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Todd R. Dickinson, Chairperson Fisher & Dickinson, PC 4764 E. Fulton St Ste 204 Ada, Michigan 49301 (616) 575-5655	Robert L. Schroder, Editor Robert L. Schroder, PLLC 8921 Margo Drive Brighton, Michigan 48114 (810) 229-0326	Peter D. Holmes, Assistant Editor Clark Hill, PLC 500 Woodward Avenue, Ste. 3500 Detroit, Michigan 48226 (313) 965-8230

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STATE OF THE LAW

2004

Recent Developments in Environmental Law

By

Jeffrey L. Woolstrum, Esq.
Honigman Miller Schwartz and Cohn LLP
Detroit, Michigan

I. INTRODUCTION

The following summarizes selected Michigan and federal environmental judicial decisions from May 2003 through May 2004, and statutory and regulatory developments from June 2003 through June 2004. While not encompassing every environmental decision, statute or rule during these periods, the intent was to include those developments having significant import to environmental law practitioners.

II. JUDICIAL DECISIONS

A. FEDERAL JUDICIAL DECISIONS

1. CLEAN WATER ACT

a) *U.S. v. Rapanos*, 339 F.3d 447 (6th Cir. 2003).

John Rapanos (Rapanos) owns 175 acres of land in Williams Township, Michigan. In the mid-1980s, his property contained wetlands that were connected to navigable water through an attenuated route: water could travel from the wetlands to a 100-year-old man-made drain, which eventually flowed into a creek, which in turn flowed into the Kawkawlin River, a navigable water. By all accounts, Rapanos's property was located more than ten miles from the nearest navigable water.

In 1988, Rapanos began plans to clear, drain, and fill his property to make it more attractive to developers. At the suggestion of the Michigan Department of Natural Resources ("MDNR"), he hired a wetlands consultant, who found that there were around 50 acres of wetlands on the property. Upon receiving that report, Rapanos ordered the consultant to destroy all records indicating that there were wetlands on the property, and proceeded to fill the wetlands on his property with earth and sand.

After Rapanos began filling his wetlands, the MDNR asked the United States to intervene and enforce federal laws against Rapanos. EPA filed criminal charges against Rapanos, claiming that he had filled wetlands without a permit in violation of Section 404 of the Clean Water Act ("CWA"). Rapanos claimed that the United States lacked jurisdiction over his property, and, therefore, could not enforce the CWA against him. After a protracted string of litigation, a federal district court convicted Rapanos and sentenced him to three years of probation and ordered him to pay a \$185,000 fine. Rapanos appealed.

When the Sixth Circuit affirmed Rapanos's conviction, Rapanos appealed to the United States Supreme Court. The Supreme Court vacated the Sixth Circuit's decision and ordered the Sixth Circuit to reconsider the case in light of the Supreme Court's 2001 ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC). The Sixth Circuit, in turn, remanded the case to the district court for reconsideration in light of SWANCC.

Jurisdiction under the CWA extends to all “navigable waters,” which is statutorily defined to mean “waters of the United States.” The term “waters of the United States” is defined, in turn, through federal regulations to include “waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce” Concerning wetlands, the regulations further provide that wetlands “adjacent” to navigable waters are also covered under the CWA. Section 404(a) of the CWA requires a permit before fill material can be placed into such waters.

In 1986, the U.S. Army Corps of Engineers (“Corps”) attempted to “clarify” the above definition by creating a rule stating that “waters of the United States” include intrastate waters that “are or would be used” as habitat for migratory birds or endangered species. This was known as the “migratory bird rule.”

In *SWANCC*, the Corps had asserted jurisdiction over a group of seasonal ponds in Illinois that were slated to be filled and refused to issue a Section 404(a) permit to allow the filling to commence. Although the ponds were not wetlands, were located entirely within Illinois, and were not connected to any navigable waters, the Corps noted that the ponds served as a habitat for migratory birds and asserted jurisdiction under the migratory bird rule. The affected landowner challenged the Corps’ jurisdiction over its property, claiming that the migratory bird rule exceeded the scope of jurisdiction contemplated by the CWA.

The Supreme Court noted its 1985 decision in *United States v. Riverside Bayview Homes, Inc.*, where it had held that wetlands “adjacent” to navigable waters were within CWA jurisdiction. In so holding, the *Riverside* court had noted that in the context of the definition of “navigable waters,” “the term ‘navigable’ is of ‘limited import’ and that Congress evidenced its intent to ‘regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.’” Instead, the *SWANCC* court noted, CWA jurisdiction over wetlands was dependent upon a “significant nexus” between a wetland and navigable waters, and that CWA jurisdiction clearly extended to wetlands that were “inseparably bound up with” navigable waters. The court also noted that the *Riverside* decision had not addressed the “question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water” In the *Riverside* case, the wetlands had been directly adjacent to navigable water.

The Corps pointed to the court’s holding in *Riverside* to support the migratory bird rule, arguing that the isolated nature of the ponds at issue did not preclude CWA jurisdiction because, according to *Riverside*, navigability was not required to establish jurisdiction. The court, however, rejected this argument and held that while waters did not have to be navigable themselves in order to fall under the CWA, they must at least have some effect upon navigable waters:

We said in *Riverside Bayview Homes* that the word “navigable” in the statute was of “limited effect” and went on to hold that §404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term “navigable” has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.

Because the migratory bird rule could be read to cover waters that had no effect upon navigable waters, the court struck down the rule as exceeding the scope of jurisdiction that is articulated in the CWA.

Justice Stevens dissented from the court’s decision, writing that “today, the Court draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation as well as the Corps’ assertion of jurisdiction over all waters except for actually navigable waters, their tributaries and wetlands adjacent to each.” (Emphasis added).

On remand from the Sixth Circuit, the United States District Court for the Eastern District of Michigan was required to reconsider EPA’s jurisdiction over Rapanos’s property in light of the *SWANCC* decision. The *SWANCC* decision’s impact upon CWA wetlands jurisdiction had been the subject of much dispute, however, since the decision was handed down. Some courts had interpreted the ruling strictly, holding that *SWANCC* only served to

invalidate the migratory bird rule and did not affect the other avenues of asserting jurisdiction, for example, the adjacency of wetlands to navigable waters, or a wetland's hydrological connection (however attenuated) to navigable waters. In contrast, other courts had adopted a much more expansive view of the ruling, pointing to Justice Stevens' dissent and equivocal language by the court to support holdings that *SWANCC* invalidated CWA jurisdiction over wetlands unless they were *directly adjacent* to navigable waters, as they had been in *Riverside*.

Rapanos advanced the latter view, arguing that his property, which was miles from the nearest navigable water and only hydrologically connected to that water through a series of man-made drains and non-navigable tributaries, was outside CWA jurisdiction in light of *SWANCC*. The United States predictably advanced the more limited reading of *SWANCC* to support its assertion of jurisdiction.

The district court agreed with Rapanos and held that Rapanos's wetlands were beyond the jurisdiction contemplated by the CWA. The court noted that, in "a significant shift in [the Supreme Court's] CWA jurisprudence," the *SWANCC* holding precludes the United States from regulating wetlands that are "isolated" from any navigable waters, even when a hydrological connection exists between those wetlands and navigable waters. The court explained that the wetlands at issue were beyond the CWA's jurisdictional reach because they "were not directly adjacent to navigable waters," and, furthermore, that "the plain text of the [CWA] mandates that navigable waters must be impacted by [a wetland's owner's] activities" before CWA jurisdiction will attach. The court also observed that the *SWANCC* opinion repeatedly referred to the property at issue in *SWANCC* "as 'isolated,' despite the fact that, as the dissent [in *SWANCC*] point[ed] out, even the most seemingly 'isolated' wetlands are in fact both hydrologically connected, as well as ecologically connected, to navigable waters." This led the court to conclude that "even if there is a hydrological connection . . . wetlands may be considered 'isolated,'" and hence, beyond the jurisdictional reach of the CWA as delineated in *SWANCC*. The United States appealed.

On appeal, the Sixth Circuit initially noted that "[w]etlands have presented one of the most difficult areas in which to determine the Clean Water Act's exact jurisdictional limitations. Although wetlands are not traditionally navigable-in-fact, they play an important ecological role where they exist." Noting the *Riverside* decision's holding that CWA jurisdiction extends to wetlands that are "adjacent" to navigable waters, the court also observed that "[i]n the post-*Riverside* jurisprudence, however, the question remains as to how far the jurisdiction may go."

The court rejected the district court's view that *SWANCC* "drastically changed the scope of power granted by the Clean Water Act" by limiting CWA jurisdiction to directly adjacent wetlands. The court adopted the logic of the Fourth Circuit's 2003 decision in *U.S. v. Deaton*, which had upheld the Corps' jurisdiction over property involving "wetlands that drain into a ditch which must pass through other waterways to get to navigable-in-fact water, just as is the case on Rapanos's land." The court specifically cited the Fourth Circuit's explanation that:

In *Riverside Bayview* the Supreme Court concluded that the Corps regulation extending jurisdiction to adjacent wetlands was a reasonable interpretation in part because of what [*SWANCC*] described as "the significant nexus between the wetlands and 'navigable waters.'" There is also a nexus between a navigable waterway and its nonnavigable tributaries. . . . This nexus, in light of the "breadth of congressional concern for protection of water quality and aquatic ecosystems," is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted. . . . The Act thus reaches to the roadside ditch and its adjacent wetlands.

Under that logic, the Sixth Circuit held that "[a]lthough the [*SWANCC*] decision limits the application of the Clean Water Act, the Court did not go as far as Rapanos argues, restricting the Act's coverage to only wetlands directly abutting navigable water. Instead, the [*SWANCC*] Court, in a narrow holding, invalidated the Migratory Bird Rule as exceeding the authority granted . . . by the Clean Water Act."

Instead, the court held, the true issue was whether there was a "significant nexus" between Rapanos's wetlands and navigable water:

The evidence presented in this case suffices to show that the wetlands on Rapanos's land are adjacent to the Labozinski Drain, especially in view of the hydrological connection between the two. It follows under the analysis in Deaton, with which we agree, that the Rapanos wetlands are covered by the Clean Water Act. Any contamination of the Rapanos wetlands could affect the Drain, which, in turn could affect navigable-in-fact waters. Therefore, the protection of the wetlands on Rapanos's land is a fair extension of the Clean Water Act. [SWANCC] requires a "significant nexus between the wetlands and 'navigable waters'" for there to be jurisdiction under the Clean Water Act. Because the wetlands are adjacent to the Drain and there exists a hydrological connection among the wetlands, the Drain, and the Kawkawlin River, we find an ample nexus to establish jurisdiction.

Therefore, the Sixth Circuit reversed the district court's decision and reinstated Rapanos's conviction.

b) Carabell v. U.S. Army Corps of Engineers, 257 F. Supp. 2d 917 (E.D. Mich. 2003).

Keith and June Carabell (the Carabells) bought a 19.6 acre parcel of land in Chesterfield Twp., Michigan, which was bordered on one side by a county drain. In 1993, the Carabells applied to the Michigan Department of Environmental Quality ("MDEQ") for a permit to fill 15.9 acres of wetland on their property in order to build 130 condominium units and associated roads and utilities.

The 1993 permit application was denied by MDEQ and the Carabells submitted a second application, this time proposing to fill only 12.2 acres and build 112 condominium units. The second application also included a proposal to build retention ponds on 3.74 acres to filter any water that might drain across the property as a result of the development.

The second permit application was submitted to an MDEQ administrative law judge ("ALJ"), who issued a proposed decision recommending that MDEQ issue the requested permit. One of the main facts cited by the ALJ in favor of issuing the permit was the fact that the Carabells' property was isolated from any body of water. The requested permit was issued on September 30, 1998.

In November 1998, the United States Environmental Protection Agency ("EPA") notified MDEQ that it objected to the permit that had been issued to the Carabells and asserted federal jurisdiction over the property on the grounds that it contained a wetland that was adjacent to the navigable waters of the United States. EPA directed the Corps to determine whether a federal wetland permit should be approved for the Carabells' project.

Although they objected to the assertion of federal authority, the Carabells duly submitted an permit application to the Corps.

The Corps conducted at least three site inspections and concluded that the Carabells' property was, in fact, part of the Lake St. Clair watershed based on the fact that other property in a roughly similar location had previously been determined to be part of the Lake St. Clair watershed. The Corps offered very little site-specific evidence to support this conclusion, however.

In October 2000, the Corps denied the Carabells' permit, stating that the property was a valuable seasonal habitat for aquatic organisms and year-round habitat for terrestrial organisms and that the property provides water storage functions that, if destroyed "could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oemig Drain, Auvase Creek, and Lake St. Clair." The Corps also concluded that projects such as that proposed by the Carabells were causing increased flood duration and frequency and contributing to the degradation of water quality in the Lake St. Clair watershed. Therefore, the Corps concluded that, in order for the Carabells' project to be approved, they must demonstrate that there are no feasible alternative locations for their project and they must provide "the complete functional replacement of the forested wetlands" on the property.

The Carabells appealed the October 2000 decision in a Corps administrative proceeding, arguing that the Corps did not have jurisdiction over their property and that MDEQ's decision to issue a permit precluded any federal agency from intervening. In addition, the Carabells argued that the Corps incorrectly evaluated their permit application.

The Corps hearing officer affirmed the Corps' initial decision to deny the permit, and the Carabells appealed that decision to the United States District Court for the Eastern District of Michigan. Both parties requested the court to render a judgment before a trial.

As an initial matter, the court held that the Carabells' property was subject to federal jurisdiction because it is adjacent to neighboring tributaries of navigable waters and has a significant nexus to "waters of the United States." In so ruling, the court rejected the Carabells' argument that a 2001 decision by the United States Supreme Court in the *Solid Waste Agency of Northern Cook County* ("SWANCC") case limited federal jurisdiction to wetlands adjacent to navigable waters.

The court also ruled that the Carabells had failed to demonstrate that there were no feasible alternative locations for their condominium project. Because the proposed condominium project is not water dependent, there is a presumption that other practical alternative locations are available. Although the Carabells argued that there was only one other parcel in the Township zoned for multi-family development, they did not explain why they could not pursue use of that parcel for their project. The Carabells also did not address the possibility of seeking a zoning variance for their project at another location, using several smaller upland parcels instead of one large parcel, or modifying their project to fit the available zoning. Because they did not address these issues, the court held that the Carabells failed to overcome the presumption that alternative locations for their project are available.

Finally, the court held that the Corps had provided a rational basis for determining that the Carabells' project would cause shoreline erosion and other detrimental environmental effects.

Accordingly, the court granted the Corps' motion for judgment before trial, ruling that the Corps had properly denied the permit requested by the Carabells.

c) United States v. Kuhn, 345 F.3d 431 (6th Cir. 2003).

Michael J. Kuhn was the former superintendent of the Bay City, Michigan municipal wastewater treatment plant. During the midnight shift on August 25, 1996, staff at the plant began cleaning the chlorine contact chamber, which was the last stage of the sewage treatment process before the treated sewage is discharged. Under the plant's National Pollutant Discharge Elimination System ("NPDES") permit issued under the CWA, the plant was required to notify MDEQ within five days after any accidental spill or bypass of the treatment system. While the chlorine contact chamber was being cleaned, sludge from the chamber was illegally pumped into a ditch on Kuhn's orders. Later that year, in November, Kuhn had the soil excavated from the ditch and hauled away.

The plant's NPDES permit also required the plant to submit monthly discharge monitoring reports ("DMRs"), the accuracy of which Kuhn was required certify. The DMRs contain laboratory results on both the influent sewage and the treated effluent from the plant. One of the parameters measured is the Biochemical Oxygen Demand over a 5-day period ("BOD-5"). A plant technician pointed out to Kuhn the very high BOD-5 levels on an influent sample collected on May 3, 1997. Kuhn asked the technician to change the results; however, the technician refused to do so. Suspicious that the results might be altered in the report submitted to MDEQ, the technician made a copy of the original analytical results printout.

When another technician prepared the final report for the month of May for Kuhn's review and signature, Kuhn told the technician that the May 3rd analytical results for suspended solids, total phosphorus and BOD-5 must be wrong and requested that she change the results to the averages for the month. The second technician refused, however, and when she checked the final report, the results had been changed to the monthly averages because Kuhn had asked yet another technician to change them. That technician had written a memorandum memorializing that he had changed the results at Kuhn's direction. Kuhn argued that the high results were for the influent only and that the

effluent results were consistent with the monthly averages. Therefore, he concluded that influent results must have been incorrect. Kuhn signed the altered report and submitted it to MDEQ.

Kuhn was indicted on the following four counts:

- He knowingly caused plant workers to dispose of sewage sludge improperly and the sludge flowed into a ditch on plant property and into the Saginaw River in violation of Section 405 of the CWA.
- Kuhn knowingly caused the sludge to be discharged from the ditch into the Saginaw River in violation of Section 301 of the CWA.
- Kuhn caused an employee to assist in falsifying test results that were required to be filed under the Section 309 of the CWA.
- Kuhn signed and submitted to MDEQ a DMR required under the CWA which he knew contained false analytical results in violation of Section 309 of the CWA.

Kuhn was tried before a jury, which found him guilty on all four counts. After the verdict, Kuhn filed a request seeking a judgment of acquittal. The trial court granted that request in part and dismissed the second count on double jeopardy grounds. The presentence report calculated that a sentence range of 30–37 months imprisonment was appropriate under the United States Sentencing Guidelines (“USSG”). The trial court, however, reduced Kuhn’s sentence to only six months at a halfway house and six months of supervised release and assessed the minimum allowable fine of \$6,000.

In reducing Kuhn’s sentence, the trial court considered a number of factors. The court noted that the chlorine contact chamber was the last stage of treatment before water was discharged and there were serious questions in the court’s mind whether any of the materials released into the ditch actually made it to the Saginaw River. The court also questioned whether a lengthy incarceration “serves the ends of justice in this case.” The court further reasoned that the sentence “ought to be fashioned around the fact that the discharge in this case resulted from essentially a single incident that occurred over a day or two, and was motivated by [Kuhn’s] desire to make the plant more efficient so that it would perform the function of enhancing the environmental quality as opposed to degrading it.” The court essentially concluded that Kuhn took a shortcut, engaged in conduct not authorized under the plant’s NPDES permit, and consequently violated the CWA.

The government appealed the trial court’s downward departure from the USSG-recommended sentence. The case before the Sixth Circuit dealt heavily in the proper application of the USSG and the appropriate factors to be considered by the trial court in sentence “enhancements” and “downward departures” under the USSG. The government argued that the trial court gave no notice of its intention to depart from the recommended status on the basis of Kuhn’s role in the offense and abuse of a position of public trust enhancements. The government also argued that, even if it had received notice, the departures were improper under the USSG and were not supported by the facts of the case.

The Sixth Circuit first agreed with the government that the trial court erred in failing to give notice to the government of its intention to depart from the USSG on these enhancements and, even if it had given notice, the departure was improper. The trial court had reasoned that the abuse of public trust enhancement should be discounted because “a significant number of members of the general public did not enjoy a beneficial or quasi-fiduciary relationship with [Kuhn] in his role as a public servant.” The Sixth Circuit held that this departure was improper under a previous Sixth Circuit case and that it was “difficult to see how members of the general public were not in a beneficial relationship with Kuhn, as significant numbers of the public depended upon Kuhn to prevent or ameliorate water pollution in the area.” Further, the aggravating role enhancement should have been applied because, in his role as plant supervisor, Kuhn directed others to discharge the sludge into the ditch and directed the technicians to change the test results. The Sixth Circuit held that the trial court abused its discretion because it “did not identify any facts or circumstances that would take Kuhn’s case out of the ‘heartland’ of offenders who violate their position of public trust while simultaneously supervising others in illegal activity.”

The USSG contains several enhancements relating to environmental violations, such as an offense involving a “discharge ... of a pollutant” and a “discharge ... in violation of a permit.” The trial court applied these enhancements, but then applied several downward departures. The government did not object to the court’s downward departure on the basis that the “environmental harm did not seem very great,” but objected to the downward departure by the trial court based on the reasoning that a discharge of a pollutant in violation of the CWA must also be accomplished in violation of a permit. The trial court felt that “[w]here a single discharge occurred, the scoring of both of these factors puts undue weight on these offense characteristics in this case.” The trial court stated that it was “persuaded that the sentence ought to be fashioned around the fact that the discharge in this case resulted from essentially a single event that occurred over a day or two.”

The Sixth Circuit, however, held that the USSG already took into account the trial court’s concern of “double counting” in establishing these enhancements and, therefore, the trial court had abused its discretion:

The sentencing guidelines more than adequately take into account the frequency of the discharges and the threat of environmental harm posed by Kuhn’s crimes. The district court’s comment that it had “considerable thoughts and doubt about whether the sentence, a custodial sentence, of 21 months to 27 months serves the ends of justice in this case,” indicates a “dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines,” which we noted in [a previous case] “is not an appropriate basis for a sentence outside the applicable guideline range.”

In support of its downward departures, the trial court also discussed Kuhn’s motivation and purpose in committing the violations. It found “credible [Kuhn’s] professed motive that the efficient pollution-free operation of the Bay City Wastewater Treatment Plant was his ultimate goal” based upon Kuhn’s background, length of public service, and other factors such as community service and exemplary personal record. The trial court thus “concluded that because of his pure motive, Kuhn’s case fell outside of the ‘heartland’ of pollution offenses.”

The Sixth Circuit noted that the trial court failed to give any notice to the government of its intent to depart on this basis and that it was unable to find in the USSG any authorization for such a downward departure based upon the motivation for committing a crime. The Sixth Circuit held that the government should have been given notice and an opportunity to present its arguments to the trial court, but reserved judgment on whether there might be some permissible basis for applying these considerations in adjusting Kuhn’s sentence.

Therefore, the Sixth Circuit vacated Kuhn’s sentence and sent the case back to the trial court for Kuhn to be resentenced.

d) Environmental Protection Info. Ctr. v. Pacific Lumber Co., 266 F. Supp. 2d 1101 (N.D. Cal. 2003)

The United States District Court for the Northern District of California held that a decision by the EPA to seek public comments on a regulation had the effect of reopening the regulation and triggering a new six-year period within which persons could challenge the validity of the regulation, even though EPA did not enact any changes to the regulation at the time.

Pacific Lumber Company and Scotia Pacific Lumber Company (collectively, “Palco”) engaged in timber harvesting and logging road construction in the Bear Creek watershed of Humboldt County, California. Palco owned ninety-five percent of the land in the 5,500-acre watershed.

An environmental organization, Environmental Protection Information Center (“EPIC”), filed suit against Palco, alleging that Palco’s logging activities caused more than a tripling in the amount of sediment deposited in Bear Creek, significantly adversely impacting the use of the creek by wildlife. The timber harvesting, EPIC claimed, removed vegetation and made soils more susceptible to erosion and landslides, and Palco’s construction of unpaved roads likewise exposed soils and destabilized slopes. EPIC asserted that rain carried the exposed soils, pesticides, and diesel fuel into culverts, ditches, gullies and other channels, and from there into Bear Creek.

EPIC asserted that Palco's current and planned future activities were regulated "point sources" of discharge under the CWA and that Palco did not apply for or obtain any permits required by the CWA for its current or proposed future discharges into Bear Creek. EPIC asked the court to order Palco to stop its alleged violations, pay civil penalties, and pay compensation for damage allegedly caused by Palco's discharges into Bear Creek. A critical element of EPIC's claims was its request that the court strike down an EPA regulation that allegedly excluded Palco's discharges from the CWA's permitting requirements.

The court began its analysis by observing that the CWA prohibits the "discharge of pollutants" except as authorized by an NPDES permit. The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." The term "point source" means, among other things, "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel." The term "pollutant" includes such substances as rock and sand, as well as industrial, municipal, and domestic wastes.

In 1976, EPA promulgated regulations that exempted certain categories of discharges from the CWA's NPDES permit requirements, including "[u]ncontrolled discharges composed entirely of storm runoff" and some "[d]ischarges of pollutants from agricultural and silvicultural activities" (the term "silviculture" encompasses the logging activities performed by Palco). The regulation provided that EPA would regulate "silvicultural point sources," but not "non-point source silvicultural activities such as ... harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff."

EPIC asked the court to rule that EPA's regulation actually exempted silvicultural point source discharges, not only non-point source discharges, and, therefore, was not authorized under the CWA.

Palco and EPA argued, among other things, that EPIC's challenge to the validity of the EPA regulation was barred because the federal Administrative Procedures Act ("APA") prohibited challenges to regulations more than six years after they had been enacted. In this case, the regulation had been initially enacted in 1976, and EPIC filed its lawsuit in 2001 – 19 years after the six-year challenge period allegedly expired. However, EPA had made or considered various changes to the regulation in intervening years, leading to a dispute over when the six-year limitation period began.

The court held that EPIC could proceed with its challenge to the regulation. The court observed that EPA had proposed revisions to the regulation in 1999. In its notice of proposed rulemaking at that time, EPA had explicitly invited comments on EPA's approach to regulating non-point source discharges from silvicultural activities.

Although EPA eventually decided in 2000 to leave the regulation unchanged, the court found that "EPA's call for comments reopened the underlying rule for review." As a result, EPA's decision in 2000 not to change the regulation was a new "final agency action" subject to challenge under the APA within six years of that action. Accordingly, the court held that EPIC could pursue its APA claim against the EPA regulation.

2. CLEAN AIR ACT

a) Alaska Dept. of Env'tl. Conservation v. EPA, 124 S. Ct. 983 (2004)

The United States Supreme Court ruled that the EPA has the authority to review air quality permit decisions by state agencies under the Clean Air Act ("CAA").

In 1996, Teck Cominco Alaska, Inc. ("Cominco") applied for a permit from the Alaska Department of Environmental Conservation ("ADEC") to expand its zinc mine in northwestern Alaska, approximately 100 miles north of the Arctic Circle. The expansion would increase the production capacity of the mine, which provides 25% of the region's wage base, by 40%. The project would also increase the nitrogen oxide ("No_x") emissions from the mine by more than 40 tons per year, making the project subject to Prevention of Significant Deterioration ("PSD") requirements under the CAA.

The PSD regulations required Cominco to obtain a pre-construction permit from ADEC. In addition, the PSD permit must require Cominco to use the Best Available Control Technology (“BACT”) to control NO_x emissions.

Cominco’s first permit application called for converting a 5,000 kW standby diesel generator to full time status. ADEC initially proposed selective catalytic reduction (“SCR”), a type of add-on control technology that removes NO_x from smokestack emissions, as BACT for this project. ADEC estimated that SCR would reduce NO_x emissions from the generator by 90%. In response, Cominco amended its application to request permission to install an additional diesel generator and proposing “Low NO_x” technology as BACT. Low NO_x generators have modified fuel systems and combustion chambers to reduce NO_x emissions, but do not have add-on emission controls such as SCR. Cominco estimated that the Low No_x generators would have 30% lower NO_x emission rates than conventional diesel generators.

In determining what technology would meet the BACT standard for Cominco’s project, ADEC employed the “top-down” methodology recommended by EPA. In the top-down methodology, the most effective or most stringent control alternative is presumed to be BACT unless the permit applicant demonstrates that technical considerations or energy, environmental or economic impacts justify a conclusion that the most stringent technology is not truly achievable for the particular project.

Applying the top-down methodology, ADEC first examined SCR, which was expected to reduce NO_x emissions by 90%. ADEC estimated that SCR would reduce NO_x emissions from Cominco’s generators at a cost of approximately \$1600 to \$2300 per ton of NO_x. ADEC concluded that costs in that range “are well within what ADEC and EPA consider economically feasible.”

Instead of requiring SCR on the new generator and on the standby generator that would be switched to full time status, ADEC agreed to an alternative that was proposed by Cominco. Cominco proposed to retrofit five existing generators, as well as the new generator and the standby generator with Low NO_x systems. Cominco argued that the 30% NO_x emission reduction from all seven generators would equal or exceed the amount of pollution reduction that would be achieved by reducing emissions from only two generators by 90% and would cost less than installing SCR on the two generators.

EPA objected to the proposal, arguing that the CAA did not allow ADEC to approve a control standard less stringent than BACT based on emission reductions from other units that were not subject to BACT standards.

In response to the EPA comments, ADEC re-evaluated Cominco’s proposal without considering emission reductions from the other five generators. In the re-analysis, ADEC concluded that requiring SCR would impose a disproportionate cost on Cominco because, compared to other technologies, SCR came at a “significantly higher” cost.

EPA also objected to the revised BACT analysis, stating that Cominco had not adequately demonstrated any site-specific factors to support the claim that SCR was economically infeasible at the zinc mine. Accordingly, EPA concluded that the elimination of SCR as BACT based on cost-effectiveness grounds was not supported by the record and was a clearly erroneous decision. EPA suggested that ADEC should analyze whether requiring SCR would have an adverse economic impact on Cominco specifically. Cominco declined to supply further financial information, arguing that the financial information was unnecessary to the determination of BACT and because of concerns over the confidentiality of its financial information.

On December 10, 1999, ADEC issued the final permit to Cominco approving Low NO_x as BACT. Without providing a detailed analysis, ADEC concluded that requiring SCR would have an adverse effect on the mine’s “unique and continuing impact on the economic diversity of the region” and on the mine’s “world competitiveness.”

The day the permit was issued to Cominco, EPA issued an order under the CAA prohibiting ADEC from issuing a permit to Cominco unless ADEC satisfactorily demonstrated why SCR is not BACT for the Cominco project. Two months later, EPA issued an order prohibiting Cominco from beginning construction or modification activities at its mine.

Both ADEC and Cominco appealed the EPA orders by filing petitions in the United States Court of Appeals for the Ninth Circuit. The appeals court ruled that EPA had authority under the CAA to issue the orders and that EPA had properly exercised its discretion in doing so. ADEC appealed this decision to the Supreme Court.

The Supreme Court first considered whether the EPA orders at issue in this case were ripe for judicial review. Before the Ninth Circuit, EPA had argued that the orders were “interlocutory” or preliminary and, therefore, not subject to judicial review. The Ninth Circuit disagreed with EPA, ruling that EPA had spoken its “last word” on whether ADEC had adequately justified its approval of Low NO_x as BACT. In addition, the orders had effectively halted Cominco’s project because Cominco would be subject to severe statutory penalties if it violated a valid EPA order. Before the Supreme Court, EPA conceded that its orders were, in fact, final and subject to judicial review, and the Supreme Court agreed.

Having determined that the EPA orders were subject to judicial review, the Supreme Court determined that the central question in this case was whether EPA’s role in overseeing state implementation of the CAA includes the authority to ensure that a state permitting agency’s BACT determination is reasonable in light of the statutory requirements.

ADEC agreed that there are many requirements in the PSD provisions that EPA may enforce, including the requirement that a PSD permit include a BACT determination. ADEC argued, however, that EPA’s authority in this regard is limited to ensuring that the state agency has made a determination of BACT and that EPA’s authority does not include the power to supercede a BACT determination that a state agency has made.

ADEC argued that the CAA assigns the authority to determine BACT for a specific project to the responsible state agency and, therefore, excludes EPA oversight from reaching to the substance of a state BACT decision.

The Supreme Court found that the CAA does, indeed, place primary responsibility for making BACT determinations with state agencies, which are best able to adjust for local difference in raw materials or plant configurations that might make a technology “unavailable” in a particular area. The Supreme Court noted, however, that EPA was not claiming authority to supplant the state’s authority to determine what constitutes BACT, but only the authority to reject a state’s BACT determination as unreasonable or not adequately supported by the record. EPA did not, for example, determine that SCR and not Low NO_x constituted BACT, but only that ADEC did not have an adequate basis to conclude that SCR was not economically feasible.

ADEC also argued that the CAA requires EPA approval of a state agency’s BACT determination only in limited circumstances, none of which applied to the Cominco permit. ADEC reasoned that, if Congress had intended EPA to have oversight over all state BACT determinations, it would have required EPA approval of every state BACT determination instead of merely requiring EPA approval of a limited number of BACT decisions. The Supreme Court rejected this argument, however, by noting that there is a difference between a statutory *requirement* for EPA oversight, as under the provisions cited by ADEC, and statutory *authorization* for EPA oversight. The Supreme Court held that the fact that the CAA requires EPA review of state BACT determinations in some circumstances does not mean that EPA is wholly precluded from reviewing state BACT determinations in all other circumstances.

Finally, ADEC argued that, even if EPA has authority to challenge state BACT decisions, EPA must be required to follow the available state administrative and judicial procedures for challenging a state permit decision. ADEC argued that this is necessary in order to allow the state agency to develop an adequate factual record for judicial review and properly places the burden of persuasion on EPA when challenging a state decision. In addition, if EPA is not required to follow state administrative and judicial appeal procedures, the certainty and finality of state permits will be undermined because EPA would be able to invalidate a BACT determination at any time, even months or years after the permit is issued.

The Supreme Court first concluded that nothing in the CAA states that EPA is limited to state administrative and judicial procedures to enforce the CAA and that the CAA’s silence on the issue was not enough to support such an “unusual” conclusion. In addition, the Court found no reason to conclude that a state agency could not develop an adequate factual record to allow informed federal court review. Finally, and perhaps significantly,

the Supreme Court ruled that the burden of persuasion would not be affected by allowing EPA to challenge state BACT decisions in federal court. In particular, the court held that:

In either an EPA-initiated civil action or a challenge to an EPA stop-construction order filed in state or federal court, the production and persuasion burdens remain with EPA and the underlying question a reviewing court resolves remains the same: Whether the state agency's BACT determination was reasonable, in light of the statutory guides and the state administrative record.

The Court also dismissed concerns that EPA might invalidate a BACT determination months or years after a permit has been issued. The Court noted that this case involved EPA orders issued before any construction on the Cominco project had begun. In addition, the Court observed that, in at least one previous case (*United States v. AM General*), the Seventh Circuit Court of Appeals dismissed an EPA-initiated enforcement action when EPA did not act until well after the facility received a PSD permit and completed plant modifications.

Turning to the particulars of ADEC's BACT determination for the Cominco project, the Court found that ADEC initially determined that SCR was the most stringent emission control technology that was both technically and economically feasible. Therefore, the court held, SCR would have been designated BACT unless technical considerations or energy, environmental or economic impacts justified a conclusion that SCR was not achievable for Cominco's project. EPA concluded that there was no factual basis in the record to support ADEC's conclusion that SCR was economically infeasible. In its permit analysis, ADEC acknowledged that "no judgment" could be made as to the impact of the cost of SCR on the "operation, profitability and competitiveness" of the Cominco mine. The Supreme Court could not see how, in light of this acknowledgement, ADEC could nonetheless conclude that SCR should be eliminated from consideration as BACT on the grounds that SCR would threaten the mine's operation or competitiveness. In fact, Cominco had deprived ADEC of having any factual basis to reach such a conclusion when it declined to provide the relevant financial data to ADEC. Therefore, the Court held that no evidence in the record suggested that the mine would be required to cut personnel or raise zinc prices if it was required to use SCR. In the absence of evidence of that nature or order, the Court held that ADEC lacked a sufficient basis to eliminate SCR as BACT based on the perceived impact on the mine's operation or competitiveness.

The Court also found that ADEC did not provide an adequate justification for its conclusion that SCR was too expensive. Although ADEC provided four examples of previous BACT determinations involving costs of \$0 to \$936 per ton of NO_x emissions reduction, ADEC did not explain why it retreated from its earlier statement that a cost of \$1600 to \$2300 per ton of NO_x removed was "well within what ADEC and EPA considers economically feasible." Therefore, the Court held that EPA was justified in challenging ADEC's BACT determination in this instance.

The Court emphasized that its decision does not prevent ADEC from revisiting its BACT determination. Neither EPA nor the Court has conclusively determined that BACT requires the use of SCR on the diesel generators at the Cominco mine or that SCR is economically feasible. The Court merely held that EPA did not act arbitrarily or capriciously in concluding that ADEC did not have an adequate factual basis to find that SCR was not economically feasible in this instance. Accordingly, the Court upheld the EPA orders.

b) United States v. Ohio Edison Co., 276 F. Supp. 2d 829 (S.D. Ohio 2003).

Ohio Edison Company (Ohio Edison) undertook eleven different maintenance projects at its W. H. Sammins Station in Jefferson County, Ohio without first obtaining a PSD permit authorizing the maintenance activities. Under the CAA, new major sources of air emissions must comply with permitting regulations generally known as New Source Review ("NSR"). In areas that meet EPA standards for air quality, such as Jefferson County, Ohio, the NSR requirements include: (i) identifying and installing the BACT to control emissions; (ii) evaluating the potential impact of emissions from the facility on ambient air quality to ensure that significant deterioration of air quality will not result; and (iii) obtaining a pre-construction permit, known as a PSD permit, to document compliance with all applicable requirements.

Existing emission sources are “grandfathered” and not required to comply with NSR requirements unless and until an existing source undergoes a “major modification.” At the time of the events that were the subject of this lawsuit, a “major modification” was defined as:

any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase to any pollutant subject to regulation under the [CAA].

“Routine maintenance, repair and replacement” activities, however, were excluded from the definition of “major modification.”

The Sammins Station includes seven separate coal-fired generated units, numbered 1 through 7, that were originally constructed between 1959 and 1971. The seven units have a combined rated output of over 2200 MW of electricity. The Sammins Station is a large source of emissions to the air, releasing as much as 145,000 tons of sulfur dioxide per year in recent years.

During the 1980s and 1990s, Ohio Edison developed a program to improve the *heat rate* of the Sammins Station units. “Heat rate” refers to the quantity of heat necessary to generate a kilowatt-hour of electricity. In general, the lower a unit’s heat rate, the less coal (or other fuel) it will burn and the less pollution it will produce to generate the same amount of electricity. The projects included replacement of boiler duct work expansion joints, refurbishment of internal turbine seals and improved operator training. In addition, Ohio Edison undertook a number of projects to improve the reliability of the Sammins Station units and to reduce the frequency and duration of unplanned outages for unscheduled maintenance.

In addition to these projects, Ohio Edison spent over \$450 million to install pollution control devices at the Sammins Station since 1970 and switched from locally produced high-sulfur coal to lower sulfur coal from outside Ohio, which contributed to the loss of 12,000 coal mining jobs in Ohio since 1980, the court noted.

EPA alleged that eleven specific projects at the Sammins Station were “major modifications” under the NSR regulations, rendering the Sammins Station subject to NSR requirements. Because Ohio Edison did not obtain PSD permits and otherwise comply with NSR requirements before undertaking these projects, EPA alleged that Ohio Edison violated the CAA.

Ohio Edison argued that the activities in question were routine maintenance, repair and replacement and that the projects did not increase the hourly emission rate of the Sammins Station. Therefore, Ohio Edison argued, NSR requirements did not apply to the eleven projects. The court disagreed and ruled in favor of EPA.

The eleven projects included 34 parts replacements, including replacements of furnace water wall tubes, economizer tubes, superheater tubes, reheater tubes, burners, coal pipes, pulverizers and low pressure turbine rotors. The total cost of the projects was approximately \$136 million.

The court summarized the distinction between routine maintenance, which is exempt from NSR, and other projects that trigger NSR requirements:

While the analysis required to distinguish between a modification sufficient to trigger compliance from routine maintenance, repair and replacement is complex, the distinction is hardly subtle. Routine maintenance, repair and replacement occurs regularly, involves no permanent improvements, is typically limited in expense, is usually performed in large plants by in-house employees, and is treated for accounting purposes as an expense. In contrast to routine maintenance stand capital improvements which generally involve more expense, are large in scope, often involve outside contractors, involve an increase of value to the unit, are usually not undertaken with regular frequency, and are treated for accounting purposes as capital expenditures on the balance sheet.

The court criticized EPA's enforcement of NSR requirements over the years, but ultimately concluded that EPA's failures did not absolve Ohio Edison of liability:

While the law has always been clear, the enforcement strategies of the EPA have not. It is clear to this Court that at various times since 1970 officials of the EPA have been remiss in enforcing the law and clarifying its application to specific projects.

Turning to the specific issues regarding the definition of "major modification" and the routine maintenance, repair and replacement exemption, the court largely adopted the analysis presented by EPA.

This Court is of the view that the words "any physical change" included in the definition of "modification" must be given their plain meaning – that is, that any physical change to the units at issue trigger CAA compliance assuming, (1) that the change also causes an increase in emissions and (2) the change is not excluded by a regulatory exemption. (Emphasis in original.)

The court concluded that the eleven projects all involved physical changes because they involved replacing critical components or rebuilding damaged elements. Therefore, the court turned to the question of whether the eleven projects were exempt as routine maintenance, repair and replacement.

The court noted that NSR regulations do not exempt all maintenance, repair and replacement activities, but only those that are "routine." Because the term "routine" is not defined in the NSR regulations, the court considered the reasonableness EPA's interpretation of what is "routine."

First, the court noted that, although EPA's regulations exempt routine maintenance, repair and replacement from NSR requirements, the underlying statutory provisions of the CAA do not include such an exemption. Therefore, the court preferred a narrow interpretation of the exemption to avoid conflicting with the statutory requirements. The court found that the interpretation of "routine" proposed by Ohio Edison was too broad and would thwart the purposes of the CAA by opening "vistas of indefinite immunity from the provisions of [NSR]." In contrast, the court found that EPA's four part test for "routine," which considers the (i) nature, (ii) purpose, (iii) cost and (iv) frequency of the project, to be reasonable.

Accordingly, the court deferred to EPA's interpretation of what constitutes "routine" repair, maintenance and replacement. In particular, the court accepted EPA's position that the primary focus should be on what is "routine" for a particular unit, rather than on the types of activities performed in the coal fired electric generating industry as a whole:

The types of activities undertaken within the industry as a whole have little bearing on the issue if an activity is performed at a unit only once or twice in the lifetime of that particular unit."

The court then applied EPA's four-part test for "routine" to the eleven projects undertaken at the Sammins Station and found that none of them qualified as "routine." Regarding the first part of EPA's test, the nature and extent of the activities, the court noted that the projects involved replacement or upgrade of major components of the generating units. The projects required each unit to be shut down for weeks or months at a time. Internal Ohio Edison documents showed that the activities were expected to reduce forced outages of the units and could extend the lives of the units by as much as 30 years. Most of the work was performed by outside contractors, rather than by Sammins Station maintenance staff. Funding for the projects had to be approved by personnel in Ohio Edison's central office and all of the projects were funded from Ohio Edison's capital improvements budget. Although the eleven projects were arguably smaller than the projects that were found to be a "major modification" in a previous

case involving Wisconsin Electric Power Company (“WEPCO”), the court concluded that nothing in the *WEPCO* decision suggested that all projects smaller than the ones at issue in the *WEPCO* case were exempt from NSR. Therefore, the court found that the nature and extent of the projects weighed against a finding that they were “routine.”

Regarding the purpose of the eleven projects, the court noted that Ohio Edison documents stated that the purpose of the projects was to increase the availability and reliability of the Sammins Station units. In addition, the projects were expected to extend the useful lives of the Sammins Station units by 30 years. Based on this, the court concluded that the purpose of the projects was beyond mere maintenance of the units and, therefore, the purpose of the project also weighed against a finding that they were “routine.”

With respect to the frequency of the activities, the court first ruled that the primary focus should be placed on how frequently the activities in question have been performed at the particular unit. The court found that Ohio Edison could not establish that the eleven activities were undertaken with such frequency that they could be considered “routine” at the particular unit. The evidence showed that almost all of the major component and equipment replacements at the Sammins Station had never been performed before on the particular unit. In addition, the court found the fact that the activities were expected to extend the useful lives of the Sammins Station generating units supported the conclusion that the projects would occur only once or twice in a particular unit’s lifetime.

Although the court acknowledged that similar projects may have been performed at other coal-fired generating stations across the country, the court concluded that an industry-wide standard as to what is routine would render the exemption meaningless. The court held that the frequency with which projects are performed at other plants could be considered in the analysis, but must be given less weight. Therefore, the court held that the frequency (or rather lack of frequency) with which the eleven projects had been performed in the past on the particular generating units in question weighed against a finding that the projects were “routine.”

Finally, with regard to the cost of the eleven projects, the cost of the projects ranged from \$1.15 million to \$33 million, for an aggregate cost of \$136.4 million. The court found that these costs clearly supported a finding that the activities were not “routine.” Moreover, the court concluded that because most of the cost of the projects were capitalized and not budgeted as maintenance expenses supported a finding that the projects were not “routine.”

Because the court concluded that the four-factor test for routine maintenance, repair or replacement was not satisfied with respect to the eleven projects undertaken at the Sammins Station, they did not qualify for the routine maintenance, repair and replacement exemption.

The court then turned to the second step of the analysis: whether the projects resulted in a significant increase in emissions. Ohio Edison and EPA proposed different methods for determining whether any of the eleven projects resulted in an increase in emissions. EPA argued that Ohio Edison was required to calculate the projected change in emissions that would result from the project *before* the project was performed. Ohio Edison argued that the court should simply review the actual record of historical emissions to determine whether an increase had occurred.

The court held that the question of NSR applicability must be determined before a particular project is undertaken. The statutes and regulations clearly state that a PSD permit, if one is required, must be obtained before construction of a project commences. Therefore, the court ruled that, even though actual data exists as to the emissions resulting from the eleven projects, the law does not allow an after-the-fact analysis of the effect of a plant modification. Accordingly, the court concluded that the appropriate frame of reference for determining whether a significant net emission increase would result from a particular project was whether a significant increase in emissions would have been expected before the project commenced, regardless of whether the expected increase actually occurred.

The court evaluated in detail EPA’s expert’s testimony regarding the emissions increases associated with the eleven projects. In essence, EPA’s expert reasoned that, because the purpose of the projects was to increase the reliability of the generating units and decrease the number of days per year that each unit was forced out of service for unplanned maintenance, it was expected that each unit would be able to operate more days per year after the projects than before. EPA’s expert surmised that the additional days of operation for each unit would result in a

corresponding increase in annual emissions from that unit. The court noted that Ohio Edison's records demonstrated that, in fact, the projects did reduce the average number of days of shutdown for planned and unplanned outages.

Ohio Edison argued that none of the eleven projects increased the maximum production capacity, the maximum fuel consumption rate or the net demonstrated generating capacity of any of the units. Ohio Edison also argued that EPA's analysis failed to take into account the fact that the projects improved the heat rate of the units, thereby reducing the fuel consumption (and emissions) required to generate a given amount of electricity.

EPA countered that the increased reliability and improved heat rates of the Sammins Station units would lead to increased utilization of the Sammins Station for satisfying Ohio Edison electricity generation needs. In addition, EPA argued that its expert did not ignore the effect of heat rate improvements, but rather concluded that, even if a temporary heat rate improvement could be expected from a project, the beneficial effect on emission rates would be largely cancelled out by an increase in utilization of that unit. In addition, the court noted that Ohio Edison did not submit any calculations of emission reductions that would be expected to result from the improvements in heat rate at the Sammins Station units. Therefore, the court concluded that EPA reasonably disregarded the effect of improved heat rate when calculating expected emissions from the Sammins Station units.

The court also rejected Ohio Edison's method for calculating the baseline emissions (i.e., the emission rate before the eleven projects). Ohio Edison argued that the NSR rules allow it to use the two years of highest emissions within five years before any given project to establish the baseline. The court concluded however, that the NSR regulations require the baseline to be calculated from the two years immediately preceding a project and that a different two-year period within the previous five years may be used only with approval by EPA. Because Ohio Edison had never received approval from EPA for an alternate baseline period, it was obligated to use the two years immediately prior to each project for determining the baseline amount of emissions.

As discussed above, the court rejected Ohio Edison's method for measuring the amount of emissions after a project (i.e., looking at the actual emission rate as measured at the plant) in favor of EPA's approach of estimating the amount of emissions that would have been expected to occur before the projects were undertaken. Nonetheless, the court noted that when the actual emissions from each unit after one of the projects was performed were compared to the correct baseline emissions (based on the average of the two years immediately before the project), all of the Sammins Station units, with the sole exception of Unit 2, experienced a confirmed actual increase in emissions large enough to trigger NSR requirements.

Because the court accepted EPA's methodology for calculating the amount of emissions increase associated with each of the eleven projects, the court concluded that each project resulted in a "significant" net emissions increase.

Because the court held that each of the eleven projects: (i) was a physical change; (ii) was not routine maintenance, repair or replacement; and (iii) resulted in a significant net emissions increase, the court found that Ohio Edison had violated the CAA with respect to each project.

The final issue considered by the court was whether Ohio Edison should be absolved from liability because it did not have fair notice of its obligations under the CAA. Ohio Edison argued that EPA had repeatedly changed the definition of routine maintenance, repair and replacement and the methods for calculating emission increases. Therefore, Ohio Edison argued that the tests for routineness and emissions were not "ascertainably certain" and, therefore, Ohio Edison did not have fair notice of the law.

The court rejected Ohio Edison's argument, finding that EPA's statements in the *Federal Register* and in administrative determinations, when read together with prior court opinions and the text of the CAA, were sufficient to provide Ohio Edison with fair notice that the projects at issue in this case could not be considered routine maintenance, repair or replacements. Moreover, Ohio Edison's participation in utility industry trade groups kept it informed of the latest developments in environmental law, including EPA's NSR policies. Therefore, the court found that Ohio Edison was not relieved of liability under the CAA because of a lack of fair notice.

For the foregoing reasons, the court held that Ohio Edison had violated the CAA with respect to each of the eleven projects at the Sammins Station by failing to obtain a PSD permit for each project and otherwise failing to comply with NSR requirements for each project. The court did not assess any penalties against Ohio Edison or order Ohio Edison to undertake any particular remedies to correct these violations. Those issues will be resolved after a separate “second phase” trial, which is expected to commence in March 2004. In its opinion, the court indicated that it may consider a variety of issues in determining the appropriate remedy for these violations, including issues that were not relevant to the question of whether Ohio Edison violated the CAA, such as the air quality, public health, economic impact and employment consequences. The court stated that it may also take into consideration in the second phase EPA’s inconsistent history of applying and enforcing the CAA with respect to projects such as those at issue in this case.

3. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (“CERCLA”)

a) Kalamazoo River Study Group v Rockwell Intl. Corp., 355 F.3d 574 (6th Cir. 2004)

The United States Court of Appeals for the Sixth Circuit upheld two separate decisions of the United States District Court for the Western District of Michigan concerning the liability of two manufacturers under CERCLA. The case involved a CERCLA contribution action brought against Rockwell International Corporation (“Rockwell”) and Eaton Corporation (“Eaton”) by a consortium of four former paper mill owners, known as the Kalamazoo River Study Group (“KRSG”), whose facilities had polluted sediments in the Kalamazoo River with polychlorinated biphenyls (“PCBs”). Although the district court had found that both Rockwell and Eaton were liable for some of the PCB contamination, it allocated none of the investigation costs to Rockwell, while it allocated only a small portion of the investigation costs to Eaton, and assessed neither party any cleanup costs.

In the case of Rockwell, KRSG had asked the district court to reopen the case against Rockwell because KRSG claimed it had discovered new evidence of increased environmental contamination after the district court issued its order allocating no costs to Rockwell. The district court refused to reopen the case because it was brought after the time allowed for such reopening of cases under the Federal Rules of Civil Procedure. In the case of Eaton, KRSG argued that the district court had applied an inappropriate standard of liability and had also made several errors in its factual findings.

In 1990, EPA added a 35-mile stretch of the Kalamazoo River to the National Priorities List (“NPL”) promulgated under CERCLA after discovering, in coordination with the MDNR, that sediments in the river were contaminated with PCBs. The members of KRSG entered into an administrative order with MDNR to perform a remedial investigation/feasibility study (“RI/FS”) of an expanded 95-mile stretch of the river. The expanded study zone included Eaton’s Battle Creek plant and Rockwell’s Allegan facility.

The members of KRSG have not disputed their liability for a type of PCB known as Aroclor 1242. The KRSG members used Aroclor 1242 extensively in their paper de-inking and manufacturing operations for several decades beginning in the 1930s. The KRSG also used Aroclor 1254 in electrical transformers, capacitors, hydraulic systems and paints; however, they have argued that they only contributed minimally to Aroclor 1254 and 1260 contamination at the site and that other industrial users were responsible for that contamination. Therefore, KRSG brought contribution actions under CERCLA against Rockwell, Eaton and other industrial facilities located along the Kalamazoo River in 1995.

The Sixth Circuit first considered KRSG’s appeal of the district court’s decision regarding Rockwell. Rockwell’s Allegan facility produced universal joints for automobiles and construction equipment from the early 1900s until 1989. Soil tests at Rockwell’s Allegan facility showed the presence of Aroclor 1254 (and also some Aroclor 1242 and 1260) in the groundwater and oil floating on the water table. Thus, even though there was no definitive proof that Rockwell ever purchased PCB-containing oils, the presence of PCBs at Rockwell’s facility showed that it did, in fact, use PCBs. In a December 1998 decision, the district court held that Rockwell released PCBs to the Kalamazoo River NPL site and was, therefore, liable for some of the PCB contamination in the river. In a June 2000 opinion, the district court ruled that, taking into consideration the low levels of PCB on the Rockwell property and that the river sediments and fish tended to show no significant contribution of PCBs by Rockwell, Rockwell’s PCB contribution was very minimal, particularly in comparison to the amount contributed by the KRSG

members. The district court held that KRSG was not entitled to recover from Rockwell. KRSG appealed and, in December 2001, the Sixth Circuit upheld the district court's zero-allocation, holding that there was no inconsistency between the court's finding of liability, but zero-allocation assessment, because the district court had broad discretion to allocate the costs of the remedial investigation.

The new evidence that KRSG argued justified reopening the district court's zero allocation decision came about as a result of investigations of Rockwell's facility by EPA that showed that the facility, in fact, had higher PCB levels than were reported at the time of the court's decision – in some instances, 100 times higher than the previously reported levels. EPA also indicated that one PCB plume was entering the Kalamazoo River and that another was migrating towards it.

Thus, KRSG filed a motion with the district court on September 21, 2001 to reopen the CERCLA allocation proceeding, which was 15 months after the court made its June 2000 allocation order. KRSG argued that Rockwell had deliberately obfuscated the data on its site in contravention of its duty under CERCLA and asked the court to use its equitable power to reconsider the allocation. Although KRSG did not identify its motion for reconsideration as being made under Fed. R. Civ. P. 60(b)(2), the district court ruled that it was and denied KRSG's motion for reconsideration because it was filed after the one-year time limit for bringing such motions.

On appeal, KRSG made several alternative arguments. First, that the district court was wrong in considering its motion as being made under Rule 60(b)(2) because CERCLA itself provides for reopening an allocation order based on changed circumstances. Second, KRSG argued that if Rule 60(b) did apply, then the court should have considered its motion to be made under Rule 60(b)(5), which allows a "prospective" order to be reopened within a "reasonable" time, which could be more than one year. Third, implicit in KRSG's motion for reopening was the position that the new evidence itself was a sufficient basis for reopening the allocation for remediation costs.

KRSG argued that the inherently equitable nature of the CERCLA allocation process permitted reopening of an allocation decision independent of Rule 60(b), arguing that CERCLA allocations are subject to revision whenever the equities underlying the allocation decision change. The Sixth Circuit disagreed. The court held that there is nothing in CERCLA that indicates that the Federal Rules of Civil Procedure do not apply to CERCLA allocations and that CERCLA, in fact, expressly states that all CERCLA claims are to be brought in accordance with the Federal Rules of Civil Procedure.

KRSG cited several CERCLA cases in which an allocation was later changed by the court. The Sixth Circuit distinguished these cases as not showing that CERCLA allocation decisions are inherently subject to change, but as showing that courts have the power to fashion relief in an allocation case that is subject to future change. That is, in the cases cited by KRSG, the courts expressly made their rulings provisional in the face of uncertainty of the underlying evidence or other factors involved in the allocation. In the case of Rockwell's allocation, the Sixth Circuit observed that the district court gave no indication that its allocation was provisional or subject to future alteration.

Regarding KRSG's arguments that the more generous time limits of Rule 60(b)(5) should apply, the Sixth Circuit held that the district court's allocation order was not "prospective" within the meaning of the rule and, therefore, the one-year limit of Rule 60(b)(2) applied. The Sixth Circuit stated that the application of Rule 60(b)(5) turned on whether the allocation order was of "prospective application" as required by the rule. It stated that the mere possibility that a judgment has some future effect did not make it "prospective" within the meaning of the rule – and that "[v]irtually every court order causes at least some reverberations into the future." The Sixth Circuit further reasoned that the allocation order was not "prospective" as follows:

KRSG is incorrect in its assertion that the district court's allocation was "prospective" in the Rule 60(b)(5) sense of the word. The district court's allocation order was not a consent decree, an injunction, or even a declaratory judgment. Rather, the allocation decision stated that Rockwell was not responsible for any measurable PCB contamination to the NPL site; this was a one-time judgment that Rockwell was not required to contribute and that it did not provide for any future supervision or alteration by the district court. Merely

because KRSRG requested contribution for future costs, which the district court denied, and merely because KRSRG's prospective remediation expenses would be higher in a relative sense as a result of the district judge's order, does not mean that the order was "prospective" under Rule 60(b)(5).

Therefore, the Sixth Circuit held that the district court properly denied KRSRG's motion to reopen the allocation for Rockwell because it was brought more than one year after entry of the original judgment.

With respect to Eaton, its Battle Creek facility manufactured automotive parts and undisputedly released significant quantities of oil into the Kalamazoo River for over four decades. The issue, however, was whether that oil contained PCBs and, if so, did the PCBs affect the area investigated under the RI/FS. In the underlying case, the district court concluded that Eaton only minimally used some PCBs in what were normally closed systems, such as electrical equipment and hydraulic oils, and that the oils from these systems were not directly discharged to the river, but only leaked in small amounts onto the floor of the plant and possibly into drainage ditches on the Eaton property.

KRSRG attempted to show that PCBs from Eaton actually entered the river and contributed to contamination of the NPL site by showing that Morrow Lake, which is located downstream of Battle Creek but upstream of the NPL site, was contaminated with Aroclors 1254 and 1260. KRSRG could not be responsible for the Morrow Lake contamination because it is upstream of the KRSRG facilities. In May 2001, the district court ruled that, although "there was only the most scant evidence of a measurable PCB discharge into the NPL site from [Eaton's] Battle Creek" facility, it was "constrained to find that Eaton is liable for some PCB releases ... to the Kalamazoo River."

In August 2002, the district court ordered Eaton to pay ten percent of KRSRG's investigation costs under the RI/FS and none of the future remediation costs. The district court agreed with Eaton's expert that other parties contributed to the PCB contamination in Morrow Lake and that Eaton contributed only a "de micromis" amount of PCB to the ditch on its property, that only a fraction of that amount made it to the lake, and further, only a fraction of that fraction actually washed over the lake's dam and downstream to the NPL site. The district court accepted Eaton's expert's estimate that only 1.3% of the PCBs in the NPL site could have come from Morrow Lake.

On appeal, KRSRG argued that the district court only "paid lip service" to the CERCLA preponderance of the evidence standard in its allocation, but actually applied a standard that required KRSRG to absolutely disprove the potential responsibility of upstream contributors other than Eaton. KRSRG further argued that the district court committed clear factual errors when it accepted Eaton's theory that PCB contamination in Morrow Lake and the NPL site might have come from sources other than Eaton. The Sixth Circuit rejected KRSRG arguments and upheld the district court's decision.

The Sixth Circuit found that the district court appropriately weighed the evidence presented by both KRSRG and Eaton and concluded that Eaton was only minimally responsible for KRSRG's investigation costs. While the Sixth Circuit agreed that some of the evidence presented by KRSRG supported its theory that Eaton contributed to the PCB contamination for which KRSRG is responsible, Eaton presented evidence in support of its position and the district court ultimately found Eaton's evidence more compelling. The district court assessed the evidence presented by both parties and concluded that Eaton's PCB use "was exceedingly minimal and that any PCBs it did use barely impacted the pollution at Morrow Lake, let alone the contamination at the actual NPL site" for which KRSRG was liable.

The Sixth Circuit also found flawed KRSRG's argument that, instead of requiring it to prove Eaton's complicity, the district court required KRSRG to disprove the potential responsibility of several other industrial facilities for the PCBs in the Eaton drainage ditch and Morrow Lake. The Sixth Circuit stated: "The district court did not require KRSRG to disprove in any absolute sense the potential contamination by those facilities, but rather considered the significant probability that they added to the pollution for which Eaton was being blamed. Thus we cannot agree that the district court clearly erred in reaching its factual findings." The court further stated: "Whereas KRSRG views the district court as requiring it to disprove other parties' potential responsibility, the district court in reality recognized that some convincing evidence demonstrated that parties other than Eaton may have been the chief polluters of the wastewater ditch, Morrow Lake, and the NPL site."

Thus, the Sixth Circuit upheld the district court's decisions with respect to the liability of both Rockwell and Eaton.

b) U.S. v. Consolidation Coal Co., 345 F.3d 409 (6th Cir. 2003).

In 1983, the Buckeye Reclamation Landfill was placed on the CERCLA NPL list because it was contaminated with three types of waste containing hazardous substances: (1) "gob," material left over from coal mining operations that occurred at the site prior to its use as a landfill; (2) industrial waste; and (3) municipal waste. Neville Chemical, one of the companies that deposited industrial waste at the site, stipulated that it had contributed about 4.78% of the industrial waste in the landfill.

In 1984, EPA notified numerous companies, including Neville Chemical, that they were considered potentially responsible parties ("PRPs") under CERCLA, and asked them to perform a RI/FS. Neville Chemical declined to participate. Many of the other companies, however, cooperated and entered into an administrative consent order with the EPA. After selecting a remedy for the site, the EPA notified the non-participating PRPs of their potential liability for the costs of that remedy, which resulted in some of those PRPs entering into a second administrative consent order with the EPA and participating in the remediation process. Neville Chemical again declined to participate.

Approximately ten years later, the EPA and the cooperating PRPs continued to work on modifications to the remediation plan. Neville Chemical was once again invited to participate in that process, but declined. Those negotiations resulted in the selection of a new remedy at approximately one-half the cost of the original remedy.

During the same time period, ten of the cooperating PRPs filed suit against Neville Chemical, seeking contribution for the costs they had already incurred in undertaking remediation at the landfill, and equitable apportionment of future costs (collectively, "response costs").

In evaluating the PRPs' request, the district court first observed that in allocating response costs among PRPs, it could employ "such equitable factors as the court determines are appropriate." It then identified three relevant factors to guide its determination: (1) the PRPs' varying levels of culpability; (2) the amount of waste they each contributed to the landfill; and (3) their cooperation with the government.

To determine culpability, the court divided the PRPs into four categories: (a) generators and transporters of industrial waste; (b) owners and operators of the landfill; (c) the generator of the "gob;" and (d) generators and transporters of municipal waste. Each category was assigned a percentage of the total response costs:

- Generators and transporters of industrial waste were assigned 60%, being the most culpable of the four groups because they knew the waste contained hazardous substances, and most of them had disposed of their waste without seeking required local governmental approvals.
- Owners and operators were assigned 25% because they were less culpable, but had still been irresponsible in failing to prevent the disposal of illicit industrial wastes at the landfill.
- The generator of the "gob" was assigned 10% because it knew that the "gob" contained hazardous substances, but it had deposited the materials at the site before such disposal was prohibited.
- Generators and transporters of municipal waste were assigned 5% because they had little or no knowledge that the waste contained hazardous substances and were required by local regulations to dispose of the waste at that landfill.

Because it was a generator of industrial waste, Neville Chemical fell into the 60% category. Within the group of PRPs under that 60% allocation, the court applied the "amount of waste" factor to determine individual shares. Neville Chemical had stipulated that it was responsible for 4.78% of the industrial waste. The court rounded that up to 5% because Neville Chemical was one of the parties that had failed to seek the required local approvals. That resulted in Neville Chemical being responsible for 5% of 60%, equating to 3% of the total response costs.

The court then applied the “cooperation with the government” factor. Citing Neville Chemical’s “persistent, pervasive, and unjustified” lack of cooperation despite being invited numerous times to participate in the remediation process, the court doubled Neville Chemical’s total equitable share from 3% to 6%. The court also noted that, in light of the new landfill remedy costing one-half of the original remedy, doubling Neville Chemical’s share would avoid giving Neville Chemical a windfall from its refusal to participate in the negotiations for the new remedy.

Neville Chemical appealed the district court’s decision, arguing that the court had erred in allocating 60% of response costs to the industrial waste generators and transporters, and in doubling Neville Chemical’s share.

The Sixth Circuit observed that it could only overturn the district court’s decision if it found an abuse of discretion by the district court, leaving a “definite and firm conviction that the trial court committed a clear error of judgment.” After examining the district court’s rationale, the Sixth Circuit held that “nothing in Neville’s arguments leads us to a “definite and firm conviction that the trial court committed a clear error of judgment.” Therefore, the Sixth Circuit allowed the district court’s judgment to stand.

The Sixth Circuit did hold, however, that the district court had incorrectly awarded prejudgment interest to the plaintiff PRPs. Although awarding prejudgment interest is mandatory in a CERCLA contribution case, the relevant statute requires the interest to be calculated from the later of: (a) the date that Neville was given a written request for payment of a specific amount; or (b) the date on which the expenditure occurred. Because the district court had failed to make any findings or require any evidence concerning the existence of a written request, the court could not have correctly determined the interest date. The Sixth Circuit sent the case back to the district court for resolution of that issue.

c) United States v. Domenic Lombardi Realty, Inc., 290 F. Supp. 2d 198 (D.R.I. 2003).

In one of the first judicial decisions to interpret the 2002 amendments to Superfund, the United States District Court for Rhode Island rejected an argument by the Department of Justice (“DOJ”) that the narrower definition of the innocent landowner defense as amended in 2002, rather than the broader original definition, applied to property that a defendant in a CERCLA cost recovery case had purchased in 1986. Nonetheless, the judge held that the property owner failed to prove that he qualified for even the more liberal original version of the innocent landowner defense, and, therefore, was liable for costs that the EPA had incurred to cleanup PCBs on the property.

Domenic Lombardi Realty, Inc. (“DLRI”) purchased 31 acres of land in West Greenwich, Rhode Island, from Armand Allen in December, 1986. Mr. Allen and his wife had lived on the property and used it to store several junk cars and trucks, although he never obtained a junkyard license. In May, 1988, the Rhode Island Department of Environmental Management (“RIDEM”) inspected the property, took samples from an area that appeared to be stained with oil, and found that the sample contained 12,000 parts per million of PCBs. RIDEM also observed large quantities of refuse and empty drums on the property. RIDEM ordered DLRI to remove the refuse and submit a proposed groundwater sampling plan, but DLRI never did so.

In December, 1988, RIDEM inspected the site again and confirmed that soil was contaminated with PCBs. In February, 1989, RIDEM ordered DLRI to warn all visitors that the property contained PCBs, to stop storing or disposing of waste on the property, and to arrange with a qualified waste contractor to remove all hazardous wastes from the property.

In October, 1989, DLRI hired a construction contractor who excavated about 30 cubic yards of oil-stained soil, placed it on plastic sheeting next to the excavated area, and covered the excavated soil with plastic sheeting. RIDEM then collected soil samples from the excavated area and determined that DLRI’s contractor had not removed all the PCB-contaminated soil. DLRI conducted a second excavation in September, 1990, but placed the excavated soil in a second pile rather than placing it in a roll-off container as RIDEM had ordered.

In July, 1994, RIDEM requested assistance from the EPA. In early 1995, EPA excavated and removed approximately 900 tons of PCB-contaminated soil. In December, 1998, EPA and DOJ sued DLRI to recover \$481,068 in response costs.

DLRI argued at trial that it was not liable because it qualified for the innocent landowner defense. Mr. Domenic Lombardi testified that when his company purchased the property, Mr. Allen had said that he had stripped electrical transformers on the property to salvage their copper. A truck driver also testified that he had delivered a load of transformers to Mr. Allen at the site before DLRI had purchased it. DLRI admitted that it did not perform any environmental assessment when it purchased the property, and presented a realtor witness who testified that it was not customary in 1986 to perform environmental assessments when purchasing residential property.

DOJ presented testimony by Mr. Allen's wife, who testified that her husband had never brought any transformers onto the property. DOJ also presented a real estate broker and appraiser who testified that, even in 1986, a purchaser of such property should have conducted an environmental assessment, particularly if the owner of the property had used it to dispose of waste, as Mr. Lombardi claimed Mr. Allen had told him. DOJ also presented a witness who frequently rode his dirt bike on the property in the 1980s and 1990s. He testified that he had seen trucks dumping electrical transformers on the property after DLRI had purchased it.

DOJ argued that the court should apply the innocent landowner defense not as it existed in 1986 when DLRI had purchased the property, but as it was amended in January, 2002, even though the amendment became effective only after DOJ had filed its complaint against DLRI. The court noted that the 2002 amendment changed the innocent landowner defense to make it less helpful to defendants by: (1) changing the standard for "all appropriate inquiries" that a buyer must make before purchasing the property; and (2) requiring the defendant to take reasonable steps to stop any continuing release, prevent any future release, and limit exposure to any previous release of hazardous substances. The court noted that Congress had not indicated, either in the statute or in the legislative history, whether it intended the changes to the innocent landowner defense to be retroactive. Based on a 1994 Supreme Court decision, the court held that there is a presumption against retroactive application of statutes, and held that the original standards for the innocent landowner defense as it existed in 1986 would apply to the property DLRI had purchased in 1986.

The court went on to find that DLRI could not qualify even for the more generous original version of the innocent landowner defense because it had failed to show that the PCBs on the property had been caused solely by a third-party. The court refused to believe Mr. Lombardi's testimony, or the testimony of the truck driver, because both had lengthy criminal records. Nor had DLRI shown that it "had no reason to know" that PCBs were present when it purchased the property, because it had not conducted an environmental assessment before buying the property. Finally, DLRI failed to prove that it had exercised "due care" with respect to the PCB-contaminated soil, as required by the original innocent landowner defense. The court did not define what actions DLRI would have to have taken to exercise "due care," but simply noted that DLRI: (1) never informed visitors or tenants of the contamination; (2) never properly stored or covered the contaminated soil after DLRI's contractor had excavated it; and (3) failed to place the second pile of excavated soil in a roll-off container as ordered by RIDEM.

4. INSURANCE

a) Century Indemnity Co. v. Aero-Motive Co., 254 F. Supp. 2d 670 (W.D. Mich. 2003).

Aero-Motive Manufacturing Company ("Aero I") manufactured hose reels from 1939 forward. In 1972, the owners ("Beckers") sold the company to Kalaco, Inc., which later changed its name to Aero-Motive Manufacturing Company ("Aero II").

In 1992, Aero II removed an underground storage tank that it had installed in 1974. In the process, Aero II discovered contamination under a warehouse that may have resulted from operations conducted by Aero I. In 1999 and 2001, respectively, Aero II sued the Beckers and Aero I to recover the cost of cleaning up contamination under the warehouse. The Beckers and Aero I notified Century, Continental and One Beacon, the insurance companies that had issued liability policies for 1964-1965, 1965-1968, and 1968-1972, respectively. Century agreed to pay a portion of the cost of defending the lawsuits. In 2002, Aero II, the Beckers, and Aero I signed a Consent Judgment for \$5,000,000, under which the Beckers agreed to pay \$100,000 and Aero II agreed to seek the balance of \$4,900,000 from the insurers for the Beckers and Aero I.

Aero I's insurers then sued the Beckers and Aero I for a judgment declaring their policies did not cover the pollution claim by Aero II. The insurers asked the court to decide the case in their favor before trial on the grounds

that Aero I and the Beckers had failed to produce enough evidence of the terms of their policies to show that the policies covered Aero II's claim. Aero I and the Beckers filed a motion of their own asking the court to rule that they did have enough evidence to prove what the terms of the policies were.

One of Aero I's key items of evidence was an affidavit by Douglas Talley, an expert witness on reconstruction of lost insurance policies. The insurers argued that Mr. Talley was not qualified to testify as an expert witness, and that his affidavit did not meet the minimum requirements for expert testimony. The court overruled the objections, finding that Mr. Talley had significant experience in commercial insurance underwriting, knew about forms used in the insurance industry, and had substantial practical experience in reconstructing lost insurance policies. The court held that Mr. Talley's methodology for reconstructing lost insurance policies was sufficiently reliable for the court to accept his testimony, and that the test for reliability should be applied flexibly to the subject of reconstructing missing insurance policies.

The court noted first that under Michigan insurance law, an insured may prove the terms of a missing insurance policy by presenting secondary evidence such as insurance binders, declarations pages, testimony from insurance agents or brokers, testimony from insurance policy reconstruction experts, and standard policy forms used by the insurer during the relevant period. The court then considered the motions filed by each of the insurers.

To prove that Century had issued policies, and to prove the terms of those policies, Aero I presented evidence including: (1) the schedule of underlying primary policies in an excess policy; (2) correspondence from Century's attorney stating that Century did not dispute that it had issued a certain policy to Aero I; (3) deposition testimony from a Century employee; and (4) an affidavit from Mr. Talley stating his opinion that liability insurance policies from 1964 to 1972 did not include pollution exclusions. Century argued, among other things, that Aero I could not prove the terms of one of its policies because it was a "manuscript" policy rather than a "standard form" policy. Mr. Talley testified on behalf of Aero I that the material terms of manuscript policies were based on language contained in standard forms, and that he could, therefore, reconstruct the terms of Century's manuscript policy with reasonable certainty. The court concluded that this evidence met Aero I's burden of proving the material terms of the policy. Century also argued that Aero I had failed to show that its policy did not contain a pollution exclusion. Mr. Talley testified that pollution exclusions were not generally used by the insurance industry until the 1970's. That conclusion was supported by the fact that Century had issued a policy to Aero I in a later year which did not include a pollution exclusion.

To prove the existence and terms of the One Beacon insurance policies, Aero I relied on: (1) the declarations page of a policy stating that it was a renewal of an earlier policy; (2) deposition testimony of the insurer's employee confirming that the policy was a Special Multi-Peril policy; (3) Aero I's ledger of prepaid insurance showing that Aero I had paid insurance premiums for the One Beacon policy; (4) Mr. Talley's affidavit concluding that the One Beacon policy did not include a pollution exclusion. The court held that because the policy was a renewal of an earlier policy, Aero I was entitled to rely on the rule that a renewal policy is presumed to be issued on the same terms, conditions and amounts as in the original policy. One Beacon also argued that it began to issue policies with pollution exclusions in 1970, and that Aero I had failed to prove that its policies for 1970 through 1972 did not include pollution exclusions. The court rejected this argument because the declarations pages for the policies that One Beacon had issued to Aero I in the earlier years did not list the code for the pollution exclusion, whereas the declarations page for the final policy did list that code.

The court held that Aero I had presented sufficient evidence to allow its case to proceed to trial, and dismissed the motions by Century and One Beacon.

To prove the existence and terms of the Continental policies, Aero I relied on: (1) the schedule of underlying policies in the excess policy issued for the same time period; (2) a property insurance binder for that period stating that the risk was covered by a Continental policy; (3) Aero I corporate ledger sheets showing prepaid insurance premiums; (4) deposition testimony from a Continental employee explaining that the CBP prefix indicated that the policy was a Continental policy, and that such policies always used standard form number 600; (5) an affidavit from Mr. Talley concluding that the Continental policy did not include a pollution exclusion. Nonetheless, the court held that Aero I had not proved coverage under the Continental policy because Aero I could not offer any evidence showing when the Continental policy changed from an occurrence-based policy to an accident-based policy, or when the limit of liability was reduced from \$100,000 to \$25,000.

The court concluded that Aero I had sufficiently proved the existence and material terms of the policies issued by Century and One Beacon, but not the policies issued by Continental.

b) Aero-Motive Company v. Great Am. Ins., 302 F. Supp. 2d 738 (W.D. Mich. 2003).

Aero-Motive Company owns a manufacturing plant in Kalamazoo, Michigan that was used for manufacturing beginning in the 1960's. There were at least four sources of pollution at the plant: (1) a disposal pit; (2) an underground storage tank for cutting oils; (3) overflows from a degreaser; and (4) spills that occurred during construction of a factory addition in 1967. The MDEQ ordered Aero-Motive to clean up soil and groundwater pollution that resulted from the disposal pit and other sources of pollution.

In 1996, Aero-Motive filed a claim with Great American Insurance ("GAI"), asking GAI to reimburse Aero-Motive for cleanup costs and to provide a legal defense for Aero-Motive in several court cases related to the cleanups. The CGL policy that GAI had issued to Aero-Motive for 1982 to 1985 contained a pollution exclusion that prohibited coverage for any bodily injury or property damage that arose out of the discharge of pollutants unless such discharge was "sudden or accidental." GAI denied coverage because of the pollution exclusion, and told Aero-Motive that it had failed to show that the discharges causing pollution had been "sudden or accidental."

Aero-Motive sued GAI for coverage. GAI asked the trial court to dismiss Aero-Motive's lawsuit on grounds that the pollution exclusion prevented coverage, and that Aero-Motive failed to prove that any of the discharges had been "sudden or accidental."

The court considered each of the four known sources of pollution at the Aero-Motive plant in turn. The court first noted that the disposal pit had been an unlined hole into which Aero-Motive had dumped waste paper, paint filters, paint residue, toluene, and trichloroethylene ("TCE") waste. Aero-Motive argued that the release of wastes from the disposal pit into soil, groundwater and surface water had been "sudden" and "accidental" because the very fact that the pit was not lined meant that any materials dumped in the pit would have immediately entered the subsurface natural environment. Aero-Motive also argued that the disposal pit, although primitive, was "state of the art" at the time it was constructed in the late 1960s, and that no one knew then that it would leak. However, neither Aero-Motive nor GAI presented any evidence to show whether the pit had been properly licensed, whether it was truly "state of the art" technology, or whether anyone was aware when it was constructed that it would leak. Those factors are relevant to whether a discharge is considered "accidental." Therefore, the court temporarily denied GAI's motion with regard to materials dumped into the disposal pit, and ordered each party to file an additional brief and evidence regarding these issues.

The court then considered whether hazardous substances had been released in a sudden or accidental manner when materials in the disposal pit caught fire and burned on several occasions. Michigan courts have held that a fire resulting from spontaneous combustion can be a "sudden and accidental" event. However, the court held that Aero-Motive had failed to present any evidence on how the fires may have caused waste materials to be released into the environment. The court also held that Aero-Motive's decisions to allow the fires to burn themselves out, rather than to extinguish them, meant that the fires could not be considered "accidental." Therefore, the court held that the pollution exclusion barred recovery of any costs related to any pollution that may have been caused by the fires.

Next, the court considered occasional overflows of cutting oils from an underground storage tank ("UST"). One former employee of Aero-Motive testified in a deposition that waste oil had overflowed the UST on several occasions, although he did not remember exactly when the overflows occurred. The court held that important facts regarding these overflows were in dispute, and that further discovery was needed before the court could decide whether such overflows had been "sudden and accidental."

Next, the court considered Aero-Motive's argument that overflows of TCE from a degreaser machine had caused "sudden" or "accidental" releases. The only evidence Aero-Motive had on this issue was deposition testimony by a former employee who said that other employees had told him that such discharges had occurred. The court held that such secondhand hearsay testimony was not enough to satisfy Aero-Motive's burden of proof, and therefore ruled in favor of GAI on whether such overflows had been "sudden or accidental."

Similarly, the court held that Aero-Motive had failed to offer any evidence to support its argument that TCE or other hazardous substances were spilled during the construction of a factory addition in 1967. In the absence of such testimony, the court ruled that GAI was entitled to the dismissal of Aero-Motive's claim for any pollution costs related to any spills that occurred during the construction of the factory addition.

5. MISCELLANEOUS

a) **Northwoods Wilderness Recovery, Inc. v. U.S. Forest Serv., 323 F.3d 405 (6th Cir. 2003).**

In 1986, the U.S. Forest Service ("Forest Service") issued its Forest Plan for the Ottawa National Forest, as required by the National Forest Management Act of 1976. The Plan divided the forest into sixteen management areas and set forth a management strategy for each area. For "Area 2.1," the Plan envisioned yearly logging activities of 1,440 acres of clear-cutting and 2,800 acres by "selection cutting," which removes a pattern of trees rather than an entire section of trees, leaving the forest canopy intact. However, the Forest Plan also provided that there would be no restriction on the acreage of "uneven-aged sugar maples" that could be selectively cut within any ten-year period (the "sugar maple provision"). The Plan additionally included an "Allowable Sale Quantity" ("ASQ"), restricting the amount of timber that could be sold to 780 million board feet in a ten-year period.

In 1997 and 1998, the Forest Service considered authorizing the "Rolling Thunder" project, involving the selective cutting of 1,055 acres of northern hardwood trees in Area 2.1. As required by the National Environmental Policy Act ("NEPA"), the Forest Service published an Environmental Assessment ("EA") concerning the project and solicited public comment. Northwoods Wilderness Recovery, Inc. ("Northwoods"), an environmental group, objected to the project because yearly selection cutting in Area 2.1 was already almost double the general amount that had been envisioned in the Forest Plan. Nonetheless, the Forest Service issued a Finding of No Significant Impact ("FONSI"), paving the way for approval of the project.

On February 11, 1999, the Forest Service authorized the timber cutting project and Northwoods filed an administrative appeal with the Forest Service. After an appeals officer affirmed the Forest Service's decision, Northwoods appealed to the United States District Court for the Western District of Michigan. In its complaint, Northwoods alleged that, in approving the selective cutting, the Forest Service: (1) violated the terms of the Forest Plan; (2) failed to adequately assess the environmental impact of the approved logging; (3) failed to adequately assess the impact of the approved logging on several species of birds and wildlife; and (4) failed to issue an Environmental Impact Statement ("EIS") when one was required by law.

The District Court found that Northwoods had failed to carry its burden of proof and dismissed the case. Specifically, the court observed that, although the Forest Plan contained an overall annual limit on logging, the Plan also allowed unlimited selection cutting of sugar maples. Because Northwoods failed to show that Area 2.1 contained trees *other* than sugar maples, and the record indicated that "sugar maples [would] be the dominant type of tree harvested" in the selective cutting, the Rolling Thunder project was consistent with the Forest Plan. Northwoods' case was dismissed, and Northwoods appealed to the Sixth Circuit.

On appeal, Northwoods advanced two main arguments: (1) that the overall logging acreage estimates in the Forest Plan establishes a ceiling on the amount of logging that can be authorized, and the Rolling Thunder project would exceed that amount; and (2) that the sugar maple provision was not subjected to NEPA analysis, and therefore, was not a valid part of the Plan. The Forest Service argued that the ASQ, which was not exceeded, was the only limitation on logging contained in the Plan, and that the sugar maple provision was valid.

The court agreed with Northwoods that the overall logging acreage numbers were a limit on logging activities under the Forest Plan. The court observed that to hold that the Forest Service could authorize whatever logging it wanted, as long as the amount *sold* was below a certain threshold, would render most of the Forest Plan—dealing with wildlife, water quality, and recreational opportunities, among other issues—irrelevant, because unlimited logging could severely impact those other environmental issues. Therefore, the court held that the Forest Plan limited logging in two ways, through both the ASQ *and* the total acreage numbers.

The court also agreed with Northwoods that the environmental impacts of the sugar maple provision were not adequately addressed, observing that the “Forest Service never demonstrated, by citing either the Plan or the Environmental Impact Statement, that the environmental impacts of the current level of selection logging ever was analyzed, much less unlimited selection cutting of sugar maples. No meaningful consideration was given to unlimited cutting of this species of hardwood, and it is unclear how, by whom, or for what reason the sentence was inserted.”

Furthermore, the court held that *all* projects, whether in conformance with the Forest Plan or not, must be preceded by or accompanied by an EIS that analyzes the environmental impact of the projects in order to meet the requirements of NEPA. Because approval of the Rolling Thunder project did not include an EIS, the court reversed the lower court’s decision and remanded the case with instructions to enter judgment in favor of Northwoods.

b) Isle Royale Boaters Assn. v. Norton, 330 F.3d 777 (6th Cir. 2003).

Isle Royale National Park, covering a series of islands in northern Lake Superior, was established in 1931 and certain areas of it were designated as a national wilderness area in 1976. Since 1963, the park had been governed by a “master plan.” In 1995, the National Park Service (“NPS”) began the process for formulating a General Master Plan (“GMP”) to govern activities and guide NPS decisionmaking at the park. After public hearings and the issuance of a draft GMP in March 1998, which was followed by an additional public comment period, the final GMP was issued in August 1998.

In response to several public complaints about high noise levels within the park, and in recognition of the park’s status as a wilderness area, the GMP aimed to “separate motorized and nonmotorized uses in some areas” of the park. The GMP sought to achieve this goal, in part, by eliminating some docks, relocating others, and building five new ones in different areas. The cumulative effect of those changes would increase the park’s total number of docks from 20 to 22. Despite the increase in numbers, the changes would have made it more inconvenient for boaters to access the park’s shelters and trails. For example, docks would be moved farther away from many shelters, and a trail connecting one dock with the main trail was slated to be eliminated entirely. Additionally, four of the five new docks would be on surrounding islands, many with no existing shelters, instead of on the main island.

The Isle Royale Boaters Association (“IRBA”) filed suit in federal district court in 1999 to block the GMP, claiming that its adoption violated the Wilderness Act, the 1916 Organic Act (which established the NPS and governs national parklands), NEPA, and the APA. In 2001, the district court granted judgment before trial to the NPS, dismissing all of the IRBA’s claims. Concerning the Wilderness Act, the court held that the Act gave the NPS Secretary the authority to regulate boat use. The court additionally observed that the contemplated dock changes would result in an overall increase in dockage, and noted that boaters could still access the park’s trails by “hiking, kayaking, and canoeing, just as other island visitors did.”

The IRBA appealed only the district court’s decision on the Wilderness Act claim. Although the IRBA did not challenge the district court’s Organic Act decision, the Sixth Circuit observed that the IRBA was challenging the removal of three docks that were within the national parkland, but not within the wilderness area. Because those dock locations were governed by the Organic Act rather than the Wilderness Act, the Sixth Circuit decided to address the issue of whether the planned removal of those docks would violate the Organic Act. On both the Wilderness and Organic Act counts, the court could overturn the NPS’s decision only if it was “arbitrary and capricious.”

The Sixth Circuit observed that the Organic Act authorizes the NPS Secretary to “[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System,” but the Act does not mention the placement of docks or access that docks must provide to parkland. The Act’s stated objectives are to “conserve the scenery and the natural and historic objects and the wild life [sic] therein and to provide for the enjoyment of future generations.” The Sixth Circuit held that the planned dock removal was “well within” the broad authority granted by the Organic Act, and also observed that the stated goals to protect scenery and reduce noise would facilitate “the enjoyment of the scenery, natural objects, and wild life [sic] that the island offers,” and thus, the removal was consistent with the objectives of the Act.

The court noted that the Wilderness Act does not affect the other obligations of the NPS, for example, the duty under the Organic Act to conserve the scenery and enjoyment of national parklands. Instead, the Wilderness Act requires “greater protections” than would apply to ordinary national parklands. Therefore, the court held, if the NPS’s decision was consistent with the Organic Act, it must be consistent with the Wilderness Act.

The court also held that the NPS’s decision was valid under the stated goals of the Wilderness Act, which include ensuring that “the earth and its community of life are untrammelled by man,” that the land “retain its primeval character,” and to encourage a “contrast to those areas where man and his own works dominate the landscape.” Furthermore, the court observed that the Act does not mention docks, but does ban motorboats unless the Secretary allows a pre-existing motorboat use to continue; the court did not believe “that Congress would *ban* motorboats but *require* docks.”

Although the relevant statutes supported the GMP, the court noted that legislative history, such as statements by legislators, Congressional reports, and agency correspondence concerning the passage of the statute at issue, can establish further guidelines for the interpretation of the statute. However, legislative history can only be used to vary from the explicit words of a statute in the “rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.”

The IRBA argued that the legislative history of the statute designating the Isle Royale National Park as a wilderness area (“IRNP Wilderness Act”) established that Congress did not intend to allow the NPS to limit boater access in the way proposed in the GMP. In support of its argument, the IRBA referred to the statements of individual legislators concerning boat docks and the maintenance of boat access to the park. The court responded to the IRBA’s argument by stating that “[t]his case presents a clear example of why Congress’s intent is better derived ‘from the words of the statute itself than from a patchwork record of statements inserted by individual legislators and proposals that may never have been adopted by a committee, much less an entire legislative body.’” The court also noted that other statements not cited by the IRBA indicated an intent to preserve the NPS’s discretion to manage dock locations as usual. “Although statutory language can sometimes be ambiguous,” the court stated, “legislators’ statements are almost always cacophonous, and we decline to rely on them here.”

The IRBA also pointed to committee reports indicating that legislators contemplated that the NPS would be required to maintain the docks at the park. The court recognized that the sources cited by the IRBA did evidence that some legislators sought to require the NPS to maintain the docks; however, the court observed, other legislators opposed such a restriction. In light of this ambiguity, the court refused to vary from the explicit terms of the Wilderness Act.

Finally, the IRBA produced NPS correspondence within which the NPS stated that the IRNP Wilderness Act “specifically mandated that existing docks . . . remain and be maintained” by the NPS. The court observed that those letters were not enforceable “final rulings” of the NPS, and furthermore, that the NPS Secretary “has the inherent authority to reconsider an earlier agency decision.”

In conclusion, the court held that the legislative history cited by the IRBA did not evidence that a literal interpretation of the Wilderness Act and Organic Act, allowing the dock changes, would be “demonstrably at odds” with the intention of those Acts. Thus, the court held that the GMP was valid under those statutes, and affirmed the district court’s granting of judgment before trial to the NPS.

B. STATE JUDICIAL DECISIONS

6. PART 201 (ENVIRONMENTAL REMEDIATION)

a) Howell Twp. v. Roto Corp., 258 Mich. App. 470 (2003).

In late 1995, an arsonist set a fire on property owned by Roto Corporation (“Roto”) in Howell Township. Numerous chemical compounds were released as a result of the fire. The Howell Township Fire Department incurred costs of more than \$75,000 in responding to the fire. Even though Roto’s facility had been broken into or

vandalized five times before the fire, Rotoo did not have a night watchman, a security alarm, or fire detectors in the production areas and warehouses at its plant.

In 1996, the Township sued Rotoo to recover its firefighting expenses pursuant to Township Ordinance No. 53, which makes “responsible parties” liable for costs incurred by the Township in responding to a call for assistance in connection with a release of hazardous materials. Ordinance No. 53 defines “responsible party” to include “an owner, tenant, occupant, or party in control of property from which hazardous materials are released.” State law authorizes Townships to enact ordinances authorizing the recovery of costs incurred while providing emergency police or fire services. Mich. Comp. Laws § 41.806(a). The Township later amended its complaint to add a cost recovery claim under Part 201 of the Natural Resources and Environmental Protection Act (“NREPA”).

Rotoo asked the trial court to dismiss the Township’s claim before trial on grounds that Part 201 preempts Ordinance No. 53. Rotoo argued that both Part 201 and Ordinance No. 53 deal with government responses to the release of hazardous substances, and that Ordinance No. 53 impermissibly conflicts with Part 201 because Part 201 provides an affirmative defense when a third-party not related to the defendant caused the release of hazardous substances, while Ordinance No. 53 provides no such defense.

The trial court ruled that Rotoo could not be held liable if it could show that an unrelated third-party caused the fire, but that the Township could defeat that defense by proving that Rotoo failed to exercise due care. After the parties submitted additional legal briefs, the trial court ruled that Part 201 does preempt Ordinance No. 53, and that Rotoo was not liable under Part 201 because the fire was caused by a unrelated third-party. The Township appealed.

In evaluating whether Ordinance No. 53 conflicted with Part 201, the Michigan Court of Appeals noted that Rotoo’s potential liability under Part 201 for the Township’s response costs “is essentially identical” to Rotoo’s potential liability for costs under Ordinance No. 53, because the chemicals involved in the fire, the release of chemicals resulting from the fire, and the Township’s “response activities” in response to the fire, were all covered by both Part 201 and Ordinance No. 53. The court concluded that Rotoo’s “potential liability under Part 201 of the NREPA fundamentally overlaps defendant’s alleged liability under the ordinance.”

The court found that the defense in Part 201 for releases caused by unrelated third-parties, which was absent from the Ordinance, constituted an important difference between the two. The court found that Ordinance No. 53 “directly conflicts with Part 201 . . . because the ordinance does not provide a defense to liability.” The court reasoned that the ordinance attempts to “prohibit that which the statute [Part 201] permits” because a defendant may be made liable for response costs under Ordinance No. 53 even though he would not be liable under Part 201.

The court also held that Part 201 preempts Ordinance No. 53 because Part 201, together with detailed regulations promulgated by the MDEQ, establish a “pervasive regulatory scheme” regarding releases of hazardous substances which demonstrate that the Michigan Legislature intended to preempt any local regulation of the field of hazardous substances. The court based its conclusion that Part 201 constitutes a “pervasive regulatory scheme” in part on the fact that it contains “at least eleven detailed sections that attempt to establish the response cost liability” of responsible parties. The court was also persuaded by the fact that Part 201 contains no provision allowing local governments to impose additional requirements or liabilities, in contrast with the provision in the federal Comprehensive Environmental Response, Compensation and Liability Act, which expressly preserves the rights of states to impose additional liabilities and requirements regarding hazardous substance releases.

The court then considered the Township’s alternative argument that Rotoo should be held liable for response costs under Part 201, even if Part 201’s third-party defense applies, because Rotoo’s conduct allegedly contributed to the fire. On this issue, the court ruled in favor of the Township, holding that the trial court failed to apply the proper legal standard under Part 201. The court held that in determining whether Rotoo qualified for the third-party defense under Part 201, the trial court should have determined whether Rotoo satisfied the requirements of Mich. Comp. Laws § 324.20107(a), which requires a non-labile owner of property to “exercise due care” and “take reasonable precautions” with respect to hazardous substances on “property that he or she has knowledge is a facility.”

The Court of Appeals returned the case to the trial court to determine whether Rotoo had satisfied its “due care” requirements under Part 201 and thus qualified for the third-party defense.

b) Flanders Indust., Inc. v State, 200 W.L. 22717887 (Mich. App. 2003).

Both before and after a 1992 MDEQ administrative order, Flanders Industries, Inc. (“Flanders”) incurred “response activity costs” to clean up paint sludge contamination on Flanders’ property on the shore of Lake Michigan and on the Lake Michigan bottomlands adjacent to its property. After completing the cleanup, Flanders sued MDEQ for reimbursement of the cleanup costs relating to the bottomlands, asserting that it was not liable for the bottomlands contamination because the contamination was caused by a prior owner of the property. The trial court granted judgment before trial in favor of MDEQ, and Flanders appealed.

On appeal, Flanders raised several arguments in support of its contention that it was not liable under Mich. Comp. Laws § 299.612(1) (now replaced with Mich. Comp. Laws § 324.20101 *et seq.*), which provided that:

Notwithstanding any other provision or rule of law and subject only to the defenses set forth in sections 12a and 12b, if there is a release or threatened release from a facility *that causes the incurrence of response activity costs*, the following persons shall be liable under this section:

- (a) *The owner or operator* of the facility.
- (b) The owner or operator of the facility at the time of disposal of a hazardous substance.
- (c) The owner or operator of the facility since the time of disposal of a hazardous substance not included in subdivision (a) or (b).
- (d) A person that by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by the person, by any other person, at the facility owned or operated by another person and containing the hazardous substance.
- (e) A person that accepts or accepted any hazardous substance for transport to the facility selected by that person. (Emphasis added).

Flanders first argued that an “owner or operator” of property was only liable under the above provisions if the contamination occurred during the time of ownership. Thus, Flanders asserted, because the contamination occurred before Flanders owned the property, and because Flanders was not the corporate successor of the prior owner, it could not be held liable for the prior owner’s contamination. The court disagreed, pointing out that under the language of the statute “the specific timing of the [contamination] is irrelevant in establishing liability ... the key is the incurrence of response activity costs, not the timing of the [contamination].”

The court also noted that if Flanders “was truly only liable by virtue of it being the current owner of the facility, then it could have invoked” the statute’s “innocent purchaser” defense, which provided that a person was not liable for contamination caused solely by:

An act or omission of a third party other than an employee or agent of the person that may be liable under section 12, or other than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the person that may be liable under section 12 if the person that may be liable under section 12 establishes by a preponderance of the evidence both of the following:

- (i) That he or she exercised due care with respect to the hazardous substance, taking into consideration the characteristics of the hazardous substance, in light of all relevant facts and circumstances.

(ii) That he or she took reasonable precautions against reasonably foreseeable acts or omissions of a third party and the consequences that foreseeably could result from those acts or omissions.

If that defense were raised, the timing of the contamination would be relevant. In any event, the court noted, such a defense was foreclosed because it was not raised by Flanders.

The court also distinguished a federal case involving a group of liable parties that Flanders cited to support its proposition. The federal court held that, in order to prove its case, the government must show that each party had caused the contamination at issue. The Michigan court observed that the critical distinction between the federal case and Flanders' situation was that in the federal case, because a group of liable parties was involved, a fault inquiry was "necessarily required." In contrast, the court noted, where the government seeks to hold only one party liable for response activity costs, there is no need to apportion fault among several parties, and consequently there is no need to address the issue of causation.

Flanders' second argument was that it was not liable for the cleanup costs on the bottomlands because it did not own the bottomlands – the State of Michigan did. The court again disagreed, holding that "whether [Flanders] actually holds title to the submerged bottomlands is immaterial because it is undisputed that [Flanders] is the current owner of the facility *from where the contaminants originated.*" (Emphasis added). To accept Flanders' argument, the court stated, would "allow a person to avoid liability ... simply because the released contaminants traveled outside their titled property," which would be clearly at odds with the statute's intent to "hold each responsible party liable for its own response activity costs."

Furthermore, the court held that the statute's definition of "facility" (defining the bounds of the contaminated property) was broad enough to encompass both the shorelands and the bottomlands, and, therefore, the shorelands and bottomlands constituted a single "facility." Thus, Flanders could not argue that the bottomlands should somehow be treated as separate from the other contaminated areas for which Flanders had not disputed its liability.

Flanders additionally cited several cases purportedly establishing that, where a previous owner had caused contamination, the subsequent purchaser is only liable if it is the corporate successor to the previous owner. The court held that Flanders' assertion was unsupported by those cases.

Flanders further argued that, even if it was liable, it should be offered the opportunity to limit its liability by showing that the harm was divisible and was caused by the prior owner. The court observed that the statute would allow for such an argument in a "contribution" action brought against the prior owner. However, the court held, the party from whom contribution is sought must be a party to the action. Because Flanders had not joined the prior owner in the lawsuit, it could not limit its liability in that manner.

Last, Flanders claimed that it was entitled to reimbursement for the response costs it voluntarily incurred prior to the 1992 administrative order, asserting that the State's recovery of pre-order costs violated its right to due process and unjustly enriched the state. The court began by noting that the statute only provided for the recovery of costs incurred "pursuant to the relevant order," and therefore, the language of the statute did not provide an avenue for Flanders to recover its pre-order costs from the State.

The court also disagreed that the statute's operation violated Flanders' due process rights, noting that because "there are no penalties for not voluntarily initiating response activities," Flanders could have allowed the State to incur response costs, or waited for the State to issue an administrative order, and then contested its liability; in other words, Flanders was not compelled to incur those pre-order costs by the operation of the statute. Additionally, the court observed, a due process violation necessarily requires some "action" by the State. Because there is no official "action" by the state prior to an administrative order, "there can be no violation of due process for costs voluntarily incurred before an administrative order that compels a [liable party] to engage in response activities has been entered."

Further, the court summarily held that Flanders' unjust enrichment argument was meritless. Therefore, the court affirmed the trial court's decision to grant judgment before trial in favor of MDEQ.

7. PART 111 (HAZARDOUS WASTE)

a) City of Romulus v. MDEQ, 260 Mich. App. 54 (2003).

Environmental Disposal Systems ("EDS"), a hazardous waste disposal company, applied for a permit under Part 111 of NREPA to allow the construction of a hazardous waste storage facility and underground deep injection well facility in Romulus, Michigan. As required by administrative rules, MDEQ referred the matter to a site review board ("SRB"). After a public hearing and other informal hearings, the SRB recommended in March 2000 that MDEQ deny EDS's application for several reasons, including: (a) wetlands existed on the site; and (b) there was a surplus of hazardous waste disposal capacity in the area, and, therefore, no need for the facility. In the interim, EDS had applied for a permit under Part 303 of NREPA to allow it to fill and eliminate the wetlands on the site. That permit was granted by MDEQ in June 2000.

In December 2000, MDEQ issued a "Fact Sheet" explaining why it planned to issue a Part 111 permit to EDS despite the SRB's recommendations. In particular, MDEQ stated that: (a) the wetlands on the site were not a concern because they would be filled and eliminated under the Part 303 permit that had been issued to EDS; and (b) the "need" for hazardous waste facilities is market-driven and determined by demand for such facilities, so a lack of "need" was not a valid reason for denying the permit. MDEQ issued the Part 111 permit to EDS in February 2001.

The City of Romulus and Wayne County ("Petitioners"), both of which opposed the permit, appealed MDEQ's decision in circuit court. In August 2001, the circuit court affirmed MDEQ's decision. The Petitioners appealed to the Court of Appeals. By October 2001, the wetlands on the site had been filled and eliminated.

The Court of Appeals first noted the standard of review that it would apply to the case, which differs according to whether factual or legal issues are being considered. Concerning factual issues, the court observed that:

This Court's review is limited to determining whether the circuit court "misapprehended or grossly misapplied" its review of the agency's factual findings. The circuit court's review of the MDEQ's factual findings is limited to determining whether the decision was supported by competent, material, and substantial evidence ... Courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views.

On the other hand, concerning legal issues, the court observed that:

We must also determine "whether the lower court applied correct legal principles..." The circuit court's review of an administrative agency's decision on a matter of law is limited to determining whether the decision is authorized by law. ... As a general rule, we review de novo the interpretation and application of unambiguous statutes and administrative rules.

Therefore, the circuit court's factual findings could be overturned only if it was grossly mistaken in concluding that MDEQ's factual findings were sound. However, the court owed no deference to the circuit court or MDEQ concerning their conclusions on matters of law (i.e., statutory and administrative rule interpretation), so long as the relevant statute or rule was unambiguous.

The Petitioners claimed that by issuing a Part 111 permit to EDS based upon an understanding that the wetlands would be eliminated, MDEQ had exceeded its statutory authority. This argument was based upon Mich. Admin. Code r. 299.9603 ("Rule 603"), which governs the location of hazardous waste facilities and provides in pertinent part that "[a]ctive portions of new treatment, storage, or disposal facilities or expansions, enlargements, or alterations of existing facilities shall not be located ... [i]n a wetland." According to petitioners, Rule 603 absolutely prohibited the issuance of Part 111 permits for sites containing wetlands.

More specifically, the Petitioners advanced a two-pronged argument. First, they claimed that because Rule 603 expressly includes certain exceptions, but does not include an exception pertaining to wetlands, MDEQ's issuance of a permit was tantamount to its creating a rule exception that did not really exist. Second, the Petitioners noted the implications of Mich. Admin. Code r. 299.4416 ("Rule 416"), which provides that a "type II landfill" cannot be located in a wetland unless the owner/operator can show, among other things, that a Part 303 wetlands permit has been obtained. Under the doctrine of *expressio unius est exclusio alterius* – that expressly mentioning one thing in a statute generally implies the exclusion of similar things not mentioned in the statute – Petitioners argued that Rule 603 should not be interpreted as providing an exception for wetlands where a Part 303 permit had been issued. In other words, because Rule 416 explicitly contains such an exception but Rule 603 does not, Rule 603 should not be interpreted to contain such an exception.

The court disagreed. First, the court held that under the plain language of Rule 603, MDEQ's actions were not prohibited: "[n]othing in Rule 603 provides that a Part 111 permit cannot be granted when a wetland exists on the site – Rule 603 only provides that active portions of the facility may not be located in a wetland. Therefore, the MDEQ can issue a Part 111 permit when the wetlands on the site will be legally eliminated before construction of the facility. ... There is nothing in Rule 603 that prohibits a treatment, storage, or disposal facility from being located in an area that was formerly a wetland."

Second, the court noted that the Petitioners were attempting to read Rule 603 as saying not merely that a hazardous waste facility cannot be located in a wetland, but instead, that such facility cannot be located in a wetland "even if the wetland is eliminated pursuant to a Part 303 permit." Because such a limitation was not present in the rule, the situation was not one of MDEQ creating an *ad hoc* exemption; instead, the court observed, Petitioners were attempting to insert an extra limitation that simply did not exist.

Third, the court observed that the Petitioners' argument concerning Rule 416 was without merit: "Rule 416 provides the MDEQ with discretion to allow construction of a type II landfill unit in a wetland. By contrast, Rule 603 does not provide the MDEQ with discretion to allow construction of a hazardous waste ... facility in a wetland. We nonetheless conclude that Rule 603 does not prohibit construction on land formerly classified as a wetland."

The Petitioners also claimed that MDEQ must consider the need for an additional hazardous waste facility before issuing a Part 111 permit for such facility. To support their argument, the Petitioners cited various sections of Part 111 pertaining to MDEQ's duties in updating the Hazardous Waste Management Plan for Michigan (the "Plan"), which is a general framework for the planned expansion of hazardous waste facilities and future utilization of existing facilities. More specifically, those provisions require MDEQ to base its updated Plan upon such considerations as the locations of hazardous waste facilities, data on the statewide capacity of such facilities, a "reasonable geographic distribution" of such facilities, and studies of projected need for such facilities. Further, the Petitioners pointed out, Mich. Comp. Laws § 324.11115 provides that MDEQ cannot issue a permit for a hazardous waste facility unless that permit issuance would be consistent with the updated Plan. The Petitioners pointed to several provisions of the Plan in arguing that, to be consistent with the Plan, a permit must consider the statewide need for and geographic distribution of hazardous waste facilities. Because there was no regional or statewide need for the EDS facility, the Petitioners contended that MDEQ's issuance of the permit was inconsistent with the Plan and in violation of law.

The court disagreed. First, the court observed that the provisions governing the updated Plan deal with the preparation of the Plan alone, and do not impact MDEQ's permitting authority. Second, concerning Mich. Comp. Laws § 324.11115, the court held that the Plan did not require a need-based analysis: "[t]he drafters of the updated plan clearly wanted to ensure that Michigan would not lack necessary hazardous waste facilities. Nothing in the updated plan implies that one of its goals is to avoid an overcapacity of facilities." The court further held that MDEQ's policy of using a market-based analysis for determining need was consistent with the Plan: "[a]llowing private enterprise to determine whether there is need for new hazardous waste facilities is not contrary to the updated plan's goal of reducing risks to human health and the environment. New facilities ... are cheaper, more efficient, and better for the environment Disallowing new facilities because there is a perceived "overcapacity" of facilities could stifle competition and allow facilities with older, less environmentally-friendly technology to remain."

The Petitioners also claimed that the EDS permit was illegal because Part 111 requires the SRB to consider the concerns raised by the public, which in this case included concerns that there was no need for the facility. The court observed that the SRB had considered those concerns, and in fact, had recommended that the permit be denied on that basis. However, the court held, there was no similar requirement that the MDEQ consider public concerns, and the MDEQ was not bound by the SRB's recommendations. Therefore, the court held that the public's concerns have no legal impact on MDEQ's permitting decision.

The Petitioners argued that MDEQ's market-based approach to the "need" issue was a "rule" that required formal promulgation, including public notice and a hearing, under the Administrative Procedures Act. The court rejected this argument, observing that a "rule" is:

(1) "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability," (2) "that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency...." However, a "rule" does not include, *inter alia*, "[a] decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected."

The court determined that MDEQ's market-driven approach to need was not a "rule" because Part 111 does not require MDEQ to develop standards governing its permit decisions and does not require MDEQ to consider need in making its decisions, and, therefore, the MDEQ's decision of whether to consider need is merely a "decision not to exercise a permissive statutory power." Furthermore, the court observed that "[l]ogically, an agency cannot be required to promulgate a rule regarding everything that it will not consider before issuing a permit. If this were the case, an agency would never be able to take any action."

The Petitioners finally argued that the lower court had erred in determining that MDEQ's decision to issue the permit was supported by competent, material, and substantial evidence, and claimed that the decision instead was arbitrary and capricious. The court found that the MDEQ's decision was sound, and rejected the Petitioners' argument. Accordingly, the Court of Appeals upheld the trial court's decision discussing the challenge to the Part 111 permit issued to EDS by MDEQ.

8. PART 17 (ENVIRONMENTAL PROTECTION ACT)

a) Michigan Citizens for Water Conservation v. Nestle Waters N. Am., Inc., No. 01-14563-CE (Mecosta Cty. Cir. Ct. Nov. 25, 2003)

In a widely publicized decision, the Mecosta County Circuit Court ruled that the Nestle Ice Mountain bottled water production facility in Mecosta County is in violation of Michigan's common law regarding groundwater use and the Michigan Environmental Protection Act ("MEPA"). The location of the Ice Mountain plant was selected in order to provide water that would meet U.S. Food and Drug Administration ("FDA") criteria for "spring water." After several hydrogeologic studies and public hearings on the issue, the MDEQ approved a permit for four wells with a total maximum pumping capacity of 400 gallons per minute ("gpm") in an area known as "Sanctuary Springs."

Michigan Citizens for Water Conservation ("MCWC") and several individuals initially filed a multiple count complaint attempting to terminate the groundwater extracting and bottling plant. The judge dismissed all but 2 counts, leaving a common law claim alleging that the plant would have an adverse impact on the citizens' riparian water interests, and a second count alleging that the action by the MDEQ in permitting the extraction wells would result in pollution, impairment or destruction of the environment in violation of MEPA.

Under the common law claim, the judge considered a series of Michigan cases that form the basis for Michigan's well established "reasonable use" doctrine, which essentially holds that a property owner can exercise its rights to groundwater and/or riparian interests as long as the property owner does not unreasonably interfere with someone else's groundwater or riparian interests. The judge noted, however, that all of the previous cases involved a conflict between two groundwater users or a conflict between two surface water interests. This case was unique, the

judge noted, because it involves a claim that *groundwater* use or extraction would adversely affect the riparian or *surface water* rights of neighboring landowners. Accordingly, the judge concluded that, because there were no directly applicable precedents in Michigan involving a conflict between groundwater use and riparian rights, it was incumbent on him to make a new law to resolve the dispute before him. He then proceeded to establish his new rule of law concluding that where a riparian interest and groundwater interest conflicted, riparian interest took priority over groundwater interest and that a groundwater user could not adversely affect a riparian interest.

As the court stated:

I begin this common-law ruling fully aware that I am stating a rule of law that has not been announced by any reported Michigan case to date, but I also note it is not in conflict with any either. I believe the rule(s) about to be set out consistent with the “thread” of Michigan common law regarding water uses.

....

I hereby hold that riparian interests are superior to conflicting groundwater interests, and that the latter must yield to the former in cases of conflict.

....

In cases where there is a groundwater use that is from a water source underground that is shown to have a hydrological connection to a surface water body to which riparian rights attach, the groundwater use is of inferior legal standing than the riparian rights. In such cases, as here, if the groundwater use is off-tract and/or out of the relevant watershed, that use cannot reduce the natural flow to the riparian body.

Moreover, the court also established a new rule with respect to the burden of proof in cases such as this. Arguing that it was an undue burden on individual property owners to be required to prove that damage from groundwater usage would adversely affect their surface water interests, the court concluded that when the demonstration of an affect or impact is complex, which is almost always the case in a hydrogeological groundwater/surface water analysis, then the burden of proof would lie with the party who wants to use groundwater to demonstrate that their use of groundwater will not adversely affect riparian surface water rights.

The court also found that MCWC had proven, by a preponderance of the evidence, that the groundwater pumping by Nestle would have harmful effects on the surface water interests of neighboring landowners even at low pumping rates and that the effects would get worse if the groundwater pumping rate increased to the maximum 400 gpm rate allowed by the MDEQ permit. Therefore, because the court was unable to find that a specific pumping rate lower than 400 gpm would reduce the effects and impacts to surface water to a level that is not harmful, the court ruled that the spring water pumping operations at the Nestle facility must stop entirely.

Turning to the MEPA claim, the court reviewed several prior court decisions under MEPA. According to the court, these cases establish a three-step process for evaluating the MEPA claim in this case. First, the court must determine whether MCWC has established that Nestle’s conduct “has, or is likely to pollute, impair or destroy the air, water or other natural resources.” Second, the court must determine whether Nestle has rebutted MCWC’s arguments with evidence to the contrary. Third, the court must determine whether Nestle has established that there is “no feasible and prudent alternative . . . and that [its] conduct is consistent with the promotion of the public health, safety and welfare in light of the state’s paramount concern for the protection of its natural resources from pollution, impairment or destruction.”

The court noted that one of the chief difficulties in a MEPA case is determining whether the particular activity at issue will result in “pollution, impairment or destruction” of a natural resource. Quoting a 1979 Michigan Supreme Court decision, the court noted:

Virtually all human activities can be found to adversely impact natural resources in some way or another. The real question before us is when does such impact rise to the level of impairment or destruction?

The court noted that one source of standards for determining whether an impermissible impairment or destruction of a natural resource will occur is to refer to regulatory standards established under statutes designed to protect the environment. In essence, if the court finds that an activity is in violation of an environmental protection standard, the court can also conclude that the activity is resulting in pollution, impairment or destruction of a natural resource in violation of MEPA.

The court evaluated the Nestle bottling plant according to standards set forth in the Inland Lakes and Streams Act (“ILSA”), the Wetland Protection Act (“WPA”) and the Great Lakes Preservation Act (“GLPA”). In issuing a permit to the Nestle plant, MDEQ did not apply these statutes because MDEQ did not believe they were applicable to the Nestle facility. The court did not remand the case to MDEQ for consideration under these statutes, reasoning that MDEQ’s regulations were contrary to the court’s interpretation of the underlying statutes and remanding the case to MDEQ for further proceedings would put an undue burden on MCWC and the individual claimants because they do not have as many resources as Nestle to engage in protracted administrative proceedings.

Regarding the ILSA, the court noted that the statute requires a permit for any activity that would “[c]reate, enlarge, or diminish an inland lake or stream.” Although MDEQ regulations defined “enlarge or diminish an inland lake or stream” in terms of the dredging or filling of bottomlands or adjacent shore lands or the placement or manipulation of fill or structures to increase or decrease water levels, the court ruled that this rule “does not reach all the activities statutorily included in and regulated by ILSA.” Therefore, because the court had already determined that the withdrawal of groundwater by Nestle would diminish certain existing inland lakes and streams, the court ruled that ILSA does apply to this case.

The “standards” of ILSA are set forth in Section 30106 of NREPA, which provides:

The department shall issue a permit if it finds that the structure or project will not adversely affect the public trust or riparian rights. In passing upon an application, the department shall consider the possible effects of the proposed action upon the inland lake or stream and upon the waters from which or into which its waters flow and the uses of all such waters, including uses for recreation, fish, and wildlife, aesthetics, local government, agriculture, commerce and industry. The department shall not grant a permit if the proposed project or structure will unlawfully impair or destroy any of the waters or natural resources of the state.

Because the court determined that ILSA applies to the Nestle facility and because Nestle did not obtain a permit under ILSA, the court determined that this circumstance constituted pollution, impairment or destruction of a natural resource. The court saw no reason to remedy this harm by requiring Nestle to apply to MDEQ for an ILSA permit because the court believed that MDEQ would “improperly” issue such a permit based on the MDEQ regulation defining “enlarge or diminish an inland lake or stream,” which the court had previously concluded was not consistent with the statute.

Regarding the WPA, the court noted that Nestle did not apply for a permit under the WPA and that MDEQ had concluded that no such permit was required because the WPA “does not regulate the removal of groundwater via a well before the groundwater reaches a wetland.” The court noted, however, that the WPA applies to any activity that would “[d]rain surface water from a wetland.” Because surface waters can be “drained” from a wetland by lowering the groundwater under a wetland as a result of the mechanical extraction of water or diverting water that is feeding the groundwater, the court ruled that the Nestle plant groundwater withdrawals were also subject to WPA regulation. Based on the impact that the court found the Nestle water withdrawals were having and would have on wetlands in the vicinity of the pumping plant, the court concluded that the pumping station was in violation of WPA, and, consequently, in violation of MEPA.

Regarding the GLPA, the court found that the GLPA does not establish a standard for protection of the environment relevant to this case. The court decided not to try to formulate a judge-made standard based on some of the concepts and definitions in GLPA because the court had previously found standards that could be applied to the Nestle plant under ILSA and WPA.

Having determined that the Nestle plant was operating in violation of at least two standards for environmental protection under ILSA and WPA, the court turned to the question of whether Nestle had demonstrated that it has no “feasible and prudent alternative” that would not be in violation of ILSA and WPA. The court first noted that Nestle had not presented any arguments that it had no feasible and prudent alternatives. In addition, the court stated that the record was silent as to whether there are other sources of spring water or non-spring water that could be bottled and sold by Nestle at the Mecosta County site. On the contrary, Nestle’s plant manager testified that Nestle is bottling and selling water pumped from deep aquifer wells at its bottling plant site. Although this water is not from a spring and cannot meet the FDA requirements for labeling as “spring water”, the deep aquifer wells were not challenged by MCWC in this lawsuit. The volume of the deep aquifer water was significant – about 175 gpm or almost half of the maximum amount of spring water that could be withdrawn by Nestle under its MDEQ permit.

Consequently, because the court found that the groundwater withdrawals violated standards under ILSA and WPA, and because Nestle had not demonstrated that there are no feasible and prudent alternatives to the water pumping at issue in this lawsuit, the court concluded that Nestle was in violation of MEPA.

In light of the foregoing, the court ordered Nestle to terminate all spring water withdrawals from its Sanctuary Springs well field within 21 days.

The Mecosta County Circuit Court ruling was promptly appealed by Nestle to the Michigan Court of Appeals, requesting the court of appeals to prevent the circuit court order from taking effect until all appeals could be resolved. In its appeal, Nestle agreed to limit its pumping from Sanctuary Springs to 250 gpm instead of the 400 gpm allowed under the MDEQ permit. MDEQ, along with the Michigan Department of Labor and Economic Growth (“MDLEG”) filed a friend of the court brief supporting Nestle’s request to prevent the circuit court order from taking effect. MDEQ and MDLEG did not express any opinion on the merits of the case, only that Nestle should not be prevented from pumping water from the Sanctuary Springs well field pending resolution of Nestle’s appeal. In the friend of the court brief, MDEQ stated that it would conduct additional monitoring of the pumping from Sanctuary Springs to ensure that the 250 gpm limit was not exceeded and that any potential environmental impact would be minimized. On December 16, 2003, the Court of Appeals granted Nestle’s motion for a stay of the injunction with a provision limiting Nestle’s withdrawal to 250 gpm pending further resolution.

b) Michigan Citizens for Water Conservation v. Nestle Waters N. Am., , Inc., No. 01-14563-CE (Feb. 13, 2004).

As discussed above, the Mecosta County Circuit Court had ruled that the Nestle Ice Mountain bottled water production facility in Mecosta County was in violation of Michigan’s common law regarding groundwater use and MEPA. While the appeal of that decision was proceeding, Nestle requested an opportunity to present new evidence to the Mecosta County Court and asked the court to reconsider its decision.

Nestle argued that the Mecosta County Court made several factual errors in its original decision and also claimed that the court’s decision rested on unfounded scientific theories. The court reviewed ten different claims of factual errors raised by Nestle and, in each case, the court found that either there was no mistake of fact or that the errors in question did not materially affect the outcome. The court concluded that, in some cases, Nestle misconstrued the findings of fact in the original decision and in other cases, the evidence on the record was adequate to support the findings being challenged by Nestle. Therefore, the court did not grant Nestle’s request for a new trial on the basis of these alleged errors. The court did concede that it made some factual errors in its original decision, but concluded that those errors did not materially affect the ultimate decision in the case and, accordingly, the court did not grant Nestle’s request for a new trial on the basis of these errors. The court similarly addressed several other claimed errors of fact that were raised by Nestle during oral argument on its request for a new trial.

Regarding Nestle's claim that the court improperly relied on unfounded scientific theories in its decision, the court concluded that the passages cited by Nestle were not propounding "scientific theories," but were merely illustrations and examples the court used to explain the basis for its original ruling. Because these illustrations and examples did not amount to "scientific theories" and were not part of the fundamental basis for the court's decision, the court denied Nestle's request for a new trial on these grounds.

Nestle also requested a new trial to allow it to submit new evidence that arose after the evidence phase of the original trial concluded in July 2003. The court grouped Nestle's various arguments under three general categories.

The first new evidence cited by Nestle was additional groundwater monitoring data gathered after July 2003 that Nestle believed supported its view that its groundwater extraction activities were not harming the aquifer. The court noted that, as a general rule, this type of information regarding conditions that can be continuously monitored does not provide an adequate basis for a new trial because there will always be new data that can be collected and it would be impossible to bring the proceedings to a final conclusion. In addition, the court found that Nestle did not present the new data in context with the extensive data that was submitted during the trial and that re-opening the trial to consider this new data standing alone would put undue emphasis on the recent data. Accordingly, the court denied Nestle's request to submit the new data to the court.

Nestle also asked the court to consider a new report prepared by its expert witness, Dr. Andrews. The court declined this request because much of the analysis in the new report could have been submitted during the original trial and Dr. Andrews' new report placed undue emphasis on recent data, without an appropriate balancing of all available data. Finally, the court noted that it had rejected key aspects of Dr. Andrews' approach in favor of the analytical approach recommended by the opposing expert witness. Therefore, the court declined to accept this new report into evidence.

Nestle also asked the court to consider a new proposal to augment one of the water bodies allegedly impacted by Nestle's operations, the Dead Stream, by pumping water from a deep aquifer to replace the water extracted by Nestle from the shallower aquifer. The court found that Nestle could have presented this alternative during the trial and did not present an adequate explanation of its failure to do so. Accordingly, the court declined to entertain this proposal.

The court also considered Nestle's request that the court cancel its order prohibiting Nestle from pumping spring water and instead refer the case to the MDEQ for further consideration. In this regard, the court noted that in its original ruling, it found that any amount of spring water pumping conducted by Nestle would harm the riparian property rights of neighboring property owners and that MDEQ could not legally issue permits to authorize such pumping. As the court stated:

A state agency cannot issue permits for conduct that results in a harm, most particularly a property-rights harm, that has been fully litigated between the parties. Perhaps more correctly stated, the state can issue the permits, but the permit-holder cannot engage in conduct ostensibly authorized by the permits following litigation barring such conduct by it, again especially in the arena of established real-property rights. This legal concept alone is sufficient to end the issue of referring the case to MDEQ for consideration of permits and/or conditions.

The court also noted that it had previously ruled that MDEQ rules and policies that did not require Nestle to obtain ILSA and WPA permits were inconsistent with the state statutes. Because Nestle did not present any information that MDEQ had changed its regulations or policies to be consistent with the court's decision, the court would not refer the matter to MDEQ for further processing. The court also concluded that nothing prevents Nestle from seeking the necessary permits from MDEQ while it appeals the court's ruling.

Thus, the court denied Nestle's request for a new trial and for the court to cancel its order prohibiting Nestle from pumping spring water.

9. PART 307 (INLAND LAKES AND STREAMS)

a) **Attorney General v. Harkins, 257 Mich. App. 561 (2003), appeal denied 676 N.W.2d 628 (Mich. 2004).**

In 1987, Donald Harkins (“Harkins”) applied for a permit to fill in portions of his lakefront lot in order to create a beachfront. The affected areas were approximately one tenth of an acre. MDEQ denied Harkins’ original permit application and Harkins appealed that decision. While the appeal was pending, in 1988, MDEQ issued a more limited permit to allow some filling of the lakefront property. Nonetheless, Harkins continued to appeal the denial of his first permit application until his last appeal was denied by the Michigan Court of Appeals in 1994 and the Michigan Supreme Court did not agree to hear any further appeal.

In 1990, MDEQ investigated a report that Harkins had developed his property in violation of the 1988 permit. In 1991, MDEQ issued an order to Harkins requiring him to cease and desist activities that were allegedly in violation of the 1988 permit. Thereafter, a criminal complaint was filed against Harkins under the WPA and the ILSA, but the criminal complaint was dismissed in 1992.

On March 28, 1996, MDEQ filed a lawsuit against Harkins seeking to impose civil fines and a court order to require Harkins to restore the wetlands and lake bottom that had allegedly been filled or dredged in violation of the 1988 permit. The lawsuit was dismissed by the court on April 12, 2000, on the grounds that MDEQ had not filed the lawsuit within the time period required by the applicable statute of limitations. The court ruled that a six-year statute of limitations applied and, therefore, the MDEQ lawsuit must be dismissed because it was not filed until eight years after the alleged violations took place in 1988. After the lawsuit was dismissed, Harkins requested the court to order MDEQ to pay his attorney fees and costs, alleging that MDEQ’s lawsuit was vexatious, lacked a factual basis, and was filed with the intent to harass Harkins. The trial court denied Harkins’ request.

MDEQ appealed the dismissal of its lawsuit and Harkins appealed the denial of his request for attorney fees and costs to the Michigan Court of Appeals.

The statute of limitations states that “[a]ll other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes.” The appeals court held that MDEQ’s lawsuit seeking a court order requiring the restoration of wetlands allegedly filled in violation of a permit was a “personal action” within the meaning of this statute because it sought to compel Harkins to repair an alleged loss. Moreover, the court noted that MDEQ and Harkins agree that NREPA does not contain a different limitation period for actions filed under NREPA. Therefore, the court of appeals ruled that the six year statute of limitations for personal actions was, in fact, the correct limitation period for the MDEQ lawsuit.

The court next turned to the question of when MDEQ’s cause of action against Harkins “accrued” – that is, when the six-year limitation period started to run. The court relied on another statute, which provides that a “claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.” The court noted that the alleged illegal filling activities occurred in 1988 and the MDEQ lawsuit was not filed until 1996 and, therefore, more than six years had passed before MDEQ filed its lawsuit.

MDEQ argued that the six-year period should be “tolled” or suspended because of Harkins’ “continuing wrongful acts.” Michigan courts have previously held that, when wrongful acts of a continuing nature are committed, the period of limitation will not run until the wrongful acts are abated. The court of appeals found, however, that a continuing wrong occurs only when there are continuing wrongful actions, and not merely continuing harmful effects from past actions. In this case, Harkins was alleged to have committed wrongful acts in 1988 in violation of the MDEQ permit. Although the effects from the allegedly illegal fill continued after 1988 (e.g., unlawful filling of wetlands), the beachfront development was completed in 1988 and there were no further wrongful actions that occurred after 1988. Therefore, the court rejected MDEQ’s argument.

MDEQ also argued that Harkins was involved in additional dredging that occurred in 1991, while Harkins was attempting to comply with an order issued by MDEQ in that year. The 1988 permit authorized Harkins to construct a 10-foot wide pathway on his property. By 1989 or 1990, the pathway had eroded to the point that it may

have spread as much as two additional feet on either side (i.e., the path expanded to approximately 14 feet wide). In 1991, MDEQ ordered Harkins to remove the excess pathway and return the pathway to a width of 10 feet. In response, Harkins dredged a four-foot wide strip, removed the excess sand and allowed wetland reeds to grow back in the previously eroded area. In addition, Harkins installed sod over the remaining sand pathway in order to prevent further erosion, in accordance with MDEQ requirements.

MDEQ argued that, because these activities took place less than six years before the lawsuit was filed against Harkins, the lawsuit should not be dismissed under the statute of limitations. The court of appeals disagreed, noting that Harkins was doing nothing more or less than complying with MDEQ's order. Therefore, the court of appeals ruled that Harkins' actions in 1991 were not a continuing "wrongful" act that would extend the statute of limitations period.

Finally, MDEQ argued that its lawsuit should not be barred by the statute of limitations because it had not stood idly by from 1988 through 1996. MDEQ noted that, during that eight year time period, it litigated Harkins' appeal of the denial of the original permit and attempted to enforce the modified 1988 permit and obtain restoration of the wetlands in a criminal prosecution. The court of appeals noted that MDEQ was not required to wait until the litigation over the original permit was completed before filing a lawsuit against Harkins for allegedly violating the modified 1988 permit. In addition, the fact that MDEQ filed a criminal complaint against Harkins for allegedly violating the 1988 permit merely emphasized the fact that MDEQ could have filed a civil lawsuit over the same issue, but simply chose not to do so. Accordingly, the Court of Appeals found that there was no link between Harkins' attempts to reverse on appeal MDEQ's denial of the original permit application and MDEQ's failure to prosecute the present lawsuit in a timely fashion. Therefore, the Court of Appeals rejected this argument, as well.

Harkins asked the Court of Appeals to overturn the trial court's decision not to require MDEQ to pay Harkins' attorney fees and costs as a sanction for pursuing a frivolous lawsuit. The court noted that applicable court rules require an attorney to conduct a "reasonable inquiry" into the factual and legal viability of a case before filing a lawsuit. The reasonableness of the inquiry is determined by an objective standard by focusing on the efforts taken to investigate a claim before filing suit. The attorney's subjective good faith is not relevant to this determination. However, the mere fact that alleged facts are later discovered to be untrue does not invalidate a prior reasonable inquiry.

The Court of Appeals noted that the six-year statute of limitations for "personal actions" had never before been applied by a court to a case arising under NREPA. In addition, the Court of Appeals found that MDEQ's arguments for tolling the statute of limitations, although they were ultimately rejected, were not so lacking in legal merit as to make MDEQ's lawsuit frivolous. The court held that penalties are not required and should not be imposed merely because the legal argument advanced by one party is rejected by the court. Where there is no prior developed body of precedents mandating a particular result (such as in this case), an award of attorney fees and costs is not appropriate. Therefore, the court of appeals denied Harkins' appeal.

Accordingly, the court of appeals upheld the trial court's decisions to dismiss the MDEQ lawsuit and to deny Harkins' request for an award of attorney fees and costs.

10. PART 303 (WETLANDS)

a) Forsberg Family, LLC v. Charter Twp. of Meridian, 2004 W.L. 345417 (Mich. App. 2004).

Forsberg Family, LLC ("Forsberg") owns nine acres of undeveloped land in Meridian Township that includes a state-regulated wetland. Forsberg prepared a plan to develop the property into an office park. In the plan, a small portion of the wetland would be needed to construct a road and a parking lot.

Forsberg applied for and received a permit from the MDEQ to fill approximately 0.15 acres of wetland in five different sections of the lot. Forsberg also applied for zoning variances from Meridian Township to allow it to construct the parking lot and road without having to provide a 20-foot set back from the wetland. Forsberg argued that there was not enough space for it to comply with both the MDEQ permit and the zoning setback requirement.

Meridian Township denied the requested variance, finding that no practical difficulties would be imposed on Forsberg from the denial because Forsberg could change its plans and a variance would adversely affect adjacent land.

Forsberg sued the Township, arguing that the wetland zoning ordinance was unconstitutional. In particular, Forsberg claimed that the ordinance was preempted by state laws concerning wetland protection. The Township countered that the ordinance was a proper exercise of the Township's zoning power and that the regulation of wetland setback areas was not preempted by state law. Both Forsberg and the Township requested a judgement before trial from the trial court. The trial court ruled in favor of the Township and upheld the ordinance. Forsberg appealed to the Court of Appeals.

The Court of Appeals noted that, in reviewing a challenge to a local zoning ordinance, courts should give heed to the fact that the Township Zoning Act gives townships broad authority to adopt zoning ordinances. Nonetheless, the Court of Appeals also noted that a local ordinance is invalid if:

(1) the ordinance directly conflicts with the state statutory scheme, or (2) the state statutory scheme preempts the ordinance by occupying the field of regulation that the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation. Preemption may be established (1) where state law is expressly preemptive; (2) by examination of the legislative history; (3) by the pervasiveness of the state regulatory scheme, although this factor alone is not generally sufficient to infer preemption; or (4) where the nature of the subject matter regulated demands exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.

In this case, Forsberg argued that the state statutory scheme for protecting wetlands preempts the ordinance. Specifically, Forsberg argued that the WPA indicated an intent by the Legislature to occupy the field of regulation with respect to state wetlands. The Court of Appeals agreed with this reasoning, but also concluded that Section 30307(4) of the WPA expressly grants a local unit of government the power to regulate wetland within its boundaries, provided that the ordinance complies with the WPA.

The Court of Appeals ruled that nothing in the WPA prohibits a local unit of government from imposing a 20-foot setback requirement for wetlands, noting that the purpose of such a requirement is consistent with the statutory scheme to preserve and protect wetlands.

Forsberg argued that the ordinance amounted to a "blanket ban on all development near the wetland" and that this was contrary to the statutory requirements. The Court of Appeals disagreed that the ordinance amounted to a blanket ban. Although the Court of Appeals did find that the ordinance, as applied to Forsberg's specific property, may have effectively prohibited development of Forsberg's property, that argument was not raised by Forsberg on appeal.

Thus, the Court of Appeals held that the trial court properly ruled that the zoning ordinance did not prohibit that which was permitted by the WPA and that the zoning ordinance, unlike the WPA, did not purport to regulate the wetland itself. Therefore, the Court of Appeals affirmed the trial court's decision upholding the ordinance.

11. PART 41 (SEWAGE SYSTEMS)

a) Lake Isabella Dev., Inc. v. Village of Lake Isabella, 259 Mich. App. 393 (2003).

Part 41 (Sewerage Systems) of NREPA authorizes MDEQ to promulgate rules governing sewerage systems and sewage treatment works. Rule 33 of MDEQ's Part 41 rules provides, in part:

When the owner of the proposed sewerage system is not a governmental agency, the application for a permit shall include a resolution from the local

governmental agency having jurisdiction, stating that the governmental agency shall assume responsibility for the effective and continued operation and maintenance of the proposed sewerage system if the owner in any way fails to perform in this capacity.

A developer, Lake Isabella Development, Inc., owns a 25-acre parcel adjacent to Lake Isabella in the Village of Lake Isabella, on which it proposed to build a 38-unit single family condominium project. The developer proposed to build a private wastewater disposal system because the lakefront property was not suitable for onsite septic systems and the Village did not have a public sewer system. The Village planning commission approved the site plan for the development, subject to the developer obtaining the necessary state and county permits and approvals.

The developer submitted detailed engineering plans and a permit application to MDEQ for the proposed private wastewater disposal system, but MDEQ refused to review the plans or issue the permit until the developer obtained the resolution from the Village required under Rule 33. The Village council, however, rejected the developer's request for the resolution, effectively killing the project. The developer then brought a case against the Village and MDEQ which, among other things, sought a ruling that Rule 33 exceeded the scope of MDEQ's rulemaking authority granted by the Legislature under Part 41. The trial court ruled that Rule 33 did not comply with the legislative intent of Part 41 and was arbitrary and capricious. The Court of Appeals upheld the trial court's ruling.

The Court of Appeals applied the following three-part test to determine the validity of Rule 33:

- (1) whether the rule is within the subject matter of the enabling statute; (2) whether it complies with the legislative intent underlying the enabling statute; and (3) whether it is arbitrary or capricious.

Part 41 provides that "[MDEQ] may promulgate and enforce rules as the department considers necessary governing and providing a method of conducting and operating all or a part of sewerage systems including sewage treatment works." The Court of Appeals agreed with the trial court that Rule 33 was within the subject matter of Part 41 – i.e., that Rule 33 concerned itself with the operation of sewerage systems. This, however, did not resolve the question of whether Rule 33 complied with the underlying intent of Part 41.

In analyzing the second prong of the test, the Court of Appeals stated that a statute granting power to an administrative agency must be strictly construed and the administrative authority must be plainly granted and, although an agency's construction of a statute it is responsible for administering must be given deference, that deference cannot be used to overcome the statute's plain meaning or to extend the agency's powers. The court characterized the question before it as "whether the Legislature intended MDEQ to be able to promulgate a rule that in essence requires a local governmental agency to be responsible for a sewerage system as a condition precedent to permitting [a] development."

MDEQ argued that Rule 33 was merely an enforcement mechanism for duties arising under Part 41. In contrast, the developer argued that Rule 33 acted as a liability-shifting mechanism, impermissibly delegated authority to local governments, would interfere with development and result in the proliferation of inferior septic systems, contrary to the legislative intent of Part 41.

In construing the involved statutory provisions, the Court of Appeals concluded that Part 41 granted MDEQ exclusive jurisdiction over the issuance of sewerage permits. The court characterized a municipality's discretion to either issue or not issue the resolution required under Rule 33 as fundamentally a "veto power." Thus, Rule 33 was contrary to legislative intent to the extent that it relinquished MDEQ's decision making authority to municipalities.

Further, Rule 33 violated legislative intent by imposing a new burden on municipalities. Although the court agreed to some degree that it could be viewed as an enforcement mechanism, the burden imposed went beyond enforcement and essentially created a new remedy rather than implementing existing remedies. Part 41 provides that enforcement must be conducted by "an appropriate action in the name of the people of this state." The court

held that Part 41 provided the exclusive mechanism for enforcement and that promulgation of a rule imposing a new burden on a municipality was not an appropriate enforcement mechanism and was contrary to the legislative intent of the statute.

The Court of Appeals outlined the following guidelines for determining whether a rule is arbitrary and capricious:

A rule is arbitrary if it was fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance. A rule is capricious if it is apt to change suddenly or is freakish or whimsical. If a rule is rationally related to the purpose of the statute, it is neither arbitrary nor capricious. Further if there is any doubt as to the invalidity of a rule in this regard, the rule must be upheld.

MDEQ argued that Rule 33 made the enforcement of existing laws more efficient because local municipalities are in a better position to assess the cost of operation and maintenance of an abandoned private sewerage system against the users of the system. The court observed that, in a situation such as the one under consideration, where the Village had “no money, public works, law enforcement, or operating engineers to effectuate a safe, let alone efficient sewerage system,” it failed to understand how the local municipality would be in a superior position to further the purpose of Part 41. The court further observed, that under MDEQ’s power to directly enforce laws, it is able to directly assess the costs of operation and maintenance on the users of the sewerage system.

The developer also argued that the indirect veto power conferred upon municipalities by Rule 33 amounted to an illegal or unconstitutional delegation of absolute discretionary authority to municipalities on whether to permit private sewerage systems. The court stated that it is well-settled law that an administrative agency may not sub-delegate its authority unless the Legislature expressly authorized it to do so.

Therefore, the Court of Appeals also found that Rule 33 was arbitrary and capricious because it constituted an unlawful delegation of discretionary power to municipalities, imposed operational mandates on municipalities ill-equipped to implement those mandates, and was unnecessary for MDEQ to enforce Part 41.

12. INSURANCE

a) City of Grosse Pointe Park v. Michigan Mun. Liab. & Prop. Pool, 2003 W.L. 22462088 (Michigan. App. 2003).

For 90 years, the City of Grosse Pointe Park (“GPP”) has owned and operated a sewer system that collects sewage from GPP residents and pumps it to a wastewater treatment plant in Detroit. During heavy rains, the combined rainfall and sewage sometimes exceeds the pumping capacity of the system. When that occurs, GPP has discharged the excess sewage directly into Fox Creek as authorized by a NPDES permit. Since the 1940s, residents living near Fox Creek have complained that sewer overflows from the GPP system have backed up into their basements during heavy storms and damaged their property and health.

From 1985 through 1995, GPP purchased a series of one-year liability insurance policies from the Michigan Municipal Liability and Property Pool (“Pool”). From 1990 to 1996, the Pool covered approximately 200 claims for sewer backup damages for its various insureds, even though those policies contained various forms of pollution exclusions. In 1994 alone, the Pool paid 72 such claims under the policy it had issued to GPP.

In September, 1995, a group of homeowners living near Fox Creek sued GPP for damages resulting from sewage overflows that occurred in 1994 and 1995. GPP asked the Pool to defend it against these claims, as it had done in the past. Pool paid for an attorney to defend GPP, but sent a “reservation of rights letter” to GPP stating that the claims might not be covered by the policy for various reasons, including the fact that the policy contained an absolute pollution exclusion, and reserved the right not to reimburse GPP for any damages that the homeowners might recover.

GPP and the homeowners reached a settlement in 1997 that required GPP to pay the homeowners \$1.9 million and stop discharging wastewater into Fox Creek. Pool refused to pay the \$1.9 million settlement for several reasons, including the fact that the policy included an absolute pollution exclusion. GPP then sued Pool to require it to reimburse GPP for the \$1.9 million.

The trial court ruled before trial that Pool would not be allowed to deny coverage based on the absolute pollution exclusion because Pool had regularly paid for such claims against both GPP and other insureds in the past, and because GPP was entitled to rely on that practice. The trial court found that the claims were covered under both Coverage A (property damage) and Coverage D (errors and omissions). Pool appealed.

The Michigan Court of Appeals held that the trial court had acted properly in considering how Pool had interpreted and applied its insurance policies in the past as a factor in determining whether the absolute pollution exclusion in the 1994 policy barred coverage for the homeowners' claims. The Court of Appeals reasoned that the intent of the contracting parties controls the meaning of an insurance policy, and that evidence of the past practices of an insurer and its insured raises a question of fact concerning whether the parties intended the policy to include damages resulting from sewer overflows. However, the Court of Appeals held that the trial court made a mistake by ruling in favor of GPP without holding a trial to determine whether the unfairness of forcing Pool to pay claims that appear to be excluded by the express terms of the policy is outweighed by the unfairness to GPP that would result from allowing Pool to change its interpretation of the policy without notice. Therefore, the Court of Appeals sent the case back to the trial court to hold a trial on this issue.

13. MISCELLANEOUS

- a) **Silver Creek Drain District v. Extrusions Div., Inc., 468 Mich. 367 (2003), reh'g denied 668 N.W.2d 145 (2004) cert. denied sub rom 124 S. Ct. 1062 (2004).**

The Michigan Supreme Court held that when the State or a local unit of government takes private property by eminent domain, the amount that it must pay the property owner may be reduced by the amount by which contamination reduced the fair market value of the property, even though the property owner is not liable for cleanup costs under State or Federal law.

In 1992, Extrusions Division, Inc. ("Extrusions") wanted to build a warehouse on an eight-acre parcel of land it owned in Grand Rapids. However, the City refused to grant a building permit because the Silver Creek Drain District ("District") wanted to use the parcel to build a stormwater retention pond. Extrusions considered the City's refusal to issue a building permit, and the District's failure to offer to purchase the property, as a taking of private property without compensation, and demanded that the City and the District pay the full value of the property.

In 1993 the Michigan Legislature amended the Uniform Condemnation Procedures Act ("UCPA") to allow a government entity that takes property by eminent domain to place the estimated fair value of the property in escrow and to reserve the right to seek environmental remediation costs from the property owner, in which case the money placed in escrow serves as security for remediation costs of environmental contamination.

In 1994, the District issued a formal "declaration of taking" for the property, placed \$211,300, which it estimated to be the fair value of the property, in escrow as required by UCPA and commenced a formal condemnation action against the property, reserving the right to recover cleanup costs in a Federal or State cost recovery action.

In 1995, with the agreement of Extrusions and the District, the trial court ordered Extrusions to convey the parcel to the District, and ordered the District to pay \$211,300 to Extrusions. However, the District then asked the court to hold the funds in escrow as security for remediation costs as authorized by UCPA. Extrusions objected on the grounds that it had not caused any contamination on the property and, therefore, was not liable for any remediation costs under Part 201. Extrusions reasoned that it should not be made to pay for a cleanup by reducing the amount of compensation the District was required to pay for the property.

By agreement of the parties, the trial court ordered the District to pay the full \$211,300 to Extrusions, and then held a trial in 1997 to determine the fair value of the property. The court found that the fair value of the property, assuming it was not contaminated, would be \$278,000. It also found that a prudent purchaser would have required the owner of the property to implement a Type C (containment) closure that would have cost \$237,768. Therefore, the court concluded that the net fair market value of the property was only \$41,032. Nonetheless, it stated once more that the full \$211,300 should be paid to Extrusions.

The Michigan Court of Appeals reversed the trial court's judgment in part. It held that the UCPA does not authorize a trial court to consider the presence of environmental contamination as a factor in determining fair market value payable for private property that is taken. The Court of Appeals ruled that the "plain language" of the UCPA allows the presence of contamination to be considered only in a separate court action to recover response costs.

On June 17, 2003, the Michigan Supreme Court reversed the Court of Appeals and sent the case back to the trial court for further proceedings. The Court held that the concept of "just compensation" under both the United States Constitution and the Michigan Constitution includes all elements of value and all factors that are relevant to the market value of a property. The Court held that the Court of Appeals had failed to distinguish the two separate ideas of (1) fair market value of property, and (2) whether or not the owner of the property is liable for cleanup costs. The Court explained that an action to condemn property for public use is an *in rem* action in which the government proceeds against the property itself; in contrast, an action to recover response costs is an action to assess liability against the owner of the property or other persons. The Supreme Court concluded that the trial court had correctly treated the presence of contamination on the property as one factor in establishing the fair market value of the property, and in measuring the effect of the contamination based not on whether the owner was personally liable for response costs, but by the effect that the presence of contamination would have on the amount a willing buyer would pay for the property. Therefore, the Court sent the case back to the trial court for further proceedings.

b) Graham v. Lautrec, Ltd., 2003 W.L. 23512133, No. 01-031717-CE (Oakland Cty. Cir. Ct. July 24, 2003).

An Oakland County Circuit Court judge granted a motion to exclude testimony by three expert witnesses regarding so-called "toxic mold" claims.

Eleven individuals (the "Residents") living in Stratford Villa Manufactured Home Park sued the owner of the park for damages, claiming that they have suffered property damage and personal injuries due to mold growing inside their homes. The Residents claimed that the mold resulted from flooding and water drainage problems at the park. The Residents offered testimony from three expert witnesses in support of their claims.

The applicable court rule states that expert testimony must be admitted if the court determines that recognized, scientific, technical or other specialized knowledge will assist the trier of fact to understand evidence or to determine a fact in issue. The expert witness must be qualified as an expert by knowledge, skill, experience, training or education. Another court rule limits expert testimony to areas of "recognized scientific . . . knowledge" and requires the court to determine the reliability and trustworthiness of the facts and data underlying an expert's testimony before the testimony may be admitted.

To be derived from "recognized scientific knowledge," the expert testimony must contain inferences or assertions that rely on an application of scientific methods and must be supported by appropriate objective and independent validation based on what is known (e.g., scientific and medial literature). Novel scientific evidence is admissible only if the party offering such evidence can demonstrate that it has gained general acceptance in the scientific community.

Applying these principles, the court ruled that the Residents' experts' testimony was not admissible. The court held that the Residents had failed to demonstrate that Michael Kelly's testimony would be based on epidemiological studies that provide a causal connection between mold exposure and human health effects. Moreover, the court found that the general scientific community recognizes that there is not enough evidence to sustain the proposition that mold exposures cause specific medial diseases or illnesses.

Regarding the proposed testimony of Francis McLaughlin, the court held that the theories and methodologies relied upon by McLaughlin are not generally accepted in the scientific community. Therefore, the court ruled that the evidence submitted does not support McLaughlin's opinion that the practice of building on wetlands contributes to an increase in microbial growth indoors or that conditions of the outdoor environment at Stratford Villa caused the alleged indoor mold contamination.

With respect to the proposed testimony of Christopher Cote, the court held that none of Cote's opinions regarding the increase in microbial growth indoors demonstrated that there is a causal link between the alleged molds in the Residents' homes and the condition of the outside environment and that the "contamination index" used by Cote to measure the amount of fungi contamination was not supported by sound scientific research nor subjected to scientific testing.

The court concluded that the most comprehensive review of the scientific and medical literature on the potential health effects of indoor mold exposures was that conducted by Drs. Kuhn and Ghannoum. After reviewing over 450 publications, Kuhn and Ghannoum concluded that, although valid concerns exist regarding the relationship between indoor mold exposures and human disease, the studies to date that purport to have found any such relationship "uniformly suffer from significant methodological flaws, making their findings inconclusive." In addition, Kuhn and Ghannoum conclude that there is no objective evidence for neurological or immunological diseases, liver disease, endocrine toxicity, renal disease or human cancer caused by indoor mold exposure.

Thus, the court concluded that there is no well-substantiated evidence linking the presence of indoor mold and the health concerns raised by the Residents. Accordingly, the court found that the Residents' experts' opinions were not supported by principles or theories generally accepted by the scientific community and, therefore, the Residents' experts' testimony would not be admitted into evidence.

c) Henry v. Dow Chem. Co., No. 03-047775-NZ-5 (Saginaw Cty. Cir. Ct., Aug. 18, 2003).

The Saginaw County Circuit Court dismissed several tort claims made against the Dow Chemical Company ("Dow"). The claims were brought by a group of landowners who alleged that their properties were contaminated when Dow released dioxin into the Tittabawassee River, which migrated down the river and invaded the landowners' soil. The landowners sued Dow under the theories of nuisance, trespass, negligence, public nuisance, strict liability, and medical monitoring, and also requested punitive damages. Dow filed a motion for judgment before trial on the trespass, strict liability, medical monitoring, and punitive damages issues, seeking dismissal of those claims.

The court first turned to the trespass claim. Dow argued that the claim should be dismissed under the logic of a recent ruling in which the Michigan Court of Appeals held that "Michigan does not recognize a cause of action in trespass for airborne particulate, noise or vibrations." The court summarily agreed with Dow and dismissed the landowners' trespass claim.

The court next addressed the strict liability claim. In Michigan, strict liability (meaning that a person can be liable regardless of their fault concerning the activities at issue) applies in limited circumstances where an "abnormally dangerous activity" is involved. The landowners claimed that, because Dow "is a chemical company and, as such, deals with some products that are inherently dangerous—dioxin being one such product," Dow's release of dioxin should fall under the strict liability doctrine. The court disagreed, however, citing two cases to support its holding. The first case, a Michigan Court of Appeals decision, held that an electric company was not strictly liable for damages relating to a person who was killed when he was struck by a power line; instead, the Court of Appeals imposed a negligence standard. The second case, a Federal Court of Appeals ruling, held that a company was not strictly liable for damage to airplanes that was caused by clouds of hydrochloric and sulfuric acid mist released from its plant. Without explaining further, the court dismissed the landowners' strict liability claim against Dow on the basis of those two rulings.

On the medical monitoring issue, the court noted the basis for Dow's argument that the claim should be dismissed, but did not elaborate further, and summarily denied Dow's motion for judgment before trial on that issue, preserving the medical monitoring claim for trial.

The final issue before the court was that of punitive damages. The court agreed with Dow that the claim should be dismissed, observing that “punitive damages are not now and have never been permitted in Michigan.” The court also noted, however, that the landowners “may be entitled to exemplary damages.”

III. LEGISLATION

C. Federal Legislation

Federal Pub. Law And Effective Date	Description
None	There was no significant federal legislation during this time period.

D. State Legislation

Michigan Pub. Act And Effective Date	Description
<i>2003 Public Acts</i>	
PA 36 (HB 4083) July 3, 2003	Amends Mich. Comp. Laws § 324.36103 provisions for development rights agreements or easements on farmland.
PA 148 (SB 289) Aug. 8, 2003	Amends Part 327 of NREPA to enable collection of information and establishment of a statewide groundwater inventory and map.
PA 153 (SB 561) Oct. 1, 2003	Amends requirements for solid waste landfill permits and fees under Part 115 of NREPA.
PA 163 (SB 567) Aug. 12, 2003	Amends and extends sunset provisions for permits and fees under Mich. Comp. Laws §§ 324.3104, .8716, .30104, .30109, .32312 and .32513
PA 164 (SB 596) Aug. 12, 2003	Amends Mich. Comp. Laws § 324.12562 aquatic nuisance fee provisions.
PA 177 (HB 4087) Aug. 29, 2003	Adds Part 317 to NREPA, Mich. Comp. Laws §§ 324.31701 - .31713 to provide for groundwater protection and dispute resolution regarding water withdrawal.
PA 252 (SB 805) Dec. 29, 2003	Amends Mich. Comp. Laws § 324.19608 to provide funding for Clean Michigan Initiative grant and loan programs.
PA 253 (HB 5270) Dec. 29, 2003	Adds Mich. Comp. Laws § 324.19608a to create the Clean Michigan Initiative revolving loan program for response activities at known or suspected facilities with redevelopment potential.
PA 270 (SB 226) March 30, 2004	Adds Part 413 to NREPA, Mich. Comp. Laws §§ 324.41301 - .41309 and amends Mich. Comp. Laws §§ 324.45901, .45906, .45908, .48735 and .48738 to prohibit the ownership and release of genetically engineered organisms or nonnative organisms into waters of the state.
PA 292 (SB 535) Jan. 8, 2004	Amends Mich. Comp. Laws § 324.80115 to provide for revenue from Great Lakes specialty watercraft decals to be deposited into the Michigan Great Lakes Protection Fund.
PA 293 (SB 536) Jan. 8, 2004	Adds Mich. Comp. Laws § 324.80124a to provide for issuance of Great Lakes protection specialty watercraft decals.
PA 294 (HB 4914)	Adds Mich. Comp. Laws § 324.80124b to earmark revenue from Great Lakes specialty watercraft decals to be deposited into the Michigan Great Lakes Protection

Michigan Pub. Act And Effective Date	Description
Jan. 8, 2004	Fund.
2004 Public Acts	
PA 24 (HB 5154) Mar. 10, 2004	Amends Part 83 of NREPA to regulate use of pesticides at schools and day care centers.
PA 34 (SB 498) Mar. 29, 2004	Amends Mich. Comp. Laws § 324.11514 to prohibit beverage container and whole tires from solid waste landfills; repeals Mich. Comp. Laws § 324.11521.
PA 35 (SB 497) Mar. 29, 2004	Amends Mich. Comp. Laws § 324.11502 to add a definition for “beverage containers.”
PA 36 (SB 57) Mar. 29, 2004	Adds Mich. Comp. Laws § 324.11526c to authorize the Director of MDEQ to prohibit by order the transportation or disposal of waste from within or outside the state that poses a threat to health, safety or the environment.
PA 37 (SB 502) Mar. 29, 2004	Adds Mich. Comp. Laws § 324.11526b to require the MDEQ to prepare a list of state and Canadian jurisdictions with landfill prohibitions at least as restrictive as Michigan.
PA 38 (SB 506) Mar. 29, 2004	Adds Mich. Comp. Laws § 324.11511a to impose a temporary moratorium on the issuance of solid waste landfill construction permits.
PA 39 (SB 557) Mar. 29, 2004	Amends Mich. Comp. Laws § 324.11507a to require solid waste landfills to submit an itemized report on waste received and remaining disposal capacity
PA 40 (HB 5234) Mar. 29, 2004	Adds Mich. Comp. Laws § 324.11526a to establish requirements that out-of-state waste must meet in order to be acceptable for disposal in a Michigan solid waste landfill.
PA 41 (SB 500) Mar. 29, 2004	Amends Mich. Comp. Laws § 324.11546 to provide for increase fines for subsequent violations of Part 115 of NREPA.
PA 42 (HB 5235) Mar. 29, 2004	Adds Mich. Comp. Laws § 324.11527a to require solid waste haulers to notify customers of items prohibited from disposal in a solid waste landfill and to notify customers of available options.
PA 43 (SB 499) Mar. 29, 2004	Amends Mich. Comp. Laws § 324.11526 solid waste landfill inspection provisions.
PA 44 (SB 715) Mar. 29, 2004	Amends Mich. Comp. Laws §§ 324.11533 and .11538 requirements for solid waste management plans.
PA 72 (HB 4929) Apr. 20, 2004	Amends Mich. Comp. Laws § 324.3112a procedures to require privately-owned sewer systems to disclose discharges of untreated or partially treated sewage.
PA 75 (SB 1014) Apr. 21, 2004	Amends Mich. Comp. Laws § 324.36202 to modify the administrative cap on the agricultural preservation fund.
PA 90 (SB 560) Apr. 22, 2004	Amends Mich. Comp. Laws § 324.3101 and adds §§ 324.3122, .3123 and .3124 to establish fees for groundwater discharge permits.
PA 95 (SB 759) May 7, 2004	Amends Mich. Comp. Laws § 324.80140 education program for training regarding marine fuel spills.
PA 114 (SB 653)	Amends Mich. Comp. Laws § 324.20129a to extend the sunset on baseline environmental assessment fees and adds § 324.3122a to limit the collection of

Michigan Pub. Act And Effective Date	Description
May 21, 2004	groundwater discharge permit fees.
PA 142 (HB 5586) June 15, 2004	Amends Mich. Comp. Laws § 324.3101 and adds § 324.3111b regarding pollution requirements for release of polluting materials; amends § 324.51107 to revise and change the date for inflation adjustment to commercial forest-specific tax.
PA 143 (SB 977) June 15, 2004	Amends Mich. Comp. Laws § 324.3115 to provide penalties for failure to report a release of pollution material to 9-1-1 and local health departments.
PA 228 (SB 1135) July 21, 2004	Adds Mich. Comp. Laws §§ 324.20517 and .20519 to create the laboratory data quality assurance advisory council.
PA 229 (HB 5742) July 21, 2004	Adds Part 205 to NREPA, Mich. Comp. Laws §§ 324.20501 - .20515 to establish an environmental laboratory quality recognition program and to make participation in the program a requirement for state contracts.
PA 230 (HB 5743) July 21, 2004	Adds Mich. Comp. Laws § 324.20513 to require audits of the environmental laboratory quality recognition program.
PA 246 (HB 4730) Oct. 1, 2004	Adds Part 33 to NREPA, Mich. Comp. Laws §§ 324.3301 - .3312 to revise regulation of aquatic nuisance control; amends § 324.30113 to include Part 33 of NREPA in the land and water management permit fee fund; repeals Mich. Comp. Laws §§ 333.12561, .12562 and .12563.
PA 247 (HB 4729) Oct. 1, 2004	Adds Mich. Comp. Laws § 324.3313 to provide sanctions for violations of Part 33 of NREPA.

IV. ADMINISTRATIVE RULEMAKINGS

E. EPA Final Rulemakings

Federal Register Notice	Description
Clean Water Act, NSPS 68 Fed. Reg. 34,831 (June 11, 2003)	Partial withdrawal of Mar. 13, 2003 direct final rule for discharge standards for the pharmaceutical manufacturing point source category.
Solid Waste, Lead-Based Paint 68 Fed. Reg. 36,487 (June 18, 2003)	Amends 40 C.F.R. Parts 257 and 258 to allow residential lead-based paint waste that is exempted from hazardous waste management requirements as household waste to be disposed of in construction and demolition landfills under certain conditions.
Clean Water Act, NPDES 68 Fed. Reg. 36,749 (June 19, 2003)	Amends 40 C.F.R. Part 125 cooling water intake structure for new facilities regulations.
Clean Air Act, NESHAP 68 Fed. Reg. 37,334 (June 23, 2003)	Amends 40 C.F.R. Part 63 to clarify existing NESHAP delegation provisions.
Clean Air Act, Ozone 68 Fed. Reg. 38,160 (June 26, 2003)	Amends 40 C.F.R. § 50.9 stay of authority re: applicability of one-hour ozone standard.
Clean Air Act, Permits 68 Fed. Reg. 38,518 (June 27, 2003)	Amends 40 C.F.R. Parts 70 and 71 compliance certification requirements for state and federal operating permits.
Clean Water Act, NPDES 68 Fed. Reg. 39,087 (July 1, 2003)	Notice of final issuance of NPDES general permit for discharges from large and small construction activities.
Clean Air Act, NSPS, NESHAP 68 Fed. Reg. 40,655 (July 8, 2003)	Notice of availability of postings to the Applicability Determination Index database.

Federal Register Notice	Description
Clean Air Act, NESHAP 68 Fed. Reg. 42,603 (July 18, 2003)	Amends Feb. 18, 2003 final rule re: NESHAPs for chemical recovery combustion sources at kraft, soda, sulfite and stand-alone semichemical pulp mills.
Safe Drinking Water 68 Fed. Reg. 42,898 (July 18, 2003)	Notice of regulatory determinations for priority contaminants on the drinking water contaminant candidate list; removes nine chemicals from the list.
Safe Drinking Water 68 Fed. Reg. 42,908 (July 18, 2003)	Notice of completion of EPA's review of existing drinking water standards and decisions whether to revise various standards.
Clean Water Act 68 Fed. Reg. 43,272 (July 21, 2003)	Amends 40 C.F.R. Part 136 guidelines establishing test procedures for analysis of pollutants; adds analytical methods for biological pollutants in ambient water.
Clean Air Act, Ozone 68 Fed. Reg. 43,786 (July 24, 2003)	Amends 40 C.F.R. Part 80 refrigerant recycling regulations.
Clean Air Act, SIP 68 Fed. Reg. 52,104 (Sept. 2, 2003)	Amends 40 C.F.R. Part 52 to approve a revision to Michigan's definition of volatile organic compound.
Emergency Planning 68 Fed. Reg. 52,978 (Sept. 8, 2003)	Amends 40 C.F.R. Part 355 to change the threshold planning quantity for isophorone diisocyanate from 100 lb. To 500 lb.
Clean Air Act, Asbestos, NESHAP 68 Fed. Reg. 54,790 (Sept. 18, 2003)	Amends 40 C.F.R. Part 51 NESHAP for asbestos and citations for labeling containers of asbestos waste materials.
Clean Air Act, Federal Plan 68 Fed. Reg. 57,518 (Oct. 3, 2003)	Amends 40 C.F.R. Part 62 to establish a federal plan for emission guidelines for existing commercial and industrial solid waste incineration units located in states without effective state plans.
Hazardous Waste, Corrective Action 68 Fed. Reg. 57,691 (Oct. 6, 2003)	Notice of availability of guidance document: "Results-Based Approaches and Tailored Oversight Guidance for Facilities Subject to Corrective Action Under Subtitle C of the Resource Conservation and Recovery Act."
Clean Air Act, NESHAP 68 Fed. Reg. 58,172 (Oct. 8, 2003)	Amends 40 C.F.R. Part 63 to establish emission standards for site remediations; adds Subpart GGGGG.
Clean Air Act, NESHAP 68 Fed. Reg. 58,615 (Oct. 10, 2003)	Amends 40 C.F.R. Part 63 to establish emission standards for primary magnesium refining facilities; adds Subpart TTTTT.
Clean Air Act, NSPS 68 Fed. Reg. 59,328 (Oct. 15, 2003)	Amends 40 C.F.R. Part 60 NSPS for certain volatile organic liquid storage vessels.
Solid Waste 68 Fed. Reg. 59,333 (Oct. 15, 2003)	Amends 40 C.F.R. Part 258 location restriction section in the Criteria for Municipal Solid Waste Landfills to incorporate information from the Wendell H. Ford Aviation Investment and Reform Act for the 21 st Century.
Clean Water Act, Sewage Sludge 68 Fed. Reg. 61,084 (Oct. 24, 2003)	Notice of EPA determination that neither numerical limitations nor requirements for management practices are currently needed to protect human health and the environment from reasonably adverse effects from dioxin and dioxin-like compounds in land-applied sewage sludge.
Clean Air Act, PSD, NSR 68 Fed. Reg. 61,248 (Oct. 27, 2003)	Amends 40 C.F.R. Parts 51 and 52 to provide a category of equipment replacement activities that are not subject to major new source review requirements under the routine maintenance, repair and replacement exclusion.
Clean Air Act, NESHAP 68 Fed. Reg. 61,868 (Oct. 30, 2003)	Amends 40 C.F.R. Part 63 to add emission standards for taconite iron ore processing facilities; adds Subpart RRRRR.
Clean Water Act, NPDES 68 Fed. Reg. 63,042 (Nov. 7, 2003)	Request for comment on proposed policy regarding NPDES permit requirements for treatment plans in publicly owned treatment works under peak wet weather flow conditions.
Clean Air Act, Permits 68 Fed. Reg. 63,735 (Nov. 10, 2003)	Amends 40 C.F.R. Part 70 to approve revisions to Michigan's Title V operating permit program.

Federal Register Notice	Description
Clean Air Act, NESHAP 68 Fed. Reg. 63,852 (Nov. 10, 2003)	Amends 40 C.F.R. Part 63 to establish emission standards for miscellaneous organic chemical manufacturing facilities; adds Subpart FFFF.
Clean Air Act, NESHAP 68 Fed. Reg. 64,432 (Nov. 13, 2003)	Amends 40 C.F.R. Part 63 to establish emission standards for metal can surface coating operations; adds Subpart KKKK.
Emergency Planning 68 Fed. Reg. 64,720 (Nov. 14, 2003)	Amends 40 C.F.R. Part 350 trade secret regulations to remove outdated information.
Clean Air Act, Emissions 68 Fed. Reg. 67,932 (Dec. 4, 2003)	Amends 40 C.F.R. Part 61 emission standard for benzene waste operations.
Clean Air Act, NESHAP 68 Fed. Reg. 67,953 (Dec. 5, 2003)	Technical corrections to July 18, 2003 rule regarding NESHAP for chemical recovery combustion sources at kraft, soda, sulfite and stand-alone semichemical pulp mills.
Clean Air Act, NESHAP 68 Fed. Reg. 69,164 (Dec. 11, 2003)	Amends 40 C.F.R. Part 63 to establish emission standards for miscellaneous coating manufacturing facilities; adds Subpart HHHHH.
Clean Air Act, NESHAP 68 Fed. Reg. 70,904 (Dec. 19, 2003)	Amends 40 C.F.R. Part 63 to establish emission standards for mercury cell chlor-alkali plants; adds Subpart IIII.
Clean Air Act, NESHAP 68 Fed. Reg. 70,948 (Dec. 19, 2003)	Notification of decision to delete the subcategory of sources that do not utilize mercury cells to produce chlorine and caustic from the mercury cell chlor-alkali plants category.
Clean Air Act, NSPS 68 Fed. Reg. 70,960 (Dec. 19, 2003)	Amends 40 C.F.R. Parts 60 and 63 standards for bulk gasoline terminals and gasoline distribution facilities, including pipeline breakout stations.
Clean Water Act, NSPS 68 Fed. Reg. 71,014 (Dec. 22, 2003)	Amends 40 C.F.R. Part 537 standards for the centralized waste treatment point source category.
Clean Air Act, PSD 68 Fed. Reg. 74,483 (Dec. 24, 2003)	Amends 40 C.F.R. Part 52 to incorporate new federal PSD rules into the Federal Implementation Plan requirements.
Clean Water Act, Water Quality 68 Fed. Reg. 75,507 (Dec. 31, 2003)	Notice of availability of national recommended water quality criteria for the protection of human health for 15 pollutants.
Clean Water Act, Sewage Sludge 68 Fed. Reg. 75,531 (Dec. 31, 2003)	Notice of results of EPA review regulations governing the use and disposal of sewage sludge and response to the National Research Council Report on Biosolids Applied to Land.
Clean Air Act, NESHAP 69 Fed. Reg. 130 (Jan. 2, 2004)	Amends 40 C.F.R. Part 63 to establish emission standards for miscellaneous metal parts and products surface coating operations; adds Subpart MMMM.
Clean Air Act, NESHAP 69 Fed. Reg. 394 (Jan. 5, 2004)	Amends 40 C.F.R. Part 63 to establish emission standards for lime manufacturing emission units, including kilns, coolers and various processed stone handling operations; adds Subpart AAAAA.
Clean Air Act, NSPS 69 Fed. Reg. 1786 (Jan. 12, 2004)	Amends 40 C.F.R. Part 60 to promulgate certain performance specifications and quality assurance requirements for particulate matter continuous emission monitoring systems at stationary sources.
Clean Air Act, Permits 69 Fed. Reg. 3202 (Jan. 22, 2004)	Notice of clarifications of the scope of certain monitoring requirements for federal and state operating permit programs; revises the interpretation of the "umbrella monitoring" rules under 40 C.F.R. Parts 70 and 71.
Clean Air Act, NESHAP 69 Fed. Reg. 5038 (Feb. 3, 2004)	Amends 40 C.F.R. Part 63 to establish emission standards for new and existing organic liquids distribution (non-gasoline) operations carried out at storage terminals, refineries, crude oil pipeline stations and various manufacturing facilities; adds Subpart EEEE.
Clean Air Act, NSPS, NESHAP 69 Fed. Reg. 7926 (Feb. 20, 2004)	Notice of additions to the applicability determination index database.

Federal Register Notice	Description
Clean Air Act, NESHAP 69 Fed. Reg. 10,512 (Mar. 5, 2004)	Amends 40 C.F.R. Part 63 to establish emission standards for stationary combustion turbines; adds Subpart YYYY.
Clean Air Act, Ozone 69 Fed. Reg. 11,946 (Mar. 12, 2004)	Amends 40 C.F.R. Part 82 to clarify how the requirements of CAA § 608 apply to refrigerants that are used as substitutes for chlorofluorocarbon and hydrochlorofluorocarbon refrigerants.
Hazardous Waste Management 69 Fed. Reg. 15,328 (Mar. 24, 2004)	Notice of issuance of exemption from land disposal restrictions for underground injection wells for Environmental Disposal Systems, Inc., Romulus, MI.
Safe Drinking Water 69 Fed. Reg. 17,406 (Apr. 2, 2004)	Notice of list of contaminants in drinking water that are not subject to proposed or final primary drinking water regulations.
Clean Air Act, Release Reporting 69 Fed. Reg. 18,819 (Apr. 9, 2004)	Amends 40 C.F.R. Part 68 reporting requirements in the chemical accident prevention regulations; amends submission schedule and data requirements.
Clean Air Act, SIP 69 Fed. Reg. 20,548 (Apr. 16, 2004)	Amends 40 C.F.R. Part 52 to conditionally approve a SIP revision submitted by Michigan regarding the “NO _x SIP Call.”
Clean Air Act, NESHAP 69 Fed. Reg. 20,968 (Apr. 19, 2004)	Amends 40 C.F.R. Part 63 to establish emissions standards for plastic parts and products surface coating operations; adds Subpart PPPP.
Clean Air Act, Ozone 69 Fed. Reg. 21,604 (Apr. 21, 2004)	Amends 40 C.F.R. Parts 51, 78 and 97 in response to court decisions on the “NO _x SIP Call.”
Clean Air Act, Performance Track 69 Fed. Reg. 21,737 (Apr. 22, 2004)	Amends 40 C.F.R. Parts 63 and 262 National Environmental Performance Track requirements.
Clean Air Act, NESHAP 69 Fed. Reg. 21,906 (Apr. 22, 2004)	Amends 40 C.F.R. Part 63 to establish emission standards for iron and steel foundries; adds Subpart EEEEE.
Clean Air Act, NESHAP, Hazardous Waste 69 Fed. Reg. 22,602 (Apr. 26, 2004)	Amends 40 C.F.R. Parts 63, 264 and 265 to establish emission standards for automobile and light-duty truck surface coating operations; adds Subpart IIII; amends Subparts MMMM and PPPP; amends RCRA air emission standards for equipment leaks for owners and operators of hazardous waste treatment, storage and disposal facilities.
Clean Air Act, Ozone, NAAQS 69 Fed. Reg. 23,858 (Apr. 30, 2004)	Amends 40 C.F.R. Part 81 to set forth air quality designations and classifications for all areas for an 8-hour ozone national ambient air quality standard.
Oil Pollution, SPCC 69 Fed. Reg. 29,728 (May 25, 2004)	Notice providing clarifications regarding certain issues pertaining to the July 2002 Spill Prevention, Control and Countermeasure rule.
Safe Drinking Water 69 Fed. Reg. 31,008 (June 2, 2004)	Amends 40 C.F.R. Part 141 to add analytical methods for compliance determinations of uranium in drinking water.
Clean Air Act, NESHAP 69 Fed. Reg. 33,474 (June 15, 2004)	Amends 40 C.F.R. Part 63 to establish emission standards for stationary reciprocating internal combustion engines; adds Subpart ZZZZ.

F. State Final Rulemakings

Michigan Register Notice	Description
Air Quality 2003 MR 12 (July 15, 2003), p. 2	Amends Mich. Admin. Code r. 336.1101, .1103, .1106, .1114, .1116, .1118 and .1119 (Part 1 – General Provisions)
Air Quality 2003 MR 12 (July 15, 2003), p. 19	Amends Mich. Admin. Code r. 336.1201-.1207, .1212, .1216, .1219, .1220, .1240, .1241, .1278, .1281, .1282, .1284, .1285, .1287, .1289 and .1299; adds Mich. Admin. Code r. 336.1214a and .1278a; rescinds Mich. Admin. Code r. 336.1279 (Part 2 – Air Use Approval)

Michigan Register Notice	Description
Waste and Hazardous Materials 2003 MR 15 (Sept. 1, 2003), p. 2	Rescinds Mich. Admin. Code r. 29.4101-.4504; adds Mich. Admin. Code r. 29.5101-.5516 (storage and handling of flammable and combustible liquids)
Air Quality 2004 MR 6 (Apr. 15, 2004), p. 2	Amends Mich. Admin. Code r. 325.17101-.17104, .17106, .17107, .17109, .17202-.17205, .17207-.17210, .17301-.17308, .17401-.17406, .17501, .17503-.17506, .17509, .18002; adds Mich. Admin. Code r. 325.17203a, .17211, .17713 and .17714; rescinds Mich. Admin. Code r. 325.17015, .17108, .17201, .17206, .17309, .17407-.17409, .17502, .17507, .17508, .17702-.17704, .17707, .17708, .177100-.17712, .18001, .18003-.18006 and .18101-.18104 (requirements for dry cleaning establishments utilizing Class I, II, II and IV solvents)
Mineral Wells 2004 MR 11 (July 1, 2004), p. 7	Adds Mich. Admin. Code r. 299.2301-2531 (mineral well operations and mineral well regulatory fee); rescinds r. 299.2201-.2298.

COMMITTEE REPORTS

NOMINATING COMMITTEE

At the April, 24, 2004 Environmental Law Section Council meeting, Chairperson, Todd Dickenson appointed a Nominating Committee consisting of Chuck Barbieri, Sally Churchill, Donnelly Hadden, Grant Trigger, and Todd Dickinson. Their task was to recommend a slate of candidates for the offices of Chairperson-Elect, Secretary-Treasurer and members of the Council of the Section, to succeed those whose terms will expire at the close of the next annual meeting, in accordance with Article IV, Section 1 of the Section Bylaws. The Environmental Law Section Council, at its meeting on June 19, 2004, approved the slate of nominees recommended by the Nominating Committee. John Byl has been nominated for the office of Secretary/Treasurer. Chris Bzdok, Anna Maiuri, Kenneth Burgess, Charles Denton, Steven Huff, and Joseph Quandt were nominated for membership on the Council.

To be considered by the Nominating Committee, a prospective nominee must meet the eligibility criteria set forth in Article IV, Section 2, of the Section Bylaws. In order to be eligible for election to the Council, a person "shall have served for no less than two years as "an active member of a Section committee." Eligibility for election as an officer of the Section requires that a person "shall have served not less than four full years as a voting member of the Section Council." In addition to imposing these mandatory qualifications, Article IV, Section 2, directs the Nominating Committee to weigh other factors in nominating candidates, including the need for representation on the Council of women, racial/ethnic minorities, and diverse legal viewpoints and geographic locations, as well as past contributions to the Section in the nature of "sweat equity."

In accordance with the Section Bylaws, an opportunity will be afforded for other nominations for these positions to be made from the floor at the annual meeting, and thereafter the Chairperson-Elect, Secretary-Treasurer and members of the Council of the Section for the following year will be elected by the Section members.

Report of the Nominating Committee – 2004

The Nominating Committee has addressed itself to the following 4 tasks: (1) nominating 6 persons for election to 3-years terms as Council members; (2) nominating one person for election to the office of Secretary/Treasurer, which has a term of one year; (3) nominating one person for election to the office President-Elect, which has a term of one year, after which the office-holder automatically succeeds to the office of President; and (4) nominating one person for election to fill the seat of a Council member whose term is not expiring, but who is being nominated for election to the office of Secretary/Treasurer.

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

The Nominating Committee met and conferred by telephone on three occasions, reviewed the directives of the Bylaws, sought and considered input from the membership of the Section and the Council, contacted prospective candidates to discuss their eligibility and willingness to serve, and deliberated to arrive at a proposed slate of nominees. They are: Peter Holmes, for President-Elect; John

Byl, for Secretary Treasurer; Kenneth Burgess, Christopher Bzdok, Charles Denton, Steven Huff, Anna Maiuri, and Joseph Quandt for the six Council seats with 3-year terms; and Dustin Ordway for the Council seat that would be vacated by John Byl, with one year remaining in its term. The nominees' respective addresses and brief summaries of their respective qualifications are set forth below.

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

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

Kenneth J. Burgess
406 E. 5th Street
Royal Oak, MI 48067

Ken Burgess, a current member of the Council, is running for a full three-year term on the council. He was appointed two years ago to fill a vacancy created by the resignation of a former Council member; and then was elected last year to fill the remainder of the term. Ken has chaired the Air Committee for a number of years. Ken works in the Regulatory Affairs Division of the Public Service Commission, providing support to the three PSC commissioners.

Christopher M. Bzdok
Olson, Bzdok & Howard, P.C.
420 E. Front Street
Traverse City, MI 49686

Chris Bzdok is Vice-Chair of the Membership Committee and a former Vice-Chair of the Natural Resources and Wetlands Committee. Chris also co-authored an article in the Section's environmental law theme issue of the State Bar Journal.

Charles M. Denton
Varnum, Riddering, Schmidt & Howlett, L.L.P.
333 Bridge Street, N.W.
Grand Rapids, MI 49501

Charlie Denton is a partner with the Environmental Law Practice Group at the Great Lakes law firm of Varnum, Riddering, Schmidt & Howlett LLP, and specializes in environmental law and litigation. He represents a broad range of industrial, municipal, institutional and individual clients in judicial and administrative environmental enforcement proceedings at Federal, State, and local levels. Charlie has authored a variety of articles on environmental law topics, including corporate officer Superfund liabilities, Natural Resources Damages, and ISO 14000 Environmental Management Systems. He is active with the American Bar Association Section of Litigation's Environmental Litigation and Insurance Coverage Committees, as well as being on the State Bar of Michigan's Environmental Law Section Council. Charlie is admitted to practice in Indiana, Michigan and Wisconsin, as well as before the U.S. Supreme Court and District of Columbia Circuit Court of Appeals.

Steven H. Huff
Donnelly W. Hadden, P.C.
2395 S. Huron Parkway, Ste. 200
Ann Arbor, MI 48104

Steve Huff has completed one 3-year term as a member of the Council. He is the chairperson of the Section's Environmental Litigation Committee, and has written several articles for the Michigan Environmental Law Journal.

Anna M. Maiuri
Miller, Canfield, Paddock & Stone, P.L.C.
840 W. Long Lake Road, Ste. 200
Troy, MI 48098

Anna Maiuri is a principal and deputy group leader of Miller Canfield's Environmental and Regulatory Group. She has 12 years of experience in helping corporations, business owners, and operators assess environmental liabilities when purchasing, selling or leasing assets and has provided environmental legal services for over \$1 billion in transactions involving environmental issues. Her experience includes investigation and defense of civil enforcement actions initiated under CERCLA, the Leaking Underground Storage Tank Act, and Part 201 of Michigan's Natural Resources and Environmental Protection Act. Since early 2002, Anna has been an active member of the Program Committee. She worked with the Federal Bar Association to co-host a program with the U.S. Army Corps of Engineers entitled "Trends and Priorities for the Prosecution of Environmental Crimes." Speakers included Krishna Dighe, assistant U.S. Attorney for the U.S. Department of Justice and David Uhlmann, Chief of the Environmental Crimes Section for the U.S. Department of Justice. In addition, Anna was responsible for securing Mr. David Drullinger, MDEQ as a speaker for the Fall 2003 Annual Program.

Dustin P. Ordway
Miller, Johnson, Snell & Cummiskey, P.L.C.
250 Monroe Avenue, N.W., Ste. 800
Grand Rapids, MI 49501

Dustin Ordway has been active in the Section for several years and has served as vice-chairperson and now chairperson of the Membership Committee. He has not previously served on the Council.

John V. Byl
Warner, Norcross & Judd, L.L.P.
111 Lyon Street, N.W.
900 Fifth Third Center
Grand Rapids, MI 49503

John Byl has been active in the Section for several years, and has completed five years on the Council. He was Chair of the Program Committee for three years and has chaired numerous programs. He also has spoken at several programs.

Joseph E. Quandt
Zimmerman, Kuhn, Darling, Boyd, Taylor & Quandt, P.L.C.
412 S. Union Street
Traverse City, MI 49684

Joe Quandt has completed one 3-year term as a member of the Council. He is the chairperson of the Section's Natural Resources and Wetlands Committee, and has been active in helping to organize Section programs.

Respectfully Submitted,

Todd R. Dickinson

Nominating Committee Chairperson

PROGRAM COMMITTEE

The Program Committee held a meeting on July 14, 2004. Attendees included, Kurt Kissling, Bob Schroder, John Byl, and Susan Topp.

Committee Liaison Reports

None.

June Program for Higgins Lake

The program was a huge success. Financial information and attendance numbers have not yet been received.

Annual Meeting

Plans for the program at the annual meeting were discussed. The program will be from 1:30 to 4:00. The program will consist of State of the Environmental Legislature and the Groundwater Protection Bills by Patty Burkholtz; All Appropriate Inquiry Requirement under CERCLA and the "Non-Opinion" Opinion on the Constitutionality of Part 201 by Chris Dunsky; and Ozone Non-Attainment and Other Hot Topics by Skip Pruss and Jim Sygo. John Byl will follow up with Burkholtz. Susan Topp will follow up with Dunsky and DEQ.

Fall Program

A program has been tentatively planned for November 18, 2004 in the Southfield/Troy area. Bob Schroder is putting together the program which will target environmental issues of interest to the automotive sector and other industry. Additional topics suggested include the economics and marketing of environmental improvements. It was also been suggested that a recent US/Canada superfund case pertaining to mining and air emissions be included.

Next Meeting

The next meeting will be on Wednesday, August 18, 2004 at 5:30 p.m. The call-in number is 1-800-270-1153, code 123915#.

ENVIRONMENTAL LAW SECTION COUNCIL MEETING

MEETING MINUTES Saturday, April 24, 2004

Call to Order at 10:06 a.m.

Present:

(in person) Todd Dickinson, Grant Trigger, Peter Holmes, Charles Toy, Charles Barbieri, Tim Lozen, Dustin Ordway, Craig Hupp, Ken Burgess, Lee Johnson, Robert Schroder, Tom Phillips, Pat Paruch, Joe Quandt, Scott Hubbard

(by phone) John Tatum, Susan Topp, Chris Dunsky, Charles Denton

Absent:

Bill Burton, John Byl, Paul Bohn, Mike Leffler, Sharon Newlon, Susan Johnson

Minutes:

On a motion by Denton, seconded by Ordway, the Council approved the minutes from the February 7, 2004 Council meeting.

Secretary-Treasurer's Report:

Holmes presented a report showing that as of March 31, 2004, the Section had a balance of \$25,705.65. Holmes then presented a proposed Section budget for fiscal year 2005. The proposed budget assumed substantial cost savings from electronic publication of the Environmental Law Journal, with an estimated 100 hard copies of the Journal to be provided to Section members who have not submitted e-mail addresses. Total income was estimated at \$26,350 and total expenses at \$16,750, for an estimated net income of \$9,600. Holmes suggested that the Council consider whether its improved financial condition would allow it to expand or improve its member services. Trigger suggested that the Council explore the concept of providing simultaneous video broadcasting of seminars. Tatum noted that the Hazardous Substances Committee had explored the concept a year or two ago, but decided that the additional benefits of video conferencing as compared to teleconferencing did not justify its much higher cost. Denton also questioned whether people would be motivated to attend a video conferencing site rather than simply hearing the seminar presentation by teleconference. Tatum suggested that it would be worth researching whether the costs of acquiring video conference capability have decreased significantly over the last two years. Following this discussion, the Council voted to approve the proposed budget for fiscal year 2005.

Membership Committee Report:

Ordway discussed the possible development of a Section directory. He stated that the State Bar had no objection to sections producing their own directories and had provided a cost estimate of \$2,400-\$2,700 for a Section directory, with the major cost variable being postage. Ordway also asked whether the Council would want to include ads in a Section directory and how much information a directory should include about Section members. In particular, he asked whether a directory should include addresses, which might be used by commercial enterprises for mass mailings. Dickinson noted that Trigger's membership survey had shown strong member interest in a Section directory. Hupp asked

whether costs could be reduced by producing an electronic version of the directory. Hubbard suggested that a PDF of the directory could be e-mailed to Section members. Lozen agreed that a PDF directory would save substantial money and could easily be updated each year. Toy offered to assist in creating a PDF directory. Trigger moved that Ordway, Toy and Tatum serve as a special subcommittee to create a PDF directory that would identify Section members, Council members, and Committee Chairs and Vice-Chairs, and that would not include any advertising. The motion was seconded by Ordway. Trigger then amended his motion, with support by Hubbard, to authorize the subcommittee to proceed to create the directory if they could do so at a cost of less than \$500. Section officers would serve as editors to make sure that no social security numbers or other information that would invade member privacy would be included in the directory. The Council approved the motion as amended.

Program Committee Report:

Topp reported that the June 18 program at Higgins Lake would focus on water resource issues, particularly the current Nestle Waters case. Topics for the Annual Meeting on September 30 tentatively include an update on environmental legislation, an update on EPA's all appropriate inquiry rulemaking under CERCLA and ozone nonattainment issues.

Technology Committee Report:

Tatum advised that the State Bar has the means to survey members electronically and suggested that the Section conduct a survey of members before it considers instituting electronic voting.

Journal Report:

Dickinson advised that Linda Blais has retired as editor and he appointed Schroder as her replacement. Dickinson asked that the minutes reflect that Schroder nodded and smiled in response to his great fortune. Holmes reported that the environmental law society students at MSU-DCL had submitted four summaries of Administrative Law Journal opinions. Schroder stated that the Journal would publish at least three issues a year and that thus far only three out-of-state Section members had said they preferred hard copies of the Journal to electronic copies. On motion by Trigger, seconded by Schroder, the Council approved awarding Blais a commemorative print in recognition of her many years of dedicated service to the Journal.

Deskbook Committee Report:

No formal report, but Dickinson noted that June 1 was the deadline for the submission of draft chapters.

Air Committee Report:

No report.

Environmental Ethics Committee Report:

No report.

Environmental Litigation Committee Report:

No report.

Natural Resources Committee Report:

Quandt stated that the Committee was trying to coordinate an environmental boot camp with the Institute of Continuing Legal Education, possibly on October 8 or 15 in Lansing.

Hazardous Substances and Brownfields Committee Report:

Dunsky reported that the Committee would meet on May 15 to discuss EPA's all appropriate inquiry rule under CERCLA, the Michigan Attorney General's recent letter on whether the contribution protection provision of Part 201 violates the U.S. Constitution, and a presentation by Kurt Brauer on recent changes in Michigan brownfield laws.

Water Committee Report:

No formal report, but Trigger noted that Ken Gold is working with the Committee to arrange the June program at Higgins Lake.

State Bar Commissioners Liaison Report:

Toy reported that the State Bar Commissioners met recently and that John Barry had been invited to Higgins Lake. He also suggested that the Chair send a representative to the upcoming Bar leadership forum.

Real Property Law Section Liaison Report:

Paruch reported that the Real Property Law Section's Winter Conference in Toronto was attended by about 30 to 35 members. The Summer Conference will be held on July 23 and 24 at Treetop, but has no specific program on environmental topics. She suggested that the Energy and Environmental Law Committee of the Real Property Law Council join forces with the Hazardous Substances and Brownfields Committee of the Environmental Law Section to provide joint programs or to combine in a single, new committee. At Dickinson's suggestion, Paruch agreed to confer with Dunsky and Hupp and report back on what structure they would collectively propose to put in place.

Administrative Law Section Liaison Report:

No report. Dickinson will follow up with Sharon Feldman, who was recently appointed as an administrative law judge, to determine if she or someone else will serve as the current liaison.

Chairpersons Report:

Dickinson reported that he had appointed himself, Donnelly Hadden, Sally Churchill, Charles Barbieri, and Grant Trigger to this year's Nominating Committee, which will propose a slate of candidates at the June meeting at Higgins Lake. Dickinson asked Committee Chairs and Vice Chairs to

consider those Committee members who have made active contributions as potential candidates for nomination. Paul Bohn is the only Council member with an expiring second term. Finally, Dickinson announced that the Section's Annual Meeting will take place in Lansing on Thursday afternoon, September 30. Dickinson has been asked to report to the State Bar on how well the State Bar is doing in supporting Section activities. Section members were invited to provide Dickinson with any comments on that issue and, in particular, any areas in which the State Bar could be more helpful to the Section.

New Business:

None.

Old Business:

None.

Adjourned at 11:49 a.m.

MEETING MINUTES Saturday, February 7, 2004

Call to Order at 10:05 a.m.

Present:

(in person) Todd Dickinson, Peter Holmes, John Tatum, Joe Quandt, Kurt Brauer, Charles Barbieri, Charles Toy, Scott Hubbard, Lee Johnson

(by phone) Susan Topp, Chris Dunsky, Ken Burgess, Steve Huff, Pat Paruch, Charles Denton, Grant Trigger

Absent:

Bill Burton, Tom Phillips, John Byl, Paul Bohn, Mike Leffler, Sharon Newlon, Susan Johnson, Robert Schroder, Tim Lozen

Minutes:

On a motion by Toy, seconded by Barbieri, the Council approved the minutes from the November 8, 2003 Council meeting.

Secretary-Treasurer's Report:

Holmes presented a report showing that as of the end of December 31, 2003, the Section had a balance of \$24,660.45. On a motion by Tatum, seconded by Toy, the Council approved the report. Regarding budgeting, Trigger stated that the Council approved a two-year budget last year. Trigger offered to help Holmes establish proposed budgets for program activities.

Membership Committee:

There was no formal Committee report. Dickinson said that Dustin Orway was still talking to the State Bar about a membership directory.

Program Committee Report:

Topp reported that a Spring program is being planned, to be spearheaded by Bob Schroder and geared to the automotive industry. The program would include plant closing, divestiture and homeland security issues. The program is tentatively planned for April in either Troy, Novi or Brighton. The Committee also is planning a Summer program, possibly on groundwater extraction or educating legislators about environmental issues. Tatum noted that a new Michigan Supreme Court Administrative Order (2004-01) states that ideological or advocacy activities by the Section require a disclaimer.

Journal Report:

Holmes indicated that two articles have been submitted for the next issue of the Journal. Discussion followed regarding the new electronic publication of the Journal and how to accommodate Section members who have not provided e-mail addresses.

State Bar Commissioners Liaison Report:

Toy is trying to set up an opportunity for the Section to present a commemorative painting to Robert F. Kennedy, Jr. at the honor's day address at Alma College. On a motion by Tatum, seconded by Barbieri, the Council approved a presentation of the painting by Toy or, in his absence, by Trigger. On a motion by Barbieri, seconded by Quandt, the Council approved presenting a commemorative painting to the Michigan Wildlife Habitat Foundation. On a motion by Trigger, seconded by Quandt, the Council approved inviting John Barry and his wife to the Council's Higgins Lake meeting on June 18 and 19.

Real Property Law Section Liaison Report:

Paruch said that the Real Property Section is following the progress of a bill package on lead poisoning. She also said the Real Property Section's annual meeting would take place at the Summer conference in Gaylord on July 22-24. She further stated that the Real Property Section has not decided whether it will participate in the State Bar annual meeting. Toy and Trigger suggested the possibility of a joint Real Property Section-Environmental Law Section program at the Bar's annual meeting, which Paruch thought was a worthwhile idea for the two sections to discuss.

Administrative Law Section Liaison Report:

No report.

Technology Committee:

Tatum stated that some updating is being done on the website for links to member law firms. Dickinson said he would follow up with the State Bar on the need to update bylaws on the website so they will reflect recent amendments by the Section and the new Section dues. Trigger suggested posting old editions of the Journal on the website as we go to electronic publishing and asked whether they would be searchable documents. Tatum responded that the past editions used PDF format which generally was not searchable. Trigger suggested that new articles for the Journal have a short description that could be used in developing a cumulative index of articles.

Deskbook Committee Report:

No formal report. Johnson indicated that Jeff Haynes had sent a letter to prospective authors that set forth deadlines for topic outlines by June 1, first drafts by September 1, second drafts by November 1, and final versions by December 1, with publication due in the first quarter of 2005.

Air Committee Report:

Burgess said there was nothing to report.

Environmental Ethics Committee Report:

No report.

Environmental Litigation Committee Report:

Huff said that he had submitted an article to the Journal and was working on another article regarding amendments to Michigan Rule of Evidence 703 regarding the use of hearsay evidence by experts.

Natural Resources Committee Report:

Quandt said the Committee had discussed the concept of an environmental boot camp for real estate and business attorneys. He indicated that ICLE was interested in that topic, which might involve the Bar's Environmental, Real Property, and Business sections and possibly the Insurance section. A tentative date for the presentation is Fall 2004. Council members expressed interest in the project.

Hazardous Substances and Brownfields Committee Report:

Dunsky stated that the "all appropriate inquiry" rule to be issued by EPA under CERCLA may not be proposed until May. He stated the Committee might meet in March to discuss the pending rule and some additional topics.

Water Committee Report:

No report. Trigger said he would relay to Ken Gold the suggestion that groundwater withdrawals be a topic for discussion at the Section's June meeting at Higgins Lake.

Chairpersons Report:

Dickinson said he had received a questionnaire from the State Bar asking if the Section would have a meeting at this year's annual State Bar meeting. Quandt suggested an in-depth program on Part 201 issues. Topp suggested working with the Real Property Section on a joint program at the annual meeting. Barbieri said that a program on EPA's "all appropriate inquiry" rule should interest both environmental and real estate attorneys. Hubbard added that the Section's meeting should continue to be held at the State Bar's annual meeting.

Dickinson also raised the issue of allowing electronic voting by Section members. Tatum suggested that we try electronic voting at the Sections' next annual meeting, not for the election of Section officers but for addressing such issues as whether to authorize the Section to take advocacy positions. Barbieri suggested doing a "trial run" of electronic voting this summer. Dickinson proposed that the issue be further discussed at the Section's April meeting.

New Business:

Dickinson discussed planning for the Section's next annual meeting. The consensus was to have the annual meeting on Thursday afternoon, September 30, followed by the Council dinner that evening.

Dickinson said he had invited Donnelly Hadden to serve on this year's nominating Committee. Trigger also suggested inviting Sally Churchill to serve and Dickinson said that he would talk to her. Barbieri also offered to serve on the Committee.

Old Business:

None.

Adjourned at 11:38 a.m.

MEETING MINUTES Saturday, November 8, 2003

Call to Order at 10:07 a.m.

Present:

(in person) Todd Dickinson, Ken Burgess, Charles Toy, Scott Hubbard, Peter Holmes, John Tatum, Charles Barbieri, Lee Johnson, Bob Schroder

(by phone) Susan Topp, John Byl, Paul Bohn, Chris Dunsky, Tim Lozen, Steve Huff, Chris Bzdok, Craig Hupp, Grant Trigger

Absent:

Tom Phillips, Susan Johnson, Mike Leffler, Sharon Newlon, Bill Burton, Charles Denton, Joe Quandt

Minutes:

Burgess made a motion, seconded by Schroder, that the minutes from the September 11, 2003 Council meeting be approved. The Council approved the minutes.

Secretary-Treasurers' Report:

Holmes reported that the Section had a balance as of September 30, 2003, of \$7,399.82. Trigger noted that the Council had adopted a budget for a three-year period and that the Journal was the largest item in the budget. To keep the budget in balance, the Council had deleted one issue of the Journal in year 2003. Lozen proposed that the Council discuss the budget at its next meeting. Trigger suggested that the Council approve an annual budget for each committee, which would then be restricted from exceeding its budget without Council approval. Hubbard made a motion, seconded by Barbieri, that the Council approve annual budgets for each committee. The Council approved the motion.

Membership Committee:

Bzdok stated that the Committee was working on producing a useful membership directory. Dickinson asked whether a directory would violate State Bar policy or create problems if commercial mailers managed to get a copy of the directory. He also asked if there was a significant need for a directory of section members. Tatum noted that the Bar provides a spreadsheet of the entire membership, which currently totals about 850 members. He supported producing a membership directory and thought it would be an easy matter to convert the spreadsheets into a booklet form. Trigger noted that the Section survey a year ago asked the membership if they would like a directory. One hundred six members responded that they would like a directory, only 10 said no and the remainder were indifferent or provided no response. Holmes suggested that a directory might identify members only by name and town or city, without street or email addresses, and thus prevent ready use by commercial mailers. Dickinson asked the membership committee to explore the issue further and report back to the Council at its next meeting. He particularly asked the Committee to look at the cost of producing a directory, format, distribution, and any potential safeguards against abuse.

Program Committee Report:

Topp reported on an upcoming environmental update program on November 18 at the Lansing Center. She also reported that Schroder is beginning work on a January program addressing environmental issues of particular importance to manufacturers.

Journal Report:

Holmes stated that November 15 is the submission deadline for the next issue of the Journal and invited any interested members to submit articles. The University of Michigan Environmental Law Society is scheduled to produce case notes three times a year and the Cooley Environmental Law Society is beginning work to provide summaries of administrative law judge decisions, starting with January 2003 decisions. Holmes also suggested that the Journal be provided to subscribers electronically, with an option for hard copy only on request, on a one-year trial basis. An electronic version of the Journal would be searchable and would greatly reduce publication costs. A discussion ensued, with significant support for moving to electronic form. Holmes made a motion that the Journal be provided next year electronically only, with an option for those subscribers who do not have or do not provide e-mail addresses to receive a hard copy upon request at no additional cost, and with the hard copy being printed by desk-top rather than by a professional publisher. The Council approved the motion.

Holmes also noted that Linda Blais may want to phase out as editor of the Journal. Johnson indicated a possible interest in taking over the duties of editor, but only after finding out what he would be getting into.

Burgess suggested that the Journal publish an accumulation of the environmental cases summarized in the daily e-Journal produced by the State Bar. Dickinson appointed a Journal subcommittee, headed by Schroder, to coordinate with Toy, Holmes, Johnson, Tatum and Blais in considering this issue.

Technology Committee Report:

Tatum reported that the Committee had completed corrections of e-mail addresses and the addition of new members for the list serve. Denton is putting together new links on the website to member law firms

Desk Book Committee Report:

Tatum reported that Jeff Haynes and Gene Smary are planning to discuss the Desk Book next week.

Air Committee Report:

Burgess reported that the Committee organized a tour on September 26 of the Consumer Energy facility at Essexville, which proved to be an interesting experience for the participants.

Ethics Committee Report:

No report.

Environmental Litigation Report:

Huff reported that Committee members had submitted some articles to him for review and that he would inform Blais about them. Huff said he was currently working on a mold litigation update, particularly focusing on medical causation evidence.

Natural Resources Committee Report:

No report.

Hazardous Substances and Brownfields Committee Report:

Dunsky reported that the next Committee meeting is planned for January. It will include discussion of the all appropriate inquiry rule soon to be proposed by EPA.

Water Committee Report:

No report.

Board of Bar Commissions Liaison Reports:

Toy reported that the State Bar Board of Commissioners is meeting November 21. He noted that the changes in the State Bar's annual meeting have cut the cost from \$9 to \$2 per member. Discussion ensued about what the Council might do with funds made available by reducing costs as a result of eliminating hard copy publication of the Journal by a professional printer. Dickinson indicated that the topic should be included on the agenda for the February Council meeting.

Real Estate Section Liaison Report:

Paruch distributed a report, which discussed the Uniform Environmental Covenant approved by the National Conference of Commissioners of Uniform State Laws, the Real Property Section Winter Conference scheduled for March 4-5 in Toronto, and other matters.

Administrative Law Section Liaison Report:

No report.

Chairpersons Report:

Dickinson noted the issue of use of the listserv under the State Bar's revised label and list policy. Tatum said he has advised the State Bar about the Section's use of its listserv. Toy indicated he would raise the question of proper use of the listserv at an upcoming meeting of the Board of Commissioners.

New Business:

None.

Old Business:

Dickinson will discuss with past Chairperson Tom Wilczak the issue of whether the Section should take positions on policies, laws and rules.

Adjournment:

Dickinson adjourned the meeting at 11:41 a.m.

MICHIGAN ENVIRONMENTAL CASENOTES

Jade Venture Group, LLC, File No. 99-06-0275 (2003); Conveyance File No. LM219 (2003); WL 1966635 (Mich. Dept. Nat. Res.).

This case involved a contested case challenging the denial of an application for a marina lease filed with the Department of Environmental Quality (DEQ) under the provisions of Part 325, Great Lakes Submerged Lands, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451. Jade Venture Group, LLC (Jade) filed an application for a marina lease on two bottomland parcels in the West Arm of Grand Traverse Bay: a 0.10 acre parcel along the upland shoreline to construct an 8 foot wide, 460 foot long floating pier, and an 8.90 acre parcel located 1,169 feet lakeward. The latter parcel was the focus of the dispute. Jade proposed to construct a mooring field, consisting of buoys attached to chains that would literally be screwed into the sandy lake bottom, that would accommodate 14 boats up to 40 feet long in front of Jade's property in Traverse City, consistent with its riparian ownership interest. The issue was the extent of the mooring field's impact on the public trust in the waters of Grand Traverse Bay. MCL 324.32502 prohibits such conveyances when DEQ determines that the proposed private or public use will substantially affect the public use for hunting, fishing, swimming, pleasure boating, navigation, or impair the public trust.

The DEQ's Geological and Land Management Division (GLMD) opposed the permit because it concluded that the proposal would substantially impair the public trust by its physical occupation of the bottomlands and waters, which would exclude the general public from using the area for fishing, pleasure boating, and navigation. It further found that the adverse affect on the public trust was neither minimal nor mitigated to the extent possible and that a feasible and a prudent alternative was available. DEQ regulations under MCL 324.32509 require that each potential permit, lease, deed, or agreement for bottomland be examined to determine existing and potential adverse effects to the public trust. Under 1982 AACS, R 322.1015 (Rule 15), approval may not be granted unless DEQ determines that the adverse effects on the environment, public trust, and riparian interests of adjacent owners are minimal and will be mitigated to the extent possible.

The Administrative Law Judge (ALJ) concluded that the statutory criteria regarding the public trust contained in MCL 324.32502 control. The Proposal for Decision (PFD) held that the proposed activity would not substantially affect the public trust and recommended the conveyance be granted. In opposition, the GLMD asserted that under the standard contained in Rule 15, the lease must be denied because its affects on the public trust are not minimal. The apparent discrepancy between standards was resolved in favor of the rule enunciated in *Illinois Central Railroad* and its progeny, where the State may permit the private use of public trust lands when that use will either improve the public trust or not substantially impair the trust lands and waters remaining. Given the context of MCL 324.32502, it is clear that the legislature contemplated the term "public trust" to be consistent with developments under the common law. The ALJ's analysis of the facts indicated the proposed moorage, by providing increased access to Grand Traverse Bay, would actually fulfill a public trust purpose. While there was some evidence that fishing could be impaired by entanglement with mooring lines, the impairment was de minimis. As for navigation, the record supported a finding that smaller motor boats, along with canoes, rowboats, and kayaks, could easily maneuver through the mooring field and there was no contention that the mooring field would interfere with commercial shipping vessels. However, there was conflicting testimony about the potential hazard to sailboat racing on the Bay. The PFD relied on testimony and other evidence to conclude that the mooring field would not substantially affect navigation.

Therefore, the ALJ determined that the project's effect on the public trust and riparian rights was minimal, so that the proposal cannot be denied under Rule 15(a). The ALJ also determined that none of

the alternatives provided by GLMD were feasible or prudent; the record is replete with testimony that all local marinas are full and have substantial waiting lists for slips. Similarly, the record supports the finding that a dredging proposal is a bad environmental alternative to the mooring field.

The ALJ determined in his PFD, dated July 9, 2002, that the application submitted by Jade should be granted. The DEQ Director adopted and affirmed the PFD. It was incorporated into the Final Determination Order, dated April 4, 2003, whereby the application submitted by Jade was granted and a marina lease was issued.

- David Pizzuti, Michigan State University-DCL College of Law

Petition of James D. Young, File No. 00-76-0031-P (2003); 2003 WL 21130237 (Mich. Dept. Nat. Res.).

This case involved a contested case hearing on the denial of a permit application filed with the DEQ's Land and Water Management Division (LWMD) under the provisions of Part 325, Great Lakes Submerged Lands, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451. Mr. James D. Young (Petitioner) sought a permit to repair two existing jetties and 71 feet of existing seawall on his riparian property, so that they would continue to control erosion of the Lake Huron shoreline. Specifically, the proposal was to encase an existing 48 foot concrete jetty with 106 lineal feet of steel sheet piling and a 6 inch concrete cap; encase a second 35 foot jetty with 74 feet of steel sheet piling and a 6 inch concrete cap; and install a 54 foot steel seawall against the existing concrete seawall, with a 17 foot return wall and five 6 foot long gusset supports installed lakeward. Young argued that the repairs exempted maintenance. MAC R 322.1008 (3)(b) authorizes maintenance of a permitted structure, if the maintenance is in place and in kind with no design or materials modification. Yet, the proposal constituted a modification of composition and design. Thus, the project was not exempt from the permit requirement. Furthermore, the existing structures did not possess the requisite permit, so even the purpose for maintenance exemptions did not apply here. Validating the unpermitted structures would render DEQ powerless to prevent future maintenance, as the exemption eliminated the need for future permits.

Part 325 provides that absent a permit from DEQ, no person may dredge or place spoil or other material on bottomland, including any man-made structure or installed device placed on bottomlands or placed into the waters of the Great Lakes, specifically including jetties. The proposal involved man-made structures placed on bottomlands below the ordinary high water mark, thus making a permit necessary. The fact that other similar structures existed, and that permits had been issued for them, did not itself entitle Young to a permit. Each project must be reviewed on its own merits. To that end, the application was construed so as to preserve and protect riparian and public trust interests. Such permits with respect to submerged lands are issued only when DEQ has determined that neither the state's public trust responsibility nor private and public use will be substantially affected.

DEQ determined as a matter of fact that the impact of the structures on the bottomlands in front of Young's property neither substantially affected the public use, nor impaired the public trust. But DEQ determined that it could affect riparian rights of adjacent owners who possessed a proprietary interest in the uninterrupted flow of sand carried to their land by littoral current in its natural state. But that impact could be substantially alleviated by the feasible and prudent alternative identified. The repaired structure would remain, but the impediment to pedestrian traffic would not be increased, impacts to the longshore movement of sand would be lessened, and the project would be consistent with the reasonable requirements of public health, safety, and welfare. The alternative proposal was a sensible balance of partially accomplishing Young's purpose while addressing the public trust issue.

The ALJ determined in his Proposal for Decision (PFD), dated September 26, 2002, that Young's application should be denied, but proposed that a final order be entered granting a permit to conduct the proposal embodied in the feasible and prudent alternative. The Director affirmed and incorporated the PFD into the Final Determination Order (FDO), dated April 29, 2003, whereby Young's permit application was **denied**. But the FDO determined that the feasible and prudent alternative identified in the PFD could be permitted under the statutory criteria and a permit consistent with that finding would be issued upon receipt of a written request from Young.

David Pizzuti, Michigan State University-DCL College of Law

Part 303, Wetlands Protection, of the Natural Resources and Environmental Act, 1994 PA 451, As Amended Petition of Alan Schultz, File No. 01-81-0091-P, May 19, 2003, 2003 WL 21250391 (Mich. Dept. Nat. Res.)

In 2001, Petitioner Alan Schultz applied for a permit under Part 303 of PA 451 to deposit nearly 6,500 cubic yards of soil into a regulated wetland located on his property in Salem Township, Washtenaw County, in order to use the property as a home site. Specifically, he wished to construct a 38-foot high x 8-foot high berm topped with evergreen trees to provide privacy and security on the property and to decrease noise from a nearby highway. The application also included the placement of a driveway crossing and two culverts. On November 21, 2001, the Department of Environmental Quality (DEQ), Land and Water Management Division (LWMD), denied the berm portion of the application. The Petitioner appealed and a contested case hearing was held.

At that hearing, a tribunal considered the factors enumerated in Part 303 and issued a Proposal for Decision (PFD) denying Schultz's application. First, the tribunal found that the permit was not in the public interest. There was little evidence to support Schultz's contention that the berm would actually reduce noise from the highway and any economic benefit derived by Schultz in enhanced property value or by the Township in an expanded tax base was outweighed by the degradation of associated water sources and loss of habitat for several species of amphibians and birds. Second, Schultz's project would destroy approximately 11% of the wetland on his property and neither geological maps nor soil surveys denote any significant wetlands in the surrounding areas. Third, Schultz's project was not wetland dependant and other feasible alternatives existed, such as placing the berm upland or constructing a fence. The tribunal did not consider mitigating factors as they were unnecessary if Schultz employed an alternative measure.

Schultz filed an exception to the PFD and the matter went before the Director of the DEQ for a final agency decision. The Director ultimately adopted the PFD into his final determination order denying the application.

--Amy Broughton, Michigan State University – Detroit College of Law

Part 303, Wetlands Protection, of the Natural Resources and Environmental Act, 1994 PA 451, As Amended Petition of David Wolf, File No. 01-71-0053-P, April 16, 2003

In 2002, Petitioner, David Wolf, applied for a permit to fill eight-hundredths of an acre of a wetland located next to Lake Huron in Presque Isle Township, Presque Isle County. Wolf applied for the permit pursuant to Part 303 of 1994 PA 451, so that he could pour 200 cubic yards of fill into the wetlands near his construction site to serve as a driveway for his future lakefront home.

On November 12, 2002, a Proposal for Decision (PFD) was issued. The PFD rejected the Geological and Land Management Division's (GLMD) findings that a new building site could be developed on one of the upland portions of Wolf's property, thereby negating any need to fill a wetland. The PFD recommended that Mr. Wolf's request for the permit be granted because there were no prudent alternatives.

The Director of the DEQ adopted the PFD. But he stated that the PFD looked only at the issue of the driveway failed to consider that the purpose of the driveway was for access to a future building site. To be issued a permit under section 30311(4), the Petitioner must show that the proposed activity is dependent on the proposed wetland location and that no prudent alternative exists. The Director first found that the construction of a driveway is not dependent upon being located in a wetland. Second, the Director cited evidence in the PFD that there is a 0.45 acre upland parcel on Wolf's land that would afford adequate space on which to construct a home. This upland parcel would be adjacent to Kauffman Road, thus providing a prudent alternative to the construction of a driveway on a wetland.

The Director of the DEQ adopted the PFD; however, he subsequently denied Wolf's application for the permit for the two reasons discussed above.

Diab Rizk, Michigan State University, DCL College of Law