did not give the EPA the right to base approval of a state's plan on the adoption of a particular control measure, the budget NOx analysis was not an impermissible SIP regulation. Further, the EPA may set minimum levels to be achieved based on the cost-effective control measures, but must allow the states to choose the method actually used for emission reduction. (See page 4 for further discussion)

Commonwealth Power Co v Department of Natural Resources, unpublished opinion per curiam of the Court of Appeals, decided March 21, 2000 (Docket Nos. 204399 and 210844).

Plaintiff Commonwealth Power was required to obtain a water quality certificate, commonly referred to as a Section 401 certificate under the federal Clean Water Act, 33 USC 1251, before it could operate its hydroelectric power plant. Plaintiff sought a Section 401 certificate from defendant, the Michigan Department of Natural Resources (MDNR), in April 1994. The request was denied because plaintiff had failed to complete a study of the fish entrainment and mortality rates that would occur once the plant was operating. On appeal, the circuit

court reversed the MDNR's denial of the certificate, stating that defendant had no authority to order plaintiff to conduct the study to obtain a permit. The circuit court also ordered the MDNR to pay sanctions for its improper regulatory activity.

The MDNR appealed, contending that it had the authority to order the study. Plaintiff argued that there was no administrative rule requiring a study, and that the MDNR had no authority to order one. The court of appeals found that the MDNR's requirement was purely exploratory, and it had no bearing on actually limiting the number of fish killed. Therefore, the court of appeals held that there was no clear error, and it affirmed the trial court's decision.

The MDNR also appealed the circuit court's decision to impose sanctions on it for its improper activity. The MDNR contended that the court erroneously applied MCR 2.114(F) and MCR 2.625(A)(2), since those rules were not applicable to the appeal. The appellate court agreed, stating that MCR 7.101(P) was applicable, and it reversed and remanded the case to determine if sanctions were proper under that rule.

Public Lands Council v Babbitt, ___ US ___; 120 S Ct 1815; ___ L Ed2d ___ (2000)

Non-profit, ranching-related organizations brought suit to challenge ten 1995 amendments to federal grazing regulations. The trial court held that four of the regulations exceeded the Secretary of the Interior's scope of authority under the Taylor Grazing Act of 1934 ("TGA"). The Court of Appeals reversed as to three of the four regulations and plaintiffs appealed. The Supreme Court affirmed the Court of Appeals' decision.

The goals of the TGA were to stabilize the livestock industry and to stop injury to lands from overgrazing and soil deterioration. The Act provided that recognized grazing privileges would be safeguarded, but that no right, title, or interest was created in the lands. In 1976, Congress enacted the Federal Land Policy and Management Act, which allowed the Interior Department to develop land use plans and to change the amount of land available for grazing. The 1995 amendments to the regulations at issue here were an effort to restore the range lands to better condition.

First, the ranchers claimed the new regulations violated the TGA by failing to safeguard their grazing privileges. The Court held that the regulations did not violate the TGA, and that under the Act, the Secretary was always free to determine the extent to which grazing privileges should be safeguarded.

Second, the ranchers claimed the new regulations eliminated the requirement that a permit holder be engaged in the livestock business by allowing individuals with only a few livestock to acquire a permit and essentially use the land for conservation purposes. The Court held that this regulation was valid because it did not change the statutory requirements for issuing permits. The Court reasoned that the Secretary can cancel grazing permits that are not being used for grazing and are unlawfully being used for conservation purposes.

Third, the ranchers challenged the regulation that changes the ownership of range improvements, giving the United States full ownership of improvements made by a permit holder under a cooperative agreement. The Court held that because the improvements were authorized by the agreement, the Secretary has the power to negotiate the terms of that agreement, including the ownership of the improvements.

Huish Detergents, Inc v Warren, ___ F3d ___; 2000 WL 690173 (CA 6, May 31, 2000)

Warren County, Kentucky, entered into an agreement with Monarch Environmental Inc., which provided that all residential, commercial, and industrial businesses in Bowling Green, Kentucky, use Monarch to remove all of their solid waste. Monarch billed all of its customers directly and was solely responsible for collecting on the accounts. This agreement was passed as an ordinance, thus giving the agreement the effect of law.

Plaintiff operated a detergent manufacturing facility, which generated considerable solid waste. Because Huish was forced to use Monarch under the ordinance, Huish sued to invalidate the ordinance under the dormant commerce clause. The district court dismissed the suit and Plaintiff appealed.

On appeal, the Sixth Circuit Court of Appeals first held that Huish had standing to sue because it had shown all the elements necessary to prove standing. Next, the Sixth Circuit held that the county did not fall within the

market participant exception of the dormant commerce clause because it chose only one in-state waste hauler for all the city's waste. The Sixth Circuit reasoned that because the county neither bought nor sold the waste removal services, and simply used their regulatory power to choose Monarch to the exclusion of all other haulers, this action brought the ordinance within the restrictions of the dormant commerce clause. The Sixth Circuit found that the ordinance treated in-state and out-of-state interests differently, benefitted in-state interests, and placed a burden on the out-of-state interests. As such, the ordinance was held to be invalid for violating the dormant commerce clause.

Ford Motor Co v Department of Environmental Quality, unpublished opinion per curiam of the Court of Appeals, decided May 9, 2000 (Docket Nos. 97-087593-97-AA)

In this case, plaintiff had submitted twenty-two reimbursement requests under the Michigan Underground Storage Tank Financial Assurance ("MUSTFA") section of the Natural Resources and Environmental Protection Act for costs incurred in cleaning up underground storage tank sites. The claims were denied because of inadequate documentation. Plaintiff requested reconsideration of the denial. Defendant denied plaintiff's request for reconsideration, claiming it was untimely. Plaintiff appealed to the circuit court, which decided the case without a hearing and affirmed the agency's denial.

On appeal defendant claimed that under MUSTFA, a request for reconsideration had to be filed within 45 days after a denial to be timely, and that plaintiff's request for reconsideration was not filed within that time period. Plaintiff claimed that requests for reconsideration could be submitted at any time and that, since at least 1993, defendant had accepted requests for reconsideration beyond the 45-day period.

The court of appeals remanded the case to the circuit court to determine whether the agency had established a pattern of accepting requests for reconsideration beyond the 45-day period and if so, whether the agency had given adequate notice to plaintiff that this established practice was going to be eliminated.

Sullivan v Department of Environmental Quality, unpublished opinion per curiam of the Court of Appeals, decided May 5, 2000 (Docket Nos. 209842 and 210106).

Plaintiffs were named on a drilling permit for an oil and gas well in Kalkaska County. Defendant refused to transfer this drilling permit to Trinity Exploration Company ("Trinity") and placed plaintiffs on the "hold permits list." This action, in effect, prevented plaintiffs from conducting business in Michigan until they cleaned up an oil spill that occurred while Trinity was operating the oil and gas well. Plaintiffs sued the DEQ and the trial court dismissed the suit. On appeal, the court of appeals held that plaintiffs were not required to exhaust all administrative remedies when it was futile to do so. Therefore, the appellate court held that the trial court erred by dismissing the case for failing to exhaust administrative remedies, but it upheld the trial court's decision on other grounds.

The court found that under MCL 319.6(a); MSA 13.139(6)(a), the DEQ had the power to promulgate rules, and that the DEQ had properly enacted several rules to regulate the drilling and operation of oil and gas wells. Further, under these rules, the DEQ had the power to suspend the transfer of ownership from plaintiffs to Trinity when plaintiffs had agreed that there was a spill at the well, and the operator of the well was unwilling to clean up the spill. Therefore, the court of appeals held that the dismissal of plaintiffs' claim on this issue was proper. The court also held that the DEQ rules that suspended the transfer were properly enacted, and that the DEQ did not exceed the scope of its authority.

Finally, the court noted that the DEQ rule in question referred to "owners of record," including anyone who holds a permit. Using the plain and ordinary meaning of the language, the court determined that plaintiffs were clearly listed as the owners, and the DEQ was entitled to take action against them. Therefore, the appellate court affirmed the trial court's dismissal of all claims.

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

Scott Bacalja, Scott Sachs, Helen Haessly and Roger Stark.

MINUTES ENVIRONMENTAL LAW SECTION COUNCIL MEETING

Saturday, April 15, 2000

Council Members Present:

Dunn, Gotthelf, Tatum, Holmes, Trigger, Wilczak, Leffler, Phillips, Toy, and by phone, Topp

Council Members Absent:

Blais, Fink, Mikalonis, Newlon, Ortega, Bohn, Dickinson, Wilson, Byl, Johnson, Schroder

Committee Chairs Present:

Huff, S. Lee Johnson

Minutes

The minutes of the meeting of February 5, 2000 were approved.

Secretary/Treasurer's Report

Tatum reported that the section's balance as of 2/29/00 was \$37,013.51

Committee Reports:

Program Committee

Tom Wilczak reported that the committee had met and that the Regional Roundtable Programs were moving along. The first one is scheduled for 5/19 at Park Place in Traverse City with Barry Selden and Dan Darnell from MDEQ participating. Susan Topp and Joe Quandt are heading that effort. The Grand Rapids/Kalamazoo meeting is in planning for 5/23 with John Byl and Bill Fulkerson taking the lead there. Bill Burton from MDEQ has been instrumental in organizing and facilitating these meetings.

Higgins Lake: Mike Leffler has a commitment from Al Howard. He will ask others, including Jim Sygo for an informal get together at 2:00 on Friday June 9, 2000.

Annual Meeting: The 201 rules and/or the Contested Case Rules are possible topics. A listserv survey was conducted by Wilczak on suggestions for future programs. One suggestion received was for a return to full day fall program. There was a sense of the meeting that such a program might collect a number of the update and 1 hour presentations the subject matter committees were developing.

2001 - 20th Anniversary of the Section: Charles Toy is developing a program for the evening prior to the annual meeting of the section. A letter has gone out to all the former Chairpersons for their suggestions. Additional suggestions received included developing a special issue of the Michigan Bar Journal and commissioning a wildlife painting/print(s) as a commemorative for the anniversary. Grant Trigger will work with Charles Toy to develop the commemorative.

Journal Report

Linda Blais reported by email that the Spring issue (number 57) is at the printers now. The next issue (Number 58) will be the State of The Law plus articles, possibly including a recently prepared one from Bill Burton of MDEQ on res judicata for EPA enforcement after MDEQ settlement. Linda also reported that she has had several notes of thanks for the email distribution of case notes. The members appear to appreciate the service.

Technology Committee

Tatum reported for Dickinson, that the research on cost effective phone conferencing systems is underway and the results of an inquiry to LDMI.

Membership Committee

No report.

Air Committee

Lee Johnson reported that the air committee had met on 4/1 at Delphi Automotive in Troy. The Air committee is looking at a program in Washington County with ANR in June, perhaps to be a half day coupled with an opportunity to play golf in the afternoon. Dan Schnee is coordinating with Lee.

Ethics Committee

Sharon Newlon reported by email that the committee had met and was working on some materials relating to MDP issues.

Natural Resources and Wetlands Committee

Wilczak reported that Paul Bohn was continuing to plan a program for Fall at Crosswinds Marsh.

Real Estate Committee

The Real Estate Committee had a very successful program on 3/30 at Jaffee.

Solid/Hazardous Waste Committee

No report. Grant Trigger and Tom Wilczak reported that new Institutional Control guidance had been published by Region V and was available on their website.

Superfund Committee

Grant Trigger reported that the committee was continuing to follow the **Shields v Shell** issue currently on the House floor, the 201 rules revisions, changes to the Groundwater/Surface Water Interface rules, and the Brownfields bills which appear to be on a track to be signed about the time of the Mackinaw Conference. The Brownfields bills include a new definition of eligible property "contaminated, blighted or functionally obsolete". Detail on those definitions and the decision making body are not yet determined.

Surface Water/Groundwater Committee

Beth Gotthelf reported that the committee was considering a program or Brown Bag on TMDLs.

Environmental Litigation Committee

Steve Huff reported that the committee was discussing the possibility that the product liability damage caps might apply to environmental litigation. Also the use of the new contested case rules and a possible program on them.

Desk Book

No report.

Chairperson's Report

Beth Gotthelf noted the resignation of Larkin Chenault and the appointment of Dan Kim as his temporary replacement. She also reported that she had discussions with the Section's Board of Governors Liaison, Bruce Courtade, about the level or lack of Bar support. A result of that discussion was an agreement with Karen Williams to work with the section as our liaison to evaluate the support needs of the section. Karen participated on the Program Committee conference call with Nancy Brown from the Bar, and she has been added to the listserv as another way of keeping up with what we are doing. Also announced was the formation of a new multi Agency Environmental Crimes Task Force. Mike Leffler indicated that he had been working on the program for quite a while and was extremely optimistic for its success. A Nominating Committee of Beth Gotthelf, Charles Toy and Mike Leffler will meet by conference call to prepare a list of candidates for open council positions for presentation at the Higgins Lake meeting on June 10, 2000. The Nominating Committee solicits ideas for new Council Members from the Committee Chairs and Council Members using the criteria shown below from the Bylaws of the Section. Requests for nominations will go out on the listserv and in the Journal.

The meeting was adjourned at 11:45.

Excerpt from Bylaws

Section 2. Qualifications In selecting nominees, the Nominating Committee shall consider the need for representation on the Council of members with differing responsible legal viewpoints and who reside in various geographic areas of the State. The Nominating Committee shall also consider the need for representation on the Council of women and racial/ethnic minority members. The Section has a tradition of recognizing the

contributions of its members to the Section when nominating officers and Council members. The Nominating Committee shall also consider the prior contributions of a member to the work of the Section in areas such as publications, programs, committee activities and Council work. In addition to the above considerations, a nominee shall have the following qualifications: (a) To be eligible for election to the Section Council, the member shall have served for no less than two years as an active member of a Section committee. (b) To be eligible for election as an officer of the Section, a member shall have served not less than four full years as a voting member of the Section Council. [added 9/26/91; amended 9/21/95; amended 9/18/97]

Current Council and Term Expiration Year:

2000: Blais, Fink (end of second term)

2000: (end of first term) Mikalonis, Ortega, Holmes, Phillips

2001: Bohn, Dickinson, Dunn, Trigger, Wilczak, Wilson

2002: Byl, Johnson, Newlon, Topp, Leffler, Schroder

MINUTES ENVIRONMENTAL LAW SECTION COUNCIL MEETING

Saturday, June 10, 2000

Called to order at 10:00 am at Higgins Lake, the DNR's Ralph A McMullen Conference Center on 6/10/00

Committee Reports

Present:

Topp, Trigger, Wilson, Toy, Tatum, Gotthelf, Domzal, Magid, Baron, Susan Johnson, Robinson, Wilczak, Schroder, Dunn, Byl, Tripp, S. Lee Johnson.

Program Committee

a) Tom Wilczak reported that the Regional Round Table programs in Traverse City and Grand Rapids had been successful. The Traverse City program, hosted by Sue Topp and Joe Quandt, had about 35 people in attendance of 45 registered. The Grand Rapids Program, hosted by John Byl, also had about 35 people and was also quite well received. The Detroit program is scheduled for June 15, hosted by Susan Johnson, and the Lansing program, hosted by Charles Toy, for June 21.

Minutes

The minutes of the meeting of 4/15, as amended and redistributed over the envirolaw-council listserv were approved.

b) The Annual meeting program is scheduled for 9:00 until 11:30 on Wednesday, September 20. The business meeting will be from 9:00 to 9:30 with a program on the 201 Rules and the Brownfields Legislation to follow. The Council and Committee Chair dinner, including spouses and partners, will be hosted by Beth Gotthelf at her home in Birmingham on the 19th.

Secretary/Treasurer's Report

John Tatum reported that the Section's balance as of 4/30/00 was \$36,104. The hosts for the regional round tables were reminded that since the Bar is a tax exempt organization, the invoices for food and room should not include sales tax. The Bar has been quite good about paying the invoices within 2 weeks. They will deduct sales tax from invoices submitted. They will also supply a copy of the exemption certificate if requested to do so.

c) ELS 20th Anniversary Celebration 2001: Commemorative Painting. A motion to approve in concept the commissioning of a wildlife painting at a total cost of \$10,000 for the painting, prints and mementos for a

program prior to the annual meeting in 2001 was approved by the Council. The stated purpose was to "increase the awareness of environmental law's contributions to the state." The attached memo from Grant Trigger provides further detail on the discussion.

d) Fall Program: Development of a full day program in October was seen to be a function of the coverage and status of the rules package and the brownfields legislation at the annual meeting.

e) Kurt Brouer is preparing a consolidated calendar of section activities for posting to the website and distribution on the list server.

f) Environmental Science and Law for Judges & Prosecutors: As a result of the discussions with Mike Leffler on Friday and remarks by Reilly Wilson, the Program Committee was directed to make contact with the Michigan Judges Association and others to explore developing a program or programs for judges and prosecutors to improve their awareness of environmental science and law.

Journal Report

No Report at the meeting. By Email from Linda Blais: "By now you all should have received Issue 57 of the Journal. The next issue will be the State of the Law and it will be published in August. If anyone has anything they would like to contribute, the deadline for submissions is July 1, 2000. I recently received another batch of Casenotes from Cooley. The last submission was in January. I believe the delay was caused or contributed to by the lack of environmental decisions and finals. After Steve and I have edited the Casenotes, I will send them out to everyone on the listserv. At the beginning of this month I changed law firms. Linda's new address: Johnson McNally, P.L.L.C., 222 Franklin Avenue, Grand Haven, MI 49417. (616) 842-1661 Fax: (616) 842-1633 email: llblais@novagate.com".

Technology Committee

Todd Dickinson reported that the phone conferencing study was continuing. The Tech committee had a meeting with the editors of the Deskbook (Smary and Haynes) in Grand Rapids to review options for publishing using the publisher of the Journal. The presentation was impressive and appeared cost effective.

Membership Committee

No report

Air Committee

Lee Johnson reported on a scheduled program that has been announced on the listserv. The June 23 seminar will cover several recent developments affecting air quality regulation. The plant tour will include a tour of a state-of-the-art underground natural gas storage plant at MichCon's Washington 10 facility. The tour will be followed by an opportunity to play golf on a course atop the storage facility.

Ethics Committee

Reilly Wilson reported that the committee had met and that a future program on MDP was under consideration, perhaps for a consolidated Fall program.

Natural Resources & Wetlands Committee

Wilczak reported for Bohn that a fall program at either Crosswinds Marsh or Traverse City was under consideration. The Traverse City program was suggested at the regional round table and as a response to the informal list serve survey. Joe Quandt is heading that effort.

Real Estate Committee

Dave Domzal reported on a very successful program in March on environmental insurance and a planned program on July 20 with Sharon Newlon of Dickinson Wright, focusing on the renewal of the Detroit Coke property. The meeting will be at Jaffe Rait.

Solid & Hazardous Waste Committee

Susan Johnson reported that there hadn't been any activity by the committee.

Superfund Committee

Grant Trigger reported that a meeting has been scheduled and announced for June 24 with Andy Hogarth on Indoor Air issues at the Lansing office of Honigman.

Water Committee

Charles Toy reported that the committee had a successful program on June 1 at Cooley.

Environmental Litigation Committee

Jeff Magid discussed a possible program on the revised contested case rules.

Section Publications

Deskbook: No report. Mike Robinson volunteered to discuss with Gene Smary.

Nominating Committee

The committee of Beth Gotthelf, Charles Toy, and Mike Leffler made its report. The report was initially adopted. The committee made its recommendations based on nominations received. The Council discussed the requirement in Section 2(a) of the Section Bylaws which provides that "To be eligible for election to the Section Council, the member shall have served for no less than two years as an active member of a Section committee." In light of this language, the nominating committee requested additional nominations by July 5. It will provide its recommendations soon thereafter in order to make the Journal deadline for publication before the annual meeting.

Chairperson's Report

1) Old Business: Beth Gotthelf reported that the liaison with the bar appeared to be improving. All committee chairpersons were requested to send a description of their committees to Todd Dickinson for posting on the web.

2) New Business: Todd Dickinson was directed to explore establishing a relationship with Jeff Dauphin, editor of Michigan Waste Report, to publish the legislative status of environmental bills on the Section's listserv. It was felt that this would be a useful member benefit and could be obtained at low cost.



Mark Your Calendar!

September 20-22, 2000

Cobo Conference/Exhibition Center
Detroit, Michigan

3 DAYS OF PRACTICAL SEMINARS & PROGRAMS

● Wednesday
CORPORATE/BUSINESS

● Thursday
ACCESS TO JUSTICE

● Friday
LITIGATION/PROBATE

ENVIRONMENTAL LAW SECTION

Wednesday September 20th 9:00 a.m.

Business Meeting and Election

Seminar immediately following:

Part 201 Rules Package

Speakers: Lynelle Marolf, MDEQ
Allen Reilly, Horizon Environmental

&

Brownfields Funding Legislation

Speakers: Jim Linton, MDEQ-ERD
Bob Tiery, MDEQ-EAD

STATE OF THE LAW
FREE TO ALL ATTENDERS



Supporting access to justice for all.

Environmental Law Journal
State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, Michigan 48933-2083

NONPROFIT
U.S. POSTAGE PAID
Grand Rapids, MI
Permit No. 1